

DRAFTING EFFECTIVE ARBITRATION AGREEMENTS

by

SUNDRA RAJOO

Chartered Arbitrator, Architect and Town Planner

B Sc (HBP) Hons (USM),

LLB Hons (London), CLP

Grad Dip in Architecture (TCAE),

Grad Dip in Urban and Regional Planning (TSIT)

M Sc in Construction Law and Arbitration (With Merit) (LMU)

MPhil in Law (Manchester),

Dip Inter Comm Arb (CIArb)

APAM, APPM, FMIArb, FCIArb, FSIArb, FICA, MAE, ARAIA

Introduction

Arbitration is the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of a court of law.¹

The purpose of the parties choosing arbitration, as against litigation, is that they expect a hand-picked expert tribunal to be able to resolve their dispute more proficiently, economically and expeditiously than the court. As compared to litigation, arbitration still is more rapid and less expensive. It provides for confidentiality of arbitral proceedings and neutrality of the forum. In international commerce, arbitral awards are generally more enforceable than municipal court decisions under the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

The primary objective of having an arbitration clause in a contract is to ensure that when a controversy arises between parties, neither one is able to avoid arbitration. There can be no arbitration at all without an effective and valid arbitration clause. The arbitration agreement is the keystone which leads to arbitration as no dispute can be decided by arbitration without it. All too often, arbitrators, arbitral institutions and the courts are called upon to consider whether a contractual clause endows jurisdiction on arbitrators to decide the dispute between them.

In such circumstances, the key question is whether the clause is in fact and in law a valid arbitration agreement with issues like the existence, validity, effectiveness, and scope of the arbitration clause being examined in great detail. The scope of the arbitration agreement is pivotal to the success of the arbitral process as it empowers parties to agree on a number of matters which deal with future disputes.

Parties should pay as much attention on negotiating how disputes will be handled in an effective arbitration clause as they do to the other terms of contract. Further, many of the difficulties that complicate and obstruct an arbitral proceedings and the possible

enforcement of an arbitral award can be ameliorated by a well drafted arbitration agreement. Also, an effective arbitration agreement may serve to deter the party considering a breach of contract as compared to an ineffective arbitration clause.

Types of Arbitration Agreement

Arbitration agreements may take two forms. The first form is where the arbitration agreement refers any future dispute or differences to arbitration. The second form is the ad hoc arbitration agreement, which refers an existing dispute to arbitration. This occurs when at the time the dispute arises, both parties wish to arbitrate it. These two forms of arbitration agreements are not mutually exclusive.

It may be that parties have agreed vide an arbitration agreement to refer particular categories of future disputes to arbitration. When a dispute falling outside the scope of the agreement occurs, parties may by way of an ad hoc arbitration agreement refer that dispute to arbitration.²

Oral arbitration agreements

At common law, an agreement to refer a dispute to arbitration could be oral or in writing. It is rare to encounter an arbitration based on an oral agreement to arbitrate. An arbitration agreement that is not in writing is not void or invalid. The fact that it is not in writing only means that such arbitration is governed by common law. It is simply outside the scope of and not subject to the Arbitration Act 1952, which applies only to arbitration based on written agreements.³

Parties may, if they so choose, arbitrate under an oral agreement. Such an agreement is called a submission. For it to be valid and complete, there must be an existing dispute as well as actual reference of the dispute and appointment of the particular arbitrator.⁴ An oral agreement to arbitrate remains so and must be treated as such even if the award is in writing or indeed under seal.⁵ If the parties are minded and have an oral arbitration agreement, if followed by a completed arbitration agreement, it can be the foundation of an enforceable award.

However, it is not an arbitration agreement within the Arbitration Act 1952.⁶ As the numerous powers conferred on arbitrators and the court by the Arbitration Act 1952 have no application to arbitrations based on an oral agreement, problems can arise if one of the parties seeks to delay matters or refuses to be bound by the directions or decision of the arbitrator.

The arbitration procedure arising from oral arbitration agreements is normally unsatisfactory as it relies on the good faith of the parties. An award cannot be enforced as a judgment of the court but only by an action on the award in that the party with the favorable award will have to bring a fresh action for breach of covenant. The arbitrator's authority to conduct the arbitration can be revoked at any time by either party before publication of the award.⁷

There are a number of problems arising from this. First, the arbitration agreement is not a submission to arbitration. The arbitrator's actual appointment is the submission to arbitration. Secondly, a party can defy the oral arbitration agreement and carry an action in the courts. Any agreement to exclude the jurisdiction of the courts will be contrary to public policy.⁸ Thirdly, a party fearing that the award will be against him can revoke the authority of the arbitrator before the award is made even if the arbitration hearings have been completed. Fourthly, there can be further difficulties if the arbitrator dies or refuses to act or proceed with the reference. Finally, if one of the parties fails to concur with the appointment of the arbitrator, the other party cannot enforce the arbitration agreement.

Given the abovementioned weaknesses, parol arbitration under common law is hardly resorted to nowadays mainly because it does not meet the demands of modern business practice. D Sutton, J Kendall, J Gill explain the position of an oral agreement under the English Arbitration Act 1996 which is equally applicable to the Arbitration Act 1952 (Act 93): *'The Arbitration Act 1996 contains a much broader definition of writing and the statute makes it difficult to conduct a dispute about an arbitration agreement which is alleged to be oral without it being construed as an agreement in writing. An oral agreement to arbitrate is unusual in most modern commercial contexts. In cases where there is no written agreement to arbitrate, the whole of the contract, including the agreement to arbitrate, is oral, and the existence and validity of that contract are also likely to be in doubt.'*⁹

Written arbitration agreements

S 2 of the Arbitration Act 1952 requires arbitration agreements to be in writing and this is followed in practice. The arbitration agreement will be enforceable in Malaysia if it complies with this statutory provision. Similarly, an arbitration clause must be in writing to benefit from the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards Invariably, arbitrations are almost always based on a written agreement to arbitrate and may be made before or after the dispute has arisen. The terms of an arbitration agreement, like any other type of agreement, must be certain if the agreement is to be valid.

Arbitration clauses are used in a variety of contexts. They are commonly found in standard forms of building contracts, in articles of association to cover disputes involving shareholders, in partnership deeds and, nowadays, in commercial contracts. In building and engineering contracts, arbitration clauses referring future disputes to arbitration are the norm. The court has construed the most minimalist and general phrases such as 'arbitration to be settled in London' as amounting to arbitration agreements as in the case of *Tritonia Shipping Inc v South Nelson Forest Products Corporation*.¹⁰

Elements of arbitration agreements

The definition in s 2 of the Arbitration Act 1952 refers to any 'written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not'.¹¹ An agreement to arbitrate may, therefore, either be contained in an underlying contract or a separate agreement between the parties to be activated where a dispute or difference arises under that contract (an arbitration clause) which may be referred serially, as and when they arise,¹² or it may be reached after a dispute has arisen between the parties (a submission agreement).¹³

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (Act 320) s 2(1) defines an arbitration agreement more elaborately as ‘an agreement in writing, including an agreement contained in an exchange of letters or telegrams, to submit to arbitration present or future differences capable of settlement by arbitration’.

Thomson LP in *Lim Su Sang v Teck Guan Construction & Development Co Ltd*¹⁴ stated, ‘By the Arbitration Act 1950, the court had power to appoint an arbitrator when the parties had agreed to submit to arbitration and had not nominated an arbitrator. The parties in the present case had clearly intended to submit their disputes to arbitration. Parties commonly agreed to submit to arbitration without naming an arbitrator at the outset of their contract and there was much to commend that practice. There was nothing therefore in the point that an arbitrator was not named nor in the fact that the words following the blank space were left in. In the absence of a name, those words were of no effect and could be ignored.’

A clause can be an arbitration agreement even though it does not provide for immediate reference to arbitration when a dispute arises. An example of such a clause is found in the case of *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*.¹⁵ The relevant clause in the case of *River Insurance Co Ltd v Al Ahleia Insurance Co. SAK*¹⁶ provided for other machinery to be exhausted before there would be a dispute or difference between the employer and the contractor under the arbitration clause. The issue was whether the clause was an arbitration clause. The matter was to be referred first to a panel of three independent experts who were specifically stated to act as experts and not arbitrators. Then there was an appeal from the panel’s decision to three arbitrators under the ICC Arbitration Rules. The court held that this type of clause was an arbitration agreement.

In contrast, the dispute resolution clause in *Cott UK Ltd v Barber*¹⁷ was titled as ‘Arbitration’ and provided that any dispute or difference was to be referred to an independent consultant who ‘shall act as an expert and not an arbiter and his decision shall be final and binding on the parties’. The court held that the heading of the clause was to be disregarded, and that the effect of the agreement was to provide for expert determination rather than arbitration, with the result that judicial proceedings in breach of the clause did not have to be stayed automatically.

The agreement may confer the right to require arbitration on only one party.¹⁸ This is to be compared to an agreement under which the parties confer upon each other an option to arbitrate, ie, any one party can elect for disputes to be referred to arbitration. Such a clause would become a binding arbitration agreement upon such election.¹⁹ The exercise of the option by one party necessarily creates an obligation to arbitrate upon the other. The option to arbitrate itself is the creation of an agreement to refer an existing dispute to arbitration. Both the framework of the optional agreement and the exercise of the option have to be in writing to satisfy the writing requirement.²⁰ Similarly, it is plainly arguable that variations to arbitration agreements would also have to be in writing.²¹

No specific words or form are required to constitute an arbitration agreement. It can include any means by which an agreement can be recorded, such as electronic transmissions. The agreement to refer disputes to arbitration is essential and the intention to arbitrate must be clear and unequivocal. Where there is a clear intention to arbitrate, effect will be given to the agreement even if the clause is incomplete or lack certain particulars.²²

Parties are at liberty to decide on how to word the arbitration agreement as long as it is clear and certain.²³ It is an agreement like any other contract and will therefore be void for uncertainty if its meaning is so ambiguous as to be incapable of being construed to give the agreement certainty. The courts have tried to resolve the ambiguity that exists within the agreement, where possible, to support the parties in their intention.

For example, the arbitration agreement in *Mangistaumunaigaz Oil Production Association v United World Trade Inc*²⁴ stated, 'Arbitration, if any, by ICC rules in London'. The court rejected the argument that the phrase 'if any' rendered the arbitration agreement too vague. The judge held that the phrase was meaningless and could be ignored or alternatively it could be construed as meaning an abbreviation for 'if any dispute arises'. On either conclusion, the court held that the arbitration clause was not uncertain. In contrast, the court in *JF Finnegan Ltd v Sheffield City Council*²⁵ held that a clause in the contract that it was a matter for further discussion as to whether disputes under the contract were to be referred to arbitration was too vague.

The arbitration agreement may be entered into before or after a dispute has arisen. There is no distinction between a submission, 26 6 that is, an agreement to submit existing disputes to arbitration and a pre-dispute arbitration clause. It may take the form of an arbitration clause in a contract or a separate document specifically dealing with the reference to arbitration. Separate pre-dispute arbitration agreements are relatively rare. Most arbitration agreements are founded as a clause in the underlying contract. Where it is worded to the barest minimum, the deeming provisions of the Arbitration Act 1952 apply when there is nothing expressed to the contrary and where such provisions are capable of being applied.

The need for written document

Ideally, the arbitration agreement should be included in an appropriately drafted clause in the parties' primary agreement signed by all parties. Alternatively, the arbitration agreement can be set out clearly in a single document signed by all parties, particularly if no such agreement had been reached at the time of the primary agreement.

Therefore the requirement of writing is satisfied where there is a document which recognizes, incorporates or confirms the existence of an agreement to arbitrate.²⁷ The reference in an agreement to a written form of arbitration clause constitutes an arbitration agreement if the reference is such as to make the arbitration clause part of the agreement. The phrase 'written agreement' in s 2 of the Arbitration Act 1952 does not demand of a formal agreement executed by the parties to the dispute. The agreement to which the section refers may be gathered from either a single document or a series of documents or, in some cases, a party may be estopped from asserting that there is no agreement.

The documents need not be signed by either party and the assent of the parties to the arbitration term may be given orally or by conduct.²⁸ It may simply be made by an exchange of communications in writing such as letters and faxes, or evidence in writing as in a memorandum, or recorded by one of the parties or a third party with the authority of the parties to the agreement. In practice, the courts have leaned in favor of giving effect to the arbitration agreement to which the parties have agreed.

Other examples from case law are as follows:

- (1) The assured in *Baker v Yorkshire Fire and Life Assurance Co*²⁹ affirmed his contract by suing on the policy, and so was held by the court to be bound by an arbitration clause, although he had not signed the policy.
- (2) The court in *London Sack and Bag Co Ltd v Dixon & Lugton Ltd*³⁰ held that the articles of association of limited companies providing for arbitration were sufficient submissions in writing.
- (3) The court in *Aitken v Bachelor*³¹ held that the indorsements signed by each counsel on his own brief constituted together a valid submission since the indorsements were in identical terms.
- (4) The court in *Zambia Steel and Building Supplies Ltd v James Clark and Eaton Ltd*³² held that the buyer was bound by the arbitration clause printed on the reverse of the seller's quotation.
- (5) The court in *Excomm Ltd v Bamaodah, The St Raphael*³³ held that the buyer was bound by the arbitration clause in the standard form of commodity contract referred to in the broker's note sent to the buyer.
- (6) The court in *Morgan v (W) Harrison Ltd*³⁴ held that an agreement was deduced from correspondence between the parties.
- (7) The court in *Fehr Frank & Co v Kassim Jivraj & Co Ltd*³⁵ held that a cable recognizing the contract was held to satisfy the requirements of writing.
- (8) The court in *Jowett v Neath Rural District Council*³⁶ held that a clause in a specification referring all differences to the engineer with or without formal reference or notice to the parties was not a submission to arbitration.
- (9) The court in *Gillet v Thornton*³⁷ held that an arbitration clause in a partnership agreement for one year, which was continued by verbal agreement, was a sufficient written agreement even after a lapse of six years.
- (10) The court in *Re Hammond and Waterton*³⁸ held that to constitute a submission to arbitration, there must be an intention of holding a judicial inquiry in a judicial manner to settle differences which have arisen or will arise as distinct from a mere valuation or appraisal for the purpose of preventing differences from arising.

In the case of an agreement conferring an option to elect for arbitration, the statutory requirement of a written agreement is satisfied when both the option agreement and the exercise of the option are in writing.³⁹ The written document may itself contain the arbitration clause,⁴⁰ for example, standard forms of building contract conditions like the PAM 1969 Form, clause 34, PAM 1998 Form, clause 34, IEM Form and CIDB 2000 Form contain arbitration clauses, or it may incorporate the arbitration clause by reference.

Skill in drafting the arbitration agreement

An arbitration agreement is the base upon which the arbitral process is structured. Too often, the arbitration clause in many contracts is done as an afterthought without any arbitration expertise input. A badly drafted arbitration agreement can squander away the potential advantages of arbitration as it may invite ambiguity and equivocation that may be capitalized upon by a party wishing to delay the arbitration. D Sutton, J Kendall, J Gill give an example of an arbitration agreement with a paucity of details and the difficulties it gave rise to: *'One of the briefest arbitration agreements to be reported merely stated: 'arbitration to be settled in London', but although that agreement was enforced, it required a court action to achieve that result, and greater detail is desirable...'*⁴¹

An arbitration agreement has to be drafted carefully with the relevant details stating the intention of the parties in clear and unambiguous language. Ambiguity may render the arbitration clause ineffective or create complications. The aim is to achieve effectiveness in the specific case at hand by giving the same attention to negotiation and drafting of arbitration clause as the rest of the contract. The relative bargaining strength of the parties becomes important. The parties must know what is essential to their interests and what can safely be given up.

The draftsman must detach himself from the heat of the negotiation and carefully examine the overall environment of the contract and of the project for which arbitration has been chosen as the mode of settling possible future disputes.⁴² Where necessary, the draftsman should consult an arbitration specialist after having set out the subject matter of the contract and the environment.

The real difficulty of drafting arbitration agreements is the skill in combining the requirements of the particular contractual situation with adequate arbitration expertise. An effective arbitration agreement need not be lengthy or complicated. A well-drafted arbitration agreement will encompass both the agreement to arbitrate disputes and an effective procedure by which this can be done.⁴³

Choice of types of arbitration

A party contemplating concluding an arbitration agreement in a contract for the resolution of disputes or differences arising may be faced with choice of the various types of arbitrations. Most branches of trade or industry have established arbitration procedures within professional bodies. Contemporary arbitration gives the parties wide latitude to establish whatever rules of procedure they deem appropriate.

There are structural contrasts between the types of arbitrations as is reflected in the manner by which cases are generally presented by the parties and apprehended by the arbitrators. However, in most situations, the type of arbitration is chosen by the parties not so much because they like it but rather because they have no other choice. While there are intrinsic merits in each type of arbitration, the option evaporates and chosen method normally prevails by default.

In most international commercial arbitration, the choice is generally between ad hoc and institutional or administered arbitration. Ad hoc arbitration refers to arbitration where the

parties and the arbitrator will conduct the arbitration according to procedures which will either be agreed by the parties or, in default of agreement, laid down by the arbitrator at a preliminary meeting once the arbitration has begun. However, this is not the only way of proceeding. There are many set of arbitration rules available to parties who contemplate arbitration including where appropriate the rules of their own trade associations.

The expression 'ad hoc', used in 'ad hoc arbitration' or 'ad hoc submission' is used in two different senses; an agreement to refer an existing dispute; and/or an agreement to refer either future or existing disputes to arbitration with an arbitral institution specified to administer the proceedings or without any procedural rules specified⁴⁴. Therefore, ad hoc arbitration may be stipulated either in the 'submission agreement' or in the arbitration clause provided it broadly establishes the arbitral tribunal, venue of arbitration, the governing law and procedural or arbitration rules.

Thus, if, an arbitration agreement stipulates that the arbitration shall be administered by an arbitral institution, it is an institutional arbitration. In the absence of such stipulation, the arbitration is 'ad hoc'. 'Ad hoc arbitration' is, therefore, arbitration agreed to and arranged by the parties themselves without assistance from or recourse to an arbitral institution. Such arbitration takes place in accordance with the rules of the institution. It is, however, open to the parties to agree to adopt the Rules framed by a particular arbitral institution without submitting its disputes to such institution. 'Ad hoc arbitration' may encompass domestic or international commercial arbitration⁴⁵.

The advantage of ad hoc arbitration is that it may be designed according to the requirements of the parties particularly where the stakes are large or where a state or Government agency is involved. The parties, in an ad hoc arbitration, are in a position to devise a procedure fair and suitable to both sides by adopting or adapting to suitable arbitration rules.

The disadvantage of an ad hoc arbitration is that it depends for its full effectiveness upon the spirit of co-operation between the parties and their lawyers backed up an adequate legal system in the place of arbitration. This may not necessarily exist. The arbitral proceedings can be easily delayed by the refusal by either party to appoint an arbitrator, or raising a challenge to either the jurisdiction or impartiality of the arbitral tribunal. In such a situation, the provisions of the arbitration law become crucial in terms of offering necessary support⁴⁶.

On the other hand, institutional arbitration is an arbitration administered by an arbitral institution. The parties may stipulate, in the arbitration agreement, to refer a dispute between them, for resolution to a particular institution, for example, the Regional Centre for Arbitration Kuala Lumpur (KLRCA) or Singapore International Arbitration Centre (SIAC) or Hong Kong International Arbitration Centre (HKIAC). Other leading international institutions are the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), International Centre for Settlement of Investment Disputes (ICSID), China International Economic and Trade Arbitration Commission (CIETAC), American Arbitration Association (AAA), World Intellectual Property Organisation (WIPO).

Such institutions operating in various fields of arbitration undertake to supervise or conduct arbitration in accordance to their rules. Though institutional arbitration may be more expensive, they provide procedural framework, specialised expertise and services. By and large the rules of these institutions follow a similar pattern although they are expressly formulated for arbitrations that are to be administered by the institution concerned.

The parties under an institutional arbitration have available to them a well-trying and tested set of arbitral rules. The arbitration rules provide for the various factual situations which may arise in arbitration. The institutions have panels of experienced arbitrators specialising in various areas like construction, maritime, contract, trade, commodity, etc available to them⁴⁷. This is clearly an advantage. There is a mechanism in the rules to challenge and, if necessary, remove arbitrators.

They generally arise under the institutional arbitration clause in the agreement between the parties. The clause recommended by the KLRCA, for instance, states: 'Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be decided by arbitration in accordance with the Rules for Arbitration of the Regional Centre for Arbitration Kuala Lumpur'. It is short and simple and contains the elements of an effective arbitration clause.

Redfern and Hunter state that such a clause is evidently advantageous, because even if, at some future stage, one party starts dragging its feet to proceed further with arbitration proceedings, it will nevertheless be possible to arbitrate effectively, because a set of rules exists to regulate the way in which the arbitral tribunal is to be appointed and the arbitration is to be administered and conducted⁴⁸.

Institutional arbitration rules are normally set out in a booklet. Parties who agree to submit their dispute to arbitration in accordance with those rules effectively incorporate those rules into the arbitration agreement. The main disadvantage is costs as the institution will charge an administrative fee on top of the fees payable to the arbitral tribunal. Another disadvantage is the possible delay that arises from having a layer of institutional administration of the arbitration.

The draftsman may find it necessary to choose between these two types of arbitration when drafting an arbitration clause. The correct choice is obviously dependent on juridical context of the actual contract, be it institutional or ad hoc arbitration, a broad or a detailed clause⁴⁹. Once the dispute has broken out, the shift from an ad hoc arbitration clause to one specifying an institution is extremely difficult⁵⁰.

Checklist for an effective arbitration agreement

It is usual practice in most industries to use standard form arbitration clauses like that recommended by KLRCA, ICC and LCIA. Such standard form arbitration agreement will include many of the matters referred to in the checklist. For an arbitration agreement to be exhaustive and comprehensive, the scope of it should cover the following points:

1) There should be a clear reference to arbitration

The parties to the arbitration must be clearly identified and the terms of the arbitration agreement must be clear and certain to be valid and enforceable⁵¹. The reference to arbitration must be clear and the procedure envisaged by the arbitration agreement must be consistent⁵². The assessment of whether the arbitration agreement is clear and certain is that which is applicable for any other contract by giving the language of the agreement its natural meaning⁵³. Generally, the courts will uphold the arbitration agreement when the words used shows reasonably that arbitration is intended⁵⁴. The arbitration agreement must clearly be the means for final and binding resolution of disputes between the parties and not be a matter for further negotiation⁵⁵.

Different facts and circumstances always call for a specific reference to arbitration. The choice is then having a detailed arbitration clause rather than a “broad” clause. Parties must be careful not to narrow inadvertently the scope of the arbitration clause in that it narrows the disputes covered by the clause. Stephan R. Bond has suggested that a “broad” arbitration clause is more clearly separable from the contract in which it is contained so that even when there is an allegation that the contract itself is null and void because, for example, it was induced by fraud, the “broad” arbitration clause permits the arbitral tribunal to retain jurisdiction in order to determine its competence.⁵⁶ In the main, the arbitration clause must clearly cover every dispute between the parties regardless of the label attached to the dispute. The tricky point is what are the elements that must be considered in arriving at such a decision?

2) The seat of the arbitration should be specified

It is sensible to include a place or jurisdiction where the arbitration will have its seat. This in turn will determine the “lex arbitri” i.e. the law of the arbitration agreement⁵⁷. The legislation at the seat of the arbitration determines the extent and likelihood of the involvement of the national courts in the conduct of the arbitration either by way of judicial support or supervision and the likelihood of the enforceability of the arbitral award. Some seats like Geneva, Paris or London offer a perception of neutrality (although that consideration may be overrated given the adoption of Model law by many jurisdictions). Other practical considerations include whether the selected location has the facilities such as hearing rooms, transcribing services and the additional traveling and accommodation costs. To be cost effective, hearings can be heard in locations other than at the seat of the arbitration. Parties wishing to avoid geographical uncertainties can include express provisions in the arbitration agreement requiring all hearings to be in the place of arbitration and nowhere else in the absence of agreement by all parties.

3) Choice of the proper law should be indicated

The proper law of a contract governs the performance obligations of the parties⁵⁸. Also, the rights of the parties will be determined according to the proper law of the contract. It is desirable for the parties to expressly agree upon the applicable law in determining the substantial issues before the arbitral tribunal. It also allows the parties or the appointing body to select the arbitrator who is expert in that country’s law. It is preferable that the applicable law is developed in regard to the specific issues likely to

arise. Also, the subject matter of the contract is in fact arbitrable in that system of law. Certain countries do not recognize arbitration to resolve matters like copyright, patent law or anti-trust matters.

4) The agreement should indicate applicable procedural law and rules

The arbitrator has to follow a variety of procedures in conducting the arbitration. The applicable procedural law or “lex fori” i.e. the law of the forum will determine the procedure to be adopted in arbitration. The flexibility of arbitration allows the parties to design the procedural rules according to their specific needs and wishes. The parties may do so by preparing their own individual set of rules or, by adopting some standard arbitration rules of some arbitral institution. These rules provide a procedural framework for the conduct of the reference and may impose restrictions on party autonomy. Such arbitration rules normally provide a more complete code by specifying time limits for the service of pleadings and appointment of the arbitral tribunal. The Arbitration Rules of the Regional Centre for Arbitration Kuala Lumpur (KLRCA) incorporates the UNCITRAL Arbitration Rules for example, provides under article 15(1), the parties must be treated with equality, and each party must be given full opportunity of presenting his case. Otherwise, the parties can adopt a formal or can opt for informal procedure. It is for the parties vide the arbitration agreement to confer a narrow or wide jurisdiction on the arbitral panel.

5) How and by whom the arbitral tribunal is to be constituted

The selection of arbitrators is one of the most important activities in arbitration. Arbitrators are called upon to determine the parties’ respective legal rights. The task of presiding over the conduct of arbitration cannot be entrusted to a person who lacks the necessary education, training, skill and practical experience to deal with the subject matter of the arbitration. The parties may name the arbitrator in the agreement, or may provide specifically for a reference to a sole arbitrator or a panel of arbitrators, and agree on the persons to act after the dispute has arisen.

Another common procedure arises from the fact that parties are free to authorize any person including an institution to determine an issue which they are free to determine. Therefore, the arbitration agreement may entrust the task of appointment to such persons or institutions that have the benefit, experience and equipment to do such appointments. Such institutions may include for example, the Regional Centre for Arbitration Kuala Lumpur, International Chambers of Commerce or the London Court of International Arbitration. Institutions that are called upon to make appointments will normally do so from a panel of arbitrators maintained by them.

6) What shall be the qualification and number of members of the arbitral tribunal

All arbitrators must be impartial. An arbitrator is not required to have special qualifications except that which the parties may contractually agree upon. Without express words in the arbitration agreement, arbitrators need not have any qualifications. They can be of any nationality and need not be legally trained. However, parties may consider providing in the arbitration agreement that disputes must be referred to any person or persons without any qualification, but from a particular country.

On the other hand, parties may also agree upon certain qualifications, required of the arbitrator which may be relevant and necessary to the subject matter of the dispute. Such qualification may be expressly specified in the arbitration agreement. The qualifications may also be included in the agreement by incorporation of the rules of some arbitral institutions. Parties in drafting the arbitration agreement should define carefully and clearly the required qualifications of the arbitral tribunal particularly where the anticipated disputes are expected to be highly technical in nature, for example, those arising out of construction contracts, architecture, commodity trade, medical negligence, maritime contracts and intellectual property.

Where parties are able to agree upon the appointment of a sole arbitrator, it is advisable for them to do so. However, in international arbitrations, it is common that three or more arbitrators are appointed. This is because the parties are of different nationalities and often not sharing a common language. Where a state or state agency is a party, the concept of each party nominating an arbitrator (who must act impartially) presided over by a third arbitrator is more acceptable. Normally there is no reasonable justification for appointing an arbitral tribunal comprising of more than three arbitrators.

7) The mode and manner of filling vacancies

An arbitration agreement may make provision for what is to happen if a party fails to appoint an arbitrator. If it does the agreed consequences take place rather than those contained in the applicable legislation governing the arbitration. Where the arbitrator refuses to act, is incapable of acting or dies the mode and manner of filling such vacancies becomes crucial. The arbitration agreement should make provision for this, for example, that an arbitral appointing authority to make the appointment.

8) The language of the arbitral tribunal

The arbitration agreement should make clear which language is the official language of the arbitration. By agreeing on one language, it does not prevent witnesses from giving evidence in their native language nor does it prevent documents in a foreign language being translated for use by the arbitral tribunal. Where there are different nationalities involved in the arbitration and if the parties do not make a choice of language, it can cause enormous difficulties where for example, the party appointed arbitrators and the parties are fluent only in their own language. The costs of translation of many documents may also be a consideration and it is usual for the arbitration clause for provide that those seeking to rely on documents at any hearing shall provide translations of them. Such costs would form part of the cost of the reference and is recoverable from the losing party.

9) Privacy and confidentiality

Arbitration is distinguished from litigation by two essential features; privacy of the proceedings and confidentiality of the process. Privacy is concerned with the rights of persons other than arbitrators, parties and witnesses to attend meetings and hearings and to know about the arbitration. Confidentiality is the obligation on the arbitrators and the parties not to divulge or give out information relating to the contents of the proceedings, documents or the award. Both are sold as one of the major benefits of arbitration as it

prevents uninvolved third parties from intruding into the parties' conduct of the proceedings and information and impact upon the arbitrator's independence.

The parties should expressly provide in their arbitration agreement for the nature and extent of confidentiality. In this regard, a specific provision about confidentiality may be worth including in an arbitration agreement. Parties can draft an appropriate arbitration clause setting out the extent and nature of confidentiality obligations to apply in any future arbitration⁵⁹.

Conclusion

While it is quite reliable to use standard form arbitration agreements, there is probably no single arbitration clause appropriate and effective in every case. There is the need in every negotiation of an arbitration clause to engage in a rigorous analysis of the circumstances related to the particular transaction in order to produce an arbitration clause tailored to the situation at hand. Greater detail may give clarity and thereby certainty as to the parties' intentions. The effectiveness of such an arbitration clause will in the long run result in great savings of time and money.

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- 1 13 Halsbury Laws of Malaysia at para 220.001
 - 2 See *Jones Engineering Services Ltd v Balfour Beatty Building Ltd and Anor* [1994] ADRLJ 133; *MJ Gleeson Group plc v Wyatt of Snetterton Ltd* (1995) 11 Const LJ 59, CA (Eng); *LG Caltex Gas Co Ltd v China National Petroleum Corp* [2001] All ER 198.
 - 3 *New India Assurance Co Ltd v Lewis* [1967] 1 MLJ 156, [1965–1968] SLR 149, FC (Sing); *Imperial Metal Industries (Kynoch) Ltd v Amalgamated Union of Engineering Workers* [1979] 1 All ER 847, [1979] ICR 23, CA (Eng).
 - 4 *Doleman & Sons v Osset Corp* [1972] 3 KB 257.
 - 5 *Talbot v Earl of Shrewsbury* (1873) LR 16 Eq 26
 - 6 See Mustill and Boyd, *Commercial Arbitration* (2nd Ed, 1989) p 6. See also *Bac Abr, Arbitrament and Award; Com Dig, Arbitrament; Livingstone v Ralli* (1855) E & B 132; *Ex p Glaysher* (1864) 3 H & C 442
 - 7 Cf *Bac Abr, Arbitrament and Award (B); Re Rouse & Co and Meier & Co* (1871) LR 6 CP 212 per Willes J; *Lord v Lee* (1868) LR 3 QB 404 at 407 per Blackburn J; *Fleming v J S Doig (Grimsby) Ltd* (1921) 38 RPC 57.
 - 8 *Doleman and Sons v Ossett Corporation* [1912] 3 KB 257 at 267
 - 9 *D Sutton, J Kendall, J Gill, Russell on Arbitration* (21st Edition, 1997) paragraph 2.044, p 51–52.
 - 10 [1966] 1 Lloyd's Rep 114. See also *Hobbs Padgett v Kirkland Ltd* [1969] 2 Lloyd's Rep 547; *Mangistaumunaigaz Oil Production Association v United World Trading Inc* [1995] 1 Lloyd's Rep 617; *XL Insurance Ltd v Owens Corning* [2000] 2 Lloyd's Rep 500.
 - 11 *Arbitration Act 1952* s 2.
 - 12 *Compagnie Graniere SA v Fritz Kopp AG* [1980] 1 Lloyd's Rep 463.

13 Navigazione Alta Italia SpA v Concordia Maritime Chatering AB, The Stena
14 Pacifica [1990] 2 Lloyd's Rep 234.
15 [1966] 2 MLJ 29 at 31, FC.
16 [1993] 1 All ER 664, HL.
17 [1973] 1 Lloyd's Rep 2.
18 [1997] 3 All ER 540.
19 Pittalis v Sherefettin [1986] QB 868, [1986] 2 All ER 227, CA (Eng); Woolf v
20 Collis Removal Service [1948] 1 KB 11, [1947] 2 All ER 260, CA (Eng).
21 Westfal-Larsen & Co A/S v Ikerigi Compania Naviera SA, The Messiniaki
22 Bergen [1983] 1 All ER 382, [1983] 1 Lloyd's Rep 423; Navigazione Alta Italia
23 SpA v Concordia Maritime Chartering AB, The Stena Pacifica [1990] 2 Lloyd's
24 Rep 234.
25 Westfal-Larsen & Co A/S v Ikerigi Compania Naviera SA, The Messiniaki
26 Bergen [1983] 1 All ER 382, [1983] 1 Lloyd's Rep 423.
27 Alto Ltd v Sutherland [1971] 2 Lloyd's Rep 515.
28 Lim Su Sang v Teck Guan Construction & Development Co Ltd [1966] 2 MLJ 29,
29 FC; Woh Hup Pte Ltd v Property Development Ltd [1991] 3 MLJ 82.
30 See Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena)
31 [1995] 3 MLJ 273.
32 [1995] 1 Lloyd's Rep 617.
33 (1988) 43 BLR 124.
34 See the Arbitration Act 1952 s 2, where the arbitration agreement is referred to as
35 a submission. See also Cheah Wai Poh v Chin Brothers & Co Ltd [1958] MLJ
36 215; Thiagarajah Poinpatarsan v Shanmugam Paramsothy [1990] 2 CLJ 312.
37 Bauer (M) Sdn Bhd v Daewoo Corp [1999] 4 MLJ 545 at 565, CA, per Gopal Sri
38 Ram JCA, citing Radha Kanta Dass v Baerlein Bros Ltd AIR 1929 Cal 97 (Cal);
Union of India v Rallia Ram AIR 1963 SC 1685, SC (India); Shankar Lal v Jaaney
Bros AIR 1931 All 136 (All). See also Anglo-Newfoundland and Development
Corporation v R [1920] 2 KB 214; Caerlon Tinsplate Co v Hughes (1891) 60
LJQB 640; Excomm Ltd v Ahmed Abdul-Qawi Bamaodah, The St Raphael [1985]
1 Lloyd's Rep 403, CA (Eng); Sweeny v Mulcahy [1994] ADRLJ 143 (HC
Ireland).
Birse Construction Ltd v St David Ltd [1999] 1 BLR 194.
[1892] 1 QB 144. See also Hickman v Kent or Romney Marsh Sheep-breeders
Association [1915] 1 Ch 881; Beattie v E & F Beattie Ltd [1938] Ch 708, [1938]
3 All ER 214, CA (Eng).
[1943] 2 All ER 763, CA (Eng).
(1893) 62 LJQB 193, 68 LT 530. See also Excomm Ltd v Bamaodah, The St
Raphael [1985] 1 Lloyd's Rep 403, CA (Eng).
[1986] 2 Lloyd's Rep 225, CA (Eng).
[1985] 1 Lloyd's Rep 403, CA (Eng).
[1907] 2 Ch 137, CA (Eng).
(1949) 82 Ll L Pep 673.
(1916) 80 JP Jo 207.
(1875) LR 19 Eq 599, 44 LJ Ch 398.
(1890) 62 LT 808, DC (Eng).

- 39 Westfal-Larsen and Co A/S v Ikerigi Compania Naviera SA, The Messiniaki Bergen [1983] 1 All ER 382, [1983] 1 Lloyd's Rep 423.
- 40 See Cheah Wai Poh v Chin Brothers & Co Ltd [1958] MLJ 215; Lim Su Sang v Teck Guan Construction & Development Co Ltd [1966] 2 MLJ 29, FC; Woh Hup (Pte) Ltd v Turner (East India) Pte Ltd [1987] 1 MLJ 443; Invar Realty Pte Ltd v JDC Corp [1988] 3 MLJ 13; Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd [1989] 3 MLJ 216; Woh Hup (Pte) Ltd v Property Development Ltd [1991] 3 MLJ 82; Pembinaan Leow Tuck Chui & Sons Realty Co Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd [1995] 2 MLJ 57, SC; Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena) [1995] 3 MLJ 273; Chung and Wong v CM Lee [1934] MLJ 153; Ong Boon Him v Tan Oh Tee [1937] MLJ 122; Ching Hen Tiu v Sime Darby Holdings Ltd [1978] 2 MLJ 83; Teong Piling Co v Asia Insurance Co Ltd [1994] 1 MLJ 444.
- 41 D Sutton, J Kendall, J Gill, Russell on Arbitration (21st Edition, 1997) paragraph 2.004, p 28–29.
- 42 See Paul A Gelinias, Arbitration Clauses – ‘Achieving Effectiveness’ published in Improving the Efficiency of Arbitration Agreements and Awards (ICCA Congress Series No. 9). International Arbitration Congress, Paris, 3–6 May 1998. See also Stephen R Bond, ‘How to draft an Arbitration Clause’ (1989) 6 Journal of International Arbitration 66.
- 43 Bernstein, Handbook of Arbitration Practice. 3rd Edn 1998 p 33.
- 44 See D Sutton, J Kendall, J Gill, Russell on Arbitration (21st Edition, 1997) paragraph 2.024. p 42.
- 45 See OP Malhotra, The Law and Practice of Arbitration and Conciliation: The Arbitration and Conciliation Act 1996 (1st Edition, 2002) pp 75-76. LexisNexis Butterworths.
- 46 See Redfern, A and Hunter, M, Law and Practice of International Commercial Arbitration, (3rd Edition, 1999) Sweet & Maxwell, p. 48.
- 47 See OP Malhotra, The Law and Practice of Arbitration and Conciliation: The Arbitration and Conciliation Act 1996 (1st Edition, 2002) pp 75-76. LexisNexis Butterworths.
- 48 See Redfern, A and Hunter, M, Law and Practice of International Commercial Arbitration, (3rd Edition, 1999) Sweet & Maxwell, p 48.
- 49 See Paul A Gelinias, Arbitration Clauses – ‘Achieving Effectiveness’ published in Improving the Efficiency of Arbitration Agreements and Awards (ICCA Congress Series No 9). International Arbitration Congress, Paris, 3–6 May 1998 at p 49.
- 50 See also Stephen R Bond, ‘How to draft an Arbitration Clause’ (1989) 6 Journal of International Arbitration 66 at 69.
- 51 See Lobb Partnership Limited v Aintree Racecourse Company Ltd [2000] B.L.R 65.
- 52 See AIG Europe SA v QBE International Insurance Ltd [2001] Lloyd's Rep 268.
- 53 See Al Midani v Al Midani [1999] 1 Lloyd's Rep 923.
- 54 Astro Vendeor Compania Naviera SA v Mabanafi GmbH [1970] 2 Lloyd's Rep 267 as per Mocatta J; Paul Smith Ltd v H & S International Holdings Inc [1991] 2 Lloyd's Rep 127; Shell International Petroleum Co. Ltd v Coral Oil Co Ltd [1999]

- 1 Lloyd's Rep 72; Lobb Partnership Limited v Aintree Racecourse Company Ltd [2000] B.L.R 65.
- 55 See Finnegan v Sheffied City Council (1988) 43 BLR. 124; AIG Europe SA v QBE International Insurance Ltd [2001] Lloyd's Rep 268.
- 56 See also Stephen R Bond, 'How to draft an Arbitration Clause' (1989) 6 Journal of International Arbitration 66 at 70.
- 57 See Union of India v McDonnell Douglas Corporation [1993] 2 Lloyd's Rep 48.
- 58 See Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA [1971] AC 752 at 604; Bank Mellat v Helliniki Techniki SA [1984] QB 291 at 301.
- 59 Leon E Trakman, Confidentiality in International Commercial Arbitration (2002) Vol 18 Number 1 LCIA International 1 at 12; Hans Bagner, The Confidentiality Conundrum in International Commercial Arbitration, ICC International Court of Arbitration Bulletin Vol 12/No 1 – Spring 2001.