

STRATEGIC CONSIDERATIONS IN ARBITRATION

Introduction

When a dispute arises, the first avenue parties resort to resolving a dispute is through the Courts however there are the Alternative Dispute Resolution mechanisms which includes solving a dispute through negotiation, conciliation, mediation and arbitration.[1]

This article focuses on the areas of Arbitration, a contract-based dispute resolution mechanism[2], which offers a binding effect through the application of law by one or more persons (the arbitral tribunal), instead of a court of law where parties' legal rights and liabilities are referred to and determined judicially.[3] Arbitration is amongst the oldest dispute resolution mechanism, disassociated by the processes attached to litigation in court.

The Arbitration Act 2005 was enacted to bring about the reform of the arbitral regime relating to domestic arbitration and it also provides for the recognition and enforcement of awards made through international arbitration. The Arbitration Act 2005 is recognised worldwide as it was based on the United Nations Commission on International Trade Law ("UNCITRAL") and the Model Law on International Commercial Arbitration.[4] This makes arbitration accessible when a dispute arises between parties in different countries as it also brings about the finality[5] through the arbitration award. The use of arbitration can be included in an agreement between parties.

Arbitration Agreement

An arbitration shall be made in writing however, it does not need to be in a separate arbitration agreement, instead it can be in the form of an arbitration clause as part of any written agreement which is sufficient to prove that an agreement exist between parties to the agreement.[6] An arbitration clause is included in the agreement to prevent parties from having to deal with their dispute through areas of litigation in court, therefore parties should

be clear and ensure that the terms in the agreement are valid and enforceable.[7] Where an agreement includes an arbitration clause, courts will uphold the agreement as the agreement provides for the use of arbitration.

Seat of the Arbitration

The seat of arbitration is the location for which the arbitration is held therefore it should be decided by the parties to be then included in the agreement and depending on the choice of the country, the law governing the arbitration is linked to the laws of the respective country. Where a seat is not determined, the arbitral tribunal steps in to determine the seat of arbitration, taking into account the circumstances of the case at the point in time.[8] In attempts to be cost effective, parties may opt for hearings in locations other than the seat of arbitration[9] and in these circumstances, the arbitration shall be deemed to have taken place at the seat of arbitration.[10]

Applicable Laws

The laws of contract would govern the rights of the parties to an arbitration proceeding, therefore it is preferable that the parties agree on the applicable country's laws at the onset to be included in the agreement as the respective laws would be applicable in determining the substantial issues that are put forth before the arbitral tribunal.[11] In the instance where it is a domestic arbitration, unless otherwise agreed by the parties, should the seat of arbitration be in Malaysia, the arbitral tribunal shall decide the dispute in accordance with the substantive laws of Malaysia.[12] However, in an international arbitration, the arbitral tribunal shall decide the dispute pursuant to the laws agreed by the parties[13] taking into account the locality of the parties and the dispute.

Appointment of Arbitrators

The selection of an arbitrator may be included in the agreement as part of the clause where either a sole arbitrator is named or a panel of arbitrators, and if the panel of arbitrators is opted for, the parties will agree on one arbitrator to preside over the proceeding should a dispute arise.[14] The parties are generally free to determine the number of arbitrators unless the parties have agreed to the application of the AIAC Arbitration Rules then the Director of the Kuala Lumpur Regional Centre for Arbitration shall appoint the Arbitrator.[15] Where the parties fail to agree to a procedure in appointing an arbitrator, each party shall appoint one arbitrator where the two arbitrators will then appoint a third arbitrator who will preside over the arbitration.[16] Should the Director fail in its appointment within the period of 30 days, the parties may apply to the High Court for the appointment to be made.[17] In the process of appointing an arbitrator, the Director is required to take into account the qualifications, independence and impartiality, and nationality of the arbitrator before making an appointment.[18]

Language of Arbitral Tribunal

Subject to the parties agreeing to a language to be used, usually it would be the English language, the arbitral tribunal will step in to determine the language that is used throughout the proceedings, including any oral hearings which may take place.[19] The arbitral tribunal may also order that the documentary evidence be translated into a language agreed by the parties.[20]

Privacy and Confidentiality

In circumstance where privacy of the proceedings is concerned, parties opt for arbitration as confidentiality throughout the process is obligatory on the part of the arbitrators and the parties to not divulge information relating to the contents of the proceedings and the award.[21] For assurance, parties can include a clause in their agreement to contractually bind the parties to maintain confidentiality through setting out the extent and nature required of the confidentiality.[22]

Award and Enforcement

The effect of arbitration is that it is easier to enforce an award in another country in comparison to a court judgement as an arbitral tribunal has the power to make decisions that binds parties.[23] Being that an arbitration award is a binding contract between parties, wherein it is final and binding,[24] unless the parties have agreed otherwise in the agreement.[25] An arbitration award is enforced through an application made in writing to the High Court of Malaysia, where it can be accomplished through first applying for leave in the High Court[26] and once it is obtained, the judgement of the award can be entered. The finality of the award however is reliant on the process of procuring the award and the circumstances in which the proceeding is conducted such as taking into consideration that the arbitrator would need to be impartial and that natural justice is observed throughout the arbitration proceedings.[27]

Conclusion

Where parties agree on an arbitration award as the finality to a dispute, the parties are bound by the terms of the agreement and if one of the parties refuse to perform their part by honouring the award, it would be a breach of the agreement which can lead to the aggrieved party instituting an action in court thereby obtaining a judgement for the amount mentioned in the award.[28] Although the cost of arbitration is significantly higher as opposed to litigation in Court, it appears to be the preferred mode of resolving commercial and contractual disputes mainly due to the flexibility as well as the expediency of resolving the dispute.

1. Grace Xavier, Comparative Study of Arbitrations in Malaysia and Selected Jurisdictions in the European Union [2002] 4 MLJ lxxxix.
2. Florian Quintard, A global view of the law applicable to an arbitration agreement <<https://www.stewartslaw.com/expertise/international-arbitration/arbitration-process/>>.
3. Sundra Rajoo, DRAFTING EFFECTIVE ARBITRATION AGREEMENTS [2005] 1 MLJ vii.
4. Grace Xavier, Comparative Study of Arbitrations in Malaysia and Selected Jurisdictions in the European Union [2002] 4 MLJ lxxxix.
5. AIAC Arbitration Rules, Rule 12.
6. Arbitration Act 2005, Section 9.
7. Sundra Rajoo, DRAFTING EFFECTIVE ARBITRATION AGREEMENTS [2005] 1 MLJ vii
8. AIAC Arbitration Rules, Rule 7.
9. Sundra Rajoo, DRAFTING EFFECTIVE ARBITRATION AGREEMENTS [2005] 1 MLJ vii
10. AIAC Arbitration Rules, Rule 7(3).
11. Sundra Rajoo, DRAFTING EFFECTIVE ARBITRATION AGREEMENTS [2005] 1 MLJ vii
12. Arbitration Act 2005, Section 30.
13. Ibid.
14. Sundra Rajoo, DRAFTING EFFECTIVE ARBITRATION AGREEMENTS [2005] 1 MLJ vii
15. AIAC Arbitration Rules, Rule 4.
16. Arbitration Act 2005, Section 13 (3).
17. Arbitration Act 2005, Section 13 (7).
18. Arbitration Act 2005, Section 13 (8).
19. UNCITRAL Arbitration Rule, Article 19.
20. Arbitration Act 2005, Section 24.
21. Sundra Rajoo, DRAFTING EFFECTIVE ARBITRATION AGREEMENTS [2005] 1 MLJ vii
22. Ibid.
23. Florian Quintard, A global view of the law applicable to an arbitration agreement <<https://www.stewartslaw.com/expertise/international-arbitration/arbitration-process/>>.
24. UNCITRAL Arbitration Rule, Article 34.
25. Grace Xavier, Comparative Study of Arbitrations in Malaysia and Selected Jurisdictions in the European Union [2002] 4 MLJ lxxxix.
26. Arbitration Act 2005, Section 38.
27. Grace Xavier, Comparative Study of Arbitrations in Malaysia and Selected Jurisdictions in the European Union [2002] 4 MLJ lxxxix.
28. Ibid.

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