Chapter 6

5.4. International Arbitration Practice

In most cases tribunals relying on Article V(1)(a) New York Convention, consider the place of arbitration as the relevant factor to determine the applicable law, if no choice has been made by the parties. A typical example is the interim award in ICC Case 6149. The dispute concerned three sales contracts between a Korean seller and a Jordanian buyer which provided for arbitration under the ICC rules. The defendant challenged the jurisdiction of the arbitration tribunal alleging that the arbitration clause was not valid according to a mandatory provision of Jordanian law. The tribunal decided that this provision was not applicable since the validity of the arbitration agreement was governed by a different law. In determining that law it held

Pursuant to [the then] Art. 13(3) of the ICC Rules of Conciliation and Arbitration, failing any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate. If, according to the second doctrine, the proper law of the three arbitration agreements could not necessarily be derived from the proper law of the three sales contracts themselves, the only other rule of conflicts of laws whose application would seem appropriate in the sense of the above-mentioned Art. 13(3), would be the application of the law where the arbitration takes place and where the award is rendered. This conclusion would be supported also by Art. V(1)(a) of the ...[1958 New York] Convention which has been ratified by the Republic of Korea, Jordan, France and Iraq. According to the said Art. V, the validity of the arbitration agreement has to be determined 'under the law of the country where the award was made'.

The reason for such an approach is primarily the often claimed duty to render an enforceable award. So for example, in ICC Case 5485 the tribunal in determining the applicable law held

Whereas Art. 26 [now Article 35] of the ICC Rules of Arbitration establishes that the arbitrators shall make every effort to make sure that the award is enforceable at law. As the place of this arbitration is the city of Paris.
(France), the Tribunal has examined French law (Nouveau Code de Procedure Civile, Arts. 1492 to 1497) and have concluded that said law contains nothing which is in conflict with the full validity and effectiveness of the arbitration clause in dispute. Again, the parties have sustained nothing to the contrary.  

6-71 Determining the validity of an arbitration agreement by reference to the same rules as the courts at the place of arbitration may reduce the risk of rendering an award which is unenforceable or susceptible to challenges. Enforcement can normally be resisted if the award has been set aside in the country where it was rendered. In those annulment procedures at the place of arbitration the courts base their findings on the existence of a valid arbitration agreement on their own law, i.e. the law of the place of arbitration. If an arbitrator has determined the validity of the agreement under a different law it is possible that the courts could decide in annulment proceedings that the agreement was invalid under the law of the place of arbitration.

4 Scope and Interpretation of the Arbitration Agreement

7-61 In older decisions the jurisdictional effect of arbitration agreements sometimes led to a restrictive interpretation. They were seen as a renunciation of the constitutional right to have a dispute decided by the courts.  

In today's arbitration-friendly climate the opposite view prevails. In particular, the US courts have consistently held that arbitration agreements must be interpreted in favour of arbitration. In Mitsubishi v Soler the Supreme Court stated

questions of arbitrability [jurisdiction] must be addressed with a healthy regard for the federal policy favouring arbitration … The Arbitration Act establishes that, as a 150matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favour of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or defense to arbitrability.

7-62 Comparable views can be found in most countries which have adopted a pro-arbitration policy. This rule can apply only once it has been ascertained that the parties actually agreed on arbitration. In cases where the main issue is whether the parties agreed to arbitration at all there is no justification for such an interpretive rule in favour of arbitration. Though it is the primary mode of dispute settlement in international business every party has a legitimate and a constitutional right to choose to have its rights determined by the courts.

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82 ICC case no 5485 of 1987, XIV YBCA 156 (1989).
83 Ibid, para 15.
84 See, e.g., ICC case no 4392, 110 Clunet 907 (1983) 908.

Generally critical to an interpretation in favor of arbitration Fouchard Gaillard Goldman on International Commercial Arbitration, para 481; Schlosser, Internationale Schiedsgerichtsbarkeit, 320; see also the award on jurisdiction in Amco Asia Corp and others v Republic of Indonesia, 23 ILM 351 (1984) 359 et seq; compare further the decision in Ashville Investment Ltd v Elmer Contractors Ltd [1988] 3 WLR 867, 873.

Referring Principles:

XIII.1.2 - Interpretation of arbitration agreements

XIV.1 - Law applicable to international arbitration agreements