English Summary

Interpretation of International Commercial Arbitration Agreements - Pathologies and Other Ambiguities

The arbitration agreement is the cornerstone for an efficient arbitral process, which must be respectful of party autonomy. Without an agreement to arbitrate the actual dispute, the arbitration tribunal has no jurisdiction, and the parties must resort to the national courts of law. A ‘pathological’ arbitration agreement is an agreement drafted in a way that inadvertently generates questions as to its own interpretation and the agreement cannot therefore offhand function as the basis for an arbitral process. The arbitration agreement is, in other words, ‘born’ (concluded) with an inherent ‘disease’ (pathology/defect).

The thesis addresses the issue of interpretation of pathological arbitration agreements and the scope of arbitration agreements from a legal dogmatic and comparative perspective with a view towards clarifying the following: What issues arise in practice, and how are they dealt with. Additionally, to what extent can pathologies be ‘cured’ and when are they ‘incurable’ and thus fatal to the arbitration agreement as such? The main aim of the thesis is to systematise, analyse and compare case law across the selected jurisdictions – USA (federal law), England (English law), Singapore, Hong Kong, Sweden, Norway and Denmark – in order to clarify how the courts should determine specific interpretive issues within the current legal framework (de sententia ferenda).

The thesis consists of three parts.

PART I (the descriptive part):

Chapter 1 maps out the thesis’ research problem, method and methodological issues as well as key concepts, including the concept of pathology. In addition, the arbitration agreement’s analytical components are presented – i.e. (I) derogation agreement, (II) prorogation agreement, (III) procedural rules (‘instrumentality’) and (IV) scope. Together with the concept of pathology, these components represent the framework upon which the analytical approach to the interpretive issues (and their solutions) is built.

Chapter 2 introduces the legal framework of the arbitration agreement. Firstly, the legal nature of the arbitration agreement is clarified, including identification of relevant principles of interpretation. Secondly, key aspects of the international legal framework of the arbitration agreement are presented, with emphasis on the New York Convention and the UNCITRAL Model Law. Finally, the national legal framework concerning the selected jurisdictions, whose case law forms the basis of the analysis in Part II, is clarified.
PART II (the analysis part):
Chapters 3 to 9 – which is the main focus of the thesis – define, systematise, analyse and compare actual interpretive issues (pathologies and scope) on the basis of case law from the selected jurisdictions. The following pathological arbitration agreements, which are the most frequent and/or the most controversial across jurisdictions, are dealt with:

Blank Arbitration Agreements (Chapter 3): The arbitration agreement sets out an allocation of competence (to arbitration), but does not (expressly or indirectly) state the procedural rules necessary for the initiation of the arbitration process.

Floating Arbitration Agreements (Chapter 4): While the place of arbitration (seat) is agreed upon, it cannot be finally determined at the time of the contract.

Facultative Arbitration Agreements (Chapter 5): The arbitration agreement does not compel arbitration on its face, but merely suggests arbitration as a possibility, an alternative, something desirable or appropriate.

Arbitration Agreements with Non-Existing & Inaccessible Elements (Chapter 6): The arbitration agreement refers to an institution or a set of rules that does not exist or which for other reasons is not accessible to the parties.

Hybrid Arbitration Agreements (Chapter 7): The arbitration agreement states that the arbitration process must be administered by one institution, but according to the rules of another institution.

 Concerning the Scope of the Arbitration Agreement (Chapters 8 and 9), i.e. the question of which disputes are covered by the agreement (and thus by the tribunal’s competence), the thesis is limited to analysing the linguistic link between ‘disputes’ and the ‘contract’ (relational words).

The identified principles of interpretation, distilled from the case law reviewed, are summarized separately for each of the categories, and in connection therewith, some considerations and suggestions are given in relation to the drafting and application of the arbitration agreement in question.

PART III (the concluding part):
Chapter 10 summarizes the research results across the six interpretive categories.

Despite terminological and methodological differences, as well as historical and (legal) cultural differences, case law across the selected jurisdictions largely leads to comparable solutions. In summary, the analysis shows that the approach to arbitration agreements – and the resulting principles of interpretation – are closely connected to whether the issue in question may be classified as an ‘infectious’ pathology, an ‘existential’ pathology, or a ‘dispute specific’ interpretive issue. For each of the three classifications, basic characteristics and main principles of interpretation may be identified.