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Chapter 1 : "Jurisdiction Issues in International Arbitration" by Mitchell L. Lathrop

Jurisdictional problems in international commercial arbitration: a study of Belgian, Dutch, English, French, Swedish, Swiss, U.S., and West German law Volume 11 of Publications de l'Institut suisse de droit comparÃ©, Institut Suisse de Droit ComparÃ© Lausanne.

Jurisdictional Issues In International Arbitration: June 14, Author: Greg Nwakogo Arbitration is an adjudicatory process wherein parties to a contract agree that if any dispute arises out of or in connection with the contract, that same shall not be brought to national courts for resolution but would be resolved by an arbiter of their choice. This discuss focuses on contemporary jurisdictional issues especially as it concerns international arbitration. A tribunal who has received the mandate must remain within the terms of such mandate and must satisfy itself that it has jurisdiction before deciding substantive issues. Arbitrators may request that parties confirm their jurisdiction with regards to the issues before proceeding. Contemporary arbitration laws provide that objections to jurisdiction of the arbitral tribunal should be raised early in the proceedings and that participating in proceedings without challenging jurisdiction is tantamount to submission to arbitration. The question of whose prerogative it is to determine jurisdiction of arbitrators is crucial. Is it the parties, the tribunal, the arbitration institution, an appointing authority or the court? Who determines jurisdiction at this point? An arbitral tribunal may decide its own jurisdiction, although that decision may be subject to review by the courts. A decision on the jurisdiction of the tribunal is required when one party expressly contests it or refuses to take part in proceedings. This is not so for awards on the merits where review is limited to public policy issues. Such a complete review is predicated on the fact that it would be contrary to public policy to bind a party to the decision of a tribunal to which it never agreed. National courts may also be required in the course of the arbitration proceeding or after an award has been rendered to determine the jurisdiction of arbitrators. This usually happens when one party brings a claim in court on the merit and the other party relying on an arbitration agreement asks the court to stay its jurisdiction. Certain arbitration laws also allow parties to apply to courts for a declaration that an arbitrator has or lacks jurisdiction. Jurisdiction of arbitrators may also be an issue in court proceedings in support of arbitration as would be the case in an application for the appointment of an arbitrator. In some modern arbitration laws it is the position that appeals or challenges in opposition to awards or actions for enforcement can only be instituted in designated courts. This is the position in England, Sweden and Germany. See English Arbitration Act S. The doctrine of competence-competence is therefore a legal fiction that allows arbitration tribunals to rule on their own jurisdiction. Nonetheless, where such provisions are non-existent, arbitral tribunals would implicitly assume the right to decide on their jurisdiction. Closely related to competence-competence is the doctrine of separability. A contract may contain a clause recording an agreement to arbitrate any dispute arising out of or in connection with that contract. That agreement to arbitrate is widely accepted to represent a separate and independent contract from the main contract itself. However, these terms are usually not interpreted strictly in arbitration friendly jurisdiction such that courts are wont to save the clause by looking beyond the pathology in the language so long as the intention to arbitrate is demonstrated in the clause. An arbitration clause can be termed null and void if it is invalid from the beginning, and will be deemed so if it does not refer to a defined legal relationship, if there was no consent or if same was obtained under duress or misrepresentation, or if it provides that the dispute be settled by an arbitration institution that is unknown or one that does not exist. An arbitration agreement is inoperative when it has not always been invalid but which over time lost its effect, and this would be so, when for instance the agreement has been terminated by the parties or an award or judgement has been rendered in an equivalent proceeding which then has a res judicata effect. This would also be the case where the arbitration agreement provides for a time frame within which the award must be rendered and the time has elapsed. This would be the case when the arbitration cannot be carried out at the place of arbitration or where the arbitrator appointed by the agreement declines the

appointment or cannot carry out the role. Would the impecuniosity of a party render an arbitration agreement inoperable or incapable of being performed? There are differing opinions as to whether a lack of funding will render an arbitration agreement incapable of being performed. Indeed, it does happen that impecuniosity may cause a party to be unable to pursue its claim in arbitration. In a recent decision, the Swiss Federal Tribunal in setting aside a final award of the Court of Arbitration for Sports ruled on the issue whether and under what conditions a party may unilaterally terminate an arbitration agreement for lack of financial resources to initiate and pursue arbitration proceedings, in order to then bring its case before the state courts, along with a request for legal aid. The German Federal Court of Justice has also ruled that impecuniosity of a party may render an arbitration agreement inoperative or incapable of being performed and will then permit a party claiming same to justifiably institute proceedings before a state court. It does not yet appear that the impecuniousity of party has been universally acknowledged as a ground for rendering an arbitration agreement as incapable of being performed or inoperative. The writer is of the view that if this is to be taken as the law, the approach of the English courts which is that the lack of funding must be a consequence of the same breach of contract in issue, should be a more plausible position of the law. It is further opined that this latter position should be considered for adoption by our legislative draftsmen whilst reviewing the Nigerian Arbitration and Conciliation Act which is overdue for a review as even the Model Law which it was modelled after has since undergone reviews. Conclusion I identified that arbitration is an adjudicatory procedure where parties agree that disputes between them would be resolved by an arbiter of their choice, that arbitral tribunals derive their legitimacy from the parties, and that jurisdiction is determined by the arbitral tribunal or the court. Further that when jurisdiction is determined by arbitrators, that such decision is open for full review by national courts. I distinguished a review of the decision of the arbitral tribunal on jurisdiction from the review of the merits of the case, where reviews are limited to public policy issues. I identified that arbitration clauses that are null and void, inoperative or incapable of performance may by their nature be unable to confer jurisdiction on arbitrators. I identified finally that whilst in certain jurisdictions the impecuniousity of a party may render an arbitration agreement inoperable or incapable of being performed, in other jurisdictions this would only be the case if the lack of funding is a result of the same breach of contract which is the issue in dispute. The writer also concludes that if this is to be taken as the law, the latter approach would be more plausible and should indeed be adopted in Nigeria.

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See Article 16(2) Uncitral Model Law on International Commercial Arbitration, Section 31 English Arbitration Act, Article (2) Netherlands Code of Civil Procedure, Section (2) German ZPO, S(3) Nigerian Arbitration and Conciliation Act, CAP A18 LFN

The parties may provide for the application of some national law or for some nonnational set of rules. The party autonomy is widely recognized both in common law and civil law. However, not every country gives parties unlimited freedom to choose the applicable law. Since every right, power or duty of a person has its root in the law of the nation, even the party autonomy principle as well as arbitration as a whole, must rely on and derive its existence from a national law system. The arbitrator must analyze the party autonomy under the conflict of laws of the lex fori and he can also disregard the choice of the parties if they did not select the national law with which the contract has its closest connection. In so doing they can find an agreement that they probably could not have reached if they had applied the national law of either party. In spite of all these different labels probably the same phenomenon reoccurs: The question is whether an arbitrator should respect the choice of the parties. Furthermore, not being a highly developed system, lex mercatoria does not cover all the matters which might be the object of a dispute. Determination of the Applicable Law by the Arbitrator When the Parties Do Not Make a Choice It so happens that an agreement is sound but when parties reach the stage of selecting the applicable law they face a difficult situation. They come from different countries and therefore they are not acquainted with and do not confide in the respective national laws. Why is the determination of the applicable law by the arbitrator a problem in an international commercial arbitration? That country has been in reality dispossessed of its jurisdictional authority by the arbitration clause and therefore it may reaffirm its control over arbitration in this way. The theory has been criticized mainly on two grounds. Second, this solution is not acceptable because it is circular. An arbitrator has to select a conflict of laws rule to know which country would have had jurisdiction; hence the issue of the applicable private international law system arises again. An arbitration clause, as any other contract between private parties, cannot be suspended in the air, but must draw its authority from a national law provision. Three Trends It has often been suggested that the conflict of laws rules of the arbitrator should apply. The first question is: The argument in favor of this theory is that an arbitrator has the best knowledge of his personal law. It is very easy to object that in an ICA the two parties come from different countries and therefore an arbitrator choosing the law of either party leaves the other one unsatisfied. The third and last example is the attempt to apply the private international law system of the state where the arbitral award will be enforced. In this context a national court would usually apply its private international law rule. When the intention of the parties to a contract with regard to the law governing it is not expressed and cannot be inferred from the circumstances, the contract is governed by the system of law with which the transaction has its closest and most real connection. Therefore the specific subject of the Convention does not interfere with the issue at hand: The provision is dealing exclusively with the arbitration agreement and not with the whole contract. It is undisputed today that the two issues, the validity of the arbitration agreement and the validity of the contract, are separate and therefore the law applicable to the former is not necessarily the same one applicable to the latter. Consequently a national court could refuse enforcement of the award if the arbitration clause was invalid under either law of article V l a, but it could not if any other substantive provision of the contract was invalid under that law. All three provisions follow the pattern of the European Convention: Another part of the doctrine, as authoritative as this, argues against lex mercatoria and any attempt to detach arbitration from any national law system. It is important to stress that international commerce needs a "denationalization" of arbitration and that international merchants look at an arbitration as disconnected from any national law system. One has to demonstrate how this new legal order, in which international arbitration plays such an important role, can subsist theoretically. VII of the Convention reads: The parties shall be free to determine,

by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contract and trade wages. The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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Chapter 3 : Contemporary Problems in International Arbitration - Google Books

The topic for discussion and debate was "Jurisdiction Issues in Arbitration". The panel event was chaired by Simon Rainey QC of On 20 February , about 80 participants attended Quadrant Chambers' biannual international arbitration seminar.

Louis Flannery kicked off the event looking at two topics: Institutional perspectives of jurisdiction challenges. In relation to the former, Louis noted that the countries in the UK were the only legal jurisdictions which sought to define the jurisdiction of the arbitral tribunal: In broad terms, both pieces of legislation seek to define jurisdiction by reference to: Whether there is a valid arbitration agreement. Whether the tribunal is properly constituted. What matters have been submitted to arbitration in accordance with the arbitration agreement. Louis focused on section 30 of AA Whilst considering this issue in detail, Louis noted that arbitral tribunals and the courts often get confused and look at issues of admissibility as issues of jurisdiction. For example, a challenge on the basis that a claim, or part of claim, is time-barred or prohibited until some precondition has been fulfilled, is a challenge to the admissibility of that claim at that time i. The ICC Court then decides whether and to what extent the arbitration shall proceed. Louis then looked at the statistics of the number of cases referred to the ICC Court and their outcomes, concluding that the gate keeper power was useful for the ICC Court to have. She addressed three questions: Is the role or responsibility of the tribunal to take a view on jurisdiction whether or not the parties raise it? The approach to determining questions of jurisdiction, premise, burden and construction. Pragmatism and effective solution finding. In relation to the first of these issues, Philippa noted that section 30 of the AA gives an English- seated tribunal the power, but not the obligation, implicitly to determine its own jurisdiction, whether or not on the application of a respondent. In exploring this issue, Philippa looked at issues of enforcement particularly under Article V. She went on to discuss an example of a claimant represented by inexperienced counsel â€" it was their first ever international arbitration who issued a single London Court of International Arbitration LCIA reference in respect of payments due under five separate contracts, where five separate references should have been commenced and an application to consolidate made. Whether a tribunal should approach the question with a predisposition to finding jurisdiction where possible, or on the assumption that the challenge is justified or completely neutrally. Who had the burden of proof? The party seeking to say that the claim was within the arbitration clause or the party challenging jurisdiction? Whether the balance should be tipped in favour of arbitration if the alternative is the bringing of claims in a court system which is objectively more difficult with a particular focus on the Kyrgyz mobile saga. Lastly, Philippa sought to give some pragmatic solutions looking at submission agreements by way of example , the upshot of which was: He started by noting that the Commercial Court has been very supportive of arbitration, but that the arbitral community often saw section 67 challenges as an obstruction of arbitration. Sir David then considered alternatives to the current system, including one suggestion that findings of fact, made by the tribunal when considering their own jurisdiction, should be unchallenged. In his view, that would be wrong for four reasons: If there is no contract at all and therefore no agreement to arbitrate , how can a tribunal make a binding decision on fact? In international arbitration, the governing law of the claim is often not English law and questions of foreign law are questions of fact. The demarcation between fact and law is difficult to draw. The Commercial Court does not care whether a jurisdiction challenge under section 67 succeeds or not, but an arbitral tribunal has a potential conflict of interest in that they may be tempted unconsciously to make findings of fact, as the financial significance of the outcome to them may be great. At the end, Simon Rainey QC put to the participants whether section 67 should be looked at again â€" the overwhelming response from the audience was no. Quadrant Chambers Ruth Hosking.

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(ii) European Convention on International Commercial Arbitration, April 21, In contrast with the New York Convention, article VII 6 of the European Convention specifically deals with the issue of the applicable law in an international commercial arbitration.

Chapter 5 : Jurisdiction issues in arbitration | Arbitration Blog

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