

SKILLS TRAINING WORKSHOP
WITHIN THE 7 TH P.R.I.M.E
FINANCE ANNUAL
CONFERENCE "Arbitration and
Finance: A Starter"

Drafting arbitration agreements

Céline Greenberg

Arbitration lawyer



Model arbitration clause

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**. [The number of arbitrators shall be three.] The **seat/place of arbitration** shall be [Paris, France]. [The language of arbitral proceeding shall be English.]



New York Convention on the recognition of foreign arbitral awards (1958)

Article II:

- 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
- 2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
- 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.



New York Convention on the recognition of foreign arbitral awards (1958)

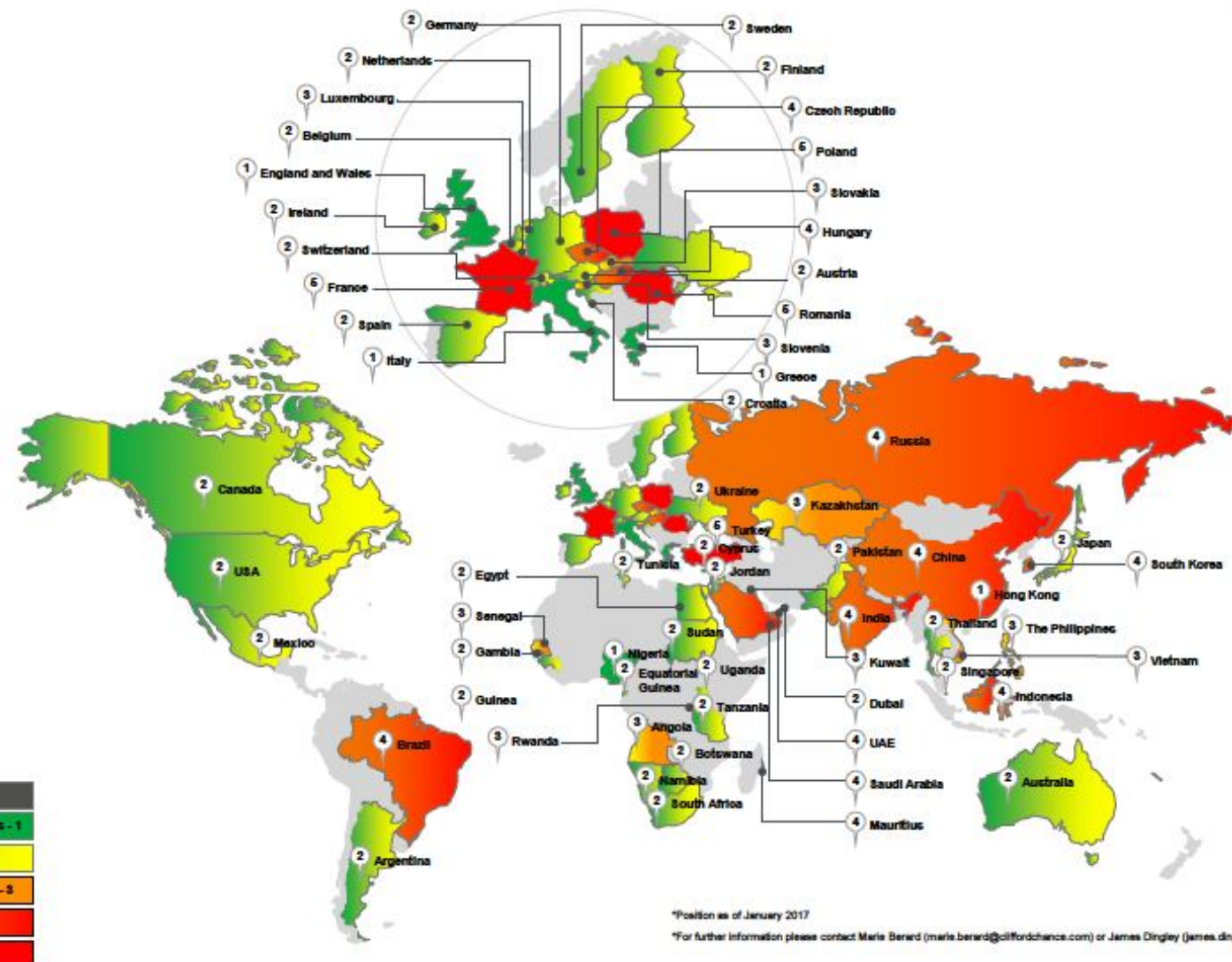
Article V

- 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
 - (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
 - (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
 - (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
 - (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
- 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
 - (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
 - (b) The recognition or enforcement of the award would be contrary to the public policy of that country.



Unilateral option clauses

- clauses that permit one of the contracting parties to opt for either arbitration or litigation as it sees fit.
- These clauses seek to preserve the advantages of arbitration and litigation in the empowered party after the dispute has arisen, and thus enables the party to select the forum that will best fit its needs in the present dispute.
- Not uniformly accepted in all jurisdictions



Unilateral
option clauses

Clifford Chance
survey 2017

(available
online)



Drafting a unilateral option clause

- Seek specialist legal advice about unilateral dispute resolution options, which might include advice on the law of various jurisdictions (such as the law governing the arbitration agreement, the law of the seat of the arbitration and the law of the jurisdiction in which enforcement of the arbitral award might be sought).
- Assess whether the benefits of the unilateral option clause outweigh the costs and risks associated with the option.
- Draft the unilateral option clause clearly and precisely.
- Draft the arbitration and litigation aspect of the unilateral option clause as separate clauses, ensuring that each of them is capable of operating independently in case they need to be severed.
- In case the unilateral option clause fails, ensure that the default position is adequate and acceptable.
- The beneficiary of an option to arbitrate should avoid taking any substantive step in court proceedings before exercising the option in order to limit the risk of the clause becoming unenforceable. Similarly the beneficiary of an option to litigate should avoid taking any substantive step in an arbitration before exercising its option



Consolidation

Example of clause for group of related contracts (ICC Rules):

1.3.1 Each Party agrees that this Clause [x] and the arbitration clauses contained in each Related Agreement shall together be deemed to be a single arbitration agreement. Parties to an arbitration initiated on any of the above arbitration clauses may make claims based on any Related Agreement.

1.3.2 Pursuant to Article 10(a) of the ICC Rules, the Parties hereby agree to the consolidation of any two or more arbitrations commenced pursuant to the Single Arbitration Agreement into a single arbitration.

1.3.3 In this Clause [x], "**Related Agreement**" means the [*Names of Agreements*] other than this Agreement.



Amicable discussions phase

30.1.1 If there is any dispute, controversy or claim arising out of or in relation to this Agreement, including the validity, invalidity, breach or termination thereof ("Dispute"), the parties agree to resolve the Dispute in accordance with this Clause 30 (DISPUTE RESOLUTION).

30.1.2 If a Dispute arises, either party may serve written notice on the other stating that a Dispute has arisen and asking for consultations within 14 days of the date of the notice ("Notice of Dispute"). The parties shall, during the 14 days following the service of the Notice of Dispute, use reasonable endeavours to resolve the Dispute through friendly negotiations.

30.1.3 If the Dispute is not resolved in accordance with Clause 30.1.2 above within 14 days of the service of the Notice of Dispute, the parties shall endeavour to engage representatives of the governments of Country A and the Country B to assist to resolve the Dispute through friendly negotiations within 30 days of service of the Notice of Dispute.

30.1.4 If a Dispute is not resolved by friendly negotiations within 30 days of service of the Notice of Dispute, either party shall have the right to submit such dispute to the International Chamber of Commerce ("ICC") for arbitration.



Interim measures : consider various options

Preserving the option to resort to local courts:

« Nothing in these dispute resolution provisions shall be construed as preventing either Party from seeking conservatory or similar interim measures in any court of competent jurisdiction »

Excluding the jurisdiction of local courts in respect of the lenders (asymmetric clause – quite common) :

« Notwithstanding any provisions of the ICC Rules, the arbitral tribunal shall not be authorised to grant, and [*Party X / borrower*] agrees that it shall not seek from any judicial authority, any interim measures or pre-award relief against any [*Lenders / finance parties*]. »



Confidentiality clause

(example taken from SPA between two European banks)

- (1) The Parties agree to keep private and confidential all matters relating to the arbitration, including its existence, the tribunal's orders and awards and the Parties' submissions, unless required by Applicable Law (including stock exchange regulations) and a Party shall have the right to disclose any settlement agreement between the Parties only to the extent that such disclosure is required by Applicable Law (including stock exchange regulations) or is necessary for the purpose of implementing or enforcing the settlement agreement (Annex 1 =*