



Practice Guideline 6: Guidelines for arbitrators dealing with jurisdictional problems

1. Introduction

1.1 These guidelines cover how to deal with jurisdictional problems under the UNCITRAL Model Law. The UNCITRAL Rules here merely replicate the Model Law. Since in most instances, the key questions revolve around whether there is a binding arbitration agreement covering the relevant dispute and parties, the Rules play a very modest role in this area.

1.2 The huge variety of issues that can arise in this area in international arbitrations makes it impossible to provide definitive guidance to arbitrators dealing with jurisdictional problems in all situations. What the arbitrator needs is an awareness of the key issues that come up regularly and the relevant principles so that the tribunal can react intelligently when challenges to its authority are raised.

1.3 The Model Law mainly embodies four relevant principles which should be borne in mind by arbitrators when considering matters relevant to their own jurisdiction.

1.3.1 The first principle is that, unless the parties otherwise agree, an arbitral tribunal has the power to rule on its own substantive jurisdiction and that, if it does so, that ruling will be binding on the parties, subject to any available arbitral or judicial process of appeal or review. The first sentence of Article 16(1) of the Model Law (Article 23(1) of the Rules is in almost identical terms) says:

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

1.3.2 The second principle is that the arbitral tribunal is not the final arbiter of a question of jurisdiction. Consequently, on any application to the Court, the question of jurisdiction may be approached anew and both the findings of fact. Moreover, there is no absolute rule that the arbitral tribunal must always be the first to rule on its own jurisdiction or that there can be no court intervention or ruling until it has done so.

1.3.2.1 Article 16(3) of the UNCITRAL Model Law creates an exception to the first part of this rule which is repeated in the section 34 of the Hong Kong Ordinance, by providing that decisions declining jurisdiction cannot be challenged in the Courts. The German ZPO essentially follows the Model Law and a decision of its Supreme Court appears to have closed the door on any review in this area although the case is not free from ambiguity: BGH, 6 June 2002, Schieds VZ 2003 p. 9, [2003] Rev. Arb. 507. This refusal to review decisions declining jurisdiction is expressly not followed by section 2 of the Swedish Lag om Skiljemän (Arbitration Act) and the statutes and caselaw of other countries.

1.3.3 The third principle is that, if entered into after a dispute as to jurisdiction has arisen, an arbitration agreement may confer on an arbitrator an unchallengeable right to rule on his jurisdiction to decide the original dispute. (This is because the parties may by an ad hoc agreement confer on an arbitrator the power to determine a question of jurisdiction in a manner that is definitive and excludes appeal or review by the Court to the extent that the Courts concerned regard decisions on the merits as unreviewable.

1.3.4 The fourth principle is that any objection to the tribunal's jurisdiction and any challenge to a ruling on jurisdiction must be raised promptly and within a specified time or the right to object may be lost. Article 16(2) of the Model Law and 23(2) of the UNCITRAL Rules says:

“A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.”

2. Initial enquiries to be made by the arbitrator

2.1 On being appointed, an arbitrator should normally satisfy himself that the parties have made a relevant arbitration agreement and that the dispute falls within its terms. He should ask to be supplied with a copy of the agreement or details of agreement, as the case may be, under which the dispute is said to have arisen and should check that it contains a

valid arbitration clause which appears to cover the dispute and that he is qualified under the clause.

2.2 Similarly when the details of the claim are brought to his attention, he should check whether they fall or appear to fall within the terms of the agreement. If it is clear that there is no relevant agreement to arbitrate and that the parties are unwilling to conclude one, it will serve no purpose to proceed further.

2.3 The position can be more doubtful when one party produces some reasonable prima facie evidence that the arbitrator has jurisdiction to decide the dispute but that evidence is not necessarily clear. If the other party does not take part in the arbitration or does not challenge the arbitrator's jurisdiction, the right course would normally be for the arbitrator to proceed to the merits of the dispute. Where there is a reasonable prima facie case for saying that jurisdiction exists, the arbitrator should not take it upon himself to mount a challenge to that case such as the opposing party might make but has not opted to make. The one well-known exception to this rule concerns the possible unenforceability of an arbitration clause under Council Directive 93/13/EEC on unfair terms in consumer contracts: *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*, (C-40/08) [2009] EUECJ C-40/08, 6 October 2009.

2.4 These four considerations should guide the arbitrator's initial engagement with the matter. It is appropriate to next consider the issues that typically arise in respect of jurisdiction.

3. The issues that typically arise

3.1 It may be helpful to list some of the most common types of dispute that may be regarded as jurisdictional:

- (a) identity of the parties;
- (b) identity of the contract or contracts governed by the agreement to arbitrate;
- (c) validity of the agreement to arbitrate;
- (d) the effect of a problem with the main contract on the validity of the arbitration clause (separability);

(e) failure of a condition precedent to the right to arbitrate contained perhaps in an agreement to mediate in advance;

(f) whether a particular subject-matter can be arbitrated;

(g) time-limits for commencing proceedings;

(h) whether an arbitrator may apply a law other than the one expressly chosen by the parties or breach a duty contained in arbitration or other legislation;

(i) whether particular relief or remedies can be awarded.

3.2 There are issues that may contain elements of jurisdiction mixed in with other points. For example, problems relating to the constitution of a tribunal are definitely matters of jurisdiction. An improperly constituted panel does not have jurisdiction to render an award. However, issues of bias more properly belong to another subject.

3.3 Otherwise, the range of possible jurisdictional disputes is enormous. It covers all the typical formation and construction issues that arise in ordinary contract and company law, both domestic and international. In addition, one might have to consider features of one or more set of municipal laws specifically related to arbitration or the resolution of disputes generally.

3.4 Jurisdictional issues considered by the arbitral tribunal usually break down uneasily into three categories:

(a) whether there is a valid agreement to arbitrate at all;

(b) whether the scope of the agreement to arbitrate covers the dispute; and

(c) whether the arbitrator has certain powers.

3.5 Validity of the agreement to arbitrate and problems with the main contract (separability) (issues (c) and (d)) typically fall within the first category. They involve a decision on whether there is a valid agreement to arbitrate. Questions relating to whether the arbitrator may disregard the parties' choice of law and whether he can award particular relief or remedies (issues (h) and (i)) come within the third category. They deal with the ambit of the arbitral tribunal's powers. The other points, such as subject matter arbitrability,

fit within the second category. They relate to whether the arbitration agreement allows the arbitrator to deal with the particular dispute and the parties to it.

4. The Process

4.1 Attitude

4.1.1 The first question that an arbitral tribunal faced with a challenge to its jurisdiction must consider is the process by which it is going to deal with the problem. The internationalization of the process and the greater risk of cultural clashes make it vital for the tribunal to deal calmly with the facts and issues. It must not, and must not appear to take personally the challenge to its authority. The tribunal must avoid anything which may give the impression to the losing party on the jurisdictional issue that it has any bias against that party.

4.2 The arbitral tribunal has the right to rule on its own substantive jurisdiction

4.2.1 If the tribunal does so, that ruling will be binding on the parties, subject to any available arbitral process of appeal or review and subject to appeal or review by the Court.

4.2.2 The parties are at liberty to exclude the power of the tribunal to make a ruling as to its substantive jurisdiction. They may do so either expressly or by implication.

4.2.3 "Substantive jurisdiction" embraces disputes as to:

(i) whether there is a valid arbitration agreement;

(ii) whether the tribunal is properly constituted;

(iii) what matters have been submitted to arbitration in accordance with the arbitration agreement.

It is reasonably clear that (iii) does not, unless the arbitration agreement clearly states otherwise, normally embrace the question whether or not the claim is time-barred: *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).

4.2.4 The laws of all the important arbitration centres permit the arbitral tribunal to consider a challenge to its own jurisdiction. The tribunal does not have to wait for a party to

bring court proceedings. In UNCITRAL Model law countries and under the ICC rules, there is no obligation to wait for the court to make up its mind. So, the tribunal faced with a challenge to it needs to consider straight away what to do with the problem.

4.2.5 However, the arbitral tribunal is not the final arbiter of a question of jurisdiction unless, under the Model Law it declines jurisdiction. Given this, on any appeal to the Court the question of jurisdiction may be approached anew and typically both the findings of fact and holdings of law of the arbitral tribunal may be challenged. Moreover, there is no hard and fast rule that the arbitral tribunal must always be the first to rule on its own jurisdiction or that there can be no court intervention or ruling until it has done so.

4.3 Waiver

4.3.1 The parties must raise their jurisdictional objection within a reasonable time. For general objections, under Article 16(2) of the UNCITRAL Model Law, this must be no later than the submission of the statement of defence. Otherwise, it will have waived the right to object to the step in question or to the case being dealt with at all. As Article 16(2) says:

“A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.”

4.3.2 In practice, there is considerable divergence in the way in which different courts and tribunals interpret behaviour in this area. The individual facts of a case can easily sway a judge or arbitrator either way. The general test should be whether the party now seeking to raise the objection has behaved in a way inconsistent with the position that it now wishes to take in relation to the point in question. A greater concern, though, is whether waiver requires some finding of prejudice to the other party or parties.

4.3.3 Similar provisions appear in various arbitration rules. Article 23(2) of the UNCITRAL Rules is almost identical to Article 16(2) of the Model Law. Article 39 of the ICC Rules (2012 Version) contains a general waiver provision which may be interpreted as being much stricter than the UNCITRAL approach. It reads:

“A party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of the Rules, or of any other rules applicable to the proceedings, any direction given by the arbitral tribunal, or any requirement under the arbitration agreement relating to the constitution of the arbitral tribunal or the conduct of the proceedings, shall be deemed to have waived its right to object.”

4.3.4 Article 15(3) of the ICDR Rules of the American Arbitration Association is much simpler but on broadly similar lines, stating:

“A party must object to the jurisdiction of the tribunal or to the arbitrability of a claim or counterclaim no later than the filing of the statement of defense, as provided in Article 3, to the claim or counterclaim that gives rise to the objection.”

4.3.5 One can argue as to whether there needs to be any reliance on the behaviour by either the tribunal or the other party. The UNCITRAL approach does not seem to require it. In practice, it will not be difficult to find reliance where one party’s behaviour is inconsistent with its position on the jurisdictional challenge.

4.3.6 Overall, these provisions can give rise to complex issues as to whether an objection has been made in time. If the point gives rise to arguable issues it is best dealt with in an award as to jurisdiction or an award on the merits, as the case may be. If the objection is obviously out of time, then an arbitrator, after giving both parties an opportunity to make submissions, may in a suitable case give a summary and informal decision but which should be recorded in writing with brief reasons explaining why the right to object has been lost. The arbitrator should subsequently record that he has done so in any later award on the merits.

4.4 Dealing with jurisdictional issues not raised by the parties

4.4.1 Where an arbitrator identifies a jurisdictional issue that the parties have not noticed, the question arises as to whether he should take any active steps to draw this to their attention. In many cases, failure to raise a point promptly will result in its waiver. Bearing in mind the fact that the parties have not objected to the arbitrator dealing with the case or at least not on the ground in question, the arbitrator should normally not raise issues on his own. This is particularly the case when the tribunal may not know where the parties will have to enforce the award.

4.4.2 However, in some rare public policy situations, it can be argued that the arbitrator has a duty not to deal with the case for fear of offending local norms or risking the subsequent recognition or enforcement of the correctness, the point should be raised with the parties so that they can make submissions on the point. This may be the case where the tribunal risks allowing an arbitration to be used to cover up corruption or other criminal matters or actually become part of the means by which the parties aim to transfer funds as part of money laundering, terrorist financing, exchange control fraud or other criminal activity. The legal consensus has been for some time that such problems do not invalidate the arbitration agreement. Nevertheless, with the modern emphasis on the need to avoid money laundering, terrorist financing and corruption, an arbitrator may think it more appropriate to decline jurisdiction.

4.4.3 An area where the law is much clearer concerns possible unenforceability of an arbitration clause under Council Directive 93/13/EEC on unfair terms in consumer contracts: *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*, (C-40/08) [2009] EUECJ C-40/08, 6 October 2009. In the *Asturcom* case, the European Court of Justice held that a national court when dealing with an application to enforce an arbitration award against a consumer had a duty to take the point relating to the Directive even where the consumer had not raised it. It must follow that an arbitral tribunal has a similar duty when confronted with an agreement that appears to be unenforceable under the Directive.

4.5 Agreements about jurisdictional issues

4.5.1 Increasingly in international cases, the tribunal has to issue a ruling on jurisdiction. With different legal cultures involved, it may be vital for the tribunal to obtain the parties' agreement as to the precise scope of the challenge. The use of Terms of Reference, mandatory in ICC cases, or a document like it, may be particularly useful here. If signed, even under protest by the objecting party, it may reduce the scope for challenges not listed in the Terms of Reference. For example, an argument about the overall formal validity of the agreement may be excluded if the challenging party only indicates in the Terms of Reference concerned a general concern about whether one or all of the parties agreed to arbitrate.

4.5.2 It is always open to the tribunal to invite the parties to agree to it resolving the jurisdictional issue. This is a practical solution notably where the ruling on whether there is a contract containing the arbitration clause in question may determine both the jurisdictional point and the outcome of the case.

4.5.3 Without the parties' agreement to submit the relevant dispute to the arbitrator, there does not appear to be any scope for forcing the parties to be bound by the tribunal concerned. This applies even if the parties appear to have agreed to arbitration under a set of rules which empower the tribunal to rule on its own jurisdiction: *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46. It is always open to the party objecting to the arbitrator dealing with the case to argue before a court that he did not validly consent to arbitrate at all or under the relevant rules.

4.6 Ruling on jurisdiction: the process

4.6.1 More commonly, the tribunal has to issue a ruling on jurisdiction before the court can intervene directly. The key question is whether to deal with jurisdiction separately from substance. Article 16(3) of the UNCITRAL Model Law reflects modern legislative practice by giving the arbitrator a choice as to whether to rule on his own jurisdiction in a preliminary ruling or the final award on the merits.

4.6.2 There is much to be said for the view, expressed in Article 186(3) of the Swiss LDIP, that normally the arbitrator should deal with jurisdictional matters separately. It is helpful if such problems can be cleared up at an early stage of the process with any court challenges being concluded before extensive consideration of the merits. If the tribunal is likely to declare that it has no jurisdiction over all or part of the case, it is imperative that it rules swiftly on jurisdiction. It needs to end the arbitrators' consideration of parts of the claim that fall outside their authority. Delays may also cause an unsuccessful claimant to be time-barred elsewhere. There are, though, exceptions to this, notably:

(i) Jurisdiction and substance revolve around the same facts or issue

(ii) The challenge is made in bad faith

(iii) Delays in the local legal system could result in the case being delayed for many years pending the resolution of any court challenge to the ruling.

4.6.3 As seen above, jurisdiction and substance sometimes concern the same point, notably where the case revolves around whether the parties ever concluded the contract or validly assigned it. Normally, in such a case, issuing a final award on jurisdiction and substance together makes sense.

4.6.4 The same applies where the jurisdictional challenge appears to be a delaying tactic with no prospect of success or there is a risk of delays within the local court system damaging the proceedings.

4.6.5 When considering matters of jurisdiction, the tribunal must be careful to observe the rules of natural justice and give both parties a reasonable opportunity to present their case. An informal approach has led to challenges to the tribunal's general ability to handle the case as well as to its actual decision.

4.7 The form of a ruling on jurisdiction

4.7.1 An issue that can arise relates to the form in which the arbitrator's decision should be delivered. Any ruling against jurisdiction may terminate the case and should in such a situation clearly be in the form of a final award. It should also cover the tribunal's fees.

4.7.2 A problem arises with rulings that reject jurisdictional challenges. Article 16(3) of the Model Law provides for the arbitrator to rule on jurisdiction "as a preliminary question". Anything called an "award" in ICC cases must be subject to the approval process of that organization under Article 33 of that organization's rules (2012 version). This can create delays. There is, therefore, much to be said for avoiding making the decision on jurisdiction in that form. Unfortunately, it is not just a question of labelling the ruling "order" or such like. If the arbitrator's ruling purports to decide definitively an issue in the case, it is an award under certain legal systems. One solution is to make a ruling giving reasons but reserving the tribunal's right to reach a different decision at a later date in the proceedings. The final option is just to incur the delays of institutional approval while campaigning for the relevant requirements to be relaxed.

4.10 Dealing with the objection in a ruling on the merits

4.10.1 A tribunal may consider that, in terms of time and cost, the procedure most suitable to the circumstances of a particular case is to deal with the objection to his jurisdiction in a ruling on the merits.

4.10.2 Should it decide to proceed in this way, the tribunal should give each party an opportunity to put its case both on the jurisdictional objection and on the substance of the dispute.

4.10.3 If the tribunal rejects the objection, it will give reasons for so doing in its ruling and then proceed to make a ruling on the merits.

4.10.4 If it upholds the objection with regard to certain matters referred to arbitration but not to others, the tribunal will proceed to make a ruling on the remainder.

4.10.5 If the tribunal upholds an objection as to all matters referred to arbitration, it may seem pointless and illogical to proceed to deal with the merits of the dispute at all.

4.10.6 However, the parties might wish the award to deal with both aspects so that, if the Court subsequently upholds the tribunal's jurisdiction, the successful party can then enforce the ruling on the merits without having to start anew.

4.11 Stopping the arbitration to await a court's ruling

4.11.1 When a court is considering a challenge to his jurisdiction, should the arbitrator stop the procedure? Normally, again, the answer depends on the likely success and good faith of the challenge as well as any applicable law of the seat. If the challenge seems reasonable, waiting at least initially for a reasonably prompt ruling can make sense. If not, the arbitrator should usually continue to prevent an abusive application to court from delaying the resolution of the matter.

4.11.2 Faced with a challenge to his authority, the arbitrator must be aware of the seat of arbitration and its rules governing the process to adopt. So, for example, if sitting in the USA, he may find himself or the parties prevented from proceeding by an injunction brought in aid of an application to court for a final order stopping the arbitration. Failure to observe this may affect the arbitrator's ability to complete the case or others in the future and depending on the jurisdiction concerned, could prevent the enforcement of the award.

4.11.3 However, the arbitrator may be faced with an injunction obtained outside the seat of arbitration. This may, and usually does, involve the home country of the party objecting to jurisdiction. In that case, the arbitrator should normally continue with the case. Otherwise, the ability of one party to obstruct an arbitration merely depends on the compliance of its local courts. Anyway, if the parties did agree to arbitrate, they consented to a process in the place of arbitration not elsewhere. If the courts in the seat of arbitration are happy for the case to continue - or indeed unhappy for this to happen - it accords with the parties' agreement and common-sense to follow their lead.

5. Jurisdictional Issues

5.1 There is increasing convergence between municipal arbitration laws in their treatment of jurisdictional issues. As a result, many of them can be dealt with in practice by only cursory references to municipal law. This is notably the case where the question relates to the proper construction of the arbitral agreement. In many situations, the problem relates to a matter of municipal contract, agency and sometimes company law, rather than the Model Law provisions.

5.2 Parties

5.2.1 Increasingly, the international arbitrator's main jurisdictional task is to decide whether the actual or prospective participants in the case are parties with claims under the arbitration agreement. These questions are determined by the ordinary law applicable to the arbitration agreement, typically the agency, contract and company law concerned, rather than any provision of the Model Law or UNCITRAL Rules. The differences between the approaches to this point of various countries' legal systems may also be more apparent than real. The French courts have made a number of decisions indicating a willingness to include within an arbitration more companies within a corporate group than are listed in the contract, particularly where those other entities play a significant role in performing the agreement. This is accentuated where the involvement of non-signatories was anticipated at the point of sale.

5.2.2 Ostensibly, this appears to be different to the domestic legal positions in countries like England (and those that follow its legal tradition) and Switzerland with their apparently stricter approaches to the corporate veil. However, as the French cases indicate, it is a matter of judging the parties' intentions as to who they thought they were contracting with. This may involve consideration of who is involved in the performance of the contract. A number of US, Swiss and English court decisions have shown that concepts of agency, unilateral contracts or simple construction based on the parties' intentions can produce similar results to those found in France. However, such approaches must be used instead of the French group of companies' theory outside France or there is a serious risk of an award being set aside.

5.2.3 Indeed, an arbitrator sitting in France or a country that takes a similar approach might do well to explain any conclusion in favour of jurisdiction in terms of the specificity of French law and perhaps explain how this might produce the same result in other countries where enforcement may be sought in the future. (See for an example of this *Dallah Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA Civ 755 to be contrasted with the subsequent Cour d'appel de Paris decision on the same case reaching the opposite view on French law.) It should be appreciated, though, that conflicting decisions by different countries applying the same law are not as surprising as they might seem since they involve not just a view of a difficult area of law but a relatively subjective interpretation of the facts involved.

5.3 Incorporation of arbitration clauses by general reference

5.3.1 The issues here may be two-fold. First, there is the contractual question of whether the parties' behaviour demonstrated an intention to incorporate the second agreement. That often breaks down to two sub-questions: whether the words of incorporation are drafted widely enough and whether the arbitration clause fits the dispute in question. Secondly, there can be difficulties with the formal validity of the arbitral clause under local laws and notably Article II (2) of the New York Convention. This requires the agreement to arbitrate to be contained either in a signed document or an exchange of letters or telegrams. In recent times, as will be seen, the courts and statutes of major arbitration countries have liberalised their rules in this area and the Convention represents the minimum acceptable standard. Option 1 of Article 7(6) of the UNCITRAL Model Law reflects the modern consensus in this area for those countries which still have formal validity requirements. It says:

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

Nevertheless, arbitrators need to be careful in this area. The English courts have traditionally been more inclined than most countries to permit the incorporation of arbitration clauses by general reference to a standard form agreement. Even then, there is a great deal of conflicting English caselaw on the incorporation of arbitration clauses in charterparties into bills of lading when less than clear terms have been used in this area.

5.3.3 The greater emphasis is on the point about the parties' intentions. Not infrequently, one finds a master agreement to which other contracts refer with greater or lesser degrees of clarity and incorporation. This has given rise to the difficult line of English cases referred to above. Sometimes, arbitrators have to sort out conflicting dispute resolution clauses in the different agreements.

5.4 Formal validity

5.4.1 Since the 1980s, there has been a general coming together of legal systems on formal validity.

5.4.2 One should note, though, that in original UNCITRAL Model Law countries, one has to be able to find written evidence of an agreement to arbitrate. An e-mail or facsimile confirming an arbitration agreement concluded orally will not, on its own, constitute a formally valid agreement under these legal systems even though the underlying contract remains in force. The Anglo-American approach of accepting oral or other types of evidence to indicate an intention to be bound by an arbitration clause in writing is not acceptable in those countries. When UNCITRAL amended the Model Law in 2006, it adopted the Anglo American position as Option 1 of Article 7(3) of the Model Law, which now reads:

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

This is reflected in Article 19 of the Hong Kong Ordinance.

5.4.3 Option 2 of Article 7 of the UNCITRAL Model Law now adopts the French/Swedish approach of not having any formal validity requirements. However, very few countries have gone down this route.

5.4.4 Whatever the situation, having a properly signed agreement to arbitrate either in the original contract or a subsequent Terms of Reference or submission can facilitate enforcement of the award. The New York Convention still permits countries to decline enforcement in the absence of both parties' signature or an exchange of letters or telegrams. The fact that few countries insist on such formalities should not blind the arbitrator to the desirability of a signed document (typically obtained by asking the parties to sign a Terms of Reference). This reduces the scope for later disputes.

5.5 Separability

5.5.1 The international arbitrator needs to know that Article 16(1) of the Model law, in line with that of all major arbitration centres and rules, apply the principle of separability. This creates a presumption that the agreement to arbitrate will survive any problems with the validity of the main contract. If the problem affects the arbitral clause equally, this may invalidate the arbitration clause. It is insufficient, though, to say the contract is illegal or its formation was affected by fraud. Unless it is argued that the arbitral clause suffers from those defects, the challenge must be rejected.

5.5.2 There are differences of opinion amongst Supreme Courts in England and Sweden on one side and France and Switzerland on the other as to whether separability extends to the situation where it is alleged that the parties did not conclude the underlying agreement. The Anglo-Swedish view gives a positive answer: *Premium Nafta Products Ltd v. Fili Shipping Company Ltd* [2007] UKHL 40. Usually, a contract formation problem (but not the failure of a condition precedent) will affect the arbitration clause equally. This is more open to discussion, though, where, during negotiations, the parties agreed the arbitration clause but there is a dispute as to whether they reached agreement on the necessary substantive provisions.

5.5.3 Separability within an arbitration agreement

5.5.3.1 The US Supreme Court in *Rent-A-Center v. Jackson* concluded that even if it was alleged that the arbitration clause as a whole was void for unconscionability, a provision of a separate arbitration agreement referring the question to arbitration was valid. This was so long as the unconscionability was not alleged to affect the submission of the question to arbitration.

5.5.3.2 The English Court of Appeal took the opposite view in *Jivraj v. Hashwani* [2010] EWCA Civ 712, concluding controversially that the invalidity of the clause's requirement for a member of the Ismaili community to be the arbitrator invalidated the entire agreement to arbitrate. While it reversed the Court of Appeal's decision in this case on two other points, the UK Supreme Court declined to deal with this issue: [2011] UKSC 40.

5.5.3.3 The traditional position and that found in other countries probably lies somewhere between the two. Courts are usually keen to save agreements to arbitrate where one has been clearly entered into freely. For example, the German Bundesgerichtshof "saved" an

arbitration clause which provided for arbitration under a non-existent set of rules administered by an equally non-existent institution. The overriding view of the clause was that the parties intended to arbitrate and that the courts would honour that by reconstructing the clause either to refer to another institution or in that case none at all: III ZB 70/10 14 July 2011. This is in line with the approach of the US Court of Appeals in *Bauhinia Corporation v. China National Machinery & Equipment Import & Export Corp*, 819 F. 2d 247 (9th Cir. 1987) and the House of Lords in *Premium Nafta Products Ltd v. Fili Shipping Company Ltd* [2007] UKHL 40.

5.6 Conditions precedent – mediation

5.6.1 It is becoming increasingly common for arbitration clause to require the parties to engage in a mediation process before agreeing to arbitrate. Australian authority favours enforcement where the mediation process is sufficiently certain, contrast *Hooper Bailie Associated Ltd v. Natcon Group Pty Limited* (1992) 28 NSWLR 195 at 206 where it was said “What is enforced is not co-operation but participation in a process from which co-operation and consent might come,” with the decision in *Elizabeth Bay Developments Pty Ltd v. Boral Building Services Pty Ltd* (1995) 36 NSWLR 709 at 716 where enforcement was refused. Section 32 of the Hong Kong Arbitration Ordinance requires the courts to take the same view as the Court in *Hooper Bailie*. So does the decision of the Dubai Supreme Court in *A v. B* [2010] Rev. Arb. 354. Section 32 goes further entitling the Hong Kong International Arbitration Centre to appoint a mediator if the parties fail to make the necessary appointment. This whole approach can be used to prevent the arbitral tribunal from having jurisdiction over a party who fails to co-operate with the mediation process.

5.7 Subject-matter arbitrability

5.7.1 Subject-matter arbitrability can cause serious problems although major arbitration centres have made a point of removing barriers to arbitration of this type over the last 50 years. Arbitration statutes use a variety of different approaches sometimes in combination, such as prohibiting arbitration in specific situations or where a dispute cannot be settled (Belgian and Dutch approach), where a court has exclusive jurisdiction (Belgium, France and Holland), a dispute cannot be valued in money terms (Switzerland) and in the case of England, an absence of any particular approach at all. The Model Law does not refer to this subject except as a ground for non-recognition of an arbitration award.

5.7.2 As an example of the exclusivity approach of European law, it is now clear that an arbitrator can resolve a dispute over whether a contract infringes the anti-competition provisions of what is now Article 101 TFEU. The Swiss Tribunal fédéral even requires arbitrators to rule on this in cases involving the European Union's scope of activities. They cannot, though, give an exemption to the nullity of the contract entered into in violation of Article 101.

5.7.3 It is sometimes argued that patent validity disputes are a matter for the exclusive jurisdiction of a court. This argument should almost invariably be rejected on the basis that this refers to rulings capable of binding people not party to the arbitration. A much safer approach is to study the local law in countries where patent validity may be in issue before proceeding, particularly if minded to conclude that the patent is invalid.

5.7.4 Bankruptcy is a subject always to be handled with care and reference to local lawyers. In practice, there is no general rule that stops an arbitration in the event of a bankruptcy. There are, however, a series of complex municipal laws which can prevent arbitrations continuing, require awards to be limited to a declaration of indebtedness and may lead to the annulment of an award on public policy grounds. Local lawyers must be consulted if a wasted arbitration is to be avoided. See J Sutcliffe & J Rogers, "Effect of Party Insolvency on Arbitration Proceedings: Pause for thought in Testing Times, 76 Arbitration 277 (2010).

5.8 Time-limits for commencing proceedings

5.8.1 It is an unusual feature of Hong Kong law (section 58 of the Arbitration Ordinance) that the arbitrator, has a limited power to extend time for commencing arbitration. The UNCITRAL Model Law does not contain any such provision.

5.9 Disregarding the law applicable to the substance

5.9.1 Article 34(2) of the Model Law contains no ground for setting aside the award on the merits or even for not conforming to the mission entrusted to the arbitral tribunal (such as one finds in French or Dutch law). So, a failure to apply the contract or the arbitration clause provisions that relate to the substance of the decision is not a ground for setting aside the award. It is unlikely that this would result in the award being in conflict with the public policy of the state of the seat of arbitration.

5.9.3 In any event, a court reviewing an award, as part of setting aside or enforcement proceedings, may always rule that for public policy reasons, the arbitrator was right not to apply the law agreed upon by the parties.

5.10 Remedies - Punitive Damages

5.10.1 One can argue that this has less to do with jurisdiction than the limits of the arbitrator's powers. Such restrictions are themselves "jurisdictional" in one sense. Some countries do find contrary to public policy awards of punitive damages or similar remedies with regard to antitrust breaches and sometimes those more generally of higher rates of interest.

5.10.2 If in doubt, a tribunal might do best to make the award according to the applicable law chosen by the parties, make it clear which parts of the award relate to any punitive damages and/or higher interest element and risk partial annulment or limited enforcement of the award.

6. Concluding Remarks

6.1 The arbitrator must focus on whether there is a valid agreement to arbitrate at all, whether it covers the dispute and parties in question and whether he has the power to act in the way in which he would like to. In resolving these issues, he must, as always, pay careful attention to the arbitration agreement and the surrounding circumstances.

6.2 The difficulty stems from the possible application of legal systems with which the arbitrator may not be familiar. In this respect, the Model Law is of limited help since it contains a number of key gaps on jurisdiction notably as regards subject-matter arbitrability. The arbitrator needs to be aware of the possible differences between the laws of different countries in the areas most likely to concern him. There will, though, be occasions where the very international nature of the disputes produces intractable difficulties. This comes about where different legal systems with an interest in the case produce conflicting outcomes. At the same time, the growing consensus in international arbitration statutes and increasing amounts of information available about the differences should make the handling of jurisdictional problems less challenging than it has been in the past.

The guidelines are inevitably something of a permanent work in progress. We would welcome it if you could send any suggestions for updating, improvements and corrections to nmcnamee@ciarb.org. Thank you in advance.

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