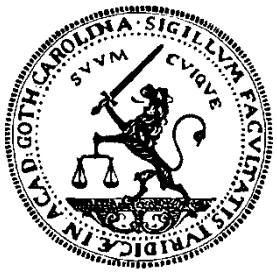

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The dos and don'ts of arbitration clauses

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30 credits

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Contents

Summary

In the world of dispute resolution, arbitration has throughout history been an increasingly popular alternative to the litigation process. The major features of arbitration provide contracting parties with many advantages such as discreetness, efficiency and lower costs; making it preferable in a various number of branches and industries where such features are crucial. Furthermore, the arbitration process offer contracting parties' greater flexibility as to the composition of the deciding tribunal for their conflict, allowing the possibility to ensure the competence needed or desired in order to efficiently solve the dispute at hand.

The flexibility and adaptive nature of international arbitration, hovering over national regulations without explicitly being bound by the laws or regulations of the places directly related to the contracting parties, has raised the demands for arbitration institutions, rules and frameworks providing global guidance and support for parties wishing to use international arbitration. The UNCITRAL Model Law example clause, originated in 1985 has been, and still must be considered to be, the basis for an endless number of arbitration clauses and agreements; providing a number of essential aspects contracting parties need to consider in order to make their arbitration agreement valid and efficient. Throughout the years, principles deriving from the clause, books, judicial articles and journals, failed and successful agreements and case law have provided parties with guidance as to how to adapt the clause to their need.

However, after 25 years of usage, it the time has come to take a more critical look at the example clause, in order to ascertain whether or not it, and the rules that accompanies it, are in need of an update. This thesis breaks up the different aspects of the example clause, takes a closer look on the current developments and takes into account considerations that should be made by contracting parties when assessing them. Furthermore, this thesis recognizes a number of aspects not included in the example clause in order to evaluate their importance, relevance to the agreement and the potential ramifications of parties' negligence to address them when constructing their arbitration clause or agreement.

This thesis also focuses on the closely related aspect of the separability of the arbitration agreement. The widely discussed doctrines of separability and the principle of *Kompetenz-Kompetenz* must be considered to have had a large impact on the arbitral procedure and the abilities and limits of arbitrators versus the national courts. This thesis addresses the evolution of the doctrines, focusing on the most recent developments from a global view and their implications on reviews of arbitration agreement.

Sammanfattning

Inom området för tvistelösning, har skiljedom genom historien blivit ett allt populärare alternativ till rättstvistprocessen. De viktigaste inslagen i skiljedom ger avtalsparterna med många fördelar såsom diskretion, effektivitet och lägre kostnader, genom att göra det smidigare i ett antal olika forum och branscher där dessa aspekter är avgörande. Dessutom kan skiljedomsförfarandet erbjuda avtalsparterna större flexibilitet i sammansättningen av den beslutande tribunalen för deras konflikt, därigenom förstärkandes möjlighet att säkerställa att den kompetens som krävs eller önskas för att effektivt lösa den aktuella.

Den flexibla och anpassningsbara formen på internationell skiljedom, som svävar ovanför nationell lagstiftning utan att uttryckligen vara bunden av lagar och andra författningar på platser med direkt anknytning till de avtalsslutande parterna, har höjt efterfrågan på skiljedomsinstitutioner, regler och ramar för global vägledning och stöd för parter som önskar använda sig av internationella skiljeförfaranden. UNCITRAL:s exempelklausul, ursprungligen från 1985 har varit, och måste fortfarande anses vara, grunden för ett oändligt antal skiljedomsklausuler och avtal, som ger ett antal viktiga aspekter för avtalsslutande parter att överväga för att göra skiljedomsavtalet giltigt och effektivt. Under åren har principer som följer av exempelklausulen, böcker, rättsliga artiklar och tidskrifter, misslyckade och framgångsrika avtal samt rättspraxis bistått parter med vägledning om hur man ska anpassa klausulen till deras behov.

Men efter 25 års användning, kan det anses dags att ta en mer kritisk titt på exempelklausulen, för att avgöra om den, och de regler som åtföljer den, är i behov av en uppdatering. Denna avhandling bryter ut olika aspekter av exempleklausulen, tar en närmare titt på den aktuella utvecklingen och bemöter faktorer som bör behandlas av avtalsparterna vid bedömningen av dem. Dessutom behandlar denna avhandling ett antal aspekter som inte ingår i exempelklausulen i syfte att bedöma deras betydelse, relevans för avtalet och de potentiella konsekvenserna av parternas oaktsamhet att bemöta dem när de bygger sin skiljedomsklausul eller sitt avtal.

Denna avhandling fokuserar också på den närbesläktade aspekten om avskiljbarhet av skiljeavtalet. Den omdebatterade doktrinen om avskiljbarhet och principen om *Kompetenz-Kompetenz* måste anses ha haft en stor inverkan på skiljedomsförfarandet samt dess förmågor och begränsningar gentemot mot de nationella domstolarna. Denna avhandling behandlar utvecklingen av doktrinen, med fokus på den senaste utvecklingen ur ett globalt perspektiv och dess konsekvenser på processer av skiljeavtal.

Preface

This thesis is the result of hard work, poorly distributed over too long time.

In 2003 I started studying law at the University of Lund, not for one instance realising what I was attempting to do or understanding what the goal would eventually be. An unnecessary number of years later, the goal may finally have been identified and reached. This thesis, in many ways, represents both the time elapsed and the personal growth made.

When trying to show my appreciation to the people making this goal possible, I could only wish that they will be mentioned in a better context. They deserve much more gratitude than their names in this thesis ever can give.

First, I would like to thank the faculty of law at the University of Lund. You have, throughout the years I have spent with you, shown me all the expected, and some truly unexpected, faces of an academic organisation. I will never forget all you have done; feel free to interpret that freely.

I would also like to show my warmest and sincerest gratitude to the following people:

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In the end, this is just Law.

Abbreviations

AAA	American Arbitration Association
ECJ	European Court of Justice
EWHC	High Court of England and Wales
IBA	International Bar Association
ICC	Stockholm International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
LCIA	The London Court of International Arbitration
NCPC	Nouveau Code de Procédure Civile
UNCITRAL	United Nations Commission on International Trade Law
WIPO	World Intellectual Property Organization

1 Introduction

1.1 Purpose

When using arbitration today, one finds that the evolution of technology, markets and players on the markets create a situation where a method, which is supposed to ease the solving of disputes and avoid unwanted publicity, becomes unusable. One might wonder if arbitral institutions throughout the world have or have not realized that during the latter part of the decade realized that the instruments they give to companies and arbitrators, in order to make arbitration function, maybe no longer meet the requirements needed to be efficient or covers all the aspects that are needed. When looking critically on the work performed by arbitration institutions and organisations handling international arbitration frameworks and rules, one quickly realises that the ability to "keep up with the market and the demands of actors on the market" gets increasingly more difficult the faster and more global the markets become.

This thesis takes its starting point in the UNCITRAL Model Law example clause in order to determine what aspects it contains and how they have evolved and changed since the forming of the clause. Furthermore, the intention of this thesis is to also determine if there are aspects that are neglected, avoided or simply so new that they've started to exist after the example clause was constructed.

The major questions raised in the work are

1. What are the, for contracting parties, relevant aspects of the Model Law arbitration clause that might affect their agreement?
2. What judicial considerations regarding legal features of these aspects should parties, currently constructing their arbitration clause or agreement, take into account in order to ensure efficiency of the final formulation?
3. What aspects are not parts of the UNCITRAL example clause? What should be considered when regarding these aspects and whether or not parties should insert them into their arbitration clause or agreement?

When choosing arbitration as the preferred dispute resolution, parties should at an as early stage as possible consider these questions in order to produce an arbitration clause or agreement that is sure to fulfil both the demands of the arbitral community and the parties while at the same time be as effective possible. Indeed, by assessing the further on mentioned aspects during the constructing phase of the agreement, parties may or may not be able to foresee and avoid issues that, at a later stage in an eventual conflict, very well may have made the dispute harder or impossible to solve to the extent

that the choice of arbitration as the more efficient, less costly alternative to litigation may be in vain. Undeniably, it is in contracting parties' interest, although not in their competence, to strengthen the incentive to use arbitration as an alternative to the litigation process.

Given the possibility that parties do not address these aspects, simply choosing to rely on an example clause either constructed by party-representatives wishing to save additional money through an ad hoc arbitration[1] or given by a chosen arbitration institution, not explicitly allowing parties to ensure the compability with their individual contract, the implications at a later stage may be both unwanted and/or devastating to the contracting parties. Besides the obvious issue that either the arbitration agreement or the whole contract can be considered null an void, placing the contracting parties in a situation with damages inflicted without any valid basis on the seek help; the just as high risk of an unexpected outcome placing a party in a situation where a rendered award of an arbitral tribunal seems unfair but judicially and substantially correct, simply because or errors made at an much earlier stage.

1.2 Methods

In order to examine the above mentioned aspects and questions, extended research regarding international arbitration has been the most suitable method. By studying recent material, books, journal articles case comments and case law in the field of arbitration, the author has intended to form a clearer image of the current development of international arbitration, more from a global perspective than by dividing continents and jurisdictional areas.

By reviewing material gathered from different writers, the author realises that unintentional distortions regarding eventual translations may occur. Additionally, issues as to objectivity may also occur if too one-sided material only is reviewed. Furthermore, there is an obvious risk that materials are missed or simply just not available. The author of this thesis has, to the extent of ability, tried to foresee and prevent these issues.

1.3 Delimitations

The UNCITRAL Model Law of 1985, along with the New York Convention of 1958 must be considered to a wide foundation on which a large part of modern arbitration is built; it is therefore natural for several reasons to use the example clause provided by the UNCITRAL Model Law as a starting point for this thesis. First of all, the UNCITRAL example clause is intended to be generally applicable regardless of whether or not the agreement which

[1] A further definition of this type of arbitration is addressed further on in this thesis.

it is regulating is branch-specialised, giving this usage of the clause in this thesis a wider scope compared to specialised example clauses. Second, the UNCITRAL example clause can very well be seen as an average-clause, when compared to other example clauses deriving from i.e. arbitration institutions such as ICC, AAA or WIPO.

In order to limit the extent of the thesis in accordance with the planned course, aspects that do not directly affect the process of constructing an arbitration clause have been disregarded. Furthermore, each aspect has been approached with the goal to highlight the uttermost important qualities for the reader. In order to fully examine each aspect, the thesis would have needed to be substantially longer.

1.4 Outline

The thesis start by first looking, and then dissect the UNCITRAL Arbitration Model Law example clause; dividing it into different parts and defining them into aspects that can be considered to affect contracting parties that intend to use arbitration as their dispute resolution.

Having done so, this thesis shortly focuses on the aspect of separability; despite the fact that this aspect isn't an actual part of the example clause, it must be considered to substantially affect the contracting parties' willingness and intention to proceed with arbitration as their chosen forum of dispute resolution.

Taking the next natural step, the focus returns to the previously established aspects of the UNCITRAL example clause. By shortly defining the aspects and why they can be considered to be vital for contracting parties to assess when constructing their agreement, the thesis identifies the characteristics that will constitute the major part of the analysis of an example clause.

During the analysis, the thesis individually regards the previously mentioned aspects and zooms in on the main qualities with the aim of highlight the development and current state of each aspect; giving parties to an eventual agreement useful tool when creating their own individual arbitration clause or agreement.

Having done so, the thesis turns to the aspects that haven't been assessed through the example clause. In order for arbitration agreements to develop and on a larger scale meet the demands of the international market, it is important to determine what aspects that might influence a modern agreement where an intended arbitration clause must be effective. Furthermore, such aspects might be needed to avoid when constructing the agreement but nevertheless important not to neglect in order to avoid finding oneself in a worse position than the other party if an arbitration process is needed. It is here important to inform the reader that the list of aspects regarded in no way should be considered as an exhaustive list of

important aspects. Instead the reader should consider the aspects as starting point for further reference, simply providing contracting parties with tools to more easily address the initial issues.

2 Arbitration

2.1 Development of Arbitration

Arbitration can be traced as far back in history as to Ancient Greece where arbitration was used as a more peaceful alternative to warfare, trying to avoid bloodshed. Arbitration, in the form it is recognized today, can be said to have originated in the end of the 18th century but started to progress and be used to a larger extent during the 19th century.[2] At that point, three different approaches to the form of arbitration could be identified; A special agreement submitting unsolved disputes to arbitration; an embedded clause stating in advance that certain disputes should be solved by arbitration and finally a separate agreement stating that any dispute arising regarding the agreement at hand would be solved by arbitration.

The usage of the second alternative, an embedded clause, was made popular during the start of the 20th century, beginning in Italy and focusing mainly on commerce treaties Italy made.[3] At the time, the arbitration clause focused mainly on disputes regarding the execution of the treaty and violation thereof. The clause focused very little on the form, costs or consequences of the arbitration, of which there were little experience of. It was established that the parties would choose an equal number of arbitrators each, giving the arbitrators the task of choosing a final arbitrator who would be the weigher in an eventual deadlock.[4]

Progression and development regarding different aspects of arbitration has been made throughout the 20th century, i.e. 1904 when the arbitration clause in the treaty of commerce between Italy and Switzerland stated a request for arbitration would be agreed upon by the other party and that the decision of the arbitrators would be binding[5]; giving the form of arbitration and the arbitrators more power.

2.2 Arbitration today

The modern arbitration gives parties in an agreement several positive possibilities compared to referring the dispute to a national court. Parties

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[2] *International Arbitration : Past and Prospects : A Symposium to Commemorate the Centenary of the Birth of Professor J.H.W. Verzijl (1888-1987) / Edited by A.H.A. Soons*, ed. Jan Hendrik Willem Verzijl, et al., Nova Et Vetera Iuris Gentium. Series a, Modern International Law ; No. 15 (Dordrecht [Netherlands] ; Boston : Norwell, MA :: M. Nijhoff ; Sold and distributed in the U.S.A. and Canada by Kluwer Academic Publishers, 1990). p 9-10

[3] Ibid. p 12

[4] Ibid.p 13

[5] GB Foreign, *British and Foreign State Papers* (HMSO, 1829).Treaty of 13 July 1904, Art 18, p. 1071

can, through the choice of arbitrator guarantee competence that is necessary for taking all aspects of a particular case into account. Furthermore, the procedure can be tailored to match the requirements of the parties, also giving them the possibility to focusing on chosen parts of the agreement, compared to a national court which will indisputably regard the entire agreement. Taking into states superiority, arbitration grants disputes between states to be solved without referring the matter to an international court. Bad publicity can, in a modern competitive market, be devastating to parties, especially a large multinational company. Arbitration however can, and often is, subtle and discreet allowing disputes to be handled without unwanted consequences.

During the 20th century, several important conventions and treaties have been founded to regulate the aspects of arbitration. The Geneva protocols of 1923 and the Geneva Convention from 1927 but foremost The New York Convention from 1958, has all made contributions to international arbitration procedures. The New York Convention is today ratified by 144 countries, clearly showing its implications and importance.

Institutional arbitration has given the arena of arbitration greater champions, allowing experience and competence to convene to the benefits of parties who themselves may not possess adequate judicial or technical knowledge to properly choose arbitrators or settle disputes. Among important institutions one can mention the London Court of International Arbitration (LCIA) founded in 1892, the International Chamber of Commerce (ICC) founded in 1923 and the American Arbitration Association (AAA) founded in 1926.

2.3 Complications of old example clauses

Despite the increasing usage of arbitration and the advantages it provides, problems can occur when using example clauses. The modern market is under constant changes, making it difficult to foresee and take new aspects and situations into account. Agreements that last for 10 years will face a totally new situation if a dispute arises after only a few years. It is important for contracting lawyers to critically evaluate the agreement and look both to the past, the present and try to foresee eventual future problems and aspects that may have implications to the agreement and a contingent arbitration.

In example, one of the today most easily spotted problem is the transition to digital agreements and the fact that almost all communication today is digital in one way or the other. The criteria for the validity in a request of arbitration has been differing from one country to the next and when constructing international contracts it can be considered risky not to consider the legislation of the other party or parties.

Looking at a well used and established example one can find a number of aspects that today have different impact on the contracting parties if

arbitration is initiated. This thesis will identify a number of the most important aspects and try to enlighten the aspects that may be important to consider.

3 The aspects of an arbitration clause

Arbitration can be input into a contract in different ways. It is possible to use an arbitration clause that will in itself govern the entire procedure of the arbitration. Furthermore, it is possible to use the arbitration clause to simply forward the matter to a separate arbitration agreement, which will govern the proceedings.

3.1 Separability

An arbitration clause in itself be considered as its own agreement and be distinguished from the rest of the clauses in a contract.[6] The "separability doctrine" can, as pointed out by Born, have a number of origins.[7] The perhaps most vital observation regarding the separability of the arbitration clause is that the clause in itself is required to be separated in order to properly function. If, in example, the arbitrators find the contract void, and the arbitration clause isn't considered separated; the arbitration in itself becomes void, creating a situation where the purpose of the clause is lost. This very problem has been addressed in the arbitrations TOPCO vs. Libya[8], where the arbitrator leaned on the principle of independence of the arbitration clause. The arbitrator referred to the cases of Lena-Goldfields[9] and Losinger[10] in support for the decision.

The separability of the arbitration clause has since then been further established in several cases and is now, as above cited, included in the UNCITRAL Model Law.[11] A further discussion regarding the separability will be held further on in this thesis.

3.2 The UNCITRAL model Clause:

An arbitration clause can have any form chosen by the parties of an agreement but several international arbitral institutions have, during the development and progressive formation of rules for arbitration, formed their

[6] "Uncitral Model Law on International Commercial Arbitration," ed. United Nations (Vienna, Austria: United Nations Publication, 1985).Art. 16(1)
[7] G Born, *International Commercial Arbitration: Commentary and Materials* (Transnational Pub Inc, 2001). P. 69
[8] *Texaco Overseas Petroleum Co./California Asiatic Oil Co. V. The Government of the Libyan Arab Republic* (1975).
[9] *Lena Goldields Limited V. Ussr*,(1930).
[10] *Losinger Award*,(1936).
[11] "Uncitral Model Law on International Commercial Arbitration." art 16(1)

own example clauses in order to give inexperienced contracting parties an already tested and approved approach when constructing their agreement.[12]

The UNCITRAL example clause, originally from 1976, can be considered to be used as a widely spread, non-specific business related clause and takes a number of important aspects into consideration:

> *"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as present in force."*[13]

The UNCITRAL model law further recommends that the contracting parties take the following aspects into consideration:

> *"(a) The appointing authority shall be _____ (name of institution or person);*
> *(b) The number of arbitrators shall be _____ (one or three);*
> *(c) The place of arbitration shall be _____ (town or country);*
> *(d) The language(s) to be used in the arbitral proceedings shall be _____."*[14]

When deconstructing the clause, the different aspects can be critically observed and evaluated on their own, giving the contracting parties of today the opportunity to add new and more modern views and to the clause. The different aspects all contribute to create an individual arbitration agreement, hopefully ideally suited for the contracting parties. It is however vital that the parties to an agreement don't neglect the existing aspects of the arbitration clause since this very well may lead to unexpected or unwanted consequences. Furthermore, as this thesis attempt to illustrate, there may very well be aspects and considerations outside the example clause that parties may need to insert into the clause (or arbitration agreement) or at least take into consideration in order for an eventual arbitration to become the quicker and easier dispute resolution that it is intended to be. The UNCITRAL arbitration clause and the following recommendations, when deconstructed, reveals several aspects that are elementary for parties to consider:

[12] UNCITRAL, ICC, LCIA, AAA & ICDR etc.
[13] "Uncitral Model Law on International Commercial Arbitration." art. 1
[14] Ibid.

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof"	The first aspect of the example-clause is the question of what is arbitrable and what is not; the scope of the arbitration. This is, of course a vital aspect for the contracting parties.
"shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as present in force"	The contracting parties' choice of applicable law for the arbitration, note that national laws may vary and that the law applicable to the actual contract may differ from the law applicable to the arbitration.
"The appointing authority shall be"	The choice of arbitral authority can widely vary from ad hoc arbitration to institutional arbitration, also linking this aspect to applicable law.
"The number of arbitrators shall be"	The number of arbitrators follows, to a certain extent, the choices above mentioned but is an aspect of mainly economical and competence importance.
"The place of arbitration shall be"	Seemingly unimportant, the aspect of where the arbitration will be held still contains issues that may be important to both parties and an arbitral tribunal.
"The language(s) to be used in the arbitral proceedings shall be"	The language of the arbitration gives the contracting parties opportunities to make arbitral proceedings easier or more difficult, depending on intentions from each side.

These aspects all give the contracting parties guidance when formulating their arbitration clause or agreement. As mentioned above it is, during the contracting phase of an agreement, very important for parties that intend to use arbitration as dispute resolution to clarify their intentions at an early point in the negotiations in order for the process to run more smoothly. However, hidden intentions or advantages given by clever negotiation are

critical points that may hide in arbitration clauses and are important to detect and address at this point.

3.3 The Scope of Arbitration

The scope is an important aspects when contracting an agreement and focusing on the arbitration clause. Generally example clauses use a wide choice of wording when approaching the scope, thereby making sure that every possible conflict regarding the agreement can be referred to arbitration.[15] This of course, presumes that parties want all aspects of the agreement to be arbitrable.

The wording used in the UNCITRAL example clause, "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof" clearly indicates that the aim of the clause is for the entire agreement to be arbitrable and that the connection between the dispute and the agreement must be established in order for the arbitration to take place. As pointed out by Lew, Mistelis and Kröll, the wording "arising out of or relating to" is very wide and allows parties to more easily link disputes and issues to the agreement.[16] One may very well find complications when parties have several agreements and a dispute may or may not fall under agreements with or without arbitration clauses.

As will be discussed later on, the arbitration clause may function as a powerful tool when forcing the other party to avoid disputes. This, however, can very well fail if parties have agreements both with and without arbitration clauses, making it a dispute on whether or not the dispute at hand falls under the agreement with the arbitration clause or not.

A narrow wording of the arbitration clause can, of course, cause problem as well. Especially when considering that some disputes regarding the agreement will be arbitrated and while others must be brought before a national court, most likely resulting in proceedings that are dependant on each other while not being finalized at the same time or even resulting in rulings in opposite directions.

It is, in the end, up to the parties to decide how explicit they wish to formulate their arbitration clause. Using a narrow language, the parties can steer disputes and an eventual arbitration process and, thereby, fixate what issues to avoid. This will, unavoidably be a longer process for the parties, making it more costly and time-consuming during the contractual phase but will also have the desired result. Another way is to use a wider wording of the clause, shifting more power to an arbitral tribunal and their interpretations of both the arbitration clause and the agreement in itself. This eases the load on the contractual phase, making it easier to agree, but

[15] Example of Arbitration clauses
[16] JDM; Mistelis Lew, LA; Kröll, S, *Comparative International Commercial Arbitration* (Kluwer Law Intl, 2003)., p 169

introduces a smaller risk when going to arbitration since parties may not be able to influence the process as much as in before mentioned scenario.

3.4 The Applicable Law

There are several aspects regarding the choice of law in arbitration. First of all one must regard what law is governing the underlying contract and whether or not it should also be applied to the arbitration clause (or agreement). Second, there are two clear aspects of the law regarding the arbitration that must be enlightened: The substantial law governing the arbitration and the procedural law governing the proceedings of the arbitration. Finally there is the issue of eventual conflicts between applicable law rules when determining above-mentioned aspects.

The substantial laws of the arbitration can, as above indicated, differ entirely from the rest of the underlying contract and the procedural law of the arbitration. There are several approaches to how to determine which law that will be applicable to the arbitration agreement at hand. The parties are of course entitled to by self determine what law to apply and grounds for this can also be found in for example article VI(2) of the European Convention[17], article 28 of The UNCITRAL Model Law and furthermore on national level in the Swiss law on private international law[18].

Second option when constructing, the parties have the possibility to allow the arbitral tribunal to apply the choice of law that it considers applicable.[19] This can also be the case if the parties fail to agree on the law most suited for the agreement. The important question regarding this is who has the better competence, the contracting parties or the assigned arbitral tribunal? The contracting parties of course has competence regarding the substance of the agreement while the composition of the arbitral tribunal is chosen by the parties and may very well have a larger competence. Furthermore a lot of circumstances can, at the time of an eventual arbitration, be altered making it more suitable to allow the arbitral tribunal to choose the most fitting law rules.

The third option for the parties is to let the arbitral tribunal decide in accordance with it considers to be right and just, not expressively forcing the arbitrators into any choice of law.[20] The European Convention takes another approach towards this by pointing the arbitrators in the direction of the national law in the country the award is to be made.[21]

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[17] European Convention on International Commercial Arbitration
Done at Geneva, on 21 April 1961
[18] Swiss Law On Private International Law art. 178.
[19] "Uncitral Model Law on International Commercial Arbitration." Art. 28(2)
[20] Ibid. Art. 28(3)
[21] European Convention on International Commercial Arbitration
Done at Geneva, on 21 April 1961 art. VI(2b)

3.5 The choice of arbitration

When deciding the form of arbitration, the parties generally choose between two different types: the *ad hoc* arbitration and the institutional arbitration.[22] Which one to choose is of course up to the parties but it is important to take a number of parameters into consideration in order to find the most reliable and suiting arbitration method for the specific agreement.

3.5.1 *Ad hoc* arbitration

The *ad hoc* arbitration's characteristic is that it us unique for every agreement. It is individually created for the agreement and activated only if, or when, a dispute arises. When regulating this kind of arbitration, it has been suggested that the easiest way for the parties is to apply standard international rules e.g. the UNCITRAL Rules.[23]

The idea of the *ad hoc* arbitration is to avoid the usage of institutional involvement, giving the parties true freedom in creating their way to solve the issues. It is however possible and, to some extent, recommended to use an institution when appointing the arbitrator or arbitral tribunal.[24] If the parties fail to agree on the procedural rules for the arbitration, the UNCITRAL Rules grants the chosen arbitrator or tribunal the possibility to "conduct the arbitration in such manner as it considers appropriate".[25]

Glancing at the economical aspects, the *ad hoc* arbitration is believed to be a cheaper solution than the institutional arbitration. The *ad hoc* arbitration avoids the standard fees and costs that often comes with using an arbitration institution and gives the parties greater possibilities negotiating the costs of the arbitration.

3.5.2 Institutional arbitration

The institutional arbitration can be considered the "safe road" for parties inexperienced with arbitration. The larger arbitration institutions, such as ICC, LCIA and the AAA handle a large number of arbitrations yearly giving their decisions a certain "quality-stamp" towards an eventual court deciding on the enforcement of an award. Furthermore, the usage of an arbitration institution grants a larger possibility of assistance and guidance for the arbitrators, whether or not the have been appointed by the institution or not. The competence that an institution assembles works as a good knowledge and reference library for arbitrators. One of the key advantages, rightly

[22] Lew, *Comparative International Commercial Arbitration*. P. 32
[23] Ibid.P. 34
[24] Born, *International Commercial Arbitration: Commentary and Materials*. P. 12, Lew, *Comparative International Commercial Arbitration*. P. 34
[25] "Uncitral Model Law on International Commercial Arbitration." Art.19

pointed out by Lew, Mistelis and Kröll[26] is the material detachment between the parties and the arbitrators that the usage of an institution provides. When restricting the contact between the arbitrators and the parties regarding negotiations and determination of costs and fees, the arbitrators can focus more on the heart of the matter and avoiding other factors to affect the procedure.

3.6 The number of arbitrators

When determining the number of arbitrators, the costs are of course a vital factor balancing with the difficulties of ensuring that your own party's interests are enforced. There are of course, other aspects that very well may be affected by the number of arbitrators, which should be considered when finally deciding how many people that the tribunal should consist of.

Expertise is an aspect that, to a certain extent, speaks for a larger number of arbitrators. When using only one arbitrator, it is in no way guaranteed that the arbitrator appointed holds both the technical knowledge of the issue at hand and at the same time the know-how on suitable arbitration procedure. Even though the parties have the possibility to use specific requirements for the arbitrator, this must be considered an option to use with caution. If the possibility of selection becomes too narrow or if an unexpected issue arises, it is not certain that the arbitrator most fitting to solve the issue at hand can be chosen, annihilating the purpose of the selection in the first place.

The speed becomes a clear factor, especially if the parties have decided to be entitled to choose one arbitrator each. The interests of those two arbitrators are, in order to maintain a good relationship with their employer, to make sure that their party is the most successful one, especially regarding the parties key-issues. This can make for a longer and more complex arbitration that may not be ideal or even possible for parties involved.

If the parties fail or simply doesn't regulate the number of arbitrators for the tribunal, the institution chosen or the applicable rules or law will determine this for them.[27] Depending on the rules applicable the number of arbitrators may be determined after the dispute has arisen in order to match the issues at hand and to guarantee that the effort is proportional to the matter.[28]

[26] Lew, *Comparative International Commercial Arbitration*. page 37
[27] "Uncitral Model Law on International Commercial Arbitration." Art 10, "Icc Rules of Arbitration," ed. International Chamber of Commerce (Paris, France: International Chamber of Commerce & International Court of Arbitration, 1998). Art 8; "The Lcia Rules," ed. London Court Of International Arbitration (London: LCIA, 1998).(London, den 1 January 1998) Art. 5.5
[28] The parties, presumably, does not want a large arbitration regarding a small issue.

3.7 The seat of the arbitration

The seat of the arbitration can, at first glance, seem like a trivial question. However, it can make a difference depending on where the agreement is constructed, carried out and where the arbitration is to take place. For example the parties might want to avoid their own countries and find a more neutral scene for the arbitration. There are of course more aspects, which might seem insignificant but can have an actual effect on the arbitration process. The hearings related to the arbitration should, in regard of the witnesses called, be held not too far away making it more difficult for witnesses to sacrifice the time needed to attend. Furthermore, it would be wise to avoid unnecessary costs, by not placing the hearings so witnesses called will have large expenses going to the hearing.

Furthermore, parties might want to ensure that the New York Convention is applicable where the arbitration is to be held.

3.8 The language of the arbitration

One can suppose that the language of the arbitration generally is the same as the contract at hand, but it is not necessarily so. Parties have the possibility to choose the language on their own, making this aspect an indication of which party has the upper hand in the agreement.

The institutional rules regarding this aspect has given most of the power to the arbitral tribunal and steers the choice of language towards the language most commonly used by the parties, whichever that may be.[29]

[29] "Uncitral Model Law on International Commercial Arbitration." art 22, "Icc Rules of Arbitration."art 16, "Aaa Commercial Arbitration Rules and Mediation Procedures," ed. American Arbitration Association (2009). Rules art 14.

4 Analysis

4.1 The separability of the arbitration clause

As earlier mentioned, the separability of an arbitration clause must be considered to be a vital requirement in order to achieve the purpose of arbitration.[30] As stated by Lew when regarding arbitration agreements, it becomes "self-evident" that the agreement is separated from the main contract.[31] Problems that are primarily discussed today regards situations where the existence of an arbitration *clause* creates the impression that the aspects of arbitration are a part of the main contract.[32] The development of the separability doctrine has, i.e. the US, been driven in several not coherent directions during the 21st century.[33] Looking closer at the US development, a few cases stand out as to regarding the aspect of the separability of the arbitration agreement. The case of Prima Paint[34] from 1967 gave the first real good glance of the separability doctrine, stating that the court, through the Federal Arbitration Act, could only rule on the arbitration validity and not the substantial part of the contract; thereby showing that the two were, to an extent, separate. As a counterweight to the earlier mentioned "*Kompetenz-Kompetenz"*-doctrine[35], the case of First Options of Chicago tried to establish courts as the competent instance for deciding whether or not a contractual issue was to be referred to arbitration.[36] It has been argued that the arbitrators' jurisdictional power, to a large extent due to First Options, will depend on the wording of the agreement[37], displaying the importance of a well constructed arbitration clause. This is exemplified in the French rules, where *manifestement nulle* indicates that litigation only gets jurisdiction if the arbitration agreement is "clearly void".[38] Opinions have risen as to whether the doctrine of "*Kompetenz-Kompetenz"* and separability should be separated as well, since the separability doesn't allow the arbitrator to avoid infirmities in the arbitration clause itself.[39]

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[30] Se supra 3.1
[31] Lew, *Comparative International Commercial Arbitration*. at p 101
[32] Ibid.p 102; Born, *International Commercial Arbitration: Commentary and Materials*.at p 67 (note 2(a))
[33] Michael H Brady, "Exclusive Separability? Arbitrability and the Contract Formation Defense," *Review of Litigation* 28, no. 4 (2009). p 917
[34] *Prima Paint Corp. V. Flood & Conklin Mfg. Co., 388 U. S. 395*,(1967).
[35] Given many different expressions, the jurisdiction to decide jurisdiction indicates that arbitration processes should not be forced to stop to decide if an arbitral tribunal has jurisdiction to rule on the matter.
[36] *First Options of Chicago, Inc Petitioner V. Manuel Kaplan, Et Ux. And Mk Investments, Inc.* ,(1995).
[37] William W Park, "Arbitral Jurisdiction in the United States: Who Decides What," *International arbitration law review* 11, no. 1 (2008). P 593
[38] NCPC, Article 1458
[39] Park, "Arbitral Jurisdiction in the United States: Who Decides What." At p 595

Progression has eventually put the separability doctrine into the arbitration rules of the major institutions, generally in conjunction with the jurisdiction of the arbitrators to rule on their on jurisdiction.[40] As stated by Lew, this has also been implemented into several States implicating the UNCITRAL Model Law.[41]

The judgement of Buckeye[42] in 2006 introduced a categorization of challenges to an arbitration agreement, linking challenges into one of two different categories:

1. Challenges "specifically regarding the validity of the arbitration agreement".
2. Challenges on the "contract as a whole, either on a ground that directly affects the entire agreement or on the ground that the illegality of one of the contracts provisions renders the whole contract invalid"[43]

This dividing of challenges is however, by practitioners, viewed as too vague and unclear to be useful for the arbitration community.[44] Instead, help will be found in Ware's article on separability, further distinguishing the challenges into levels.[45] Ware's "levels" divide challenges further, distinguishing challenges regarding "never agreed to" that are possible to litigate and those that aren't; while the other level regards finished agreements where challenges to the separate arbitration agreement are possible for courts to rule while challenges to the substance agreement aren't.[46]

Addressing the issue of separability, it is vital to mention the Nagrampa case.[47] As recognized by Brady, the Nagrampa case is considered the latest case where a court of appeals applies the separability doctrine.[48] The case most influential aspect, according the author, is the introduction of the "crux of the complaint"-aspect, defining the intent of the complaining party.[49] By defining if the plaintiff wants to annul the entire contract or challenging the enforcement of the arbitration provision, the Nagrampa court tried to give light as to jurisdiction over the challenge but, according to Brady, failed to effectively do so.[50] The court found that the arbitrator must decide whether

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[40] "Icc Rules of Arbitration." Art 6(4) ; "Uncitral Model Law on International Commercial Arbitration."art 16(1)
[41] Lew, *Comparative International Commercial Arbitration*.at p 105
[42] *Buckeye Check Cashing, Inc. V. Cardegna*,(2006).
[43] Ibid. n.1.
[44] Brady, "Exclusive Separability? Arbitrability and the Contract Formation Defense." At p 926
[45] SJ Ware, "Arbitration Law's Separability Doctrine after Buckeye Check Cashing, Inc. V. Cardegna," *Nev. LJ* 8(2007). at 117
[46] Ibid.117
[47] *Connie A. Nagrampa V. Mailcoups, Inc.; the American Arbitration Association*,(2006).
[48] Brady, "Exclusive Separability? Arbitrability and the Contract Formation Defense."at p 926
[49] *Nagrampa*.at 1271
[50] _____, "Exclusive Separability? Arbitrability and the Contract Formation Defense." at p 928

an agreement that contains an arbitration clause is a contract of adhesion because this issue pertains to the making of the agreement as a whole and not to the arbitration clause specifically.[51]

Since the Nagrampa decision, the separability doctrine hasn't progressed further in substance, however in speculation. When assessing this, Brady recognizes four distinctions for achieving a separability that will clarify the challenging possibilities:

1. The functional distinction
2. The formal distinction
3. The procedural distinction
4. The integrative distinction[52]

Considering these distinctions, one quickly finds their qualities and capacities, giving the author an opportunity to exemplify and define them. The functional distinction, is easily achieved when the arbitration agreement is, in fact a physically, separate agreement on a different paper. This making the distinction of which agreement that is being challenged, parties still need to construct two agreements in order for this distinction to be effective. The formal distinction can be considered close to the functional distinction in the sense that it need not be a physically separate document but nevertheless obviously separate from the substantial agreement. The key question being whether or not the conduct of the plaintiff can be considered as a challenge applicable to the whole contract? The procedural distinction can be regarded as having its basis in the Nagrampa case by mainly focusing on what the "crux of the plaintiff" could be, thereby giving parties the possibility argue their intentions with the challenge. The final, and according to Brady preferable, distinction is the so called integrative distinction, combining the preferable aspects of the previous distinctions, apply them in a analytical manner and adding a more active role of courts by allowing them to more extensively force parties to produce evidence. [53]

It is the clear opinion of the author that separability of the arbitration agreement, regardless of how it is achieved is crucial in order for arbitration to be effective. Preferably, the role of national courts regarding this should be to as quickly and efficiently as possible if necessary assist arbitral tribunals to determine the proper forum for the challenge at hand. The proper conduct for achieving this is too big a subject to address in this thesis but the author supports the integrative distinction presented by Brady, if it can be proven to have the intended efficiency; an aspect that still raises doubts according to the author.

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[51] *Nagrampa*.
[52] ———, "Exclusive Separability? Arbitrability and the Contract Formation Defense."at p 940
[53] Ibid.p. 940 - 949

4.2 A closer look on the aspects

4.2.1 The scope of arbitration

In a recent Austrian case, the scope of an arbitration clause was reasoned by the court to be decided by the will of the parties, but limited by the wording of the arbitration clause.[54] The Austrian Supreme Court further reasoned that the wording of the arbitration clause at hand, which referred "disputes resulting from the agreement" to arbitration, cannot be considered to cover non-contractual claims such as unfair competition or antitrust law since they connect to the contract in just a "functionally illustrative" way. [55] However, the Austrian Supreme Court still emphasized that an arbitration agreement should, when being interpreted, still been seen in the light of the fact that the parties of the agreement have chosen to arbitrate. This viewpoint was a confirmation of the opinion of Fremuth-Wolf[56] and is earlier discussed and established in The British House Of Lords[57]; that the will of the parties must be considered to be a vital incentive in order to encourage parties refer issues to arbitration. If parties to an agreement run the risk of having their will to arbitrate neglected when interpreting the agreement, the relation between litigation and arbitration could easily be uneven. In a recent case comment[58] to the Austrian case, the author suggests that, not unlike the UNCITRAL example clause, the wording "or in connection with" is attached to the arbitration clause in order to expand the scope of the arbitration agreement to non-contractual disputes may be referred to arbitration. This suggestion, however well intended still raises two important questions when regarding the wording and the scope of the arbitration:

1. Is it preferable for parties to refer ALL disputes to arbitration?
2. What can, within the contract, be arbitrated?
3. Are non-contractual disputes arbitrable?

Looking at the first question, one can consider which situations that can occur when arbitration isn't a preferred way to settle disputes. First of all, parties to an agreement using an arbitration clause may not want to refer minor disputes to arbitration if they can be settled through ordinary negotiations, discussions or mediation. There must be considered to be a fine line between an arbitration clause that forces parties to arbitration in

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[54] *4 Ob 80/08f* (2008).

[55] Ibid.§ 2.5-2.6

[56] S Riegler, *Arbitration Law of Austria: Practice and Procedure* (Juris Publishing, Inc., 2007)..

[57] *Fiona Trust & Holding & Holding Corporation & 20 Ors V. Yuri Privalov & 17 Ors Sub Nom Premium Nafta Products Ltd. (20th Defendant) & Ors V. Fili Shipping Co. Ltd. (14th Claimant) & Ors* (2007).

[58] Christian Koller, "Scope of Arbitration Agreements - Unfair Competition and Anti-Trust Claims Not Covered by the Arbitration Agreement," *International Arbitration Law Review* 12, no. 3 (2008)..

unnecessary cases and a clause which, through reckless wording, prevents parties to have their interests enforced by inability to refer important matters to arbitration. The scope of the arbitration clause highly affects the competence of the arbitrator or arbitral tribunal; but the wording of the clause is; according to the French Supreme Court, not exhaustive to the jurisdiction of the arbitrators.[59] The Supreme Court overruled the finding of the Commercial Court, which relied on arguments referring to the French Code of Civil Procedure. Whether or not the French Supreme Court ruling in the Prodim-case can or will have impact on an different national or on international levels remains to see but it must be considered an important indication that a courts obligation to decline jurisdiction is enforced making the principle of "*Kompetenz-Kompetenz*"[60] for arbitrators stronger.

The discussion of arbitrability highly affects the arbitration clause and the scope, making these aspects crucial to parties, especially when they are of different nationalities. For example, case-law in the United States show that the development of arbitrability and the "*Kompetenz-Kompetenz*" can be considered to have chosen another course than the development in i.e. Europe.[61] According the US courts, the question of who's going to decide who's getting the jurisdiction in the case at hand, a court or an arbitral tribunal, depends on the circumstances and the waiving of rights amongst the parties to the agreement. Furthermore, the court in the just mentioned case held the importance of clarity in the arbitration agreement in order for arbitration to be the preferred choice.[62]

In order to understand the question of arbitrability and the rather complex question of jurisdiction on arbitrability in the United States, it is important to highlight the vital U.S. case of *First Options of Chicago v. Kaplan*.[63] Set in 1995, the case gave the courts a larger scope of jurisdiction when it comes to determining arbitrability and also gave strength to the importance of the intention of both the parties to an agreement.[64]

Earlier discussions regarding this have drawn a distinction between "objective"and "subjective" arbitrability where the main difference can be

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[59] *Prodim V. X., No. G 07-13.927 Dec. 12, 2007*,(2007).

[60] Originally from French case law, the principle is now codified under Articles 1466 and 1458 of the French Code of Civil Procedure. The principle, in original language "Compétence-compétence", has, through the different approaches in different national systems developed somewhat different meanings. The French approach, also confirmed through the Prodim-case induces courts to decline jurisdiction over arbitration until such jurisdiction is declined by the arbitral tribunal. This can be compared to the English interpretation, where simultaneous proceedings of both the arbitral tribunal and a court investigating the jurisdiction of the arbitral tribunal can go on, and the Swiss interpretation where the arbitral tribunal primarily rules on its own jurisdiction through an interlocutory decision.

[61] *Jack Ehleiter V. Grapetree Shores, Inc.*,(2007).

[62] Ibid. 222

[63] *First Options of Chicago, Inc. V. Kaplan*.

[64] Ibid. 943

identified as to the influence of the parties on the issue.[65] Therefore, issues such as public policy or criminal law can easily be categorised into *objective arbitrability* while issues such as entitlement for parties to get involved in arbitration fall under *subjective arbitrability*.[66]Recent arguments have also been made in the line of negative effects of national arbitration laws regarding the arbitrability of certain questions, mainly in the field of objective arbitrability.[67]

Returning to the earlier established questions arising when discussing the scope of arbitration-clauses and agreements, it is safe to say that the aspects that are needed for consideration create a more difficult task for contracting parties than initially expected. When combining the two latter questions, what can or cannot be arbitrated of contractual or non-contractual issues, arguments have earlier been brought forward that focuses on the original intention of the parties to arbitrate, allowing for arbitration clauses to broadly interpreted[68]; the reasoning of the court Austrian case (as earlier stated) and Koller clearly limits the scope of the arbitration to issues "resulting from the agreement".[69] Whether the wider or the narrow approach towards this is to be the final basis for consideration when contracting an agreement is, however, yet to be seen.

4.2.2 The applicable law

One of the first and foremost tips arbitrators give when arbitration is considered is to "know the rules applicable to the agreement".[70] The choice of applicable law in arbitration is not as easy as a first glance may indicate; mainly due to the fact that there are more choices than one involved. When examining this aspect, several influential elements can be outlined when trying to limit or expand the earlier discussed scope of the arbitration:

- The chosen law may not cover all aspects of the legal relationship regulated in the contract
- Overriding laws may be applicable
- Foreign, unwanted law may come into effect[71]

This question borders on the important issue of predictability in legal systems and can very well play an important part in the ground-laying

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[65] P Fouchard et al., *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law Intl, 1999).;A Kirry, "Arbitrability: Current Trends in Europe," *Arbitration International* 12(1996).
[66] Fouchard et al., *Fouchard, Gaillard, Goldman on International Commercial Arbitration*..
[67] Giuditta Cordero Moss, "Arbitration and Private International Law," *International Arbitration Law Review* 11, no. 4 (2008).
[68] Lew, *Comparative International Commercial Arbitration*. at p 153
[69] Koller, "Scope of Arbitration Agreements ".
[70] Robert L Arrington, "Tips for Advocates in Arbitration," *Tennessee Bar Journal* 45, no. 6 (2009). p. 16
[71] Moss, "Arbitration and Private International Law."

question on the validity of an eventual issued award and, in the extreme case, the entire arbitration process.[72]

Indeed, as pointed out by Redfern, up to five different State's laws cannot be considered unusual in any particular international arbitration process:

1. The laws of jurisdiction or jurisdictions governing the parties ability to agree to arbitrate,
2. The law of the jurisdiction governing the agreement to arbitrate,
3. The law of the arbitral forum,
4. The law of the jurisdiction or jurisdictions where the award will be recognized and enforced and
5. The substantive law of the contract.[73]

In this thesis, the author chooses to focus on the aspects that directly relate to the formation of the agreement and the arbitration clause; this however does not mean that the author insinuates that other aspects are less important to address.

The aspects that, in the opinion of the author, should be considered to directly affect the formation of the arbitration are number 3, 4 and 5. These aspects will here be dealt with in earlier mentioned order.

4.2.2.1 The law of the arbitral forum

Generally, one can assume that the seat of the arbitration will be the procedural law governing the process.[74] The parties are naturally free to let the law of the location of the arbitration to influence or even govern the arbitral process. This, on the other hand, can initiate a number of other issues that either parties or the arbitral tribunal need to address. First; the chosen place of the origin may very well have been chosen on different criteria than the geographically applicable law. It is even more likely that the contracting parties haven't considered the national law of the site of the arbitration. Additionally, the arbitration process may very well be forced to be held in several places making an eventual influence of national law even more difficult. Contracting parties may even allow for the arbitral tribunal to choose the site of the arbitration, making the predetermined stipulating of law governing the arbitral forum a potential obstacle for the process. This issue has been addressed as the "delocalization theory"[75] whiles the before-mentioned opposite approach, the "seat theory" has support through the New York convention.[76] This creates a situation where the "seat theory" is more widely spread and preferred despite the issues that arises. The question, which also has been dealt with by Halket, is to what extent

[72] Ibid.153
[73] A Redfern, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 2004).
[74] Born, *International Commercial Arbitration: Commentary and Materials*. At 413
[75] Redfern, *Law and Practice of International Commercial Arbitration*.105
[76] "Convention on the Recognition and Enforcement of Foreign Arbitral Awards ", ed. United Nations (New York: United Nations, 1958). Art V

contracting parties should consider the jurisdiction of the chosen place for the arbitration?[77]

Reviewing the interests of the contracting parties, it becomes clear that the answer to the question varies significantly depending on the experience and routine of the contracting parties. When forming of the arbitration clause or agreement, parties should ensure to address the aspect of whether or not the arbitral tribunal or they should adapt the process to use the legal jurisdiction of the decided seat of the arbitration. An address of the jurisdiction of the seat of the arbitration should also involve the aspects of procedural issues, public policy and of course, if the responsibility falls on the arbitral tribunal, the importance of not issuing an award that violates the law of the seat (or seats) of the arbitration.[78]

4.2.2.2 The law of the jurisdiction or jurisdictions where the award will be recognized and enforced

Somewhat falling under the issue of enforceability, discussed further on in this thesis, this aspect must be considered very complicated and not easily addressed form a general perspective. Contracting parties may very well find it difficult to in advance fully know or predict where an eventual future award will be recognized and enforced, indicating that this aspects is better handled by the arbitral tribunal. Generally, under the presumption that the place of recognition and enforcement applies one or more of the major arbitration sets or rules, the grounds for not recognizing an international arbitral award are scarce and limited, focusing mainly on faults in different parts of the arbitration process.[79] It can nevertheless be a good idea to, in the arbitration agreement, define whether or not the arbitral tribunal should be able to or forced to take this aspect into account; the arbitral tribunal can of course be considered to have an obligation to issue an award that is enforceable for the award-winning party. As discussed by Halket, the issue can on the other hand very well go out or proportion if the arbitral tribunal is to take into account whether an award is enforceable in all possible jurisdictions; while the aspect become equally difficult if the arbitral tribunal issues awards that, despite the enforceability in the “current country” isn’t enforceable or recognized in a later desired country.[80]

4.2.2.3 The substantive law of the contract

At a first glance, the aspect of the substantive law may seem as a small obstacle, since the parties are free to mutually determine what jurisdiction shall apply to the contract and the arbitration agreement. Indeed, contracting parties have the possibility to guide the process into a substantive law that both sides are satisfied with, but this may also become a bigger minefield

[77] Thomas D Halket, "Contemporary Issues in International Arbitration and Mediation," in *The Fordham Papers*, ed. Arthur W. Rovine (Leiden: Hoeti Publishers, 2008).p 207
[78] Ibid.p 210
[79] "Convention on the Recognition and Enforcement of Foreign Arbitral Awards ".Art. V; "Uncitral Model Law on International Commercial Arbitration." Art 34-35
[80] Halket, "Contemporary Issues in International Arbitration and Mediation."p 213

than intended if parties are inexperienced or simply if one party want to ensure an advantage. Parties should, before deciding a substantive law, ensure that arbitration and the heart of the contract are even possible to possible to contract on under the intended jurisdiction. Many countries, including the United States, have expressed a policy of favoring arbitration[81] where comity towards foreign tribunals must be considered necessary. However, contracting parties cannot presume that so is the case when choosing the substantive law. Instead it must be, and is, considered important to ensure that the chosen jurisdiction allows contracting parties to apply arbitration to their dispute.[82]

4.2.3 The choice of arbitration

How to choose between an ad hoc arbitration an institutionally administered arbitration is a question that contains aspects in many directions. Arguments brought forward by established practitioners place contracting parties in totally different places depending on their intent, competence and willingness to adapt rules to each individual agreement.[83]

4.2.3.1 The Ad Hoc choice

When taking matters into own hands, contracting parties immediately face advantages; saving costs being the most obvious. Institutional fees automatically increase the costs for the arbitration, as well as the compensation when lawyers from bigger institutions get involved in the agreement.[84] The growing number of arbitrators and clearer, more developed legal frameworks on an international level also contribute to making ad hoc arbitration more competent and competitive.[85]

Ad hoc arbitration can also, from one aspect, be considered to be even more flexible than institutional arbitration.[86] When parties to a contract find it hard to agree on an arbitral institution, the ad hoc alternative could very well be the smoothest compromise in order to avoid litigation.[87] A small ad hoc-arbitration clause, stating only that issues should be solved by arbitration and where the arbitration should take place, will force issues to be solved when they appear thereby avoiding wasting time stipulating issues that never occurred.

There is nothing to hinder parties to contract an arbitral institution to appoint arbitrators. By having ad hoc arbitration as a starting point; contracting parties also gain the advantage and possibility to, at any stage

[81] *Mitsubishi Motors V. Soler Chrysler-Plymouth, 473 U.S. 614 (1985)*,(1985).
[82] ———, "Contemporary Issues in International Arbitration and Mediation."p 218-219
[83] Robert Carrow, "Ad Hoc Arbitration," Robert Carrow, http://www.carrow.com/ad-hoc.html.
[84] Born, *International Commercial Arbitration: Commentary and Materials*.p 11
[85] Ibid.p 12
[86] Carrow, "Ad Hoc Arbitration."p 2
[87] Lew, *Comparative International Commercial Arbitration*. p 35

during the arbitral process, to engage an arbitral institution to further handle the arbitration.

Given the possibility that one of the contracting parties is a state, the ad hoc arbitration may very well be the best alternative since sovereign entities may very well be reluctant to submit to a process devaluing their sovereignty.[88]

Not surprisingly, on the other hand, ad hoc arbitration carries with it possible disadvantages that may stand in the way of an effective process. First and foremost, ad hoc arbitration by nature demands a larger cooperation and initiative from the contracting parties; not unlikely in a time when the relationship between the parties isn't at its best. Delay and unwillingness to cooperate regarding the various aspects of the arbitration process may very well lead to a situation more ineffective than litigation.[89]

4.2.3.2 The Institutional choice

Taking the road more traveled, institutional arbitration comes with a number of advantages; mainly due to the strength created by the larger number of cases administered.[90] Pre-established rules and principals offer a predictability and net of safety that an ad hoc arbitration simply cannot offer. Furthermore, the major arbitral institutions decisions are more likely to be recognized by arbitration-unfriendly courts just because of the reputation of the institution (compared to ad hoc arbitration where only the individual arbitrators reputation matters).[91] Indeed, the experience and routine of arbitrators and mediators from an arbitral institution may very well influence reluctant parties to proceed with the process.[92] The presence of an arbitrator chosen by an arbitral institution also decreases the risk of procedural breakdowns during the arbitration.[93]

The issue of remuneration is greatly diminished when using institutional arbitration; despite the fact that, as earlier mentioned, costs may be increased compared to ad hoc arbitration. It is, at this stage, important to recognize that even though the costs may be higher, they are nevertheless more predictable when using arbitral institution. Additionally, arbitrators connected to an institution are likely to promote a more effective procedure because they represent and answer to a larger organization.

On the other hand, institutional arbitration is accompanied by, for contracting parties, issues that may influence their final choice. Besides the already mentioned cost-factor compared to ad hoc arbitration, the time that is needed for an institutional arbitration may very well be longer too. [94]

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[88] Ibid.p 35
[89] Carrow, "Ad Hoc Arbitration."p 2.
[90] Ibid.p 2
[91] Lew, *Comparative International Commercial Arbitration*.at 34
[92] Carrow, "Ad Hoc Arbitration."p 2
[93] Born, *International Commercial Arbitration: Commentary and Materials*.12
[94] Carrow, "Ad Hoc Arbitration."p 2

4.2.4 The number of arbitrators

The selection process is, by arbitrators, considered to be one of the more important aspects of the process.[95] Therefore, it is important to expand the aspect to not only regard the number but also the very selection of arbitrators. The contracting parties have the possibility to, during the constructing of the arbitration agreement; determine if a certain arbitrator (or composition of arbitral tribunal) is to be used in an eventual arbitration process. The reasons for this conduct may spring from several reasons, all from previous experience of said arbitrator or trust in a certain organizations representatives to the simple fact that the arbitrator is considered competent enough by both parties. While this creates a trust, a somewhat legal and economical predictability and mutual starting point in an arbitration process, it also initiates a number of issues. First and foremost, the contracting parties lock themselves in a situation where the agreement might be considered null and void if said arbitrator isn't available when the process is actualized.[96] This issue can of course be solved by the parties by, when defining the arbitrator is wanted, listing arbitrators so that backups can be used if the first choice isn't available.

It is, as earlier mentioned, not unusual for contracting parties to, in order to avoid extended arguments when resolving to arbitration, to name an arbitral institution as "appointing authority" to ensure a quicker process when selecting arbitrator(s), regardless if the chosen form of arbitration is ad hoc or institutional.[97]

Dealing with the aspect of the number of arbitrators, one automatically wanders into the time and cost-issues of the arbitration process. Whether or not parties, under either ad hoc or institutional arbitration are allowed to themselves determine the number of arbitrators is generally stipulated by the applicable legal framework and usually does not lay out and prohibitions against the parties choice.[98] Logically costs increases when appointing more arbitrators but as all other aspects regarding arbitration, this notion may be deceiving and not necessarily true. Dwindling with the thought that contracting parties are cautious, the most important factor of an arbitration process is a proper issued award leading to the conclusion that that must be the first priority even if arbitration-costs get higher in order to achieve this. It could therefore be argued that the insurance of a competent arbitral tribunal which is costlier outweigh the cheaper constructed solution with the risk of incompetence or unfair award. The issuing of such an award most likely leading to a much more costly litigation process undermine the very purpose of the intended dispute resolution. It is therefore easily said that

[95] Garylee Cox, "The Selection Process and the Appointment of Arbitrators," *The Arbitration Journal* 46, no. 2 (1991). & Arrington, "Tips for Advocates in Arbitration."p 17
[96] Cox, "The Selection Process and the Appointment of Arbitrators." p 29
[97] Born, *International Commercial Arbitration: Commentary and Materials*.p 616
[98] "Uncitral Model Law on International Commercial Arbitration."Art 10(1); The FAA doesn't specifically deal with this issue but is, according to BORN, to be interpreted as consistent with the UNCITRAL Model Law.

there is no simple way of determining the appropriate number of arbitrators already in the constructing phase of an agreement. On the other hand, if the aspect is intentionally left out to be sorted out later, an infected relation can very well drag this issue for a long time with a potential risk of costs increasing anyway. A possible solution to this problem is a pre-arbitration mediation, an aspect that will be discussed further on in this thesis.

There is also a conduct, where parties in the contracting phase, list qualifications of a future arbitrator or arbitrators in a tribunal.[99] This can be both useful and hindering, especially if the list is constructed too narrow or too wide. This conduct is also possible to use when arbitrating through institutional arbitration, shifting more responsibility to the institution to find the appropriate arbitrator(s). This also opens up the possibility for an all-neutral environment if the institution chosen have the possibility to choose the tribunal. An all-neutral tribunal can, from one side, be viewed as suitable since party-chosen representatives naturally aim to issue an award in favor of their employer. From a time/cost-perspective it is natural that a totally neutral tribunal will set aside such issues for the benefit of a swift solution. On the other hand, parties laying their conflict in a totally neutral tribunals hand cannot be sure that their interests will be as looked after as they might have been by a party-appointed tribunal.

An aspect not often usual of consideration is the disqualifying of one or more arbitrators. The major institutions for arbitration have established rules regarding the challenging of an arbitrator in order for parties to be able to object to appointed tribunals.[100] As noted by Born, there can arise a number of issues when handling a situation where one or both parties wish to challenge an arbitrator.[101] Furthermore, there is the obvious complication of who rules on a challenge of an arbitrator? The earlier mentioned *"Kompetenz-kompetenz*"-principle indicates that an arbitral tribunal should, in itself, decide on such matters. This however, raise obvious questioning as to whether it's suitable or even possible for an arbitral tribunal to question itself or one of its members correctly. According to Born, studies have shown that as little as 10 % of challenges made during the proceedings succeed.[102] The solution is not easily found; if a litigation process should handle such a challenge, then the effective and low-cost purpose of arbitration may very well be lost when parties wishing to prolong or sabotage arbitration repeatedly challenge appointed arbitrators. Leaning the issue on national law doesn't make things clear or effective either; as the regulation for this is lacking or not effective enough to meet the demands of arbitration process time-schedule.[103]

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[99] Cox, "The Selection Process and the Appointment of Arbitrators."30
[100] "Uncitral Model Law on International Commercial Arbitration." Art V-VIII; "Icc Rules of Arbitration." Art 7-9; "The Lcia Rules."5-11; "Aaa Commercial Arbitration Rules and Mediation Procedures." Art 12-17
[101] Born, *International Commercial Arbitration: Commentary and Materials*.p 642
[102] Ibid.p 642
[103] Ibid.644

Summarizing the issues and possibilities concerning the composition of the arbitral tribunal, the party-neutral focus must be to render a just and enforceable award. That being said, one can very well argue that no two cases are alike and therefore the forming of the arbitral tribunal cannot be put into general principals. Clear, however, is that problems occurring due to negligence of these aspects highly outweigh the cost and time to address the issues at an early stage of the constructing of the agreement.

4.2.5 The seat of arbitration

When choosing the seat of arbitration contracting parties should be aware of the fact that different issues may or may not come into play, depending on the final decision. Besides the simple aspect of convenience and the obvious benefits of creating an environment where the arbitral tribunal and eventual witnesses are comfortable enough to work efficiently[104], other even more important aspects should be considered. The most important aspect of the arbitral situs, closely related to the enforceability of the issued award, is whether or not the New York Convention is applicable in the state chosen by the parties.[105] However, if a party tries to gain an obvious advantage by placing the seat of the arbitration far away from the other party, the possibility that the arbitration agreement is found invalid still exists.[106]

It is also important for contracting parties to take into consideration that the law applicable to the agreement and the arbitration process may override the selection of seat for the arbitration process.[107] Indeed, as the judge pointed out, the applicable law of the contract weighs heavier than the decided seat of the arbitration when comparing the two aspects.[108] This has lead to the opinion that parties should be able to increase the efficiency of the arbitration process by seating the process at the most convenient place while at the same time use the applicable law most suited for the agreement.[109] This is of course suitable if i.e. most witnesses and evidence are located in another place than the parties.[110] However, it is of significance to notice that this reasoning has been undermined by later decisions[111], making practicing arbitrators opt for a clearer solution.[112]

Furthermore, it is important to in fact decide a seat for the arbitration and not just refer to a state. In a criticized arbitration award, a sole arbitrator

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[104] Ibid.573
[105] Ibid.575
[106] Vera van Houtte, Stephan Wilske, and Michael Young, "What's New in European Arbitration?," *Dispute Resolution Journal* 64, no. 3 (2009). p 14
[107] *Braes of Doune Wind Farm (Scotland) Ltd V Alfred Mcalpine Business Services Ltd*,(2008).
[108]
[109] Vera van Houtte, Stephan Wilske, and Michael Young, "What's New in European Arbitration?," *Dispute Resolution Journal* 63, no. 2 (2008). at p 11
[110] Lew, *Comparative International Commercial Arbitration*. p 173
[111] *Roger Shashoua V Mukesh Sharma; Case No: 1588 of 2007*,(2009).
[112] Peter Ashford, "When Is a Seat Not a Seat?," *Cripps Harries Hall LLP*(2009), http://www.crippslaw.com/publications/arbitration_bulletin_06%2009.pdf.

decided that an agreement which didn't properly define the seat of the arbitration narrower than "Switzerland".[113] As pointed out by van Houtte, the criticism towards this award expands further than just the reasoning regarding this issue; the federal tribunal has not ruled on this issue, thereby still making it a valid reasoning.

It should here be noted, that if contracting parties fail to designate a seat for the arbitration, the assigned institution[114] or arbitral tribunal[115] will be empowered to determine this.

Therefore, parties should, until further clarifications as regards to how narrow a determination of seat must be, take this aspect into account and define their arbitration clause properly.

4.2.6 The language of arbitration

Despite the scarce support found in general arbitration rules[116], the language of the arbitration can very well affect the proceedings more than first can be expected. Problems need not occur but can, due to the fact that different states can be involved, if documents disclosed to the arbitral tribunal are allowed to be in any language. It might therefore be of importance to contracting parties of different languages to, in their arbitration agreement, determine which should be the working language of the process, including the disclosure of documents. Furthermore, if parties are using institutional arbitration, the determining of working language (or lack thereof) might steer the composition of the arbitral tribunal.[117] This aspect should thus be considered when selecting the seat of the arbitration as well.

4.3 Neglected aspects?

Turning now to the essence of this thesis; it is time to turn focus from the aspects that already are in the model arbitration clause to the aspects that are not. The fact that the model clause dealt with in this thesis originated from 1985 and hasn't changed substantially since that despite the fact that the world and the markets of the world have been revolutionized several times since then indicates that there very well might be aspects that should be incorporated in a general arbitration clause.[118]

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[113] van Houtte, Wilske, and Young, "What's New in European Arbitration?."p 11
[114] "Icc Rules of Arbitration."art 14(1)
[115] "Uncitral Model Law on International Commercial Arbitration." art 16
[116] See Infra 3.8
[117] Arbitral institutions will, of course, appoint the most suitable arbitrator; one of the most basic criteria being that the arbitrator(s) speaks the desired language of the parties.
[118] Regarding so called specialized clauses, generally used in ad hoc arbitrations, these are usually modified individually to suit the needs of the contracting parties.

4.3.1 Electronic agreements and electronic information in arbitration?

A question that has evolved during the later part of the 20th and the beginning of the 21st century is the implications of an arbitration clause in an electronic agreement. Using the New York Convention, one finds that the validity of agreement is governed by the rules of law chosen by the parties; unless such a choice hasn't been made and the law of the country where the award was made becomes applicable.[119] As pointed out by Moss, the latter alternative is more common and can be problematic for the parties depending on which country becomes applicable and the actual wording of the national legislation regarding arbitration.[120] Depending on how strict the interpretation will be regarding the wording in the national legislation, parties may find that electronic agreements may not reach the qualifications for a valid agreement in the State where the award has been made, creating a difficult climate for contract-writing and arbitration enforcement.

There is however other aspects of electronic information that must be considered both when constructing the arbitration agreement and in an eventual arbitration process later on.

- Disclosure of electronic information from parties?
- In which form should such information be disclosed?
- To what extent can parties be required to archive electronic information in order to fulfil an eventual later obligation to produce or disclose that information?

Though this thesis does not intend to answer or address these aspects it is nevertheless important to recognise that these aspects may, or should, be considered when constructing an arbitration clause. When searching for guidance regarding this aspect, one quickly finds that there is little to be found on an international level. The US case Zubulake can be considered guiding regarding disclosure of electronic disclosure.[121] The case has, to a certain extent, given clarity regarding the levels of accessibility[122] and also laid ground for the later adjusted steps necessary when preserving and producing electronic data and how for courts to determine the shifting of costs of e-discovery.[123] Relying on principles from case law, the US federal courts presented, in 2006, amendments regarding e-discovery to the already existing federal discovery rules concerning litigation. The e-discovery amendments originated with the Advisory Committee on Civil Rules, which first heard about problems with computer-based discovery in 1996 and

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[119] United Nations, "Convention on the Recognition and Enforcement of Foreign Arbitral Awards ", ed. United Nations (New York: United Nations, 1958). Art. V(1)(a),

[120] Giuditta Cordero Moss, "Risk of Conflict between the New York Convention and Never Arbitrationfriendly National Legisllation?," *Stockholm Arbitration Report*, no. 2 (2003)., p. 4

[121] *Laura Zubulake, Plaintiff, V. Ubs Warburg Llc, Ubs Warburg, and Ubs Ag, Defendants.*,(2004).

[122] Ibid.318 – 319

[123] *Amy Wiginton, Plaintiff, V. Cb Richard Ellis, Defendant.*,(2003).

began intensive work on the subject in 2000. The Advisory Committee considered numerous alternatives, perspectives, and ideas in determining whether amendments specifically addressing electronic discovery were necessary, and, if so, what the language of any such amendments should be. In August 2004, the Committee published its proposed amendments.[124] These rules are however aimed at a litigation process and arguments have been lifted to whether or not such a conduct is suitable to the arbitration process.[125] The main issue of course being the risk of slowing down or making the arbitration process inefficient, arguments have been brought forward that arbitral institutions won't fully engage this issue.[126] The opinion of this author is however that it is simply not possible for the arbitration community to ignore or dismiss electronic information as a vital part of modern agreements and communication between business partners.

The UNCITRAL Model Law shines a certain light over the problem at hand, using art 7 (2-4) that uses a more modern wording and can be regarded as including electronic communication as a valid form of agreement. However, the major arbitration rules all consider discovery and production of "documents" or other "evidence" but neglect to further define or address how to handle electronic information.[127] Even the IBA rules, which through its actuality must be considered to be a guiding tool for international arbitration, fail to include or closely define electronic information when discussing how to address the actual arbitration agreement (or clause) or the discovery or production of information later in the process.[128] It is clear, as also has been pointed out by Smit & Robinson, that there is a lack of guidelines regarding electronic information as a part of a modern arbitration process.[129] However, the creating of such guidelines creates further issues that need considering; i.e. the judicial difference between countries or the fact that different countries and companies have very different levels of electronic communication. At this point, the closest to such an instrument is provided by Smit & Robinson.[130] Unfortunately, these guidelines cannot be considered to be useful unless they are, in present or adapted form, adapted or accepted by arbitration institutions. It must

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[124] K&L Gates, "E-Discovery Amendments to the Federal Rules of Civil Procedure Go into Effect Today," K&L Gates, http://www.ediscoverylaw.com/2006/12/articles/news-updates/ediscovery-amendments-to-the-federal-rules-of-civil-procedure-go-into-effect-today/.
[125] Robert H. Smit and Tyler B. Robinson, "E-Disclosure in International Arbitration," *Arbitration International* 24, no. 1 (2008).
[126] Irene C. Warshauer, "Electronic Discovery and Arbitration: A Shortcut through E-Discovery," in *Contemporary Issues in International Arbitration and Mediation*, ed. Arthur W Rovine (New York: Fordham Law School, 2008).p 267
[127] *See e.g.* UNCITRAL "Uncitral Model Law on International Commercial Arbitration."art 24.3; ICC "Icc Rules of Arbitration."art 20.5; LCIA "The Lcia Rules." Art 22.1(e); International Centre For Dispute Resolution, "Icdr Guidelines for Arbitrators Concerning Exchanges of Information," ed. International Centre For Dispute Resolution (International Centre For Dispute Resolution, 2008). Art 4.
[128] International Bar Association, "Iba Guidelines on Conflicts of Interest in International Arbitration," ed. International Bar Association (International Bar Association, 2004).art 1
[129] Smit and Robinson, "E-Disclosure in International Arbitration."
[130] Ibid.p 130

either way be considered vital that a uniform approach towards e-disclosure is taken as soon as possible in order to be able to successfully use aspects of electronic information in an arbitration clause.

4.3.2 The ”legality” of decision/ enforcement

Generally, the exhaustive list of grounds to prevent enforcement, found in the New York Convention[131] is, as stated by Moss, to be interpreted restrictively on order to avoid judicial involvement.[132] In 2006, the 2nd circuit held that the amount of evidence needed in order to make an arbitration clause unenforceable extends further than merely indications of fraud.[133] There is, nonetheless, an example of when an unfair arbitration clause can question the validity of the agreement.[134] It should though be noted that when regarding consumer-relationships, it is considered that arbitrations agreements are weakened by the public policy behind consumer rights. [135] Indeed, as clarified by Buoncristiani, public policy is, despite the narrowly regarded grounds, a ground on which to rely when arguing to whether to vacate an arbitral award.[136]

One can quickly rule on the smaller issue of whether or not enforcement or legality of an arbitration agreement is achieved if only one party signs it.[137] Despite the fact that there is no formal requirement of signature from both parties, it is doubtful that an arbitration agreement without signatures from both parties will be considered valid by courts.[138]

Regarding the legality, different approaches can be seen depending on which states courts is used. US courts can be considered to have a much larger scope of engagement when it comes to legality of both arbitral agreement and award compared to i.e. French courts.[139]Despite this fact there have been US cases that still limit the role of the courts when it comes

[131] "Convention on the Recognition and Enforcement of Foreign Arbitral Awards ".art V
[132] Moss, "Arbitration and Private International Law."p 154
[133] David Seidman, "Enforceability of Arbitration Clause Where Fraud Alleged," *Dispute Resolution Journal* 60, no. 4 (2005).
[134] *Elisa María Mostaza Claro V Centro Móvil Milenium Sl*,(2006).
[135] "Unfairness of Contract Term May Be Raised on Challenge to Arbitration Award," *EU Focus* 198(2006).
[136] David Buoncristiani, "How International Arbitration Awards Can Be Enforced in the United States," *Construction Weblinks Industry Reports Newletters* November 2006(2007), http://www.constructionweblinks.com/Resources/Industry_Reports__Newsletters/Nov_26_2007/howi.html.
[137] Scott D. Marrs and Sean P. Milligan, "10 Major Arbitration Issues," *Dispute Resolution Journal* 64, no. 3 (2009). p 45
[138] It is however noticeable that courts nowadays are more likely to rule on the”will of the parties to arbitrate”, given the existence of an arbitration agreement. It has not however been put to the test if such an agreement exists with only the signature of one party.
[139] Park, "Arbitral Jurisdiction in the United States: Who Decides What."p 40

to arbitral awards, showing that the "purpose for resort to arbitration… would be frustrated".[140]

Since the exhaustive list of grounds for unenforceability in the New York convention demands, as mentioned above, that clear evidence is needed; in the event of conflict when enforcing an arbitral award, the main burden to present such evidence lies on the party opposing the confirmation.[141] Despite earlier clarifications, opinions have been expressed to whether the US courts follow a unified line regarding enforceability in arbitration.[142] It is recommended by practitioners that contracting parties, in order for the award to be final regardless of jurisdiction, insert such an addition to the arbitration clause or agreement.[143]

4.3.3 The possibility to challenge decision/ finality of award

The finality of an award is very dependent on whether or not the issue is addressed in the creating of the agreement.

The Federal Arbitration Act[144], clarifying the relationship between courts and arbitration tribunal, stipulates that the function of the court in confirming arbitral awards is limited "since if it were otherwise, the ostensible purpose for resort to arbitration i.e., avoidance of litigation, would be frustrated."[145] As previously stated and recommended by Gonzales & Ramirez, finality of the award is most easily achieved by stipulating this into the arbitration clause or agreement. Such a provision can be formulated as follows:

"The arbitral award is binding, final, not subject to review and not subject to appeal by the courts of any jurisdiction".[146]

The Chromalloy-case was enforced by both the US Supreme Court[147] and the Paris Court of Appeal[148], giving international guidance towards the enforcement of awards where parties stipulated for such finality. As identified by Lew however, US courts have not followed this line of conduct

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[140] *Alan A. Booth, Plaintiff-Appellee, Counter-Defendant, V. Hume Publishing, Inc., and the Hume Group, Inc., Defendants-Appellants, Counter-Claimants.*, 931(1990).
[141] "Convention on the Recognition and Enforcement of Foreign Arbitral Awards ".Art. V(1)
[142] S. Kaplinsky Alan, Mark Levin, and C. Bryce Martin, "Arbitration Developments: The Battle against Arbitration Intensifies," *The Business Lawyer* 65, no. 2 (2010).
[143] Daniel E. González and María Eugenia Ramírez, "International Commercial Arbitration; Hurdles When Confirming a Foreign Arbitral Award in the U.S," *Florida Bar Journal* 83, no. 10 (2009). p. 61
[144] "Federal Arbitration Act," ed. United States Federal Courts (1925).
[145] *902 F2d 925 Booth V. Hume Publishing Inc.* p 932
[146] González and Ramírez, "International Commercial Arbitration; Hurdles When Confirming a Foreign Arbitral Award in the U.S."p 61
[147] *Chromally Aeroservice Inc V the Arab Republic of Egypt, 939 F Supp 907 Xxii* (1997).
[148] *The Arab Republic of Egypt V Chromalloy Aeroservice Inc, 12(4) Mealey's Iar*,(1997).

consequently.[149] On the other hand, indications show that the approach "reflects the court's scepticism of decisions by foreign courts that vacate arbitration awards entered against their own sovereign."[150] No matter what, it seems so far as the grounds for un-enforcement of arbitration awards are firm as long as practitioners use the possibilities of existing rules.

4.3.4 The dividing of costs

The dividing of costs may very well be the key issue in modern arbitration. Parties, that are bigger, richer or just in a more favourable position of negotiation, will without a doubt use the dividing of costs to their advantage. Parties can, if so wanted, choose to divide the costs of the arbitration between them, making each party pay for half.[151]

It is, however, in international arbitration much more likely that one or both parties will try to use the costs-factor as a tool to avoid the arbitration by making it too expensive to be efficient. By shifting the obligation to pay for arbitration on the weaker party, the stronger party will ensure two advantages; The other party will refrain from using arbitration and if needed, the stronger party will easier be able to use arbitration without it generating as high costs as otherwise. If both parties are at the same strength, they may still want to push the costs of the arbitration upwards whilst at the same time, making the party that initiates the arbitration forced to pay a greater part of the arbitration. This will create a situation where none of the parties try to avoid disputes that can lead to arbitration, making the agreement locked and more or less impossible to challenge. This is, of course, not an optimal situation and it is therefore very important to try to avoid this when contracting an agreement and especially an arbitration clause.

The advantage of the stronger party making it to expensive for a weaker party to initiate arbitration can however turn out to be risky. The earlier mentioned German cases where the court found disadvantages related to the seat of the arbitration that generated large costs for the weaker party ultimately made the arbitration agreement null and void. Furthermore, The American "Green Tree-decision"[152] of 2000 clearly gave parties a larger possibility to bring forth disputes where the dividing of costs in an arbitration agreement can be regarded as unjust. The Court, however, argued that the party claiming invalidity of the agreement carries the burden of showing their incapability of paying the costs.[153]

[149] Lew, *Comparative International Commercial Arbitration*. at p 719
[150] Buoncristiani, "How International Arbitration Awards Can Be Enforced in the United States."
[151] This is regarded as standard in the United States, the so called"American Rule".
[152] Green Tree Financial Corp. vs. Randolph 531 U.S. 79. (2000)
[153] ibid. at 91-92

One can also argue, as rightly pointed out by Gusy & Illmer[154], that both the UNCITRAL Model Law and the New York Convention regulates that an arbitration agreement becomes invalid if it is incapable of being performed.[155] Despite the fact that it must be considered a sound principle that arbitrators first priority should be to produce an enforceable award; this is, however, not addressed and must be regarded as uncertain whether it would be successful in courts.

[154] Martin F. Gusy; Martin H. Illmer., "The Icdr Guidelines for Arbitrators Concerning Exchanges of Information - a German/American Introduction in Light of International Practice," *International Arbitration Law Review* 11, no. 6 (2008).
[155] "Uncitral Model Law on International Commercial Arbitration."Art. 8 (1) & Nations, "Convention on the Recognition and Enforcement of Foreign Arbitral Awards ".Art. III (3)

Conclusions

Arbitration as an alternative dispute resolution must, compared to litigation, be considered to be a more suitable approach towards contractual issues for international agreements. There are several reasons for companies about to enter international agreements to consider arbitration as a replacement for litigation; first, the publicity of a public litigation process no matter what the issue must be considered bad for the reputation of the company. Instead, turning to arbitration most likely keep both attention down and sensitive information discreet. Second, a litigation process will unquestionably take longer time to resolve the issue. Even if one disregards the probable time parties need to wait before the court addresses their case, the court will not have the same incentive to resolve the issue in a quick and efficient manner as a contracted arbitral tribunal. Third, an arbitral tribunal is selected for the very issue at hand, either by the parties or an arbitration institution, promoting the possibility that the desired and necessary competence needed to deal with the issue at hand is ensured. Forth, lack of knowledge regarding laws, regulations and litigation processes of foreign countries may very well, if not prevent, decelerate international agreements and the resolving of issues arisen out of those agreements.

It is however important to not stop at the conclusion that arbitration should be preferred. In order for parties constructing an agreement to make certain that arbitration will be all that it's promised, there are, as shown in this thesis, several aspects that can and should be taken into account. It is understandable that inexperienced parties feel the need to retrieve guidance and help form an arbitration institution; first and foremost because arbitration processes can, if not dealt with properly, become more expensive and inefficient than litigation processes.[156] It is therefore necessary, before leaping into an arbitration clause or agreement, to analyse what the clause actually means and what implications it might have on the international agreement. It is also important for parties to recognize that they have the possibility to adapt the arbitration clause to suit their specific needs, in theory to the extent that they wish. In reality, negotiations regarding extremely specific clauses will most likely slow down the contracting process too much and contradict the purpose of the provision.

Indeed, as illustrated, the arbitration agreement is regarded as a separate contract with the ability to alone survive a nullification of the substantive contract. This is necessary in order for arbitral tribunal's decisions to be valid, as they otherwise as well might be considered null and void (thus resulting in a so called "catch 22"[157]). The separability doctrine's development clearly shows reluctance towards litigation courts involvement

[156] For a further discussion on poorly handled arbitration see B Shanoff, "Not Always the Right Move," *Waste Age* 35, no. 9 (2004).
[157] The concept of catch 22 originates from the post-modernistic book "Catch 22" by Joseph Heller

in proceedings regarding arbitration agreements, both as a whole and more specifically regarding the competence of addressing challenges made. The principle of *Kompetenz-Kompetenz* is one of both advantages and risks. While the essence of arbitration can be considered to be the avoidance of public courts and their involvement in the process, which is protected by the competence of the arbitral tribunal to determine their own jurisdiction, contracting parties should be aware of the risk that the mere fact that the arbitral tribunal has the judicial competence of the issue at hand, it's not necessarily the most suiting or appropriate approach towards achieving a just and fair decision. A fraudulent or neglecting arbitral tribunal deciding on their own competence might very well place one or both parties in disadvantageous positions, probably making them unwilling to submit to a rendered award (thereby undermining the very purpose of the process). One thing is certain; in order for arbitration processes to remain competitive as an alternative dispute resolution, it is important to avoid external interference however only to a certain extent. If the possibility for external review disappears completely, arbitration will, in the opinion of the author, become an unattractive dispute resolution process not as widely used as the current developments show.

Arriving on the other side of this analyse, the thesis will now focus on the heart of the matter: What can be drawn from this approach towards the UNCITRAL Model Law arbitration clause?

Returning to the first question asked, it is important to acknowledge that the dividing made is one made by the author, and therefore important to assess critically. The Model Law example clause does not, in itself, give contracting parties much information or support as to how the arbitration process should, as a whole, be carried out if actualized. This is not unusual; most arbitration example clauses offer parties a scarce amount of information, mainly relying on institutional rules that only briefly are referred to.[158] By doing so, as indicated earlier, arbitration institutions ensure that inexperienced contracting parties choose the "easy way out" and rely on the hope that the chosen procedure, if actualized, will suit the needs and demands of the parties. It is however, as demonstrated in this thesis, never as simple as a first glance may indicate.

Many of the aspects that are already included within the arbitration clause or closely attached are easy to assess by contracting parties, just by the fact that they are there to begin with. Parties can address the text in front of them and decide if they want it to be changed or not. The difficult part, and the task of this thesis, has been to explore aspects that aren't originally included but nevertheless can have an impact of the agreement. As earlier mentioned, other aspects than the one's addressed here may very well be worthy of consideration, but it has never been the intention of the author to create a complete list of aspects for consideration but to simply illustrate the need for critical viewing of arbitration clauses.

[158] For a substantial list of example clauses for institutional arbitrations, see Born, *International Commercial Arbitration: Commentary and Materials*. At p 1111.

The perhaps most important aspect is that of the electronic agreement and electronic information in arbitration proceedings. Since the constructions of example clauses, arbitration frameworks and rules, the globalisation of markets have exploded through the many benefits of internet. Of course, this also means that desires and demands of the market regarding agreements have changed, taking an obvious turn towards digitalisation. To not address this aspect in an arbitration clause or agreement in an international agreement can, without a doubt, create unwanted and difficult situations. As illustrated earlier in this thesis, arbitration rules generally does not concentrate on electronic information or the validity of electronic arbitration agreements, making it even more vital for contracting parties to do so. The fact that US courts have begun to enforce the validity of electronic agreements further strengthen the opinion that this aspect is vital.

As for the aspects of legality and finality, they are, when push comes to shove, key issues for a party having been issued an award. By addressing this aspect in their agreement, inexperienced parties take somewhat of a risk. When explicitly finalising the award rendered by the arbitral tribunal, it is important to ensure that no unexpected issues may arise during the actual process. The balance between whether or not courts should be a last resort for guidance and help if the arbitration process fails is hard or impossible to render into a "general principal" answer. It is the opinion of the author that it is more suitable to address the aspect on an agreement-individual basis; the important part is to actually assess it instead of disregarding it. The earlier suggested formulation[159] does however, according to the author, fulfil the criteria for achieving the intended goal of finalising an agreement, making the issued award the "end of the line". Efficient while ensuring lower costs at the expense of an eventual unsuccessful finality is a consideration for contracting parties to make.

The low cost of arbitration is a relative term. The dividing of costs can, as earlier highlighted, be considered as a power tool for stronger parties. As long as a weaker party cannot prove to a court that the arbitration will be impossible to perform due to the unjust dividing of costs, this aspect will continue to be to the benefit of a stronger party. This also indicates that other aspects of an agreement affect, and are affected, by the arbitration clause or agreement. For a weaker party to sign an agreement stipulating it to bear a majority of the costs for an eventual arbitration, other parts of the agreement must be vital for the contracting party since the actual possibility to use the arbitration clause diminishes due to the heightened costs. This aspect of course become more imminent and crucial in an ad hoc arbitration than in an institutional, since rules of arbitration institutes often stipulate how costs are to be generally divided. With this comes also a risk for stronger parties, when under the belief of getting a preferable agreement, shifts costs for arbitration to the other party in order to prevent such a

[159] Se infra at 4.3.3

process later, eventually realises that the institution used through its rules denies such a shifting of costs.

As a whole, the UNCITRAL Model Law example clause leaves parties with lots of aspects to deal with. It must be considered that the solution of simply letting the arbitration clause on an agreement refer to a separate arbitration agreement where aspects can be assessed to the extent necessary is preferable. This is, however, to the inexperienced contracting party, often not a considered or practically viable conduct. Costs of contracting competence at an early stage may not be attractive since it renders immediate costs. After writing this thesis, observing the development of arbitration usage and preferences and looking into the possibilities and limitations, it is the clear and distinct conclusion of this author that costs rendered in the contracting stage while ensuring an arbitration clause suitable to the agreement will doubtlessly protect parties from higher costs and frustrating delays a later stage.

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