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INTERNATIONAL COMMERCIAL ARBITRATION AND THE ARBITRATOR'S CONTRACT

By  
Jaclyn Reilly\*

I. INTRODUCTION

The formation of the arbitrator's contract requires a significant amount of consideration when parties agree to enter into international commercial arbitration. This is especially true where parties to the arbitration agreement are not familiar with arbitration. Emilia Onyema's book, *International Commercial Arbitration and the Arbitrator's Contract*,<sup>1</sup> makes that point, although the author takes a while to get to make it clear. While the book discusses many theories about contract formation during the arbitration process, the focus of this article will mainly be the formation of the arbitration agreement and the parties thereto, the formation of the arbitrator's agreement and the parties thereto, and the terms of the arbitrator's agreement. The chapters focusing on these topics contain practical information because these chapters are not so theoretical and provide a very thorough explanation that would be especially helpful to those not familiar with international commercial arbitration. There are other topics covered in this book, but this author feels these topics are beyond the scope of this article because of the high technical and theoretical nature of the chapters. While these other topics may have some useful practical application for a small number of people, the complexity of the information's presentation in conjunction with its limited applicability are beyond the scope of this piece.

In discussing international commercial arbitration, the book uses examples of laws from different countries to show how different arbitration laws are written and applied to arbitral proceedings. The author gave examples from Brazil, China,

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<sup>1</sup> EMILIA ONYEMA, *INTERNATIONAL COMMERCIAL ARBITRATION AND THE ARBITRATOR'S CONTRACT* 8 (Routledge 2010).

and Switzerland, and also from the New York Convention and the UNCITRAL Model Rules, but did not discuss why the laws presented were important or whether these laws were representative of those in other countries. Also, cases and statutes were the only examples used; there were no real-life examples of arbitration agreements. Such examples may have added to the reader's understanding of certain concepts, such as how parties may describe the procedures to follow when appointing an arbitrator and also how the terms in the arbitrator's contract should be written so that the terms are clear and enforceable.

The book discussed the arbitration agreement at length and provided a good overview for anyone unfamiliar with arbitration, especially the discussions about identifying the parties and how to form an arbitration agreement. The arbitration agreement is important because it sets out how the arbitration proceeding should be conducted, identifies those parties who will participate in the arbitration proceeding, sets out how an arbitrator is to be appointed and details any other important decisions the parties have made regarding the arbitration. The chapter that describes the parties to the arbitrator's agreement discusses mainly which parties have rights and obligations under the arbitrator's contract and who may have the authority to appoint an arbitrator. There is also an extensive chapter regarding the formation of the arbitrator's contract. Both this chapter and preceding chapter discuss the differences between ad-hoc and institutional arbitration and why the choice between the two forms has a drastic impact on how the arbitrator's contract is formed. Lastly, thirteen terms that should be considered and perhaps included in the arbitrator's contract are discussed individually in great detail.

While overall this book may not have practical application because of its focus on contract theory and the technicalities of entering into the arbitrator's contract, it is worth noting that the chapter dealing with the terms to include in the arbitrator's contract did provide a thoughtful discussion of what the parties should consider when entering into the arbitrator's contract. These terms will allow the

parties to refer to the arbitrator's contract to resolve disputes in a wide variety of circumstances that may arise during the arbitral process. Those circumstances may include when parties are able to challenge the appointment of arbitrators, who may decide challenges and what laws govern the arbitrator's contract. This chapter would be most useful to those who are not necessarily familiar with executing these kinds of contracts because there are different considerations that need to go into the arbitrator's contract in international commercial arbitration than in other contracts.

## II. THE ARBITRATION AGREEMENT

The basis for any arbitration proceeding is the arbitration agreement. Parties may agree to arbitration in one of two ways.<sup>2</sup> An arbitration agreement can be a clause in the main contract in which the parties to the main contract agree to submit any future disputes to arbitration; or parties may execute a separate submission agreement after a dispute arises and thereby promise to submit the current dispute to arbitration.<sup>3</sup> The arbitration agreement evidences the parties' exchange of promises and intent to be bound to arbitrate disputes, and therefore, the arbitration agreement is a contract for which parties must have legal capacity to enter into as provided for by the national laws governing the contract.<sup>4</sup> Lack of consent with respect to an arbitration agreement will nullify any proceedings already commenced or award rendered.<sup>5</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 9.

<sup>5</sup> *Id.* at 8.

A. *Parties to the Arbitration Agreement*

The parties to an arbitration agreement are bound to arbitrate disputes covered by the arbitration agreement, and, therefore, identifying the parties is a critical inquiry to undertake before the commencement of any arbitral proceeding.<sup>6</sup> Where a written agreement is present, this inquiry will be relatively straightforward because the agreement will name the parties and give a description of the same.<sup>7</sup>

Parties to an arbitration agreement can be any individual or entity that can sue and be sued under the laws of their domicile.<sup>8</sup> Sovereign states and state-owned companies may be engaged in commercial transactions and, therefore, may be subject to arbitration if the applicable arbitration laws allow them to participate in binding arbitration.<sup>9</sup> Further, a non-signatory may be considered a party to the arbitration agreement in which that party acquires rights and obligations under the contract.<sup>10</sup>

In international commercial arbitration, the group of companies' doctrine is followed where companies may be complexly structured in joint ventures and partnerships.<sup>11</sup> Companies structured under this doctrine are likely to have subsidiaries operating in multiple states, and thus it is harder to determine exactly which entity is bound by an arbitration agreement because multiple subsidiaries may have been involved in executing a contract.<sup>12</sup> In these cases, subsidiaries will be bound to arbitrate if they were "actively involved in the formation, performance

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<sup>6</sup> ONYEMA, *supra* note 1, at 9.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 10.

<sup>9</sup> *Id.* at 13.

<sup>10</sup> *Id.* at 12.

<sup>11</sup> ONYEMA, *supra* note 1, at 11.

<sup>12</sup> *Id.*

and possible termination of the contract.”<sup>13</sup> Therefore even where a subsidiary did not sign or is not named in a contract, it may still be bound to arbitrate.<sup>14</sup>

A party to an arbitration agreement must have legal capacity in order for the agreement to be valid and binding.<sup>15</sup> An individual who has the capacity to enter into a contract under most national laws must be an adult without a legal impediment;<sup>16</sup> an example of such impediment is mental incapacity.<sup>17</sup> In international commercial arbitration, it is also important to determine when an entity has capacity since it is most often companies that are parties to such arbitration agreements.<sup>18</sup> A company is said to have capacity where it is incorporated according to the relevant laws and the company is authorized to enter into such contracts under the “articles of association or the company’s constitution.”<sup>19</sup> An entity may claim incapacity when a person enters into a contract but is not authorized to do so.<sup>20</sup>

#### *B. Formation of the Arbitration Agreement*

An arbitration agreement is considered a bilateral contract, meaning that the parties enter into the agreement through an exchange of promises.<sup>21</sup> The promise contained in an arbitration agreement is that each party promises to submit covered disputes to arbitration.<sup>22</sup> This means that a party is able to commence arbitration proceedings upon the occurrence of an event that the agreement provides will be resolved through arbitration.<sup>23</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 11-12.

<sup>15</sup> *Id.* at 14.

<sup>16</sup> ONYEMA, *supra* note 1, at 14.

<sup>17</sup> *Id.* at 186, n. 43.

<sup>18</sup> *Id.* at 14.

<sup>19</sup> *Id.* at 14-15.

<sup>20</sup> *Id.* at 15.

<sup>21</sup> ONYEMA, *supra* note 1, at 15.

<sup>22</sup> *Id.* at 16.

<sup>23</sup> *Id.*

In order to resort to arbitration, the parties must first enter into a valid and binding arbitration agreement. This is accomplished through a valid offer of terms that the offering party is willing to be bound by, and acceptance, which is the other party's agreement to be bound by the terms presented by the offering party.<sup>24</sup> In other words, each party must intend to be bound by the arbitration agreement in order for it to be a valid contract.<sup>25</sup>

The way an offer and acceptance is accomplished differs depending on whether the arbitration agreement is a clause in the main contract or is a separate submission agreement. Where the arbitration agreement is contained in the main contract, the offer to arbitrate is made at the same time as the offer of the other terms in the main contract.<sup>26</sup> The offeror, the party making the offer, is therefore the same with regards to both the arbitration agreement and the main contract.<sup>27</sup> In contrast, where the parties enter into a submission arbitration agreement, the offeror is the party who first expresses a clear intent to arbitrate the existing dispute; the offeree is then able to accept or reject the offer to arbitrate.<sup>28</sup>

Once the parties have agreed to enter into the arbitration agreement through an offer and acceptance, there are certain formal requirements that need to be met so that the contract to arbitrate will be considered valid. First, most national laws require a written agreement.<sup>29</sup> The promise to arbitrate disputes needs to be reduced to a writing because the parties are considered to be giving up a legally protected right to be heard in court and instead have chosen to pursue recourse through private dispute resolution.<sup>30</sup> Under the New York Convention, a writing may be evidenced through a signed writing that is contained in an exchange of

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<sup>24</sup> *Id.* at 15.

<sup>25</sup> *Id.* at 16.

<sup>26</sup> ONYEMA, *supra* note 1, at 15.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 17.

<sup>30</sup> *Id.*

documents; therefore the arbitration agreement does not need to be contained in a single document or the underlying contract between the parties.<sup>31</sup>

The New York Convention has several formal requirements that must be followed in order to form a valid arbitration agreement.<sup>32</sup> First, it offers a flexible definition of a writing by not requiring the arbitration agreement to be contained in a single document.<sup>33</sup> The New York Convention also requires a signature; this requirement will be satisfied if the arbitration agreement is a clause in the main contract and the parties sign the main contract.<sup>34</sup> While the New York Convention has these requirements, it does not necessarily follow that these formalities are required everywhere, and therefore the laws that will govern the arbitration agreement should be consulted to ensure conformity.<sup>35</sup>

Arbitrability must be determined before an arbitration agreement can be found valid. Many nations will not allow certain subject matters to be resolved through arbitration, and an attempt to arbitrate these inarbitrable disputes will result in a finding that the arbitration agreement was not valid.<sup>36</sup> Parties are advised to consult the specific laws governing the arbitration agreement to avoid attempting to arbitrate an inarbitrable subject matter.<sup>37</sup> Other laws that may be consulted to determine arbitrability are the laws of the seat of the arbitration, the laws governing the underlying contract, and those of the place where the parties are domiciled.<sup>38</sup>

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<sup>31</sup> ONYEMA, *supra* note 1, at 18.

<sup>32</sup> *Id.* at 17-18.

<sup>33</sup> *Id.* at 18.

<sup>34</sup> *Id.* at 19.

<sup>35</sup> *Id.* at 17.

<sup>36</sup> ONYEMA, *supra* note 1, at 19.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 19-20.



C. *The Doctrine of Separability*

While an arbitration agreement may be a clause found in a contract, it is still considered a separate contract.<sup>39</sup> That is, when the main contract contains an arbitration clause, that clause is considered a separate arbitration agreement.<sup>40</sup> The doctrine of separability seeks to protect the parties' decision to arbitrate disputes because, if the main contract is deemed invalid or illegal, the validity of the arbitration agreement will not be affected.<sup>41</sup> There is one significant problem that may arise in international commercial arbitration: the possibility that different laws may govern the main contract and the arbitration agreement.<sup>42</sup>

The overall effect of the doctrine of separability is that it forces a party seeking to invalidate the arbitration agreement to prove that the arbitration agreement itself is somehow invalid.<sup>43</sup> If parties do not wish the doctrine of separability to apply, they may avoid application by agreeing that the arbitration clause is not separable from the rest of the contract.<sup>44</sup> It does not necessarily follow, however, that an arbitration agreement will always be found valid where the main contract is invalid. If the legal issue for invalidating the main contract extends to the arbitration agreement, then the arbitration agreement will also be found invalid.<sup>45</sup> For example, if a party enters into a contract without legal capacity, the lack of capacity also affects the arbitration agreement and will thereby invalidate that agreement as well.<sup>46</sup>

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<sup>39</sup> *Id.* at 20.

<sup>40</sup> *Id.*

<sup>41</sup> ONYEMA, *supra* note 1, at 20.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 21.

<sup>44</sup> *Id.* at 21-22.

<sup>45</sup> *Id.* at 21.

<sup>46</sup> ONYEMA, *supra* note 1, at 21.

D. *Laws Applicable to the Arbitration Agreement*

Laws applicable to the arbitration agreement are those laws that regulate the parties' rights and obligations and will be applied to interpret and enforce the arbitration agreement.<sup>47</sup> Parties may expressly agree which arbitration laws or rules will apply to the arbitration agreement, and the agreed upon law will be applied whether the parties execute an arbitration clause or a submission agreement.<sup>48</sup> In practice, it is more common for the parties to agree on the applicable laws where there is a submission agreement as opposed to an arbitral clause.<sup>49</sup>

Where there is not an agreement amongst the parties as to which laws apply, there are several other ways to make such a determination.<sup>50</sup> Conflict of laws principles may be analyzed to find out which laws will govern the arbitration agreement.<sup>51</sup> In looking at which laws have the closest connection to the arbitration agreement, there are typically three options to decide which laws will apply: the laws of the place in which the arbitration agreement was executed,<sup>52</sup> those laws that govern the main contract, and the laws of the seat of arbitration.<sup>53</sup> The seat of the arbitration refers to the laws of the country under which the arbitral award was made.<sup>54</sup>

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<sup>47</sup> *Id.* at 22.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 23.

<sup>51</sup> ONYEMA, *supra* note 1, at 23.

<sup>52</sup> *Id.* This conflict of law approach is endorsed by the Swiss Federal Arbitration Law Article 178(2).

<sup>53</sup> ONYEMA, *supra* note 1, at 23.

<sup>54</sup> *Id.*

*E. Forms of Arbitration Proceedings*

There are two general forms of arbitration: ad-hoc arbitration and institutional arbitration.<sup>55</sup> In ad-hoc arbitration parties are able to agree on which procedures will be followed.<sup>56</sup> This may include procedural rules provided by the UNCITRAL Model Rules, or the rules of an arbitration institution, or the parties may wish for the arbitral tribunal to determine which procedures to apply.<sup>57</sup> In the alternative, the parties may create the rules of procedure that will be followed throughout the arbitration proceedings.<sup>58</sup> Under institutional arbitration, however, the parties agree to incorporate the rules of an identified arbitration institution into their arbitration agreement, making the parties subject to the institution's procedural rules.<sup>59</sup> The parties may, however, agree to modify the institution's rules, which gives the parties the freedom to create their own rules within a provided framework.<sup>60</sup>

There are several other matters parties should consider when deciding between ad-hoc and institutional arbitration. One advantage to choosing ad-hoc arbitration is that it is less expensive because the parties do not have to pay the administrative fees that are associated with institutional arbitration.<sup>61</sup> One disadvantage to ad-hoc arbitration is that it is very unlikely that parties will be able to provide solutions for every situation that may arise during the course of the arbitration proceedings.<sup>62</sup> As such, parties are able to agree on which laws to apply if the agreement is silent on an issue. In essence, the parties agree to their own

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<sup>55</sup> *Id.* at 25.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> ONYEMA, *supra* note 1, at 25.

<sup>59</sup> *Id.* at 27.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 26.

<sup>62</sup> *Id.* at 25-26.

default rules, and where these default rules are not expressly agreed to, the arbitration laws of the seat of arbitration are followed.<sup>63</sup>

In contrast, the main advantage of institutional arbitration over ad-hoc arbitration is that the institution will provide all the necessary assistance needed to the parties and provide for the administrative needs of the tribunal, allowing the tribunal to focus on the proceeding.<sup>64</sup> Another advantage to institutional arbitration is the parties may agree to apply the rules of the arbitration institution but are not bound to hold the proceedings in the place where the institution is located.<sup>65</sup> The main disadvantage associated with institutional arbitration is, that, because of the services the institution provides, there is an additional cost for choosing institutional arbitration.<sup>66</sup>

The seat of arbitration may have arbitration laws with mandatory provisions that apply to both ad-hoc and institutional arbitration. These mandatory provisions limit the parties' ability to create the arbitral proceeding in ad-hoc arbitration.<sup>67</sup> Mandatory provisions may also limit the applicability of institutional rules to an arbitration proceeding because, if the mandatory laws and the institutional rules differ, the mandatory provisions will apply.<sup>68</sup>

#### *F. Summary*

The first chapter of the book served as a good introduction to arbitration and would most likely aid those who may not be familiar with the formalities of an arbitration agreement or the benefits of choosing one form of arbitration over the other. It also provided a framework of some terms that should be considered before parties agree to arbitration, such as what laws should apply to the arbitration

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<sup>63</sup> ONYEMA, *supra* note 1, at 26.

<sup>64</sup> *Id.* at 27-28.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 28.

<sup>67</sup> *Id.*

<sup>68</sup> ONYEMA, *supra* note 1, at 29.

agreement, should those laws differ from the laws that apply to the main contract, and whether the doctrine of separability should apply to the arbitration clause.

While there was a concise yet clear introduction to arbitration, this introduction included several drawbacks. First, the author used laws from many different countries to explain certain concepts. The use of real-life examples of different concepts to enhance understanding was good, but the examples were not focused because the laws were from all over the world. Perhaps a focus on just a few countries whose laws differ from each other would have made for a better understanding of the material to contrast what parties may find as part of a country's mandatory arbitration provisions. The approach the author chose might have been better had she provided an explanation of why certain laws were chosen. For example, the New York Convention is quoted several times, but the author never says why this particular international agreement is important, as it must be or it would not be quoted so much. The case examples given added more to the content because the author took time to explain what the case was about and why it was important. When she detailed the statutes, however, the statutory language was given with little discussion about what that particular law means or the impact that particular law has on international commercial arbitration as opposed to other laws.

The author also tended to use subsections to explain a very narrow piece of arbitration. While separating the information was helpful to the reader in order to follow some of the complex issues that were brought up in this chapter, the chapter did not need to be so segmented as to warrant the repetition of material. For instance, it may have been helpful to have the discussions about ad-hoc and institutional arbitration in the same section to compare and contrast the two forms of arbitration directly rather than having to refer back to information that was already presented. Also, some of the sections were short and did not need their own subsection to explain the concept. An example of this was the discussion on the intention of the parties to contract, which the author presented in a separate

subsection,<sup>69</sup> but could have very easily presented this information in the subsection on the existence of an agreement.<sup>70</sup> This would have introduced and discussed in the same section the information on offer, acceptance and intent; this order might have made more sense from a reader's standpoint because these small concepts are important to the formation of an arbitration agreement.

Except for those small interruptions to the flow of information, the chapter was very helpful. In a logical manner, it presented the important points to be considered when forming an arbitration agreement by starting with offer and acceptance, then proceeding to how to form a valid arbitration agreement and what should be taken into consideration when agreeing to arbitrate. This information would be useful to those who may not regularly execute arbitration agreements.

### III. PARTIES TO THE ARBITRATOR'S CONTRACT

The third chapter of the book discussed the parties to the arbitrator's contract and how those parties will differ, depending on the form of arbitration the disputing parties choose to pursue. In ad-hoc arbitration, the disputing parties will contract directly with the arbitrator, whereas in institutional arbitration the arbitrator will contract with the institution and not with the disputing parties.<sup>71</sup> Before discussing the formation of the arbitrator's contract, it is important to understand the impact this distinction will have on to the arbitration proceeding.

The disputing parties, in a submission agreement, are able to select an arbitrator either by expressly naming the arbitrator in the arbitration agreement or by providing for how the arbitrator is to be selected.<sup>72</sup> When parties name and appoint an arbitrator in a submission agreement, this naming is proof of the arbitrator's appointment; however, this does not make the arbitrator a party to the

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<sup>69</sup> *Id.* at 15-16.

<sup>70</sup> *Id.* at 15.

<sup>71</sup> *Id.* at 60.

<sup>72</sup> *Id.* at 61.

arbitration agreement.<sup>73</sup> Also, if the terms of appointment are not contained in the arbitration agreement but the arbitrator is named, a separate contract must be executed because a contract for the arbitrator's services is still necessary.<sup>74</sup>

The arbitrator functions as a private judge, as appointed by the disputing parties or institution, to resolve a contractual dispute that arises from the main contract.<sup>75</sup> Disputing parties are able to provide specific guidelines as to how an arbitrator should be selected and identify what qualities the arbitrator should possess. For instance, disputing parties may require the arbitrator to have certain professional qualifications,<sup>76</sup> such as expertise in the subject matter of the main contract.<sup>77</sup> When the parties agree that the arbitrator should possess certain qualities and the appointed arbitrator does not meet those qualifications, the arbitrator may be disqualified or found to be in breach of contract if the arbitrator deliberately violated this provision.<sup>78</sup>

Once the arbitrator meets any qualifications the parties may have prescribed the arbitrator must be appointed in order to preside over the arbitration proceedings.<sup>79</sup> The disputing parties directly appoint the arbitrator when the disputing parties "contact, interview and select" the person or entity that will oversee the arbitral proceedings for that particular dispute.<sup>80</sup> Indirect appointment occurs when the disputing parties grant the power to appoint the arbitrator to a third party.<sup>81</sup> Some national laws require the arbitrator to accept his or her appointment; other laws recognize that the arbitrator has accepted the position

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<sup>73</sup> ONYEMA, *supra* note 1, at 61.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 64.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 65.

<sup>78</sup> ONYEMA, *supra* note 1, at 66.

<sup>79</sup> *Id.* at 67.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

once the arbitrator has started to perform the role of arbitrator without an express acceptance.<sup>82</sup>

An arbitration institution may also be a party to the arbitrator's contract. While the arbitration institution does not decide disputes, it does perform other tasks essential to the arbitration proceeding. First, the arbitration institution provides rules on how arbitration proceedings should be conducted which disputing parties may agree to follow during the course of the arbitration.<sup>83</sup> Second, when the disputing parties file a request to arbitrate with a particular arbitration institution, the institution may have the authority to assess whether a valid arbitration agreement exists and whether the arbitration is to be conducted according to the arbitration institution's rules.<sup>84</sup> Third, arbitration institutions are able to appoint arbitrators either when the disputing parties have chosen institutional arbitration or when the parties have granted the institution appointment authority in an ad-hoc proceeding.<sup>85</sup>

#### A. *Summary*

This chapter effectively described who may become the parties to the arbitrator's contract. The last section of this chapter, which was not discussed above, is very theoretical and discusses the different theories behind how the arbitrator's contract may be formed. This section has little practical application because it is all based on presumptions; and the author was arguing which contract theory is more applicable and why. Therefore, this section is not very helpful to those practicing in the field of arbitration, and even less helpful to those who want to learn more about the field, because it has very confusing language and adds little

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<sup>82</sup> *Id.* at 67-68.

<sup>83</sup> ONYEMA, *supra* note 1, at 72.

<sup>84</sup> *Id.* at 73.

<sup>85</sup> *Id.* at 73-74.



to the rest of the chapter's discussion on who the parties to the arbitrator's contract are.

The discussion of the disputing parties, the arbitrator and the arbitration institution may be helpful for those seeking to learn more about arbitration. This discussion gives a good description of the disputing parties and the institutions, but in the section that is supposed to be discussing the arbitrator, the author seems to describe more of what the parties want in an arbitrator rather than the arbitrator's position itself. Further, while these overviews are helpful, these descriptions would be better if added to the discussion in the next chapter on the formation of the arbitrator's contract so that the reader will be better able to understand how exactly these parties are involved in the formation and execution of the arbitrator's contract.

#### IV. FORMATION OF THE ARBITRATOR'S CONTRACT

##### A. *Ad-hoc Arbitration*

In ad-hoc arbitration, a sole arbitrator may be appointed to preside over the proceedings.<sup>86</sup> This is the simplest way to appoint an arbitrator because the disputing parties need only to decide on one arbitrator to oversee the proceedings.<sup>87</sup> There is, however, one disadvantage to having a sole arbitrator in ad-hoc arbitration: the disputing parties must agree on the arbitrator while they are already in the middle of a dispute.<sup>88</sup> The parties to the arbitrator's contract in this form of a proceeding will be the disputing parties and the sole arbitrator.<sup>89</sup>

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<sup>86</sup> *Id.* at 85.

<sup>87</sup> *Id.*

<sup>88</sup> ONYEMA, *supra* note 1, at 85.

<sup>89</sup> *Id.*

One device that may assist parties in appointing an arbitrator is to employ the List procedure.<sup>90</sup> This procedure involves each disputing party compiling a list of potential sole arbitrators, exchanging the lists, and then ranking the people named on the list based on preference.<sup>91</sup> The disputing parties then engage in a process of elimination until a single arbitrator is named.<sup>92</sup> This process assists disputing parties because each disputing party then has options as to who to appoint, and the process of elimination will aid the disputing parties in coming to an agreement on the sole arbitrator.<sup>93</sup>

In ad-hoc arbitration, the disputing parties may also elect to have an appointing authority or national court appoint a sole arbitrator to preside over the proceedings.<sup>94</sup> An appointing authority may get involved in the appointment of an arbitrator when the parties did not state in the arbitration agreement how to appoint an arbitrator and the default laws provide for this method of appointment, or where the parties agreed in the arbitration agreement to have an appointing authority appoint the arbitrator.<sup>95</sup> A national court may be authorized to appoint a sole arbitrator when the disputing parties have not selected an appointing authority or if the appointing authority fails or refuses to act.<sup>96</sup>

The disputing parties may elect to use an appointing authority either at the time the arbitration agreement is executed or when a dispute arises.<sup>97</sup> The appointing authority will make an offer to the sole arbitrator who, in turn, will accept directly to the appointing authority.<sup>98</sup> The appointing authority, however, does not become a party to the arbitrator's contract because the appointing

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> ONYEMA, *supra* note 1, at 86.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 87.

<sup>98</sup> ONYEMA, *supra* note 1, at 88.

authority is acting as the disputing parties' agent.<sup>99</sup> Therefore the arbitrator's contract will be between the disputing parties and the arbitrator; the parties to the arbitrator's contract agree on the terms.<sup>100</sup>

When the disputing parties seek the assistance of a national court, that court must have jurisdiction to appoint the arbitrator.<sup>101</sup> The court will nominate a sole arbitrator and either contact him or her directly or allow the disputing parties to contact that person.<sup>102</sup> If the court takes the former approach, the arbitrator must still accept directly to the disputing parties because the court does not act as the disputing parties' agent.<sup>103</sup> Therefore, just as with an appointing authority, it is up to the disputing parties and the arbitrator to agree to the terms of the arbitrator's contract.<sup>104</sup>

Disputing parties may agree to have their arbitration proceedings conducted by an arbitral tribunal as opposed to a sole arbitrator. In a tribunal setting, each disputing party will select one arbitrator and the two party-selected arbitrators will then appoint a third presiding arbitrator.<sup>105</sup> In international commercial arbitration, the party-appointed arbitrators are said to be acting according to the terms of the arbitrator's contract in appointing the presiding arbitrator and not as an agent of the disputing parties.<sup>106</sup>

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 88-89.

<sup>101</sup> *Id.* at 89.

<sup>102</sup> *Id.*

<sup>103</sup> ONYEMA, *supra* note 1, at 89-90.

<sup>104</sup> *Id.*

<sup>105</sup> ONYEMA, *supra* note 1, at 91 (using a three member arbitral tribunal as an example, however parties may elect to have more or less arbitrators with a similar process).

<sup>106</sup> *Id.* at 93.

*B. Institutional Arbitration*

Disputing parties may enter into a contract with an arbitration institution to administer the proceedings according to the institution's rules.<sup>107</sup> Most arbitration institutions provide that the disputing parties nominate the arbitrators, but the institution confirms the arbitrators, pursuant to the rules and practices of the institution.<sup>108</sup> The institution may become a party to the arbitrator's contract instead of the disputing parties depending on whether the institution is acting as a principal or as the disputing parties' agent.<sup>109</sup>

In the context of a sole arbitrator in institutional arbitration, the institution most likely acts as the disputing parties' agent and therefore is not a party to the arbitrator's contract.<sup>110</sup> This is so because the disputing parties will appoint the sole arbitrator according to the institution's rules and the institution merely accepts the appointment by contracting with the arbitrator.<sup>111</sup> If, however, the institution appoints the sole arbitrator without any contribution from the disputing parties, then the institution will be acting as principal and will become a party to the arbitrator's contract.<sup>112</sup> Therefore, in a sole arbitrator proceeding the determination of whether an arbitration institution acts as a principal or the disputing parties' agent will be dependent upon the participation of the disputing parties in the appointment of the sole arbitrator.

Where an arbitral tribunal is to consist of three members, the arbitration institution may reserve confirmation power over the disputing parties' nomination for arbitrators.<sup>113</sup> The two party-appointed arbitrators then nominate the third

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<sup>107</sup> *Id.* at 95.

<sup>108</sup> *Id.* at 93-94.

<sup>109</sup> *Id.* at 95.

<sup>110</sup> ONYEMA, *supra* note 1, at 98.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 99.

<sup>113</sup> *Id.*

presiding arbitrator who is also subject to confirmation by the arbitration institution.<sup>114</sup> This process has the effect of the institution becoming a party to the arbitrators' contracts instead of the disputing parties.<sup>115</sup> The arbitration institution may not become a party to the arbitrators' contracts when the rules of the institution provide that the disputing parties will directly appoint the arbitrators, thereby making the disputing parties and the arbitrators the ones who execute the arbitrators' contract.<sup>116</sup> This situation would be the result if the arbitration institution does not reserve confirmation power for itself, and thus allows the disputing parties to appoint the arbitrators pursuant to their own requirements.<sup>117</sup>

C. *Classification of the Arbitrator's Contract*

An arbitrator's contract may be classified either under the agency theory or as a contract for services. Under the agency theory, an arbitrator is believed to act on behalf of the appointing party, which will be reflected in the arbitrator's decision.<sup>118</sup> This would impact the arbitrator's decision because the arbitrator would act in the best interest of the party that appointed that particular arbitrator.<sup>119</sup> On the other hand, the arbitrator's contract can be viewed as a contract for services.<sup>120</sup> Under this view, the arbitrator performs certain services for the disputing parties, such as ruling on the dispute, investigating the issues, and allowing the disputing parties to each present their side of the issues in conformity with his or her contract in return for payment.<sup>121</sup> It seems most likely that the

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<sup>114</sup> *Id.*

<sup>115</sup> ONYEMA, *supra* note 1, at 99.

<sup>116</sup> *Id.* at 100.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 103.

<sup>119</sup> *Id.*

<sup>120</sup> ONYEMA, *supra* note 1, at 103

<sup>121</sup> *Id.* (quoting FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 1119 (Emmanuel Gaillard and John Savage eds., Kluwer Law International 1999)).

arbitrator's contract is a contract for services since both the arbitrator and the disputing parties or institution (depending on who is executing the contract) have made promises to each other and are bound by such promises.<sup>122</sup>

*D. Summary*

This chapter was difficult to get through because of its organization. First, the author used diagrams to illustrate how the contracts were formed and who was a party to those contracts. In doing so, however, the author did not discuss in close proximity to the diagram all of the concepts that the diagram applied to. For example, Figure 4.4 was used to show contract formation when an institution has confirmation power over the appointed arbitrator.<sup>123</sup> This diagram was mentioned again in the discussion of the appointment of a three-arbitrator panel.<sup>124</sup> While these discussions are only a few pages apart, it may be helpful to the reader to see the illustration and immediately after read why this illustration is important. Further, referencing figures in this way, the author may have been able to condense the chapter into fewer sections, which would allow for a clearer presentation of the information without being interrupted by section headings. Also, the author set out case studies in the beginning of the chapter that were supposed to be illustrative of the concepts being discussed; however, when the book discussed those concepts, the author did not restate the case study, but referred to it by number. If, in addition to the case study number, an actual case was used to describe a point, perhaps the concept would have been easier to follow and would have afforded the reader a greater understanding of the concepts being discussed.

This chapter was also redundant. The discussions about institutional arbitration with a sole arbitrator or with a three-person panel were almost identical. This led to the same information being repeated, when all that needed to be done

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<sup>122</sup> *Id.* at 103-04.

<sup>123</sup> *Id.* at 91.

<sup>124</sup> *Id.* at 99.

was to combine these two subsections into one and discuss the differences between the two types of proceedings.

What was helpful about this chapter was the discussion on ad-hoc arbitration. The author did not delve too much into the technicalities of contract formation in this section, perhaps because there are fewer theories surrounding the formation of this contract. Also, the broad introduction to institutional arbitration did have practical application because it gave an introduction to the information that followed. These sections were not as dense as the others and really discussed the arbitration proceedings as a whole as opposed to the minor details of the proceedings.

#### V. TERMS OF THE ARBITRATOR'S CONTRACT

The terms found in the arbitrator's agreement vary from proceeding to proceeding, but there are some terms that are consistently found in the arbitrator's contract.<sup>125</sup> The availability of the parties is an important exchange of promises; it says that the arbitrator will be in attendance at the proceedings and render an award and that the disputing parties will attend all proceedings and produce all necessary documents.<sup>126</sup> This term is important because it requires the arbitrator and the parties to avoid any undue delay; it also requires the arbitrator to render a timely award.<sup>127</sup>

Another important term is that the arbitrator must possess any special qualifications described by the disputing parties in the arbitration agreement. If this term is not satisfied, a disputing party may terminate the arbitrator's contract.<sup>128</sup> The scope of the arbitrator's powers should be considered before the arbitrator's

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<sup>125</sup> ONYEMA, *supra* note 1, at 122-23.

<sup>126</sup> *Id.* at 123.

<sup>127</sup> *Id.* at 123-24.

<sup>128</sup> *Id.* at 125.

contract is executed.<sup>129</sup> This will give the arbitrator the power to decide certain issues, which should be clearly identified in the arbitration agreement.<sup>130</sup> If there is a gap left by the parties, the arbitration rules and laws of the seat of arbitration may be supplemented to determine the scope of the arbitrator's powers.<sup>131</sup>

Compliance with the arbitration agreement is another term that should be included in the arbitrator's contract.<sup>132</sup> Even though the arbitrator and the institution are not parties to the arbitration agreement, compliance with the arbitration agreement is the source of the proceedings and therefore must be followed.<sup>133</sup> It should also include the disputing parties' duty to comply with the decision of the arbitrator.<sup>134</sup> While this is a duty placed on the disputing parties, it is still a term of the arbitrator's contract because the disputing parties agree not to cause any unnecessary delay in the arbitral proceedings. Also, compliance with an arbitrator's final award will allow the proceedings to come to an end and not cause any undue delay after the proceedings have been concluded.<sup>135</sup> Where an arbitration institution is a party to the arbitrator's contract, the institution promises that the disputing parties will comply with the arbitral award and the institution is able to take action against the non-complying party.<sup>136</sup>

The disputing parties will agree to pay for all services received during the course of the arbitration proceedings.<sup>137</sup> In ad-hoc arbitration, the arbitrator and disputing parties agree to the term of fees, whereas in institutional arbitration it may be either the arbitrator or the institution that fixes the fees.<sup>138</sup> In ad-hoc arbitration when a three-person panel is presiding over the proceedings, each

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<sup>129</sup> *Id.* at 127.

<sup>130</sup> ONYEMA, *supra* note 1, at 127.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 128.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 129.

<sup>135</sup> ONYEMA, *supra* note 1, at 130.

<sup>136</sup> *Id.* at 130-31.

<sup>137</sup> *Id.* at 131.

<sup>138</sup> *Id.*



arbitrator contracts separately for the fees they are to be paid for their services.<sup>139</sup> Disputing parties do not pay the arbitrators directly, but instead will deposit money in a bank account and the presiding arbitrator will distribute the funds.<sup>140</sup> Where an arbitration institution is a party to the arbitrator's contract, the institution will fix fees payable to the arbitrator.<sup>141</sup> If this term is breached, the arbitrator will be able to recover fees from the disputing parties when the institution contracts as their agent; the arbitrator may recover from the institution if the institution contracts as a principal.<sup>142</sup> The arbitrator may still be able to recover from the disputing parties in the latter situation because the disputing parties received a benefit under the arbitrator's contract.<sup>143</sup>

Confidentiality is another important term to consider when entering into the arbitrator's contract.<sup>144</sup> International commercial arbitrations are not necessarily confidential because most national laws are silent and only some arbitration institutions have rules regarding the confidentiality of proceedings and the documents presented during such proceedings.<sup>145</sup> Most institutional rules do, however, impose a term of confidentiality when referring to the tribunal's deliberations.<sup>146</sup> Because there is no set standard on confidentiality in arbitration proceedings, the parties must consult the national laws and arbitration rules before entering into an arbitrator's agreement so that the parties will be able to provide for the level of confidentiality that they wish to be followed.<sup>147</sup>

In the arbitrator's contract, the arbitrator has an obligation to treat the parties equally.<sup>148</sup> The main purpose of this provision is that the tribunal shall hold

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<sup>139</sup> *Id.* at 133.

<sup>140</sup> ONYEMA, *supra* note 1, at 133-34.

<sup>141</sup> *Id.* at 135.

<sup>142</sup> *Id.* at 136.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 141.

<sup>145</sup> ONYEMA, *supra* note 1, at 141-42.

<sup>146</sup> *Id.* at 142.

<sup>147</sup> *Id.* at 142-43.

<sup>148</sup> *Id.* at 144.

each party to the same standard when the disputing parties present their case and respond to the case presented by its opponent.<sup>149</sup> Disputing parties should also consider including a term in the arbitrator's contract that requires immediate disclosure of potential conflicts of interests.<sup>150</sup> This disclosure will alert parties to potential bias, which is also a requirement found in many national laws.<sup>151</sup> This term is important to ensure an impartial proceeding and allows the disputing parties to decide whether the disclosure made should be a reason to challenge the arbitrator.<sup>152</sup>

The disputing parties have the right to challenge an arbitrator and should consult the arbitration rules and laws applicable to the proceeding to familiarize themselves with the grounds for such a challenge.<sup>153</sup> In ad-hoc arbitration, the appointing authority will decide any challenges to the arbitrator and in the absence of such an authority, the default rules of the seat of arbitration will control.<sup>154</sup> If it is then necessary to replace the arbitrator, the procedure provided in the arbitration agreement will be followed, and, in some cases, the original appointment method may be used again.<sup>155</sup> Where the parties have agreed to institutional arbitration, the institution will decide the challenges pursuant to its rules.<sup>156</sup>

The primary obligation dictated by the arbitrator's contract is to resolve the dispute.<sup>157</sup> If the arbitrator or the arbitral panel fails to render an award, the disputing parties will be able to recover from the arbitrator in ad-hoc arbitration and institutional arbitration where the institution acts as an agent.<sup>158</sup> In contrast, where the institution contracts as the principal to the arbitrator's contract, the disputing parties will be able to recover damages from the arbitration institution for

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<sup>149</sup> *Id.*

<sup>150</sup> ONYEMA, *supra* note 1, at 147.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 147.

<sup>153</sup> *Id.* at 150.

<sup>154</sup> *Id.* at 150-51.

<sup>155</sup> ONYEMA, *supra* note 1, at 152.

<sup>156</sup> *Id.* at 153.

<sup>157</sup> *Id.* at 155.

<sup>158</sup> *Id.* at 156.

breaching a term of the contract between the disputing parties and the institution, the promise to deliver the final award.<sup>159</sup>

Another term to be considered and included in the arbitrator's contract is the determination of what law will be applied to the arbitrator's contract.<sup>160</sup> The disputing parties have several options of which law to apply including the laws of the seat of the arbitration,<sup>161</sup> the laws of the place where the arbitrator's contract was formed,<sup>162</sup> or the place where the arbitrator's contract was performed.<sup>163</sup>

The last term to be considered is the laws that will govern a dispute arising out of the arbitrator's contract.<sup>164</sup> The parties to the arbitrator's contract may agree on what procedures to follow, which court or jurisdiction will be able to decide such disputes or even agree to submit their dispute to some form of alternative dispute resolution.<sup>165</sup>

#### A. *Summary*

This is by far the most applicable chapter for practitioners. While the title of the book says it refers to international commercial arbitration, the terms discussed in this chapter may be applied to almost any arbitration proceeding. The author gives a good description of each term and why that term is important and, where necessary, tells how the disputing parties and institutions are also bound to act under the arbitration agreement. The information was presented in a very

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<sup>159</sup> *Id.*

<sup>160</sup> ONYEMA, *supra* note 1, at 159.

<sup>161</sup> *Id.* at 162.

<sup>162</sup> *Id.* at 163.

<sup>163</sup> *Id.* at 164 (The application of this set of laws may differ from the application of the laws of the seat of arbitration because the arbitrator's contract is considered to be performed where the award was rendered and not necessarily where the arbitration proceedings took place).

<sup>164</sup> *Id.* at 165.

<sup>165</sup> ONYEMA, *supra* note 1, at 165.

logical order, following an arbitral proceeding almost from beginning (availability of the parties) to the end (disputes between the parties to the arbitrator's contract).

This material could have been more applicable if real-life examples of an arbitrator's contract were described to give the reader an idea of the specific language to use when drafting the arbitrator's contract to make these terms easily understandable and valid. Other than that, this chapter was very helpful, and the thirteen terms listed should be considered before entering into the arbitrator's contract.

## VI. CONCLUSION

The book, overall, would not be useful in practice. While there were a few chapters that could be relatable to more than just international commercial arbitration, as a whole, the author presented mostly theoretical ideas about contract formation and argued in favor of specific points over others. The chapter on the formation of the arbitrator's contract presented mostly theories about how the contract may be formed between the arbitrators and either the disputing parties or the arbitration institution. While some useful information was presented, such as the broad definitions of the different forms of arbitration parties may agree to participate in, overall the way the material was presented and the theoretical nature of this particular chapter proved to be confusing and did not add much in the way of practical knowledge as the chapters that discussed the arbitration agreement and the terms of the arbitrator's contract.

Further, most of the examples used were not helpful. Mostly the author relied on presenting the laws of various countries or rules of different institutions to present the material without explaining why these laws were important or how they contributed to the discussion. Had the book focused on just a few jurisdictions perhaps the examples would have been easier to follow, and instead of just being exposed to one section of the law, the reader would be able to understand the

overall statutory scheme. This overview would allow for a greater knowledge of how the laws would apply to the particular discussions in each chapter.

There were two chapters, however, that could prove useful in practice. The chapter that discusses arbitration agreements would be helpful to someone otherwise not familiar with arbitration to show how parties may enter into an agreement to arbitrate and what to consider before selecting which laws and institutional rules to apply. Likewise, the chapter on the terms to the arbitrator's agreement would be very helpful because some ideas were presented that may not immediately be considered by someone new to arbitration, such as the term of confidentiality that may not be provided for anywhere but in the arbitrator's agreement. While these two chapters stand out from the rest of the book because of their practical application, the confusing and segmented organization of the information, coupled with the author's argumentative presentation of some topics prevent this book from having useful application to most practitioners.