CHAPTER 7

JUDICIAL INTERPRETATION OF STANDARD ARBITRATION CLAUSES

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Contents

1. Introduction

Arbitration is routinely said to be based on consent. Indeed, the consensual nature of arbitration is perhaps its most influential feature, operating both to restrict domestic court involvement in arbitral proceedings as well as limit the review of awards by national courts of law. It is also the consensual nature of arbitration, however, that justifies a domestic court's power to review an arbitral agreement, especially when a party against whom arbitration is brought denies that it

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agreed to arbitrate a dispute. In essence, the argument has long been that because arbitration is based on consent, parties that have not agreed to arbitrate should not be required to do so. However, as long as only parties who have agreed to arbitrate are required to do so, there are few legitimate reasons for court involvement in the arbitral process or court review of arbitral awards. The parties agreed to arbitrate, and thus should live with the consequences of that agreement.

Perhaps the most notable aspect of this traditional approach to arbitration is how it balances support of arbitration with a cautious wariness of its possible misuse. In essence, courts in many jurisdictions perceive their role as equivalent to that of gatekeepers to a secret garden. Their role is to remain at the gate and ensure that only those who had genuinely agreed to arbitrate their disputes were allowed to pass through the gate and access arbitration.

This balance between careful scrutiny of arbitration agreements, and limited review of arbitral procedures and awards, laid the foundation for the development of arbitration from a niche method of dispute resolution into one of the primary methods through which international commercial disputes are resolved. It created a balance through which parties were given the autonomy to decide for themselves how their dispute would best be resolved, while providing assurance that if they still wanted to go to court, they merely had to avoid agreeing to arbitrate.

Traditionally, this gatekeeping role was performed by domestic courts through careful analysis of arbitral agreements. Famously, for example, English courts would often place great weight on such minor variations in contractual language as whether an arbitration agreement covered disputes "arising under" or "arising out of" the contract, with the former often being interpreted as covering a narrower range of disputes than the latter.[4]

However, the growth of international commercial arbitration since the late 20th century has unquestionably resulted in an adjustment to the traditional balance. Arbitration came to be acknowledged as a professionalized field of legal practice, which in turn reduced concerns that requiring parties to arbitrate meant subjecting them to an unknown process that might work well but also might result in appalling injustice. In sum, the gatekeepers took a glimpse into the garden and concluded that perhaps they did not need to be monitoring the gate as strictly as they had been previously.

This change was perhaps most famously exhibited in the 2007 decision by the United Kingdom's House of Lords in *Fiona Trust & Holding Corp v. Privalov*.[5] While England and Wales had long established itself as a leading arbitration forum, English courts had traditionally paid close attention to the language of the contract (*i.e.*, parsing of the words of the agreement) in order to precisely determine the scope of the parties' agreement to arbitrate. The 2007 *Fiona Trust* decision, however, represented a sea change in English arbitration, with the court rejecting this longstanding approach and adopting instead a broad presumption that commercial parties, "as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered . . . to be decided by the same tribunal."[6] In short, as long as commercial parties have agreed to arbitrate, they should be assumed to have agreed to arbitrate all of the

[4] *See, e.g.*, *Heyman v. Darwins Ltd* [1942] AC 356 at 399. *But see Union of India v. E B Aaby's Rederi A/S* [1975] AC 797 at 814, 817 (rejecting this distinction).

[5] *Fiona Trust & Holding Corp v. Privalov* [2007] UKHL 40.

[6] *Id.* ¶ 13.

disputes that arise from the same commercial relationship, subject only to a clearly expressed intention to do otherwise.

The importance of this change was not that British courts were now directed to adopt a more expansive interpretation of the language of arbitration agreements, but rather that language itself became less important than the expressed intention of parties. Given the inherent uncertainty involved in third parties (*i.e.*, judges) interpreting contracts, it thereby signified an acceptance of arbitration as a means of resolving disputes. In essence, while close attention to contractual language says 'we need to ensure that no-one is sent to arbitration unless they agreed to arbitrate, even if this means sometimes not sending people to arbitration who did agree to do so,' the new presumption equates to 'we need to ensure that arbitration agreements are enforced, even if this means sometimes sending people to arbitration who did not actually agree to arbitrate.'

Nonetheless, despite the increased acceptance of arbitration and the resulting broad interpretation given to arbitration clauses, this has certainly not been universal. Indeed, in two large-scale surveys of arbitration practitioners in 2014 and 2016, only practitioners in 22 of 53 countries described courts in their jurisdictions as taking a, to some degree, "liberal" approach to interpreting the scope of arbitration clauses, with practitioners in 12 other countries describing their courts as taking to some degree a "strict" approach.[7]

Indeed, even in England and Wales, an insistence on the need for the traditional balancing has remained, as seen in the decision by the English Court of Appeal in *Michael Wilson & Partners, Ltd v. John Forster Emmott*.[8] There, the court placed an important qualifier on the *Fiona Trust*'s presumption and thus found that a broad arbitration clause providing for "all and any disputes" be referred to arbitration in London nonetheless did not cover the dispute in question, because it was "highly unlikely" that at the time the parties entered into the arbitration agreement, they had intended for that agreement to cover the type of dispute at hand.[9] Importantly, this was not because of the language of the clause, but because of the court's understanding of the likely intentions of the parties.

This leads to an important issue within the interpretation of arbitration agreements, namely how expansive such interpretation should be. Acceptance of arbitration as a valid form of dispute resolution argues in favor of broad interpretation of arbitration agreements, while traditional concerns about parties losing access to court argues in favor of attending closely to the language used. As this chapter will demonstrate, jurisdictions around the world are steadily moving towards the former approach, focusing on identifying the intentions of the parties on the basis that arbitration is acceptable as a mechanism for dispute resolution. While this is not yet a universal position, even those jurisdictions that have traditionally been resistant to arbitration can now be seen to be moving towards this position.

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[7] T. Cole, P. Ortolani, et al., 'Legal Instruments and Practice of Arbitration in the EU', 2014 Directorate General For Internal Policies Policy Department C: Citizens' Rights And Constitutional Affairs, 2014, available at http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2015)509988 (last visited on 19 September 2019); T. Cole, P. Ortolani, et al., 'Arbitration in the Americas', University of Leicester, April 2018, available at https://www2.le.ac.uk/departments/law/research/arbitration (last visited on 19 September 2019).

[8] *Michael Wilson & Partners, Ltd v John Forster Emmott*, [2018] EWCA Civ 51.

[9] *Id.* ¶ 46.

Nonetheless, as recognized by the English Court of Appeal, there is a difference between simply deciding that all disputes should be sent to arbitration as long as the parties entered into an arbitration agreement, and focusing on the most likely intentions of the parties. Ultimately, if arbitration is to remain consistent with its foundation in party autonomy, only the latter approach is genuinely acceptable.

This chapter will address this issue through a comparative analysis of the judicial interpretation of standard arbitration clauses. A short overview of standard arbitration clauses is provided (Section I), followed by a description of the relevant New York Convention provisions courts apply to the interpretation of such clauses (Section II). The chapter will then analyze and compare the approach taken by courts in France, the United States, Hong-Kong and mainland China, and Argentina (Section III) before offering conclusions (Section IV).

2. Overview of the Form of Standard Clauses

Standard arbitration clauses are common in international arbitration, although such clauses are often drafted with slight differences in formulation. The most frequently used standard arbitration clauses are ones emanating from arbitral institutions themselves, which promote their standard arbitration clauses on their websites and in the annexes to their arbitration rules.[10] Similarly, corporations also constitute another source of standard arbitration clauses by, for instance, including standard dispute resolution clauses in their standard contracts.

Nowadays, although parties have a wide variety of sample clauses to consider when drafting their dispute resolution clauses, unfortunately only very little attention is given to this issue.[11] In the authors' view, this finding is a cause for concern because when a dispute arises, it is the language of that clause, and that language alone, that a court will assess to determine the scope of the arbitral tribunal's jurisdiction. As such, and given the increasing complexity of legal disputes, the authors believe that great care should be given to the drafting of dispute resolution clauses so as to ensure that the protection granted to the parties is the one that they envisioned when they initially concluded their contract.

The standard arbitration clauses of leading dispute resolution institutions all have comparable language. For example, the standard International Chamber of Commerce ("ICC") dispute resolution clause provides, "[a]ll disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the ICC by one or more arbitrators in accordance with the said Rules."[12] Similarly, the London Court of International Arbitration ("LCIA")'s recommended clause states, "[a]ny dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred

[10] *See, e.g.*, model arbitration clauses contained in the arbitration rules of the ICC, LCIA, SCC, HKIAC, and ICDR, among others.

[11] *See* R. Summerfield, 'Before Midnight - Practical Approaches to Dispute Resolution Clauses' in the 2015 Compendium Litigation and Alternative Dispute Resolution, 2014 *Corporate Disputes Magazine,* 114. *See also* Hon. Nancy Holtz (Ret.), 'Beware the midnight clause: Hold the champagne?', JAMS, 19 February 2016, available at https://www.jamsadr.com/files/uploads/documents/articles/holtz-insidecounsel.com-beware-the-midnight-clause.pdf (last visited 19 September 2019).

[12] *See* 'Standard ICC Arbitration Clauses (English version)', International Chamber of Commerce, available at https://iccwbo.org/publication/standard-icc-arbitration-clauses-english-version/ (last visited 5 September 2019).

to and finally resolved by arbitration under the LCIA Rules."[13] Finally, the Hong Kong International Arbitration Centre ("HKIAC") model clause –more complex than that of either ICC or the LCIA – provides in relevant part that "[a]ny dispute, controversy, difference or claim arising out of or relating to this contract, including the validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration."[14] As a general matter, arbitral institutions encourage parties to adopt institutional clauses to help ensure the arbitrability of the dispute and the ultimate enforceability of the award. All of these considerations allow for greater efficiency and predictability of the dispute by notably ensuring that the parties' time and money are not wasted on unnecessary jurisdictional hurdles.[15]

Corporations also heavily rely on standard arbitration clauses, although the language of such clauses may vary depending on the industry, the parties involved in the transactions, and the nature of the disputes. Yet, most of these clauses are carefully drafted and often appear to share overlapping language with institutional model clauses. For example, the standard arbitration clause used by AT&T provides that:

> [The parties] agree to arbitrate all disputes and claims between [them]. This agreement to arbitrate is intended to be broadly interpreted. It includes, but is not limited to:
>
> - Claims arising out of or relating to any aspect of the relationship between [the parties], whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory;
> - Claims that arose before this or any prior Agreement (including, but not limited to, claims relating to advertising);
> - Claims that are currently the subject of purported class action litigation in which [the customer is not] a member of a certified class; and
> - Claims that may arise after the termination of this Agreement.[16]

[13] *See* 'Recommended Clauses', The London Court of International Arbitration, available at https://www.lcia.org/Dispute_Resolution_Services/LCIA_Recommended_Clauses.aspx (last visited 5 September 2019).

[14] *See* 'Model Clauses', Hong Kong International Arbitration Centre, available at https://www.hkiac.org/arbitration/model-clauses#Arbitration%20under%20the%20HKIAC%20Administered%20Arbitration%20Rules (last visited 5 September 2019).

[15] Poor drafting of dispute resolution clauses often results in complex jurisdictional challenges where *both* parties spend a great amount of time and resources to determine whether a claim, or a party fall within the jurisdiction of the tribunal. *See, e.g.*, *Mediterranean Enterprises v. Ssangyong Corporation*, 708 F 2d 1458, 1465 (9th Cir. 1983).

[16] *See* 'File a complaint', AT&T, available at https://www.att.com/esupport/article.html#!/wireless/KM1041856?gsi=xmrlze (last visited 3 October 2019).

Similarly, the dispute resolution clause contained in the 1999 FIDIC standard contract provides in relevant part that "[u]nless settled amicably, *any* dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration."[17]

The frequency of use of standard dispute resolution (or form) clauses, such as the ones cited above, have come to the center of scholarly and institutional debates. A 1990 survey of ICC dispute resolution clauses found that "the standard ICC clause, with perhaps minor variations in wording, was used in 47 arbitration clauses (20%) in 1987 and in 21 arbitration clauses (10%) in 1989, generally with the addition of the place of arbitration."[18] A more recent survey of international supply contracts collected from SEC filings over the four-year period from 2011-2015 found similar divergences in clauses. Of the 86 arbitration clauses identified in 157 total contracts, the authors found that the dispute resolution clauses "departed in notable ways from the standard language suggested by international arbitration institutions" and "contained 70 different formulations of scope language."[19] Notably, and relevant to the discussion of the present chapter focused at analyzing the interpretation of standard arbitration clauses by domestic courts, in referring to the "dispute," the contracts included 29 references to "dispute or disputes," 23 references to "dispute, controversy, or claim," and 11 references to "controversy or claim."[20] Similarly, in describing the source of the dispute, in 31 clauses the parties involved referred to "contract" or "agreement" and 10 clauses referred to "contract, or breach thereof."[21] There were 21 different variations of how the relationship between the dispute and its source was described, with 31 clauses invoking the term "arising out of or relating to" and 11 clauses invoking the phrase "arising out of or in connection with."[22] Despite the differences highlighted by Bond, Coyle and Drahozal in their respective studies, other scholars mostly involved in complex international disputes have noted that "[i]n the overwhelming majority of cases, . . . international arbitration agreements are straightforward exercises, adopting either entirely or principally the model, time-tested clauses of a leading arbitral institution."[23] Whether or not this is true, and whether or not an arbitration agreement is "standard," it is certainly true that certain phrases and words often appear in arbitration agreements. As reflected further below in this chapter, it is the court's interpretation of these phrases, and that interpretation alone, that ultimately matters.

As the above examples have shown, the language of standard arbitration clauses may vary slightly with the use of terms such as "any and all claims related," "all disputes," or "any disputes arising from." The difference between "arising under" and "relating to" has been one of the most discussed in national jurisprudence. With little exception, domestic courts tend to interpret arbitration agreements, in line with the pro-arbitration stance most countries have now adopted, in

[17] 'Conditions of Contract for Construction', International Federation of Consulting Engineers ("FIDIC"), 1999, Cl. 20.6, available at http://site.iugaza.edu.ps/kshaath/files/2010/12/FIDIC-1999-RED-BOOK.pdf (emphasis added).

[18] S. R. Bond, 'How to Draft an Arbitration Clause (Revisited)', reprinted in C. R. Drahozal & R. W. Naimark (eds.), *Towards a Science of International Arbitration: Collected Empirical Research* (The Hague: Kluwer Law International BV, 2005), pp. 69-70.

[19] J. F. Coyle and C. R. Drahozal, 'An Empirical Study of Dispute Resolution Clauses in International Supply Contracts' (2019) 52 *Vanderbilt Journal of Transnational Law* 323, 327.

[20] *Id.* at 351.

[21] *Id.* at 352.

[22] *Id.*

[23] G. B. Born, *International Commercial Arbitration* (AH Alpen aan den Rijn: Kluwer Law International, 2014), p. 212.

an attempt to enforce the parties' true intent to arbitrate, as opposed to strictly focus on the language of the clause.[24] Notwithstanding, there are nuances and differences in how certain phrases are interpreted: this notion is developed at Section III below.

3. Interpreting Standard Clauses

The starting point for considering the scope of any arbitration clause, including standard clauses, is the New York Convention,[25] and any applicable provisions of domestic arbitration laws.

Article II of the New York Convention, which refers expressly to arbitration agreements, provides that:

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to an arbitration all or any differences which have arisen or which may arise between them in respect of a defined 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. [26]

This Article thus gives effect to the scope of an arbitration agreement and sets forth the requirements of a valid agreement to arbitrate. Articles II(1) and II(2) introduce a requirement that the agreement to arbitrate must be in writing and Article II(3) requires that the courts of a Contracting State refer parties to arbitration unless the agreement is "null and void, inoperative or incapable of being performed."[27] Such defects of formation are understood to include internationally recognized and generally applicable contract law defenses such as incapacity, duress, mistake or fraud, among others.[28]

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[24] Even jurisdictions that were once very restrictive in their approaches, such as China and Argentina, are now starting to prefer a more encompassing approach. *See* Section III below.

[25] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 20 June 1958, 21 UST 2517 (hereinafter "New York Convention"). As of July 2019, the New York Convention has been ratified by 160 Contracting States (Papua New Guinea being the latest State to have deposited its instrument of accession on 17 July 2019).

[26] New York Convention, Art. II.

[27] New York Convention, Art. II(3).

[28] Born, *International Commercial Arbitration*, pp. 3470-71 (citing, *e.g.*, *Bautista v. Star Cruises*, 396 F 3d 1289, 1301 (11th Cir. 2005) ("The limited scope of the Convention's null and void clause 'must be interpreted to encompass only those situations – such as fraud, mistake, duress, and waiver – that can be applied neutrally on an international scale.'") (internal citation omitted) (emphasis added); *Rhône Méditerranée Campagnia Francese Di Assicurazioni E Riassicurazoni v. Lauro*, 712 F 2d 50, 53 (3rd Cir. 1983) ("An agreement to arbitrate is 'null and void' only (1) when

Article V(1)(a) of the New York Convention also has an important role in assessing standard clauses at the time of award enforcement. This Article provides, in relevant part, that:

> Recognition and enforcement of the award may be refused […] [if] [t]he parties to the agreement referred to in Article II [*i.e.* the agreement to arbitrate] 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 […].[29]

Therefore, pursuant to Article V(1)(a) – which places the parties' consent at the center of the analysis – the invalidity of an arbitration agreement is a ground to refuse enforcement of an arbitral award. This Article must be read together with Article II, given the cross-reference in the text. Parties, and their counsels, should thus carefully review the drafting of their arbitration clauses "to ensure insofar as possible[,] that all of the parties' disagreements are resolved in a single forum,"[30] arbitration.

4. A comparative approach: court interpretation of standard clauses in France, the United States, China and Argentina

A comparative analysis of the interpretation of standard clauses in multiple jurisdictions offers distinct insights into the shift to a broad interpretation of standard clauses that many jurisdictions now embrace. We have chosen the courts of four jurisdictions – France, the United States, Hong Kong and mainland China, and Argentina – as demonstrative evidence of the ways in which various jurisdictions (from the more liberal to the more restrictive ones) interpret arbitration clauses.

4.1.The Interpretation of Standard Arbitration Clauses in France

France has long established itself as one of the most arbitration-friendly fora. It thus comes as no surprise that French courts have taken a very liberal approach to interpreting arbitration agreements. In this context, very little importance is given to the fact that the arbitration clause is a standard one, as opposed to the actual language being used. Indeed, French courts apply an *in concreto* approach aimed at giving effect to the intent of the parties rather than focusing strictly on the exact language of the agreement.[31] Therefore, defective clauses – *i.e*., poorly drafted clauses, indefinite in their scopes – may survive in France while they, most likely, would not in other jurisdictions. The rationale behind this approach lies in the normalization of international

it is subject to an internationally recognized defense such as duress, mistake, fraud, or waiver, or (2) when it contravenes fundamental policies of the forum state.")).

[29] New York Convention, Art. V(1)(a).

[30] Born, *International Commercial Arbitration*, p. 1352.

[31] *See, e.g., Municipalité de Khoms El Mergeb v. Société Dalico,* French Cour de cassation, First Chamber, 20 December 1993, 1994 REV. ARB. 116, 117 (holding that the existence and validity of an arbitration agreement should be determined primarily in light of the common intent of the parties).

arbitration as the primary means of solving international disputes, and thus – according to French courts – there can be no justification to restrict the interpretation of arbitration agreements.[32]

French courts have long applied pro-arbitration policies,[33] whereby arbitrators only have jurisdiction over disputes that the parties have agreed to bring before them. To ensure that the parties' intent to arbitrate is respected, French courts rely on a combination of various legal principles aimed at materializing the exact intent of the parties, and so notwithstanding the language of the clause at issue. Therefore, when tasked with determining the scope *ratione materiae* of an arbitration agreement, French courts have rejected the principle of strict interpretation and instead have commonly relied on the principle of good faith, as well as the doctrines of *contra proferentem* and *effet utile*.[34] Together, these legal principles ensure that (i) the initial intent of the contracting parties is respected;[35] (ii) the ambiguity of the clause does not benefit the drafter at the expense of the other party;[36] and (iii) "where [an arbitration] clause can be interpreted in two different ways, the interpretation enabling the clause to be effective should be adopted in preference to that which prevents the clause from being effective."[37]

Such an interpretive approach has allowed French courts to extend the scope of arbitration agreements to tortious claims where the agreement *solely* provided for the arbitrability of disputes "relating to the present contract", "arising out of the contract", or "in connection with the present contract".[38] Similarly, in cases where arbitration clauses provide for the arbitrability of "disputes arising *from the execution of the contract*," "all disputes arising during the performance of the present contract," or "in connection with the present contract," French courts have recognized that

[32] *See, e.g.*, C. Seraglini and J. Ortscheidt, *Droit de L'Arbitrage Interne et International* (Montchrestien, 2013), p. 207 n. 136 ("[L]'arbitrage est le mode ordinaire de règlement des différends; il ne serait donc pas justifié de restreindre l'interprétation des conventions d'arbitrage qui prévoient d'y recourir.") ("International arbitration is the ordinary means of solving disputes; it would therefore not be justified to restrict the interpretation of the arbitration agreements which provide for it.").

[33] *Id.*

[34] *See, e.g., id*. p. 207; Fouchard, Gaillard & Goldman, *International Commercial Arbitration* (AH Alpen aan den Rijn: Kluwer Law International, 1999), pp. 257-260.

[35] *See, e.g.*, Fouchard, Gaillard & Goldman, *International Commercial Arbitration*, p. 257 (noting that "a party's true intention should always prevail over its declared intention, where the two are not the same" and that "when interpreting a contract, one must look for the parties' common intention, rather than simply restricting oneself to examining the literal meaning of the terms used").

[36] *See, e.g., id*. p. 259; UNIDROIT Principles of International Commercial Contracts, May 2016, Art. 4.6 ("If contract terms supplied by one party are unclear, an interpretation against that party is preferred.") (hereinafter "UPICC").

[37] *See, e.g.*, Fouchard, Gaillard & Goldman, *International Commercial Arbitration*, p. 258 n. 83 (noting that "[t]his provision has been contained in the French Civil Code since its initial publication in 1804. Since then it has been adopted in a large number of jurisdictions"); UPICC Art. 4.5 ("Contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect.").

[38] *See SAS Merial v. Société Klocke Verpackungs*, Cour d'appel de Paris, 17 March 2011 discussed in the Revue de l'arbitrage (2011) at 575. *See also* Seraglini and Ortscheidt, *Droit de L'Arbitrage Interne et International*, p. 209 n. 148; Fouchard, Gaillard & Goldman, *International Commercial Arbitration*, p. 307 (citing ICC Case Award No. 5779 (1988) and *Bureau de recherches géologiques et minières v. Patino International N.V.*, Cour d'appel de Paris, 11 December 1981, and the opinion of the advocate general J.-C. Lecante).

the arbitrators could entertain quasi-contractual claims related to the wrongful termination of the contract.[39]

In *Sineco v. Société Shure Brothers Incorporated*,[40] for instance, the Paris Court of Appeal considered the following arbitration clause: "all disputes, differences or questions arising from or in relation with the present contract, its validity, interpretation, or lack thereof, or a violation or a rescission of the contract, shall be finally and only settled in arbitration in Chicago, Illinois in accordance with the rules of arbitration of the AAA."[41] The court was tasked to consider whether the arbitration agreement was manifestly inapplicable and if so, whether the court of Bobigny had jurisdiction over the dispute. While claimant argued that the arbitration clause was inapplicable because the dispute related to extra-contractual breaches arising from the economic public order, rather than contractual breaches resulting from one party's failure to renew the contract, the Court rejected this argument and went on to find that such claims ultimately fell within the scope of the arbitration agreement.

Similarly, when analyzing the standard ICC arbitration clause which provides that *"[a]ll disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules*" the French Supreme Court held more than forty years ago that the scope of such an agreement extended to non-contractual disputes.[42] This finding has been upheld in subsequent decisions before French courts.[43]

It follows from the above that a careful review of arbitration clauses with a seat in France is essential. Indeed, the French pro-arbitration policy has a significant impact on the parties most notably because French courts will give meaning to the clause so as to ensure that most disputes not expressly excluded by the parties be subject to arbitration.[44] It is thus of paramount importance that parties and, *a fortiori* their counsel, properly understand the intention of the parties and draft the arbitration clause accordingly. Given the liberal approach of French courts, parties willing to exclude non-contractual claims from the jurisdiction of the arbitrators may want to expressly

[39] Seraglini and Ortscheidt, *Droit de L'Arbitrage Interne et International*, p. 207 n. 139; Fouchard, Gaillard & Goldman, *International Commercial Arbitration*, p. 307 (citing ICC Case Award No. 5779 (1988) and *Bureau de recherches géologiques et minières v. Patino International N.V.*, Cour d'appel de Paris, 11 Deccember 1981, and the opinion of the advocate general J.-C. Lecante).

[40] *Sineco v. Société Shure Brothers Incorporated*, Cour d'appel de Paris, 2 June 2004.

[41] *Id.* (Tous les litiges, différends, ou questions nées ou en relation avec le présent contrat, sa validité, son interprétation, un manquement, ou une violation ou une résiliation de ce dernier, devront finalement et uniquement être déterminés et réglés par arbitrage à Chicago, Illinois, conformément aux règles d'arbitrage de l'Association d'arbitrage américaine. (…)) (unofficial translation).

[42] *See* French Court of Cassation, Commercial Chamber dated 9 July 1974, cited in the French Rev arb 1976, p 107, note Ph Fouchard.

[43] *See, e.g.*, above note 23.

[44] French Courts even go as far as to cure "pathological clauses" – *i.e.* clauses suffering from essential defects hindering the harmonious progress of arbitration resulting from, among other things, an incorrect reference to the arbitral institution or a defecting appointment for choosing arbitrators – because "when inserting an arbitration clause in their contract the intention of the parties must be presumed to have been willing to establish an effective machinery for the settlement of disputes covered by the arbitration clause. *See* Fouchard, Gaillard & Goldman, *International Commercial Arbitration*, pp. 262-264.

provide in their agreement that, for instance, "tortious disputes should not be subject to arbitration, and that such claims fall within the exclusive jurisdiction of the national court of law where the damage occurred."

4.2.The Interpretation of Standard Arbitration Clauses in the United States

In the United States, Chapter 2 of the Federal Arbitration Act ("FAA"), which incorporates the New York Convention, regulates the interpretation and enforcement of international arbitration agreements and foreign arbitral awards. At the outset, it is worth noting that the authors recognize that the FAA may apply in state courts, and that states are not preempted from applying either state arbitration laws or state rules of procedure where the latter do not conflict with the FAA or its policies, but the authors have decided to solely focus the below analysis on the federal court's interpretation of the FAA in recognition of the dominance of the FAA in U.S. jurisprudence.

The United States has long established itself as an arbitration-friendly forum, where courts have commonly refused to interfere with the arbitral process and where arbitration agreements are interpreted in a broad and liberal manner. However, unlike the French approach, the American approach is more focused on the actual language of the clause. This pro-arbitration stance originates from a 1973 landmark decision in which the United States Supreme Court recognized that "the principle purpose underlying American adoption and implementation of [the Federal Arbitration Act] . . . was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed."[45] Applying this new ruling, the highest court of the land later rejected the "old hostility toward arbitration" and instead enacted a "national policy favoring arbitration."[46]

The Supreme Court's pro-arbitration stance has likewise been affirmed by federal courts, which have, for instance, found that Chapter 2 of the FAA "generally establishes a strong presumption in favor of arbitration of international commercial disputes"[47] as well as establishing, "as a matter of federal law, [that] any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[48]

Against this backdrop, United States courts have developed a singular approach to the interpretation of standard arbitration clauses, which since the early 1980s has included the categorization of arbitration agreements as either broad or narrow. This categorization by courts is relevant when, for instance, courts assess whether an arbitration clause extended to extra-

[45] *Scherk v. Alberto-Culver,* 417 US 506, 520 n. 15 (1973).

[46] *Southland Corp. v Keating,* 465 US 1, 10, 14 (1984).

[47] *Trifonov v. MSC Mediterranean Shipping Co. SA*, 590 F Appx 842, 843 (11th Cir. 2014).

[48] *Doe v. Princess Cruise Lines, Ltd.*, 657 F 3d 1204, 1213 (11th Cir. 2011). It bears mention that the FAA has been found to apply in both federal and state courts,[48] but nothing appears to prevent a state court from applying state arbitration law and state rules of procedure where they do not conflict with the FAA. *See Southland Corp. v. Keating,* 465 US 1, at 10, 12, 16 (1984) (holding that "[t]he Arbitration Act creates a body of federal substantive law . . . applicable in state and federal court"; "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration"; and "[i]n holding that the Arbitration Act preempts a state law that withdraws the power to enforce arbitration agreements, we do not hold that [state courts are bound by the act's procedural rules]." *See also* C. R. Drahozal, 'The New York Convention and the American Federal System' (2012) *Journal of Dispute Resolution* 101, 111-14.

contractual claims or to multi-party disputes. However, the courts of many circuits have started to abandon such a categorization in favor of a more all-encompassing analysis.

The evolution and approach of United States courts' interpretation of the scope of arbitration clauses may be understood through the lens of how the term "arising hereunder" has been analyzed. Historically, US courts have found that the term "arising hereunder" is synonymous with "arising under the agreement" and has been considered to be relatively narrow insofar as standard arbitration clauses are formulated. An oft-cited case supporting this position is the Ninth Circuit's *Mediterranean Enterprises v. Ssangyong*, where the district court was asked to consider the scope of an arbitration clause providing that "*any disputes arising hereunder* or following the formation of a joint venture shall be settled through binding arbitration pursuant to the Korean-US Arbitration Agreement with arbitration to take place in Seoul, Korea."[49]

Following a hearing on the scope of the arbitration clause, the Court found that the breach of contract claims and the breach of fiduciary duty claims were arbitrable and therefore decided to stay the litigation while the arbitration was pending. Ssangyong appealed the decision and both parties made arguments concerning the meaning of "arising hereunder." According to Ssangyong, the arbitration clause extended to "'any' disputes between the parties," while according to Mediterranean Enterprises, "arising hereunder" meant "arising under the contract itself" and did not include "matters or claims independent of the contract or collateral thereto."[50]

The Ninth Circuit agreed with *Mediterranean Enterprises* and specifically relied on Second Circuit precedent to find that "arising hereunder" was synonymous with "arising under the [a]greement."[51] While "arising under" has been considered a narrower construction than "arising out of or relating to,"[52] this approach has largely been rejected by other federal courts.[53] In *Prima Paint,* the United States Supreme Court clarified the US position and unsurprisingly found that the use of "any controversy or claim arising out of or relating to this Agreement" in a clause results in a broad, all-encompassing clause.[54]

A comprehensive overview of the current US circuit courts' position on the interpretation of the "arising under" clause can be found in the 2018 Colorado Court of Appeals decision, *Digital Landscape Inc v. Media Kings*.[55] There, the Court noted that out of the eight circuits considered,

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[49] *Mediterranean Enterprises v. Ssangyong Corporation*, 708 F 2d 1458, 1465 (9th Cir. 1983) (emphasis added).

[50] *Id.* at 1463.

[51] *Id. See, e.g., In re Kinoshita & Co.*, in which the Second Circuit held that when an arbitration clause refers to "disputes or controversies 'under' or 'arising out of' the contract," arbitration is restricted to "disputes and controversies relating to the interpretation of contract and matters of performance." 287 F 2d 951, 953 (2nd Cir. 1961).

[52] *In re Kinoshita & Co.*, 287 F 2d 951, 953 (2nd Cir. 1961).

[53] *See, e.g., Gregory v. Electro-Mechanical Corp*., 83 F 3d 382, 386 (11th Cir. 1996) ("This Court has not drawn a distinction between the words 'arising under' and 'arising out of.'"); *Battaglia v. McKendry*, 233 F 3d 720 (3rd Cir. 2000) (using both phrases interchangeably); *Oldroyd v. Elmira Sav. Bank, FSB*, 134 F 3d 72 (2nd Cir. 1998).

[54] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 US 395, 404 (1967). Arguably, the 2nd Circuit may be moving closer to the majority position, as it has held that, "to ensure that an arbitration clause is narrowly interpreted, contracting parties must use ['arising under'] or its equivalent, although the better course, obviously, would be to specify exactly which claims are and are not arbitrable." *See S.A. Mineracao da Trindade-Samitri v. Utah Int'l, Inc.* 745 F 2d 190, 194 (2nd Cir. 1984). *See also Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading, Inc.*, 252 F 3d 218, 225 (2nd Cir. 2001).

[55] *Digital Landscape Inc. v. Media Kings LLC*, 440 P 3d 1200, 1213 (Colo. App. 2018).

five circuits concluded that the mere use of the "arising under" language in a dispute resolution clause could not narrow the scope of an arbitration agreement.[56]

In sum, while the language of standard arbitration clauses has been heavily discussed in US jurisprudence, interested parties should pay close attention to the below:

- *"Any and all disputes"* has commonly been interpreted as extending the tribunal's jurisdiction to any disputes having any factual or legal connection to the parties' agreement or their dealings. The rationale behind this conclusion is that US courts view the use of "all" or "any" as determinative evidence that parties intended to give broad discretionary powers to the arbitral tribunal.[57]

- For the stake of clarity, the word "disputes" may be preferable to the word "controversy," but no real distinction exist among the two since they both cover *every* circumstance where one party is demanding something and the other party refuses, fails, or is unable to provide for it. US courts have therefore commonly rejected attempts to limit the scope of arbitration agreement based on this artificial distinction. [58]

- The use of "related to" has the effect of allowing a tribunal to hear a broad range of disputes. In this regard, US courts have almost entirely confirmed that using "related to" in an arbitration agreement permits a tribunal to consider both the parties' contractual and non-contractual claims. Most notably, that particular language allows a tribunal to "reach[] any disputes that 'touch' or have a factual relationship with the parties' contract,"[59] as well as

[56] *Id*. at 1210.

[57] Notwithstanding the usefulness of the "any" and "all" language, some arbitral institutions (such as the LCIA) have provided additional security in their standard arbitration clause in order to ensure that a tribunal's powers would not be restricted to a limited set of issues. The LCIA therefore recommends to explicitly state that "any question regarding [the arbitration agreement's] existence, validity or termination" falls within the arbitral tribunal's jurisdiction. While this language is not mandatory, and may appear as overzealous, the authors believe that principles of efficiency and predictability may warrant such additional language especially in cases where, for instance, the arbitration is seated in a forum where (i) little arbitral jurisprudence exists, or is accessible or, (ii) domestic courts are known to be reluctant to enforce all-encompassing clauses. *See* 'Recommended Clauses', The London Court of International Arbitration, available at https://www.lcia.org/Dispute_Resolution_Services/LCIA_Recommended_Clauses.aspx (last visited 5 September 2019).

[58] *See, e.g., Public Serv. Elec. & Gas Co. v. Local 94 IBEW*, 140 F Supp 2d 384, 395 (D.N.J. 2001); Born, *International Commercial Arbitration*, p. 1348 (citing to *Caithness P.I. Corp. v. Prod. Inc.*, 1992 WL 266316 (D. Kan.); *Cales v. Armstrong World Indus., Inc.*, 2003 WL 1798671, at *15-21 (Ohio Ct. App.); *Nanosolutions, LLC v. Prajza*, 793 F Supp 2d 46, 57 (D.D.C. 2011) (noting that the term "conflict" has similarly been interpreted expansively)).

[59] *See* Born, *International Commercial Arbitration*, p. 1349 (citing to *Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd*, 139 F 3d 1061, 1068 (5th Cir. 1998) ("relating to" language in arbitration agreement is "broad"; clause not limited to claims under contract, and also reaches claims that "'touch' matters covered by" contract); *Swensen's Ice Cream Co. v. Corsair Corp.*, 942 F 2d 1307, 1309 (8th Cir. 1991); *In re Kinoshita & Co.*, 287 F 2d 951, 953 (2nd Cir. 1961); *Nokia Corp. v. AU Optronics Corp.* (*In re TFT–LCD (Flat Panel) Antitrust Litg.*), 2011 WL 2650689, at *5 (N.D. Cal.) ("relating to" interpreted broadly to cover all disputes "touching" contractual relationship between parties, including antitrust claims); *Tigra Tech. v. Techsport Ltd*, 2011 WL 2710678, at *2 (C.D. Cal.) ("any dispute arising from or relating to this Agreement" is broad, covering disputes that "touch[ed] matters" related to underlying contract); *McDonnell Douglas Corp. v. Kingdom of Denmark*, 607 F Supp 1016, 1019 (E.D. Mo. 1985) ("'[R]elating to' is generally regarded as broad rather than narrow language.")).

"all disputes having a significant relationship to the parties' underlying contract, regardless of whether those claims implicated the terms of the consulting agreement."[60]

4.3. The Interpretation of Standard Arbitration Clauses in Hong Kong and Mainland China

Although Hong Kong and mainland China share a common cultural tradition and history, their approach to international arbitration (and *a fortiori* the way in which each interpret international arbitration agreements) differs significantly. Indeed, while arbitration has long been used as a means of solving disputes in mainland China,[61] Chinese courts have traditionally been more reluctant to effectively let parties access private tribunals for the resolution of international disputes.[62] In fact, it was only in 1994, with the internationalization of disputes and the rise of "foreign-related and civil and commercial transactions", that the Chinese Arbitration law was finally codified.[63]

In sharp contrast, Hong Kong, owing much to its British colonial past, has traditionally been considered an arbitration-friendly jurisdiction primarily because of its "legislation based on the UNCITRAL Model Law, decades of jurisprudence, and good lawyers and judges."[64]

While these differences may in part lie with the difference in legal tradition (*i.e.*, common law in Hong Kong and, civil law in mainland China), the below analysis limits itself to presenting and analyzing the way in which arbitral agreements have been interpreted and enforced in each jurisdiction.

In the authors' view, this analysis is essential, especially at a time when Hong Kong and mainland China continue to play an increasing role in the Asia Pacific region, and the interaction between the two jurisdictions is growing. On 18 January 2019, for instance, Hong Kong and mainland China signed the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, which provides for reciprocal enforcement and recognition of judgments covering monetary and non-monetary relief and updates an older 2006 Arrangement.[65] The same year, on 2 April 2019, the two also entered into an arrangement in which Chinese courts would recognize and enforce interim measures in arbitrations seated in Hong Kong, applicable to only

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[60] *See* Born, *International Commercial Arbitration*, p. 1349 (citing to *Am. Recovery Corp. v. Computerized Thermal Imaging*, 96 F 3d 88, 93 (4th Cir. 1996). *See also Doe v. Princess Cruise Lines, Ltd*, 657 F 3d 1204, 1218 (11th Cir. 2011) (arbitration agreement ("any and all disputes…relating to or in any way arising out of or connected with") was "broad, but not limitless"; court required that claims be foreseeable or have some direct relationship to performance of duties under contract)).

[61] *See* Song Lianbin, Zhao Jian, Li Hong, 'Approaches to the Revision of the 1994 Arbitration Act of the People's Republic of China' (2003) 20 *Journal of International Arbitration* 169.

[62] K. Yuan, 'Revision of China's 1994 Arbitration Act – Some Suggestions from A Judicalization Perspective' (2005) 22 *Journal of International Arbitration* 323.

[63] Z. Weidong, 'Determining the Validity of Arbitration Agreements in China: Towards a New Approach' (2010) 6 *Asian International Arbitration Journal* 44.

[64] C. W. Allen, 'Disputes Resolution in Hong Kong: Time to Go Back to Basics', mondaq, 25 July 2017.

[65] *See, e.g.*, 'Hong Kong and China Sign New Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters', Baker McKenzie, 29 January 2019.

certain institutions and primarily to measures against assets or property.[66] The move towards greater judicial cooperation between mainland China and Hong Kong will likely expand in the months and years to come,[67] and will undoubtedly affect the development of arbitral jurisprudence relating to the enforcement of arbitration agreements.

4.3.1. Hong Kong

Hong Kong has long established itself as one of the most arbitration-friendly forum, making it in 2018 the fourth most preferred seat of international commercial arbitration in the world, behind Paris, London, and Singapore.[68] While this will come as no surprise for practitioners in the Asia Pacific region, the overwhelming success of Hong Kong as an arbitration hub is, for the most part, attributable to its modern arbitration law – conforming closely to the UNCITRAL Model Law on International Commercial Arbitration – as well as "the aggressive 'pro-arbitration' stance of Hong Kong's first-rate judiciary, [] [which builds] on similar trend in other jurisdictions with legal systems based on English common law; and the Hong Kong International Arbitration Centre, known for its innovation, internationalism and world-class secretariat."[69] Additionally, and most relevant to this chapter's section, any domestic judgment on the scope of an arbitration agreement in Hong Kong now benefits from the liberal approach of English courts, which emphasizes the importance of the parties' intent in interpreting arbitration clauses.

Unlike courts in mainland China, Hong Kong courts have put the will of the parties at the forefront of their analysis, hence giving "great deference to party autonomy in determining whether a valid arbitration agreement exists" and with "a strong inclination toward overcoming defects in such agreements where the parties clearly intended to arbitrate their disputes."[70] In *Schindler Lifts (Hong Kong) Ltd v. Sui Chong Construction Engineering*,[71] for instance, the Hong Kong District Court confirmed this position when it ordered stay of an action pending referral of the dispute to arbitration, despite the defendant having filed a defense in Hong Kong's trial courts.

There, the arbitration agreement provided, in relevant part, that "[i]f a dispute arises under or in connection with the[] [Contract] the parties agree to resolve the dispute in accordance with the

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[66] *See* P. Yuen, H. Shi, D. McDonald et al., 'Hong Kong and Mainland China Agree upon Bilateral Arrangement Regarding Interim Measures for Arbitration', Kluwer Arbitration Blog, 2 April 2019.

[67] In the authors' view, the interaction between China and Hong Kong will continue in the years to come in part because of China's continued commitment to develop the Belt and Road Initiative, and Hong Kong being one of the major financial player in the development of the project. All together, these initiatives evidence the desire from both mainland China and Hong Kong to create an environment more suitable to the resolution of international disputes. Hong Kong's financial institutions, along with other major financial institutions from UK, France, Singapore, Pakistan, the UAE, among others, have signed up to the Green Investment Principles for Belt and Road Development aimed at promoting green investment for Belt and Road project. *See, e.g.*, 'List of Deliverables of the Second Belt and Road Forum for International Cooperation', The Second Belt and Road Forum for International Cooperation, 27 April 2019, available at http://www.beltandroadforum.org/english/n100/2019/0427/c36-1312.html.

[68] *See* '2018 International Arbitration Survey: The Evolution of International Arbitration', White & Case LLP and Queen Mary University of London.

[69] *See* S. Nelson and M. Robbins, 'Hong Kong – The Gold Standard of International Arbitration in Asia', Dorsey & Whitney LLP, 7 October 2016.

[70] *Id.*

[71] *Schindler Lifts (Hong Kong) Ltd v. Sui Chong Construction and Engineering Co Ltd* [2014] HKEC 1967.

dispute settlement procedures in clause 42 [of the Contract]."[72] The dispute settlement provision of clause 42, in turn provided "for the referral of the dispute to the parties' designated representatives and for mediation," otherwise (1) "either party may give a notice to the other party, by special delivery, to refer the dispute to arbitration and the person to act as the arbitrator shall be agreed between the parties;" and (2) "[t]he arbitration shall be a domestic arbitration conducted in accordance with the Arbitration Ordinance."[73]

Unsurprisingly, and consistent with its general pro-arbitration stance, the Hong Kong court, *inter alia*, held that non-compliance with a multi-tier dispute resolution mechanism, which provides for mandatory recourse to mediation before arbitration, could not render the arbitration agreement "inoperative or incapable of being performed."[74] Similarly, the Court reaffirmed its position that a party's use of 'in connection with' or 'connected therewith' in their arbitration agreements will force the court to apply an all-encompassing approach that "will cover all disputes other than those entirely unrelated to the transaction covered by the contract."[75]

While Hong Kong is now a preferred forum for solving international disputes, it will undoubtedly become an even more attractive forum for arbitration players since Hong Kong's jurisprudence now benefits from the landmark *Fiona Trust* judgment, which – as discussed in the introduction to this chapter – creates a rebuttable presumption of consent to arbitrate in cases of ambiguity.[76] Indeed, the *Fiona Trust* court examined the language of the standard arbitration agreement and concluded that"[i]t may be a great disappointment to the judges who explained so carefully the effects of the various linguistic nuances if they could learn that the draftsmen of so widely used [] [standard arbitration agreements] obviously regarded the expressions 'arising under this charter' [. . .] and 'arisen out of this charter' [. . .] as mutually interchangeable."[77]

Parties, however, should not be misled by this language and should keep in mind that limitations do in fact exit. This has recently been confirmed by the 2019 *Dickson Holdings Enterprise Co Ltd v. Moravia CV and Others* decision. There, the Court of the Hong Kong Special Administrative Region was tasked to consider, among other factors, the scope of the HKIAC's standard arbitration agreement when deciding whether to stay the proceeding while the arbitration was pending.[78] More specifically, the Court examined whether the dispute between the parties concerning (i) the transfer of 225,000 shares which formed part of an addendum to a shareholders' agreement and, (ii) the forfeiture of 275,000 shares fell within "the ambit of the arbitration agreement."[79] To answer this question, the judge had to consider if, in any event, the dispute could be considered within the scope of the phrase "dispute, controversy or claim arising out of or relating to [the

[72] *Id.* ¶ 22 (emphasis added).

[73] *Id.*

[74] *Id.* ¶ 54.

[75] *Id.* ¶ 57 (citing *Tommy CP Sze v. Li & Fung* [2003] 1 HKC 418).

[76] *See Premium NAFTA Products Ltd. v. Fili Shipping Co. Ltd.* [2007] UKHL 40; Introduction to the present chapter.

[77] *Premium NAFTA Products Ltd. v. Fili Shipping Co. Ltd*. [2007] UKHL 40.

[78] The arbitration clause at issue provided in relevant part that "[a]ny dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof, shall be settled by arbitration under the Hong Kong International Centre Administered Arbitration Rules in force at the date of this Agreement." *See Dickson Holdings Enterprise Co Ltd v. Moravia CV and Others* [2019] HKCFI 1424.

[79] *Id.*

shareholders' agreement], or the breach, termination or invalidity thereof."[80] The Judge responded in the negative because:

> It has to be borne in mind that the arbitration clause []. . . applies to disputes arising out of or relating to the *Shareholders Agreement* or the breach, termination or invalidity thereof, *not* arising out of or relating to any *affairs of the Company*. If the parties had intended otherwise, they could have easily devised an arbitration clause that expressly applied to any dispute between them relating to any affair of the Company.[81]

In short, although Hong Kong is a forum where arbitration agreements are interpreted quite liberally, parties to a contract ought to be careful when choosing the language to be inserted in their dispute resolution clauses. Indeed, Hong Kong courts will try to extend the scope of the agreement as much as they possibly can. They will not, however, completely disregard the language of the clause when making their assessments.

4.3.2. Mainland China

Chinese courts have traditionally been reluctant to "depart from a largely court-driven justice system" mostly because they view arbitration "as procedurally unsound, based on a perception that arbitration cannot guarantee due process."[82] As such, a number of specific court procedural rules are incorporated into arbitral proceedings, which in turn places a number of inappropriate restrictions on the parties involved in the arbitration.[83] In recent years, however, Chinese courts have leaned towards a more liberal approach, enforcing ambiguous arbitration agreements that nonetheless reflect a clear intention to arbitrate. As always and as further described below, changes only go so far, and limits do remain.

Nowadays, when courts in mainland China are asked to interpret the scope of arbitration agreements involving domestic arbitral institutions, they generally adopt a pro-arbitration stance. In an unpublished case, for instance, the Supreme People's Court ("SPC"), in response to a query from the Gansu Higher People's Court, held that the terms "disputes arising out of the contract performance" referred to "[a]ll disputes between the two parties to a contract over matters such as the existence of a contract, the time of its establishment, interpretation of the contents of a contract, implementation of a contract, liability for breach of contract, as well as disputes over the amendment, suspension, assignment, dissolution or termination of a contract."[84]

Similarly, arbitral clauses providing that "all disputes arising from the contract," "in connection with the contract," or "arising out of the performance of the contract" have been interpreted by

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[80] *Id.*

[81] *Id.* (emphasis added).

[82] K. Yuan, 'Revision of China's 1994 Arbitration Act', 323.

[83] *Id.* (noting that "[f]or example, parties in arbitrations governed by the 1994 Act enjoy less freedom and flexibility than they would under other legislation where parties choose arbitrators, the place of arbitration, as well as the procedural rules and substantive law governing their relationship, rights, and obligations").

[84] L. Yifei, 'Arbitration Agreement: General Issues', in *Judicial Review of Arbitration: Law and Practice in China* (Kluwer Law International, 2018), p. 65.

courts in mainland China as allowing for the adjudication of both tortious and quasi-contractual claims.[85] Moreover, Chinese courts have repeatedly dismissed cases where a validly formed arbitration agreement has been found,[86] and have, for instance, recognized the validity of an arbitration clause in a standard-form electronic contract.[87]

In *Zhejiang Yisheng Petrochemical v INVISTA Technologies*,[88] the Intermediate People's Court of Ningbo Municipality recognized, for the first time, the validity of a clause in which parties to a contract agreed to have a permanent arbitration institution in China manage an arbitration process in accordance with the [UNCITRAL] Arbitration Rules and clarified that what was agreed upon by this clause was institutional arbitration, rather than ad hoc arbitration."[89] This decision is significant as it showcases the Intermediate People's Court of Ningbo Municipality 's willingness to "adopt[] the teleological method of interpretation that was conducive to realizing the parties' wishes to arbitrate"[90] rather than declaring the agreement as "null and void, inoperative or incapable of being performed."[91]

There are limits, however, to the Chinese courts' willingness to enforce poorly drafted clauses. In *Wicor Holding AG v Taizhou Haopu Investment Co Ltd*, for instance, the SPC denied enforcement of an ICC award on public policy grounds because it concluded that the arbitration

[85] *See* W. Sun and M. Willems, 'Arbitration Agreements', in *Arbitration in China* (Kluwer Law International, 2015), p. 84 (citing *Best (USA) Enterprise Co., Ltd. v. Anhui Hotel, Zongkui HE, Fucheng ZHANG, and Others* [2005] Min Si Ta Zi No. 9); L. Yifei, 'Arbitration Agreement: General Issues', in *Judicial Review of Arbitration: Law and Practice in China* (Kluwer Law International, 2018), p. 66 ("[T]he Response of the Supreme People's Court to Certain Questions Concerning the Application of the Foreign Economic Contract Law shall apply, which provides that: "The term 'disputes arising from the contract' as stated in Article 5 of the Foreign Economic Contract Law shall be understood in the general sense. All disputes between the two parties to a contract over matters such as the existence of a contract, the time of its establishment, interpretation of the contents of a contract, implementation of a contract, liability for breach of contract, as well as disputes over the amendment, suspension, assignment, dissolution or termination of a contract shall be included under this term." In China, "disputes" in arbitration agreement, whether arising from the main contract or in connection with the contract, should be construed expansively according to the above opinion by the Supreme People's Court.").

[86] *See, e.g.*, L. Yifei, 'Arbitration Agreement: General Issues', in *Judicial Review of Arbitration: Law and Practice in China* (Kluwer Law International, 2018).

[87] *ZHENG Jianfang v. Jindao Precious Metal Co. Ltd.*, Case No. (2016) Min Min Shen 2368, Fujian High People's Court (18 June 2016) (decision in Chinese). Argentina has similarly shown its desire to create a friendlier environment for the resolution of international disputes in Argentina. Indeed, while Argentinean courts have traditionally been known for their hostility towards international arbitration, a major shift in the legislation occurred on 4 July 2018. The Argentine National Congress passed a new arbitration act that largely mirrors the UNCITRAL Model Law and abandons the "problematic amendments introduced in 2015." For example, the new law adopts a broad definition of "commercial" and requires arbitration agreements to be in writing. Ideally, the new law will have the effect of promulgating a more stable and predictable enforcement regime in Argentina. It remains to be seen, however, whether this effect will be realized. *See, e.g.*, N. Marigo, M. J. Milesi, E. Vetulli, 'New Signs of Good Prospects for International Arbitration in Argentina', Kluwer Arbitration Blog, 12 September 2018.

[88] *Zhe Jiang Yisheng Petrochemical Co., Ltd. v. INVISTA Technologies S.à.r.l., Luxembourg*, A Case of an Application to Affirm the Invalidity of an Arbitration Clause (2014), Intermediate People's Court of Ningbo Municipality, Zhejiang Province (17 March 2014), available at http://cgc.law.stanford.edu/belt-and-road/b-and-r-cases/typical-case-6.

[89] *Id.*

[90] *Id.*

[91] New York Convention, Art. II.

agreement, under which the award was based, was in fact invalid due to poor drafting.[92] There, the parties agreed to have their disputes arbitrated "*in accordance with ICC mediation and arbitration rules*" and "*if one party initiates the arbitration, the other party shall choose the seat of arbitration*."[93] The lower court rendered a judgment in 2012 declaring the arbitration agreement invalid as it failed to specify an arbitral commission (as required by Article 16 of the Arbitration Law of the People's Republic of China),[94] a decision that was later endorsed by the SPC.

Interestingly enough, the SPC's reasoning in declaring the arbitration clause invalid appeared to be based on the circumstance that the arbitration commission could not be "ascertained" from the ICC arbitration rules.[95] Clarity in drafting is therefore key. Ambiguous language should be avoided because an ambiguous arbitration agreement may be found invalid and unenforceable in China, despite the seat being located outside of the country.

The Chinese approach to assessing the scope of arbitration agreements in mainland China has also been overshadowed by the difficulties faced by both international arbitral institutions and non-Chinese parties willing to arbitrate disputes seated in China. While several positive developments have taken place over the years,[96] including the one described above, the authors believe that further changes need to take place.[97]

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[92] J. Kwan and M. Dimsey, 'One Step Forward, Two Steps Back – PRC Court refuses to enforce an ICC award on the ground of public policy', Lexology (citing *Wicor Holding A.G. v. Taizhou Haopu Investments Limited* (Civil Action (2015), Tai Zhong Shang Zhong Shen Zi No. 00004 (2 June 2016)).

[93] *Id.*

[94] Arbitration Law of the People's Republic of China, Art. 16, available at https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn138en.pdf.

[95] Kwan and Dimsey, 'One Step Forward, Two Steps Back'.

[96] For example, on 6 August 2019, the State Council of China published the "General Planning of the New Area of the China (Shanghai) Pilot Free Trade Zone Program" under which, reputable overseas arbitration and dispute resolution institutions will be allowed to "*set up business organisations in the new area [of the China (Shanghai Pilot Free Trade Zone)] and conduct arbitration businesses in relation to civil and commercial disputes arising in the areas of international commerce, maritime affairs, investment, etc.*" and the relevant bodies will "*support and assure the application and enforcement of interim measures by Chinese and foreign parties before and during the arbitration proceedings, such as asset preservation, evidence preservation and action preservation*." A number of international arbitral institutions including the ICC, the Hong Kong International Arbitration Center ("HKIAC") and the Singapore International Arbitration Center ("SIAC") currently maintain representative offices in the Shanghai Free Trade Zone. While these representative offices are limited to liaison and marketing purposes only and do not administer cases in mainland China, "Article 4 of the General Planning [of the New Area of the China (Shanghai) Pilot Free Trade Zone Program] now appears to have given a green light for foreign arbitration institutions to administer arbitration cases seated in mainland China in the future." *See* M. Li, S. Hu, and W. Ye, 'State Council of China Announced Ground-breaking Policy to Allow Foreign Arbitration Institutions to Set Up Businesses in Shanghai Free Trade Zone to Administer Cases in Mainland China', Herbert Smith Freehills, 9 August 2019, available at https://hsfnotes.com/arbitration/2019/08/09/state-council-of-china-announced-ground-breaking-policy-to-allow-foreign-arbitration-institutions-to-set-up-businesses-in-shanghai-free-trade-zone-to-administer-cases-in-mainland-china/#page=1 (last visited 5 September 2019).

[97] *See, e.g.*, S. Grimmer, 'Distinction and Connection: Hong Kong and Mainland China, a View from the HKIAC', Global Arbitration Review, 24 May 2019. For a more moderate approach, *see* Dr. G. Weixia, 'The Developing Nature of Arbitration in Mainland China and Its Correlation with the Market: Institutional, Ad Hoc, and Foreign Institutions Seated in Mainland China' (2017) 10 *Contemporary Asia Arbitration Journal* 257.

In that regard, two cases are worth considering: the 2009 *Duferco* case and the 2013 *Longlide* case. *Duferco* was the first reported case from mainland China enforcing an arbitration agreement providing for a foreign arbitral institution – the ICC – with a seat in China. The Ningbo Intermediate People's Court characterized the award as "non-domestic" and applied the New York Convention to conduct its analysis. The precedential value of the case has been questioned, as "the case was concluded on the basis of the respondent's waiver without discussing much about the status of ICC arbitration seated in Mainland China."[98]

In 2013, however, further light was shed on the issue when Chinese courts were again tasked to scrutinize the text of an arbitration agreement and consider the enforceability of an arbitration clause providing that "all disputes" be submitted to ICC arbitration with a seat in Shanghai. In the *Longlide* case, the Anhui Provincial Higher People's Court consulted the SPC on three issues: (i) whether the ICC was a validly designated arbitration institution; (ii) whether Chinese public policy was violated by the ICC's administration of a case seated in mainland China; and (iii) whether any arbitral award should be considered domestic such that the New York Convention would be inapplicable to enforcement issues.[99] The SPC only considered the first question and ultimately held that the ICC was a valid "designated arbitration institution." The Court, however, failed to address the questions of public policy and the status of the award under the New York Convention. According to Chinese scholars, the Court's reluctance to address the two remaining questions rests on the fact that an answer in the affirmative "would have a huge influence on [the] Chinese arbitration market."[100] This careful holding is, in the authors' view, welcome because such an impactful policy decision for the Chinese market should be reserved to the legislature, and not a court of law.[101]

Taken together, the *Duferco* and the *Longlide* decisions address two key developments for the arbitration landscape and the interpretation of arbitral agreements in mainland China: (i) the designation of an award with a seat in China as a non-domestic under the New York Convention and (ii) the ability for the ICC to be considered a "valid designated arbitration institution" for arbitrations seated in mainland China.

The above cases reflect the courts' desire to render mainland China a more attractive forum to solve international disputes.[102] The scope of these decisions, along with the courts' interpretative approach and the strict requirements of the arbitration law,[103] however, illustrate why parties, and *a fortiori* their counsels, should be cautious when drafting an arbitration clause with a nexus to mainland China. In the authors' view, and in order to avoid unnecessary procedural hurdles, proper time and effort should be given when drafting such a clause.

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[98] Weixia, 'The Developing Nature of Arbitration in Mainland China', 270.

[99] *Id.*

[100] *Id.* at 271.

[101] China is a civil law country. In civil law jurisdictions, including China or France, it is traditionally accepted that judges do not make the law but merely apply and interpret it. Major changes in the law thus need to be made by legislators. In common law jurisdictions, such as the US, England, or Hong Kong, judges do, in contrast, hold such powers. In fact, it is often said that in these jurisdictions the judges make the law.

[102] *See* Mu Xuequan, 'China improves arbitration system to strengthen credibility', Xinhuanet, 16 April 2019.

[103] *See, e.g.*, Arbitration Law of the People's Republic of China, Art. 16 (requiring the designation of an arbitration commission in the arbitral agreement for it to be valid).

4.3.3. The Interpretation of Standard Arbitration Clauses in Argentina

Argentina has long had considerable name recognition within international arbitration, derived largely from its participation as respondent in a series of investment arbitrations deriving from the economic crisis it experienced at the turn of the century. However, while this engagement with arbitration has at least contributed to the existence of an active community of arbitration practitioners in Argentina, Argentine law has placed restrictions on arbitration. Indeed, in a 2016 survey of Argentine arbitration practitioners, only 21% of respondents stated that they would recommend Argentina as one of five recommended seats for an international arbitration, placing it behind other South American countries such as Uruguay, Chile and Peru.[104] Consistent with this overall concern about arbitration in Argentina, respondents described the approach of Argentine courts to the interpretation of the scope of arbitration agreements as "strict" and focused on a narrow interpretation of the clause's language.[105]

Arguably the foundational decision of a restrictive approach to the interpretation of arbitration agreements in Argentina was the 1994 decision of the Commercial Court of Appeals of the City of Buenos Aires in *Compañía Naviera Pérez Companc v. Ecofisa*.[106] In *Ecofisa*, the Court addressed a situation in which the parties had agreed to arbitrate all their disputes in accordance with the ICC Arbitration Rules. Under these rules, the parties and tribunal were required to agree upon "terms of reference," specifying which matters were to be submitted to the tribunal. The parties disagreed on what matters had been submitted to arbitration, and so in the absence of party agreement the tribunal, in accordance with the ICC Rules, finalized the terms of reference itself. The difficulty this created, in the view of the Court, was that as drafted the terms of reference did not clearly preclude the tribunal from evaluating the validity of Argentine laws and regulations, something that was precluded by Argentine public policy. While no attempt had yet been made to require the tribunal to do this, the Court determined that it had the power to redraft the terms of reference to explicitly exclude this possibility, then allowing the arbitration to proceed.

While on one level this decision represented a moderate approach to judicial supervision of arbitration agreements, as the Court only intervened to protect what it saw as a matter of public policy, it nonetheless reflects an ongoing strain in Argentine caselaw over the following two decades, in which Argentine courts often viewed themselves as possessing a supervisory role with respect to arbitration. This conception was most famously enunciated in the decision of the Argentine Supreme Court in *José Cartellone Construcciones Civiles SA v. Hidroeléctrica Norpatagónica SA o Hidronor SA*, which announced that Argentine courts were able to annul arbitration awards if they were found to be "unconstitutional, illegal or unreasonable."[107]

In accordance with this conception of courts as supervisors of arbitration, Argentine courts largely proceeded to adopt what has been referred to as a "restrictive criterion" with respect to arbitration agreements.[108] For example, in 2014, in *Supermarkets Norte Investments B.V. v. Carrefour S.A. y*

[104] T. Cole, P. Ortolani, et al., 'Arbitration in the Americas'.

[105] *Id.*

[106] *Compañía Naviera Pérez Companc v. Ecofisa,* CNCom, Panel B, LL 1994-A, 139.

[107] *José Cartellone Construcciones Civiles SA v. Hidroeléctrica Norpatagónica SA o Hidronor SA*, CSJN, 2004, 7.

[108] D. Arroyo and E. Vetulli, 'The new Argentinian arbitration law: a train in an unknown direction?' (2016) 32 *Arbitration International* 357-35.

otros s/ ordinario,[109] the National Court of Appeals in Commercial Matters, when addressing an arbitration clause that submitted to arbitration "any dispute, divergence, claim or doubt regarding the interpretation and/or application of this Contract", with specified exceptions, emphasised that "[i]t is necessary to start from the following basic premise: compromissory clauses constitute a contractual convention, which by implying a waiver of the general principle of submission of conflicts to judges, deserve to be interpreted restrictively."[110]

Nonetheless, while such decisions may have represented the dominant approach to the interpretation of arbitration agreements in Argentina, there were also contrary decisions, adopting a more expansive approach. Perhaps more importantly, however, recent years have seen an increasing acceptance of arbitration by Argentine legislators. Prior to 2015 there was no single national arbitration law in Argentina, with the legislation applicable to arbitration being found in a variety of laws and in the procedural codes of Argentina's Provinces. In 2015, however, a new National Civil and Commercial Code ("NCCC") was adopted, based to a significant degree on the UNCITRAL Model Law, with Article 1656 expressly adopting the principal that an arbitration agreement should always be interpreted so as to ensure its effectiveness.[111] Even here, though, the traditional approach remained, with Article 1656 also including the express affirmation that the right of parties to challenge in court an arbitral award that contravened the legal order could not be waived. Subsequent case law, however, addressed even this concern by holding that this restriction related only to the possibility of applications for annulment, not to substantive review of the award.[112]

These steps towards aligning Argentina's approach to arbitration with that of the dominant trend among arbitration jurisdictions was then further solidified in 2018, when Argentina adopted a new arbitration act that largely mirrors the UNCITRAL Model Law.

While it is too early to determine the impact of these legislative changes on the approach of Argentine courts to the interpretation of arbitration agreements, the steady movement in recent years of Argentine legislation towards the norms of international commercial arbitration, combined with the restrictive approach given to the interpretation of the "no waiver" clause in Article 1656 of the NCCC provide some ground for concluding that Argentina will now also move towards acceptance of the broad approach to the interpretation of arbitration agreements that has now become the dominant approach around the world.[113]

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[109] *Supermarkets Norte Investments B.V. v. Carrefour S.A. y otros s/ ordinarioI*, CNCom, sala F, Expediente N° 9120/2011, 2017, 2.

[110] *Id.*

[111] "En caso de duda ha de estarse a la mayor eficacia del contrato de arbitraje."

[112] *See* F. Campolieti and S. Pena, 'Argentina', The International Arbitration Review Edition 10, August 2019.

[113] *Landmark Investors SRL v. Emprendimientos Inmobiliarios Arenales S.A. s/ordinario*, CNCom, sala C, Expte.nro. 14807/2015 (enforcing an arbitration agreement, but without expressly refering to the provisions of the new law).

5. Conclusion

The particular language of standard dispute resolution clauses may have significant interpretive consequences depending on the jurisdiction in which the clause is being analyzed. As the above discussion indicates, countries around the world are now increasingly adopting policies favouring a broad interpretation of arbitration clauses and a decreasing number of jurisdictions remain in which arbitration clauses are interpreted narrowly. Some jurisdictions, like the United States and Hong Kong, continue to move toward an expansive interpretation of arbitration agreements, while other courts, such as those of France, have adopted an approach that most strongly favours the will of the parties. Even courts in jurisdictions that traditionally interpreted arbitration clauses narrowly, such as mainland China and Argentina, seem to have embraced this change and are now moving towards interpreting clauses more liberally.

Reflecting on the present chapter, the authors welcome these changes but believe that a careful balance has to be struck where only disputes intended to be resolved by arbitration ultimately fall outside the hands of domestic courts. This is because, if courts want to enhance the rule of law and honor the parties' intent, not 'any and all' claims can fall within an arbitral tribunal's jurisdiction if the parties did not so intend. As such, drafters of arbitration clauses should be attentive to the subtle distinctions between jurisdictions when choosing the terms of a clause, whether or not the arbitration clauses are standard. Particular importance should be paid to limiting the scope of the clause, where desired, given the increasing tendency of courts around the world to broadly interpret arbitration clauses.