



THE ESSENTIAL CONCEPTS OF INTERNATIONAL ARBITRATION

WHAT IS ARBITRATION?

A definition of “Arbitration” that accurately captures all its different forms will be difficult to formulate. For this reason, the concept is rarely defined in arbitration legislation.

SAMPLE DEFINITIONS

Professor Bales defines Arbitration as:

“a proceeding, governed by contract, in which a dispute is resolved by an impartial adjudicator, chosen by the parties, whose decision the parties have agreed to accept as final and binding”.

SAMPLE DEFINITIONS

GARY B BORN: *"A process by which parties consensually submit a dispute to a non-governmental decision maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording each party an opportunity to present its case".*

SAMPLE DEFINITIONS

The ADR Act, 2010 (Act 798) defines arbitration as *"the voluntary submission of a dispute to one or more impartial persons for a final and binding determination"*.

WHAT IS ARBITRATION?

- i) Arbitration is a mechanism for the settlement of disputes.
- ii) Arbitration is consensual.
- iii) Arbitration is a private and confidential procedure.

WHAT IS ARBITRATION?

- iv) Arbitration is carried out in a judicial manner by arbitrators who are independent, neutral and impartial.
- v) Arbitration must lead to a final and binding determination of the rights and obligations of the parties.

WHEN IS ARBITRATION INTERNATIONAL?

Section 3 of UNCITRAL Model Law On International Commercial Arbitration

An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

WHEN IS ARBITRATION INTERNATIONAL?

(b) one of the following places is situated outside the State in which the parties have their places of business:

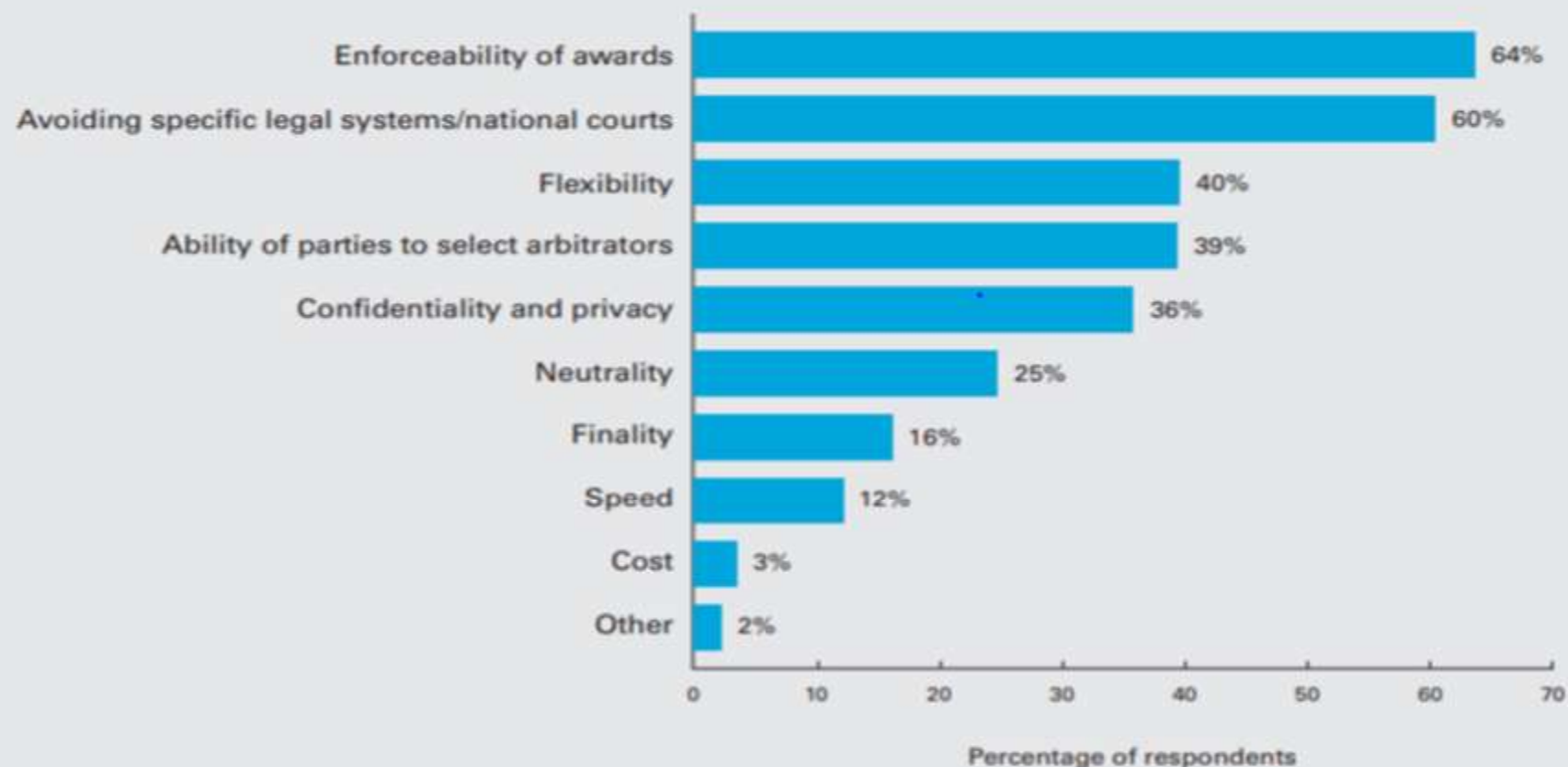
(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected;

WHEN IS ARBITRATION INTERNATIONAL?

or (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country

Chart 3: What are the three most valuable characteristics of international arbitration?



LEGAL FRAMEWORK FOR INTERNATIONAL ARBITRATION

INTERNATIONAL
ARBITRATION CONVENTION



SETTLED ARBITRATION
PRACTICE



NATIONAL ARBITRATION
LEGISLATION (mostly based on
the UNCITRAL Model Law)



RULES OF INTERNATIONAL
ARBITRATION INSTITUTIONS



PARTY ARBITRATION
AGREEMENT

ESSENTIAL CONCEPTS OF ARBITRATION

- Arbitrability
- Party Autonomy
- The Separability Doctrine
- Competence de la Compentence/
Kompetenz-Kompetenz
- Amiable Composition (Ex Aequo
Et Bono)

ESSENTIAL CONCEPTS OF ARBITRATION

➤ Arbitrability:

Arbitrability may relate to what specific classes of disputes can be resolved through arbitration and which classes of disputes are barred from settlement through arbitration because of national legislation or judicial decisions.

ESSENTIAL CONCEPTS OF ARBITRATION

➤ Arbitrability:

What is arbitrable and what is inarbitrable vary from state to state and most national legislations recognizing arbitration will have a clause setting out matters which are inarbitrable.

ESSENTIAL CONCEPTS OF ARBITRATION

THE BASIS OF THE CONCEPT

Article II of the New York Convention provides that “each contracting state shall recognize an arbitration agreement concerning a subject matter capable of settlement by arbitration”.

ESSENTIAL CONCEPTS OF ARBITRATION- Arbitrability contd;

Article V (2) of the New York Convention again provides that *"an arbitral award may be denied recognition and enforcement if the subject matter of the difference is not capable of settlement by arbitration under the law of that country".*

ESSENTIAL CONCEPTS OF ARBITRATION- Arbitrability contd;

Article 36 of UNCITRAL Model Law

Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(b) if the court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State

ESSENTIAL CONCEPTS OF ARBITRATION- Arbitrability contd;

In Ghana the ADR Act, Section 1 provides that the Act applies to matters other than those that relate to:

- a) The natural or public interest
- b) The environment
- c) The enforcement and interpretation of the Constitution or
- d) Any other matter that by law cannot be settled by an alternative dispute resolution method

ESSENTIAL CONCEPTS OF ARBITRATION- Arbitrability contd;

Indeed, section 58(3) of the Act stipulates that:

" The court shall set aside an arbitral award where it finds that the subject matter of the dispute is incapable of being settled by arbitration."

Arbitration Law of Japan No 138 of 2003
Article 13(1) provides;

"An arbitration agreement shall be valid only when its subject matter is a civil dispute that may be resolved by settlement between the parties (excluding that of divorce and separation)"

In China, Article 3 of the Arbitration Law provides that:

(a) marital, adoption, guardianship, support and succession matters are non arbitrable.

(b) administrative disputes that should be handled by administrative organs as prescribed by law.

ESSENTIAL CONCEPTS OF ARBITRATION- Arbitrability contd;

There is another aspect of inarbitrability which we may call **contractual inarbitrability**.

Need to object when introduced s. 27(a)

ESSENTIAL CONCEPTS OF ARBITRATION- Party

Autonomy

- Party autonomy in arbitration is the right of parties to a contract to determine that all or some of the disputes that may arise out of or in connection with that contract will be resolved by arbitration and not by the state courts.

Party Autonomy

- This self-determination will oust the jurisdiction of state courts as far as determining the merits of the dispute(s) is concerned, and one party can compel the other to arbitration if the other wants to opt out of that agreement once a dispute arises.
- Arbitration agreements are therefore binding unless discharged by the mutual consent of the parties.

Party Autonomy

Party Autonomy is a well recognized concept in arbitration worldwide. Typically arbitration conventions, institutional rules and national laws provides for party autonomy in matters such as;

- The decision to adopt arbitration as the method for resolving disputes,
- Whether to conduct the arbitration Ad-hoc or under institutional rules.
- Considerable procedural autonomy,
- The choice of arbitrators, the number of arbitrators and their qualifications as well as the appointment procedure.
- Choice of law; both substantive and procedural
- Choice of arbitral seat ,
- Language of the proceedings,
- Whether interim measures are available.

For Instance, ICC Arbitration Rules 2017
Article 18 provides that;

“The place of the arbitration shall be fixed by the
Court, unless agreed upon by the parties”.

Article 20

Language of the Arbitration

In the absence of an agreement by the parties, the arbitral tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract.

Article 21

Applicable Rules of law

The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.

GHANA ADR ACT

SAMPLE PARTY AUTONOMY PROVISIONS

- Section 5(1) & (2)
- Section 7(1)
- Section 14 of Act 798
- Section 13 of Act 798
- Section 12 of Act 798
- Section 16(1) of Act 798
- Section 17(1) Of Act 798

LIMITATIONS ON PARTY AUTONOMY

1. Non arbitrable disputes

2. Mandatory provisions in statutes and public policy that guarantee an opportunity to be heard and equality of treatment

EXAMPLES OF PROVISIONS ON LIMITATIONS TO PARTY AUTONOMY BASED ON DUE PROCESS

- UNCITRAL Model Law articles 18 and 19(1)
- Ghana ADR Act Section 31(1) (a) and (b)
- English Arbitration Act Section 33
- Mauritius International Arbitration Act 2008

LIMITATIONS ON PARTY AUTONOMY

3. The requirement that arbitrators must be independent and impartial and must not have a personal , proprietary, fiduciary or financial interest in the outcome

The following provisions are representative of this limitation on party autonomy;

■ UNCITRAL Model Law Articles 12(2), 34 2(a)(iv), 361(a)(iv) ; also 34(2)(b)(ii) and 36(1)(b)(ii)

- ICDR ARBITRATION RULES Article 14
- SIAC ARBITRATION RULES Article 13
- Ghana ADR Act section 12 (4)

4. Mandatory obligations on arbitrators to disclose all circumstances which could raise justifiable doubt regarding their impartiality

- UNCITRAL ARBITRATION RULES Article 11
- UNCITRAL Model Law Article 12(1) and (2).
- Ghana ADR Act section 12 (5)

THE SEPARABILITY DOCTRINE

The doctrine of the autonomy or separability of the arbitration clause or agreement is one of the key doctrines that have developed in arbitration practice to protect the sanctity of the arbitration process and to ensure that it is protected from over-reaching interference from state courts. It is a method of assuring the integrity of the arbitration process; in spite of the invalidity, rescission, termination or discharge of the main agreement.

The Separability Doctrine

The doctrine provides that an arbitration clause/agreement, whether embedded in a contract or contained in a separate arbitration agreement, is a special clause and has a separate and distinct existence from the main agreement.

The Separability Doctrine

Dwelling on this principle, Lord MacMillan in HEYMANS AND ANOR. VRS. DARWINS put it succinctly in these words:

"I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other, but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution..."

The Separability Doctrine

...And there is the very material difference, that whereas in all ordinary contracts the obligations of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Act. The appropriate remedy for breach of the arbitration agreement to arbitrate is not damages, but its enforcement"

The Separability Doctrine

He then goes on to say that:

“whenever the ‘substantive contract’ is broken, the arbitration clause survives for the determination of the mode of settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract.”

The Separability Doctrine

Similarly in BLACK-CLAWSON INTERNATIONAL LTD V PAPIERWERKE WALDHOF ASCHAFFENBURG AG, the court clarified the relationship between the arbitration clause and the substantive contract as follows:

“There is not one but two sets of contractual relationships which govern the arbitration of disputes under the substantive contract...First, there is the contract to submit future disputes to arbitration. This comes into existence at the same time as the substantive agreement of which it forms a part. Prima facie it will survive for the full duration of the substantive agreement and will then survive for as long as disputes remain unresolved”.

The Separability Doctrine

Thus, the doctrine of separability gives arbitral tribunals power to decide disputes arising out of the substantive contract even where the dispute relates to the initial or continuing invalidity of that agreement.

The justification of the doctrine or the theoretical basis of this legal doctrine has been variously given as thus:

"The parties generally intend any disputes arising out of the relationship to an arbitration agreement to be settled by arbitration. They generally do not intend to exclude disputes concerning the validity of the container contract."

1. The effectiveness of arbitration would be compromised if, by merely alleging the invalidity of the underlying contract, a party could amend/abrogate its contractual obligation.

2. *That two agreements exist as a matter of legal presumption, the one relating to the substantive obligations and the one relating to the obligation to resolve arising disputes through arbitration. The second agreement survives any birth defect or acquired disability of the principal agreement.*

If the doctrine of separability was not the case, state courts will be forced to rule on the merits of the case in such circumstances

SAMPLE PROVISIONS ON SEPARABILITY CONCEPT

Section 7 of UK Arbitration Act 1996

“Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement”.

UNCITRAL MODEL LAW

Article 16

“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”.

GHANA ADR ACT section 3

“Unless otherwise agreed by the parties, an arbitration agreement which forms or is intended to form part of another agreement, shall not be regarded as invalid, non existent or ineffective because that other agreement is invalid or did not come into existence or has become ineffective and shall for that purpose be treated as a distinct agreement”.

CONSEQUENCES OF SEPARABILITY PRESUMPTION

1. Invalidity or non existence of underlying contract does not necessarily entail invalidity or non existence of arbitration agreement
2. Invalidity of arbitration agreement does not necessarily entail invalidity of main or underlying contract

3. Law governing main or underlying contract is not necessarily the same as law governing arbitration agreement

4. Different form requirements for main or underlying contract and arbitration agreement

■ BALKAN ENERGY CASE

Competence De La Competence / Kompetenz-Kompetenz

The doctrine of Competence de la competence or Kompetenz-Kompetenz basically means that the arbitral tribunal has the competence to be the judge of its own jurisdiction.

Competence De La Competence / Kompetenz-Kompetenz

The jurisdictional challenge may take the form of an argument that the arbitration clause is null and void, is inoperative or cannot be performed or that the subject matter of the contract is inarbitrable.

Competence De La Competence / Kompetenz-Kompetenz

It may also take the form of an argument by the party challenging the jurisdiction of the tribunal that he was not a party to the contract or that, although he was a party to the contract, the contract did not provide for arbitration.

Competence De La Competence / Kompetenz-Kompetenz

The validity or the existence of the arbitration clause or the scope of the arbitration clause and all such challenges **MUST** first be determined by the arbitral tribunal, unless the parties have specifically taken this power away from the arbitral tribunal by their agreement contained in the arbitration clause. (s.24 ADR Act)

Competence De La Competence / Kompetenz-Kompetenz

It is only after the arbitral tribunal itself has determined whether it has jurisdiction that a party displeased with its ruling may apply to the High Court for the court to also determine the issue. This is a widely recognized principle in arbitration practice.

■ ENGLAND & WALES ARBITRATION ACT 1996 sections 30,31 and 32

ICC ARBITRATION RULES Section 6(3)

“ if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal”

GHANA ADR ACT section 24

Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own jurisdiction particularly in respect of (a) the existence, scope or validity of the arbitration agreement; (b) the existence or validity of the agreement to which the arbitration agreement relates; (c) whether the matters submitted to arbitration are in accordance with the arbitration agreement.

INTER RELATION BETWEEN THE TWO DOCTRINES

There is often confusion between the doctrines of separability and competence de la competence. Separability, is concerned with a contractual interpretation and the question whether the arbitral panel may decide the existence or validity of the contract. Competence de la competence, on the other hand, is concerned with the jurisdictional power of the arbitrator versus that of the court to decide whether there is a valid arbitration agreement

- See section 6(1) and (2) of ADR Act. The two related doctrines apply in the proceedings.

Amiable Composition (Ex Aequo Et Bono)

Amiable composition and arbitration ex aequo et bono are variations of commercial arbitration in which the Arbitrator is not bound by strict rules of law and is free to give effect to general considerations of equity and fair-play.

Amiable Composition (Ex Aequo Et Bono)

An arbitrator relying upon such principles is allowed to disregard the mandatory provisions of the law as well as non-mandatory rules so far as they remain within the general form of acceptable national and international public policies.

Amiable Composition (Ex Aequo Et Bono)

This principle is normally applicable only where the parties expressly confer such powers on arbitrators, although in Ghana, by section 50 of the ADR Act 2010, the arbitrator is given statutory power to act under the principles of amiable composition.