The Drafting of an Enforceable Arbitration Agreement for International Commercial Arbitration

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Abstract- Arbitration, as the mean type of alternative dispute resolution (ADR), compared with litigation, has its merits in neutrality and confidentiality. And from the commercial perspective, it is more economical and speedier. Consequently, increasingly more commercial entities tend to submit the dispute to arbitration. An enforceable arbitration agreement is supposed to be the starting point of a commercial arbitration, without which the arbitration proceeding would not initiate. This essay will talk about how to draft an enforceable arbitration agreement for international commercial arbitration from various aspects.

Keywords- Arbitration Agreement, International Commercial Arbitration, Enforceability

I. INTRODUCTION

This essay will discuss the drafting of an enforceable arbitration agreement for international commercial arbitration. While talking about this issue, a question heave insight: what is an enforceable agreement?

An enforceable arbitration agreement means three things: First, the signing of the agreement would lead to arbitration later when there is a dispute arising between the two or more party or arbitration for the dispute arising without an arbitration agreement signed before. Second, according to per Ma J, "an agreement which does not compel parties to have disputes or differences resolved by arbitration is not an arbitration agreement for the present purposes"[1].

More precisely, an enforceable arbitration agreement means that under the disputes the parties have no choice of going to litigation or something else, but to go to arbitration only, otherwise, they breach the arbitration agreement. And third, smooth enforcement means that a well-drafted arbitration agreement would result in a more efficient arbitration. A highly enforceable agreement saves both time and cost for parties.

To draft an enforceable arbitration agreement that meets the criteria mentioned above, there would be a discussion about some aspects that could be taken into consideration while drafting an arbitration agreement in the following context.

II. RESULT AND DISCUSSION

2.1 The parties' consensus

As the foundation of arbitration, the arbitration agreement is based on parties' consensus. Just like other agreements and contracts, the arbitration agreement is a legally binding and contractual document, which consist of the parties' consensus. Parties' consensus means that: first, parties are supposed to be voluntary to enter this agreement. Second, the clauses of the agreement can represent the intent of parties, as for an arbitration agreement, which means that parties have to be aware that the agreement could lead to arbitration. And third, parties are competent to enter in such agreement. Being competent means, they have the ability or authority to make decisions. For example, when there is an agent in the process of drafting, to assure the later enforcement of the arbitration agreement, it is necessary to know the agency's scope. Only with the principle's acknowledgement, the drafting done by an agent implies the principle's intention.

Without the consensus, the agreement would become null and void. Thus, it is of vital importance to imply the parties' consensus in the context of the agreement. In doing this, a written agreement would be far better than an oral agreement. With the former one, there is no need to prove the consensus's existence——it lies in words, and a written clause also increases the agreement's enforceability. Especially for an arbitration agreement, when there is a requirement on the form of agreement in statutes, which would be explained later in this essay.

Also, it is of vital importance to be careful when drafting clauses of arbitration agreement, to ensure that the correct words are applied to reflect the true intention of the parties' consensus, and even a slight typographical mistake could lead to a later misunderstanding or even the failure of enforcement of an arbitration agreement [2].

2.2 Referring to the New York Convention, and the Hong Kong Arbitration Ordinance

Party autonomy gives the party right to make agreement on what they would like to, this kind of contractual freedom; however, is never unlimited; it should not violate the mandatory rules. In addition to mandatory rules, there are also some guiding rules which are not out of compulsion but can contribute to both a better fulfilment of party autonomy and better enforcement of the arbitration agreement. Thus, it is worthwhile to remember the importance of relevant law and legislations and always take a look

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at the requirement of those legal instruments. Here takes the Hong Kong Arbitration Ordinance and the New York Convention as examples.

I. The Hong Kong Arbitration Ordinance

In Hong Kong, the Hong Kong Arbitration Ordinance (Cap609) has set some rules to draft a valid arbitration agreement to follow.

For example, according to the PART3 Arbitration Agreement, Chapter 19, "whether in the form of an arbitration clause in a contract or the form of a separate agreement, the arbitration agreement shall be in writing [3]." This is a mandatory rule that has to be followed, and an oral arbitration agreement shall be null and void.

In addition to the mandatory rules in the ordinance, there are a few guiding rules, which, not binding, but still worth take in to account when drafting an arbitration agreement.

First, there is no doubt that the arbitration agreement can be just an arbitration clause in a contract [4]. However, it would be scarcely possible for one or a few clauses to cover all the detail such as the appointment of the arbitrator, the institution, the seat and governing law, and other elements about the arbitration. That is to say, a separate arbitration agreement would be better to cover more details.

Second, according to Chapter 24., "the parties are free to agree on a procedure of appointing the arbitrator or arbitrators [5]". It makes sense that there only suggest parties to agree on the procedure, while not the appointment of certain arbitrator or characters and qualification of the arbitrator, which is feasible and seems to strengthen the enforcement of an arbitration agreement but may lead to failure of enforcement. Parties may assume that, once the arbitrator or arbitrators are appointed in the arbitration agreement, the parties can go to the arbitration directly without the procedure of appointing. It may sound like a great convenient and clever behaviour. However, what if the appointed person is reluctant to be the arbitrator--which still has some leeway if there is an effective negotiation--or even worse, there arises the ground for challenge or failure or impossibility to act which do not exist in the drafting period for the appointed arbitrator or arbitrators [6]. The thing can change every day and when the above-mentioned situation arises, according to the Hong Kong Arbitration Ordinance, the mandate terminates. Consequently, to carry out the arbitration as soon as possible, a substitute arbitrator needs to be appointed, and it takes time.

While, if parties decided firmly that they will appoint an arbitrator or stipulate the criteria for the arbitrator for the later or the presently existing dispute, the availability of the arbitrator should be taken in to account [7]. For example, under ICC arbitration rules (2019), it is required for prospective arbitrators to sign a statement confirming their availability for a case before the appointment [8]. Also, make sure the criteria is not so strict that is hard to find such an arbitrator. In other words, before making such criteria, there should be at least one arbitrator meet the criteria. Otherwise, the arbitration would be hard to move on. Philip YANG listed an example in his book *Arbitration Law, From The 1996 English Arbitration Act to International Commercial Arbitration*, An English lawyer once said that he had a case that required the arbitrator meet such qualification: three years of engineers (in a special profession, not just ordinary engineers) plus three years of lawyer qualification, but these two professions did not have a strong connection. Consequently, he searched for three years but could not find such an arbitrator to appoint [9]. In conclusion, too strict but not realistic requirements on the appointment of the arbitrator would lead to interminable delay and be detrimental to the enforcement of the clause.

II. The New York convention

The New York convention stipulates the criteria for enforcing the arbitral award, which has to be based on an enforceable arbitration agreement. Three requirements can be implied from article II.1and 2. First, which is same as the Hong Kong Arbitration Ordinance, the arbitration agreement has to be, by all means, in writing. Second, the dispute waited to be resolved is in respect of a defined legal relationship. And third, the dispute is suitable for arbitral settlement.

2.3 The Arbitral Rules

During the past few decades, we saw a boost of international arbitral institutions, which seek to create their own arbitral rules. Consequently, there are now many sets of arbitration rules, and each of them owns its rationalization and harmonization [10]. All these arbitral rules, more or less, aim to bridge over the gap between the common law and civil law system. More specifically, these rules are bend to build a framework within which all the subjects from above mentioned two legal systems (or even other legal systems) could operate an arbitration together, and this is of great importance in an international context, in which the parties often come from different sovereigns or different legal systems. Therefore, it is proposed that the arbitration rules should be chosen to follow and stipulated in the arbitration agreement.

Another reason why should an arbitral rule be chosen to follow lies in both their commonalities and differences. On the one hand, all these arbitral rules provide a few of elements that are of vital importance to be contained in the arbitration agreement, such as the appointment of arbitrators, challenge of arbitrators, seat of arbitration, and etc., which are of the great importance of the enforcement of an international arbitration agreement. On the other hand, differences of these arbitral rules allow choosing the arbitral rules fit the nature of the master contract and the dispute best, in other words, fit the parties' consensuses best and more likely to be enforced. The choice of international arbitral rules is a reflection of parties' autonomy. For example, if it is convinced by parties that it would be better than the arbitration held under the auspices of an arbitration institution, then the ICC Rules, or the LCIA Rules should be used, and if it is decided that there would be an ad hoc arbitration, the UNCITRAL Rules should be chosen.

However, it may not seem appropriate to choose the rules of an arbitration centre established in the recent past or a newly published arbitral rule, in case of that if the rule is too new to be applied or to say, it may be null and void. For example, the ICC Rules (2017) applies to arbitrations commenced on or after 1 March 2017, unless the parties have agreed to submit their dispute to the rules in force at the date of their arbitration agreement [11]. Thus, an unproperly choice of the arbitral rules may controversy

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leads to the unenforceability of the arbitration agreement, unless parties agreed.

Besides, there are many other aspects that should be taken in to consideration while choosing an arbitral rule, for example, seat, venue, applicable law, language, and etc. These aspects, which also are important in drafting an enforceable international arbitration agreement, will be discussed later in this essay.

2.4 Incorporation of Institution Arbitration Clause as Standard Arbitration Clause

Several arbitration institutions such as Singapore International Arbitration Centre (SIAC), Hong Kong International Arbitration Centre (HKIAC) and so on, has given the model clauses for parties' reference when drafting an international arbitration agreement.

Self-evidently, the use of the model clauses as applicable is never lose to be a good choice, for it provides a decent presentation of the formal language, and contains the most fundamental elements for an arbitration agreement.

Several rules publish by HKIAC has suggested clauses, and here takes HONG KONG INTERNATIONAL ARBITRATION CENTRE ADMINISTERED ARBITRATION RULES 2018 as an example. At the very beginning of the rule reads that, *any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non- contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted* [12].

We, the undersigned, agree to refer to arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules *any dispute, controversy, difference or claim (including any dispute regarding non-contractual obligations) arising out of or relating to: (Brief description of a contract under which disputes, controversies, differences or claims have arisen or may arise* [13].)"

Respectively for parties who would like to refer a future dispute to arbitration and parties who faced with an existing dispute while there is no arbitration agreement.

2.5 The Seat and the Governing Law of the Arbitration Agreement

In most cases, an international commercial arbitration take place between two or more parties came from different sovereign states. In order to make sure the fluent enforcement of an arbitration agreement, a clause about the seat of the arbitration should be contained in the agreement. "The choice of the seat of arbitration is a particularly crucial element in an arbitration agreement [14]. This choice brings a legal consequence that the law of the seat will take effect and govern quite a few things, for example, the procedural law of the arbitration proceedings. Out of the respect of the parties' autonomy, "where parties do make such a choice of the seat as part of their arbitration agreement, the court must give the same full effect [15]", and there would be no disputes on where and how to carry on the arbitration proceedings.

In addition to seats and procedure law, the substantive law is also important for an arbitration agreement. As a result of internationality of the commerce, the difference of the legal systems of the parties' states can lead to problems of the enforcement of the arbitration agreement.

For example, the chosen of the substantive governing law of the arbitration agreement have something to do with the arbitrability, which is also an important element to be considered when drafting an enforceable arbitration agreement. According to Justice Andrew Rogers, arbitrability needs to be thought in two-stage in the dispute resolution process, and the first stage is the commence of the process. In other words, whether the dispute is arbitrable or not have a great influence on whether the arbitration agreement would be enforced, and the arbitration would be commenced.

It should be bear in mind that, as an alternative dispute resolution, arbitration cannot solve everything in all sovereign, which means the arbitrability varies from states to states and there are some circumstances that the disputes are not arbitrable. Every state, more or less, has some area that is not arbitrable by law. For example, a dispute arising from an international agreement on the transfer of technology is not arbitrable under Indian law because such agreements implicate national economic policies [16].

Consequently, it is undesirable to choose the India law as the governing law of the arbitration agreement under this kind of disputes. And in Hong Kong, it is was until 2017 that the intellectual property rights related disputes can be provided for arbitration, which means that when choosing Hong Kong law as the governing law for a IPR related arbitration agreement, the arbitration agreement is enforceable and the dispute is arbitrable, and this may have a different answer when choosing another legal system.

In conclusion, when drafting an arbitration agreement, the nature of the dispute and the seat and the law governing the arbitration agreement have an inextricable link, which means that to make sure the agreement is enforceable later, the seat and the law governing the arbitration agreement most suitable for the dispute.

As is recommended by HKIAC in HONG KONG INTERNATIONAL ARBITRATION CENTRE ADMINISTERED ARBITRATION RULES 2018, an arbitration seat and governing law clause could take the following pattern: "The seat of arbitration shall be ... (the seat). The law of this arbitration clause shall be ... (Hong Kong law)."

2.6 The Use of Multi-tier Dispute Resolution Clause and its Implications

Multi-tier dispute resolution means that there is one or more alternative dispute resolution other than arbitration or another kind of resolving stage to go before the final arbitration. The purpose of this kind of scheme is to set a cooling period for parties and look forward to settling the dispute by negotiation or other procedure more amicable than arbitration.

It do have some advantages to take a negotiation in advance, especially for maintaining a long term commercial relationship between parties, when the dispute is not too complicate and pressing. Things would, however, be different when one party make use of the pre-stage resolution to spin things out for as long

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as possible if they do not want any arbitration. Because the final arbitration would never get a start until the pre-stage thing failed, it would be a waste of time and jeopardize the final arbitration's enforcement.

It can never be too careful when drafting a multi-tier dispute resolution clause. There is the possibility that is would lead to protracted enforcement or even failure of enforcement. To prevent one party buying time, a time limit could be set for the negotiation period before the final arbitration. And when the fixed time run out, even the negotiation has not come to a final agreement. It has to stop and go to arbitration. Another point to prevent unreasonable time waste from the multi-tier dispute resolution scheme is not to set too many tiers before the arbitration.

Another kind of multi-tier dispute resolution clause asks for an expert determination before the arbitration, which applies meanly to a commercial dispute concerning a few technical issues. For example, "any dispute… shall… in the first place be referred in writing to and settled by a Panel of three persons (acting as an independent expert but not as arbitrators) … [17]". It is self - evidently useful for a related technical dispute, however, expert determination is not bound by legislation and it does not have to be natural justice [18]. But the conclusion of expert determination is final and binding, and hard to challenge, which means it would weaken the jurisdiction of an arbitral tribunal. This kind of multi-tier dispute resolution clause should be used carefully, and only applied when there is a real need with a cautious selection of proper expert, otherwise, it could lead to an unfair and unwanted conclusion that cannot challenge by arbitral tribunal.

2.7 Other Details to be Included in an Arbitration Agreement

(1) The Scope of Arbitration

In most circumstances, for convenience reasons, parties would submit all disputes to arbitration. While it is also feasible to arbitrate only certain disputes if both parties agree with it. If the later pattern is chosen, it should be specified in the clauses the scope of the disputes the parties would like to take into arbitration. No matter how discreetly drafting the clauses, however, there is a great risk that an argument on whether the dispute falls in the scope can arise, which is detrimental to smooth enforcement of an arbitration agreement.

In conclusion, from the view of enforceability, submit all disputes under or relevant to the master contract is a safer and more reliable choice, but when it is agreed by parties to submit only a few kinds of issues to arbitration, further attention should be taken when drafting the clauses.

(2) Factors to be Considered When Choosing Arbitrators

Besides the arbitrator's availability, there are other factors should be taken into consideration when choosing arbitrators, for example, the familiarity with law and practice, the nation, culture, and background, business and social connections and affiliations. And according to Philip YANG in Arbitration Law, From The 1996 English Arbitration Act to International Commercial Arbitration, the factors should be taken in to account all depends on the nature of the dispute, and there is never the best or the worst arbitrator. Still, always an arbitrator suits better than another for certain disputes.

(3) The Number of Arbitrators

Besides the procedure of appointing of the arbitrators, there could be a clause on the number of the arbitrators. Both economic and enforceable reasons should be taken into account when deciding the number of arbitrators. When the arbitration is just about a few unambiguous and plain dispute, and the issue's scale is comparatively small, one arbitrator is enough. For complicated dispute or disputes, however, it would be better to have more arbitrators, usually three. From the view of enforceability, the less the number of arbitrators, the bigger the possibility they have common spare time and the earlier the arbitration is carried out. As is recommended by HKIAC in HONG KONG INTERNATIONAL ARBITRATION CENTRE ADMINISTERED ARBITRATION RULES 2018, the clause could take this pattern: "the number of arbitrators shall be ... *(one or three)* [19]."

(4) Wording

It is important to pay attention to the choice of a flexible and comprehensive expression and make sure there are no ambiguous or conflicting clauses between context. For example, it is common to see a clause like "dispute under the contract…", but what if it is not until the contract has been finished that the dispute arise? Are the disputes still arbitrable if strictly comply with the clause? For the above circumstance, "disputes arising out of or in connection with …" is supposed to be a better choice, for its flexibility and universality [20].

Another example is Lovelock (ETR) Ltd v. Exportels (1968) 1 Lloyd's Rep. 163, one clause in this agreement said that "any dispute and/or claim" shall be arbitrated in London, and another clause said that "any other dispute" shall be arbitrated in Mosco. And the court decided that the two clauses are contradictory and uncertain so the clauses are null and void [21]. Even though this is a remote case in 1968 and under the nowadays commercial environment courts tend to give the agreement and clauses invalidity as much as possible, this kind of blurry clauses would jeopardize the enforcement of an arbitration agreement and should be avoided as far as possible.

(5) The Language of Arbitration

There is no need to have a clause about arbitration language when the parties come from countries of a common language. However, if the parties come from countries with different languages, which is a quite normal circumstance for international commerce, it would be necessary to contain an arbitration language clause for a better enforcement of the arbitration agreement. As is recommended by HKIAC in HONG KONG INTERNATIONAL ARBITRATION CENTRE ADMINISTERED ARBITRATION RULES 2018, an arbitration language clause could take the following pattern: "The arbitration proceedings shall be conducted in ... *(insert language)* [22]."

(6) Institutional Arbitration or Ad hoc Arbitration

It is the parties' contractual freedom to determine the arbitration form to be institutional or ad hoc. There are, however, some mandatory rules for a certain legal system that only acknowledge the institutional arbitration. For example, in the Arbitration Law

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of the People's Republic of China, Chapter III Arbitration Agreement, Article 16:

"An arbitration agreement shall include the arbitration clauses provided in the contract, and any other written form of the agreement concluded before or after the disputes providing for submission to arbitration. The following contents shall be included in an arbitration agreement:

1. The expression of the parties' wish to submit to arbitration;

2. The matters to be arbitrated; and

3. The Arbitration Commission selected by the parties [23]."

It can be seen from subsection 3 that, only institutional arbitration is allowed in China, and the arbitration commission should be one and only. When choosing china as the seat and Chinese law as the governing law, the only institution should be specified in the clause. Otherwise, the court got the jurisdiction and there would be no arbitration.

2.8 My View and Suggestions on the Drafting of an Enforceable Arbitration Clause

From my perspective, there is no best choice for the arbitration agreement, which means, there is not a certain set of clauses enforceable for all kinds of international commercial disputes. Whether enforceable or not a clause depends on certain disputes and the parties and seeking advice from a commercial lawyer who is familiar with the commercial environment is never lose to be a good choice.

III. CONCLUSION

When facing an international commercial dispute, an agreement which leads to efficient enforcement of arbitration need to take many issues into account. First, as a legal and contractual document, an arbitration agreement has to be an enforceable agreement. In other words, like the ordinary contract, is based on parties' consensus and do not breach the mandatory rules, for arbitration agreement, the Hong Kong Arbitration Ordinance, New York convention, etc. Second, it embodies the features of arbitration. For example, a highly enforceable arbitration agreement can hardly avoid taking the arbitral rules and model clauses stipulated by arbitration institutions. And third, there are many details to be considered when drafting an arbitration agreement, such as the language of the agreement, the form of the arbitration and so on.

In conclusion, there are loads of things to be considered when drafting an enforceable arbitration agreement, which can not be completely listed in such a short essay, and only with both familiarity of arbitration and commercial activities can parties and lawyers draft a more enforceable international commercial arbitration agreement.

REFERENCES

[1] Tommy CP Sze & Co v Li & Fung (Trading) Ltd [2003] 1 HKC 418 (CFI)
[2] Bio-Chem Technology (HK) Ltd v Rich Leaf International (HK) Ltd, HCA 476/2017
[3] Arbitration ordinance (Cap 609) Chapter19
[4] Arbitration ordinance (Cap 609) Chapter19
[5] Arbitration ordinance (Cap 609) Chapter24
[6] Arbitration ordinance (Cap 609) Chapter25-27
[7] Recommended tools and techniques for effective management of arbitrations under ICC arbitration rules, Freshfields Bruckahus Deringer LLP, February 2019
[8] ICC arbitration rules 2019
[9] Arbitration Law, From The 1996 English Arbitration Act to International Commercial Arbitration, Philip YANG
[10] Why are there so many sets of arbitration rules, Ian Pennicott SC, QC
[11] ICC arbitration rules 2019
[12] HONG KONG INTERNATIONAL ARBITRATION CENTRE ADMINISTERED ARBITRATION RULES 2018
[13] HONG KONG INTERNATIONAL ARBITRATION CENTRE ADMINISTERED ARBITRATION RULES 2018
[14] ST Group Co Ltd and others v Sanum Investments Limited and another appeal [2019] SGCA 65
[15] ST Group Co Ltd and others v Sanum Investments Limited and another appeal [2019] SGCA 65
[16] Arbitrability (1992) 1-2 APLR 1
[17] Channel Tunnel v. Balfour Beatty [1993] 1 Lloyd's Rep 291
[18] Philip YANG, Arbitration Law, From The 1996 English Arbitration Act to International Commercial Arbitration.
[19] HONG KONG INTERNATIONAL ARBITRATION CENTRE ADMINISTERED ARBITRATION RULES 2018
[20] Ashville v. Elmer (1988) 2 Lloyd's Rep. 73
[21] Philip YANG, Arbitration Law, From The 1996 English Arbitration Act to International Commercial Arbitration.
[22] HONG KONG INTERNATIONAL ARBITRATION CENTRE ADMINISTERED ARBITRATION RULES 2018
[23] Arbitration Law of the People's Republic of China 2017

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