



International Arbitration: *Pitfalls and Possibilities*

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Introduction

"the' ordinary and normal method of settling disputes of international trade."

Lalive, Pierre,
Transnational (or Truly International) Public Policy and International Arbitration,
in Sanders ed., Comparative Arbitration Practice and Public Policy in Arbitration 257, 293
(ICCA Congress Series No. 3 1987)



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Introduction

"International arbitration warrants attention, if nothing else, because of its historic, contemporary and future practical importance, particularly in business affairs. For centuries, arbitration has been a preferred means of resolving transnational commercial disputes, as well as other important categories of international disputes. The preference which businesses have demonstrated for arbitration, as a means for resolving their international disputes, has become even more pronounced in the past several decades, as international trade and investment have burgeoned. As international commerce has expanded and become more complex, so too has its primary dispute resolution mechanism -- international arbitration."

Born, Gary B., *International Commercial Arbitration Volume I*, (1st Edition, 2009), page 1



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Advantages of international Arbitration

- Enforceability of Arbitral Awards (New York Convention 1958 – 149 Jurisdictions)
- Final and binding award
- Confidentiality
- Limited national court intervention during arbitration (HK: *Pacific China Holdings v Grand Pacific Holdings* CACV136/2011)
- Choice of Arbitrators
- Flexibility



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Hong Kong Arbitration

- Independent judiciary
 - Court of First Instance, Court of Appeal and Court of Final Appeal
 - Court of Final Appeal – Non-permanent judges from England, Australia, New Zealand.
- Common Law and adversarial system preserved
 - Solicitors and barristers
- Types of arbitration
 - Ad hoc
 - HKIAC Administered Arbitration Rules



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Hong Kong Arbitration

- Legal framework - Arbitration Ordinance Cap 609
 - 2006 UNCITRAL Model Law
 - Broad definition of arbitration agreement
 - Arrangements of mutual enforcement of awards between Hong Kong and Mainland China/Macau/Taiwan
 - Enforce orders and directions of tribunals
- Appointment of arbitrators
 - HKIAC to decide if it is 1 or 3 if the number of arbitrators is not agreed in arbitration agreement
 - HKIAC to appoint in default



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Hong Kong Arbitration

- HKIAC Administered Arbitration Rules
 - Single arbitration - multiple contracts
 - Joinder
 - Consolidation
 - Emergency Arbitrator



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Arbitration agreements

Pitfalls

- NYC Article II and 2006 UNCITRAL Recommendation on interpretation of Article II
- Article 7 of 2006 UNCITRAL Model Law - two options
- Asymmetric clauses
- Escalation/multi-tier dispute resolution clauses
- Hybrid clauses – see examples below
- Pathological clauses (e.g. Choice of forum clauses:
Claimant to choose court in state A or arbitration in State B)



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Arbitration agreements

Opportunities created?

- Contested stay applications
- Anti-suit injunctions
- Setting aside and enforcement battles
- Jurisdictional challenges

Adopt standard clauses provided in Rules

Make clear timing stipulations for multi-tiered dispute resolution clauses

Simplicity is beauty



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Arbitration agreements

Case Study – Hybrid clause and role of institutions

Alstom Technology Ltd v Insignia Technology Co Ltd

Arbitration Agreement: *“Any and all such disputes shall be finally resolved by arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce then in effect and the proceedings shall take place in Singapore and the official language shall be English...”*



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Case Study – Hybrid clause and role of institutions

Insigma v Alstom [2009] SGCA 24 (2 June 2009) –
Singapore court of appeal refused to set aside the award.

Enforcement refused - constitution of the Tribunal in
accordance with the agreement of the parties - violated
Article V of NYC

Arbitration agreements

Case Study – Hybrid clause and role of institutions

Results and points for consideration:

- ICC 2012 Rules Article 1(2) provides that ICC International Court of Arbitration is the only body authorized to administer arbitrations under the Rules
- Role, approach and acts of an institution can affect validity of awards.
- Liability of institutions?
- Can this clause be implemented? How?
- Should such clause be avoided?

Arbitration agreements

Case Study – Hybrid clause and role of institutions

See also: *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 5:

“..Any dispute shall be settled by amicable negotiation between two Parties. In case both Parties fail to reach amicable agreement, all dispute out of in connection with the contract shall be settled by the Arbitration Committee at Singapore under the rules of The International Chamber of Commerce of which awards shall be final and binding both parties...”



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Jurisdictional Challenge

- Art 16 of Model Law
- Art 16(3): can refer to court if tribunal rules in favour of jurisdiction

(Singapore: *Astro v Lippo* - concept of active and passive remedies and effectively ruled waiver of right to object under Art 4 of Model Law not applicable in enforcement actions in Singapore)

Challenges on

- Condition precedents not complied with – “friendly negotiation” general clause on “mediation”



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Arbitral tribunal

Choice of arbitrators

Considerations include:

- pre-disposition,
- views expressed on published articles,
- availability
- case management powers for consideration of the chair
- chemistry in deliberation process

Arbitral tribunal

Pitfalls

- challenges on basis of issue estoppel, bias due to previous writings – removal and delay
- showing off by including facts, law or arguments not advanced by parties – set aside
- lack of reasons - set aside
- inability to handle numbers and so just “say” a figure for quantum leading - set aside

Arbitral tribunal

Possibilities

- making informed choice: pre-appointment research on candidate, interview of candidate
- chair to manage proceedings to avoid perception of bias
- tribunal of three to ensure reasons set out and cogent
- getting confidential users feedback

Institutional Rules & Roles of institution

Choice for parties

- Light touch approach i.e. quality assurance without bureaucracy (e.g. HKIAC, WIPO)
- Hands-on approach i.e. confirmation of arbitrators, approval of terms of reference and scrutiny of awards (e.g. ICC)

SIAC and CIETAC also scrutinise awards

Rules are generally converging

Institutional Rules & Roles of institution

Pitfalls

- Time issues: length of scrutiny process
- Perception of influence by institutions on tribunal
- Additional costs for administrative fees
- Inadequate compensation for arbitrators, limiting the choice of arbitrators
- Appointment of arbitrators by one person
- Lack of transparency on administrative decisions

Institutional Rules & Roles of institution

Possibilities

- Time: Consider value for scrutiny process
- Perception: Quality of legal counsel
- Administrative fees: comparison made for different institutions (see HKIAC website)
- Remuneration for arbitrators: Choice of ad valorem fees or remuneration by hourly rate (HKIAC Administered Rules choice given but with a cap on the hourly rate)
- Appointment of arbitrator: Use institutions that have a committee for appointment (HKIAC Appointment Committee)

Institutional Rules & Roles of institution

Possibilities (cont'd)

- Administrative decisions: Use institutions that have an established committee or body to ensure consistency, transparency and certainty (HKIAC Proceedings Committee, ICC International Court of Arbitration, LCIA)

Powers of arbitral tribunal

Pitfalls

- Lex arbitri: arbitral tribunal has no power, necessitating need to seek assistance from court for interlocutory matters or for interim measures
- Interlocutory decisions of tribunal not enforceable

Powers of arbitral tribunal

Possibilities

- Make informed choice of legal seat:
 - 2006 UNCITRAL Model Law jurisdictions (Art 17A to J)
 - Enforcement provisions in national laws e.g. s61 of HK Arbitration Ordinance
- Institution Rules (note some national laws to prevail over rules chosen by the parties)
- Arbitration friendly Court: court ready to grant measures in aid of arbitrations but only if court is of view that it is not appropriate for tribunal to make such order.

Powers of arbitral tribunal

Example: Discovery (Request to Produce)

- Pitfalls: Extensive and wide requests, peripheral relevance only
- Possibilities: Redfern Schedule and use of IBA Guidelines

Powers of arbitral tribunal

Example: Interim measures

- Typical applications: security for costs, security for claim, preservation of status quo, preservation of evidence
- Pitfalls: only effective if ex parte order; not enforceable as award
- Possibilities: 2006 Model Law jurisdictions; national legislations

Powers of arbitral tribunal

Example: Emergency relief before constitution of tribunal

- Typical: security for claim; preservation of status quo
- Pitfalls: need to go to national court; enforceability; speed of decision
- Possibilities: Rules providing for Emergency Arbitrator relief; speedy resolution over a short period; national legislation providing for enforcement; provisions for review once tribunal constituted.

Complex commercial relationship - multiple forum

Realities

- Transaction involving multi-parties in the two groups
- Suite of contracts between different parties
- Compatibility of dispute resolution clauses?

Pitfalls

- Multiplicity of proceedings and inconsistent findings
- Different tribunals/courts for different but related contracts
- Disputes involving same fact and legal issues but still two arbitrations (construction disputes: main and sub-contracts)

Complex commercial relationship - multiple forum

Possibilities

- Single arbitration – multiple contracts
- Consolidation of two arbitrations
- Joinder of parties
- Multiple claimants/respondents
- (HKIAC Rules, ICC Rules)

Enforcement and setting aside

Pitfalls

- Art V(2)(a)(v) of NYC:
- Award set aside in supervisory jurisdiction: Can a nullity be enforced?
 - Residual discretion? If so how is it to be exercised?
 - To deal with home-town justice?
 - Or to give effect to comity of nations?
- National public policy applied to refuse enforcement

Enforcement and setting aside

Possibilities

- Art VII of NYC
- Adoption of mechanism similar to ICSID annulment process
 - Pool of international judges/arbitrators
- International public policy?



Thank You

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