DRAFTING EFFECTIVE DISPUTE RESOLUTION CLAUSES: SOME CONSIDERATIONS

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1.0 INTRODUCTION

1.1 It is perhaps not incorrect to state that for most draftspersons of commercial agreements in our part of the world, the inclusion of a dispute resolution clause in an agreement is one which is not discussed during negotiations, and one that is left to be included as a boilerplate clause.[1] It does seem that during the cordial and harmonious atmosphere when a deal is being structured, the very idea of a possible dispute arising will sound out of place, and the legal team member may suffer the "professional hazard" of being criticised as not appreciating the "real" business world, or, worse, as spoiler of deals.

1.2 This section of the Conference titled "Planning for Problems: Drafting Effective Dispute Resolution Clauses" is thus apt in recognising that there is such a mental process as "planning" for possible disputes arising and the possible ways of resolving them. It however must also be stressed at the outset that it is possible for a dispute resolution clause to be drafted *after* a dispute has arisen.[2]

1.3 From a pragmatic viewpoint, an "effective" dispute resolution clause is one which is enforceable. Concise Oxford Dictionary however defines "effective" to mean "having a definite or desired effect".[3] It is suggested that it is this call for having

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[1] "Boilerplate" has been defined as "Fixed or standardized contractual language that the proposing party views as relatively nonnegotiable." See Bryan A Garner (ed.), *Black's Law Dictionary*, 8th Edition (2004) at p. 185. See also the same learned author's work, *A Dictionary of Modern Legal Usage* 2nd Edition (1995) at p. 112 that defines "boilerplate" as "fixed or standardized language that is not subject to modification."

[2] For example, section 2 Arbitration Act 1952 (Malaysia) defines an arbitration agreement to mean "a written agreement to submit *present* or future differences to arbitration, whether an arbitrator is named therein or not" (emphasis supplied). This paper will focus mainly on the drafting of dispute resolution clauses for *future* disputes.

[3] R.E. Allen (Ed.), *The Concise Oxford Dictionary of Current English* 8th Edition (1990) at p. 374.

definite and desired effects is one that necessitates some planning and negotiations.

2.0 LITIGATION?

2.1 It is trite law that an agreement does not need to have a dispute resolution clause. In the absence of such a dispute resolution clause, either party may refer the settlement or resolution of a dispute by way of the legal process. The inclusion of a dispute resolution provision in an agreement is itself a tacit recognition that there are other means of resolving disputes between the parties other than resorting to the courts. This requires the conscious decision on the part of the parties or their advisors. The advantages, or perceived advantages, of the non-legal means of dispute resolution *vis-à-vis* the court process ought to be appreciated and fully understood for a conscious and informed decision to be made.

2.2 The means of dispute resolution referred to here include arbitration and what are generally and commonly known as "Alternative Dispute Resolution" or its acronym ADR.[4]

2.3 There has been much criticism of litigation as a means of resolving disputes and with this flood of criticisms come the emergence of the ADR movement. These criticisms are much documented in studies and papers[5] and, in England, has led to a substantial reform of the civil justice system.[6] It is pertinent to note that the Woolf Report has itself recommended and encouraged the use of ADR.[7]

2.4 The litigation process has frequently been criticised as slow (due in part to the frequent postponements and backlog of cases), costly, formalistic, "washing of dirty linens in public", technical objections not connected to the substance of the dispute can sometime prevail,[8] lack of a choice of law (for the procedural, substantive and enforceability aspects of the whole resolution process), lack of a choice of members forming the adjudicative tribunal and others. Even the main cornerstone of the litigation process, i.e. the adversarial approach for the common law system, is criticised as among the undesirable factors. I will not delve into

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[4] The ADR methods include, for example, negotiation, mediation, adjudication, expert determination, dispute review board, mini-trial etc.

[5] See, for example, Margaret Wang, *Are Alternative Dispute Resolution Methods Superior to Litigation in Resolving Disputes in International Commerce?* 16 Arb Int 189 – 212 (2000) and the learned author answers her self-posed question in the affirmative.

[6] See Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System of England and Wales* (1996), HMSO, London ("the Woolf Report"). The reforms have subsequently come to be commonly referred to as "the Woolf Reforms". Also note that an Interim Report was published in 1995.

[7] The Woolf Report para 16(c). See also CPR 1.4(2)(e).

[8] See now however the welcome decision of the Malaysian Federal Court in *Megat Najmuddin bin Dato' Seri (Dr) Megat Khas* v. *Bank Bumiputra (M) Berhad* [2002] 1 MLJ 385.

the disadvantages, perceived or actual, of the litigation *vis-à-vis* other means of dispute resolution.

2.5 If, having decided that a reference to ADR and/or arbitration as a dispute resolution method is preferred, a dispute resolution clause will need to be incorporated into the agreement between the parties. It has to be appreciated that a dispute resolution clause represents a consensual reference by the parties to the means of resolving dispute resolution other than by way of litigation, a consensus to that effect will thus be by way of the parties entering into an agreement to so refer. This brings us to the subject matter of this paper, i.e. the drafting of an effective dispute resolution clause.

2.6 However, before proceeding to this, another conscious choice confronts the draftspersons or the professional advisors of the parties, that is the choice of the dispute resolution method or methods as the mean(s) of agreed dispute resolution mechanism. It is submitted that this choice is directly linked to the nature of disputes which are likely to arise between the parties.

3.0 CHOICE OF DISPUTE RESOLUTION MECHANISMS

3.1 There is a myriad of dispute resolution mechanisms and these broadly fall into two categories: binding and non-binding methods.[9] Suffice to state that this is an important step and for this a grasp of what the various methods of dispute resolution entail, their procedures, the end results and their enforceability and other relevant factors will need to be considered. The nature of the possible disputes arising and their suitability to be resolved by a particular dispute resolution mechanism will also need to be taken into consideration.[10] It cannot be over-emphasised that this is a conscious and informed decision on the part of the draftspersons and the legal advisors to the parties.

3.2 It is noted, increasingly in this region and possibly the same trend also prevails in the other parts of the world, that the dispute resolution mechanism chosen comprises a combination of a few steps culminating in one of the parties' resort to a binding mechanism, frequently arbitration. For example, in many international construction contracts, a multi-tiered dispute resolution clause may provide for the parties to first attempt negotiation (usually amongst the top executives of both the parties) to resolve a dispute that has arisen between the parties, failing negotiation the clause will provide for mediation and if the mediation does not result in an (enforceable) settlement agreement, the clause may then provide for

[9] It would be out of place to discuss the various methods of dispute resolution methods, including arbitration in this paper. The readers are referred to the various books and papers published on this topic for their relative advantages and disadvantages. See for example, Karl Mackie, David Miles *et al*, *The ADR Practice Guide: Commercial Dispute Resolution* 2nd Edn, (2000).

[10] See for example in the context of the use of mediation in Australia, Tania Sourdin, *Matching Dispute Resolution Processes – A Study in Methods of Classifying Disputes vis-à-vis their Suitability for Mediation* in P. C. Rao & William Sheffield (eds.), *Alternative Dispute Resolution – What It Is and How It Works* (1997), pp. 143 – 181.

final resolution of the dispute between the parties by way of arbitration and this is often expressed to be "final and binding between the parties".

3.3 The enforceability of a multi-tiered dispute resolution clause will need to be first ascertained for various jurisdictions may provide different answers as to its enforceability. Before venturing into discussing the enforceability of a multi-tiered dispute resolution clause, the use of mediation (which arguably is the most common of all ADR methods of resolving disputes) will need to be briefly discussed.

4.0 MEDIATION

4.1 Mediation for the purpose of this paper is defined as a consensual process[11] where the two parties to a dispute engaged, or caused to be engaged, the services of a third party (the mediator) who will facilitate a structured negotiation between the parties so that the two parties to the dispute will resolve the dispute in ways and results which they see fit and which are jointly agreeable between them.[12] Even though it may sound contradictory, mediation can be classified into two types: mandatory mediation and optional mediation. The former is when the parties are by court sanction or by agreement between the parties make it mandatory for the parties to attempt mediation to settle the dispute between them and the later is an option between the parties. For example, in the context of standard construction contracts in Malaysia, PAM 1998 Standard Form for Building Works provides for an optional mediation clause[13] whereas the CIDB Standard Conditions of Contract for Building Works (2000) provides for a mandatory mediation clause where the parties must first attempt mediation and can only commence arbitration in the event that the mediation fails.[14] It is the experience of the present writer in Malaysia that parties to a dispute will most likely not resort to mediation if the agreement only provides an option for the parties to do so or for one of the parties to initiate the process.[15]

4.2 Appreciating the nature of mediation as it is, it will be pertinent to ask: is a mandatory mediation clause enforceable against a party to the agreement who does not wish to go along with it? A follow-up question will be: What will be the remedy to a party enforcing a mediation clause if the other party breaches it? It is to be appreciated that unlike arbitration which has a statutory regime regulating it

[11] It is possible to have non-consensual mediations, for example in the case of court ordered mediations.

[12] For difficulties and problems in attempting to define mediation, see Laurence Boulle and Teh Hwee Hwee, *Mediation: Principles, Process and Procedure* Singapore Edition (2000), Chapter 1.

[13] Clause 35 of PAM 1998 Standard Form of Building Contract promoted by Pertubuhan Akitek Malaysia (Malaysia Institute of Architects).

[14] Clause 47.2 of CIDB Standard Conditions of Contract for Building Works (2000 Edition) promoted by Construction Industry Development Board, Malaysia. The present writer is honoured to be associated with the drafting of this standard form.

[15] For a contrary opinion, see the *dictum* of Barrett J in *Morrow* v. *Chinadotcom* [2001] NSWSC 209 who took the view that "mediation forced upon one of the parties, rather than voluntarily embraced by all of them, would unlikely to achieve anything useful".

or, more accurately, coordinating it and lending it efficacy, there is no statute regulating mediation in this part of the world.[16]

4.3 There are strong arguments from a strictly legal viewpoint that a mediation clause, being essentially an agreement to negotiate, is not enforceable.[17] Further, with no statutory regime regulating it, how can one legally enforce such a provision if one party refuses to abide by the provision and attempt mediation?[18] Though this refusal to attempt mediation may be a breach of contract, it can still be argued that the non-defaulting party only suffers, if at all, nominal damages.[19] In addition, it is also argued that even if the mediation agreement or clause is enforceable, it will strictly be a futile exercise as the end result of an unwilling party is likely to be negative.[20]

4.4 The trend is however towards the enforceability of mediation clauses.[21] In England, the courts had held that if a party to the contract which contains a mediation (ADR) clause commences legal action, costs would not be awarded to his/her favour if he/she did not attempt mediation or ADR.[22] Further, in a multi-tiered dispute resolution clause, it can be said that an attempt at mediation is a condition precedent to the commencement of the remaining binding dispute resolution mechanism in the clause itself, frequently arbitration.[23]

4.5 It is thus advised that advisors should ascertain the judicial policy in a particular jurisdiction with regard to mediation before incorporate such a mediation

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[16] Unless, of course, if conciliation is equated to mediation; see then for example Part III of Arbitration and Conciliation Act 1996 (India). There has been much debate among ADR practitioners and academics as to the difference, if any, between the two.

[17] See *Courtney and Fairbairn Ltd* v. *Tolaini Brothers (Hotels) Ltd* [1975] 1 WLR 297 at 301- 302 *per* Lord Denning. See also *Walford* v. *Miles* [1992] 1 All ER 453 and *Paul Smith Ltd* v. *H & S International Holding Inc* [1991] 2 Lloyd's Rep 127.

[18] Unlike the case for arbitration, e.g. section 6 of Arbitration Act 1952 (Malaysia), Articles II.1 and II.3 of Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and, for those countries adopting UNCITRAL Model Law on International Commercial Arbitration (Model Law), Article 8 of Model Law. Note also that in arbitration, the arbitral tribunal can proceed with the proceedings *ex parte* in certain circumstances.

[19] Which *per se* may not necessary render the mediation clause unenforceable, see *per* Lord Wright in *Hillas & Co Ltd* v. *Arcos Ltd* [1932] All ER Rep 494 at 505, the clause should at least compel the parties to attempt *bona fide* mediation in good faith.

[20] See the definition of mediation in para 4.1, *supra*; it is stressed that a mediator cannot force a settlement onto the parties, the end result of a mediation process, usually expressed and reduced into a settlement agreement, must be agreed to by both parties.

[21] See Joel Lee, *The Enforceability of Mediation Clauses in Singapore* [1999] SJLS 229 - 247 in which the learned author gives an overview of the arguments against the enforceability of mediation clauses and then systematically demolishes all of them. See also Patrick Mead, *ADR Agreements: Good Faith and Enforceability* (1999) 10 ADRJ 40 - 52 and David Spencer, *Remedies: A Bar to the Enforceability of Dispute Resolution Clauses* (2002) 13 ADRJ 85 - 97. See also Boulle and Teh, *op. cit*., pp. 308 – 317.

[22] *Dunnett* v. *Railtrack Plc (In administration)* [2002] 2 All ER 850, the decision is no doubt *Woolf* inspired and in accord with the public policy of the Civil Procedure Rules. See also *Cable & Wireless Plc* v. *IBM UK Ltd* [2002] 2 All ER 1041 (Comm) and a commentary of the case by Lye Kah Cheong, *Agreements to Mediate* (2004) 16 SAcLJ 530.

[23] See Section 5.0 *infra* on Multi-Tiered Dispute Resolution Clauses.

provision in the dispute resolution clause just to err on the careful side. It is not denied that there are strong *legal* arguments against enforceability; it also cannot be said with certainty that the law in this area is well settled.[24]

4.6 There are pitfalls and problems that can arise in enforcing poorly or badly drafted mediation clauses. Boulle and Teh have helpfully listed that the following factors should be paid due attention by draftspersons of mediation clauses:[25]

"(a) mediation clauses should be clear and certain in their own right, or it should be possible to derive certainty from extrinsic documents expressly referred to in the clauses;

(b) they should be complete and comprehensive;

(c) they should specify the procedures to be followed by the parties in setting up and undertaking the mediation, with some reference to the identity of the mediator and timetables to be followed;

(d) alternatively, they should incorporate by reference the Mediation Agreement or Mediation Rules of an agency providing mediation services;

(e) they should uphold the non-ouster principle by stipulating that the parties should first submit their dispute to mediation before they institute court proceedings; and

(f) they should avoid provisions requiring participation in good faith."

5.0 MULTI-TIERED DISPUTE RESOLUTION CLAUSES[26]

5.1 Dispute resolution clauses in the form of multi-tiered dispute resolution clauses are now common particularly in the standard form construction industry contracts.[27] By mean of a multi-tiered dispute resolution clause, the writer refers to a dispute resolution clause where there are more than one (or two) distinct and separate dispute resolution mechanisms (ADR of a non-binding nature) specified in the clause itself for the resolution of any dispute which may arise and each must be attempted and if found to have failed or not to produce the intended effect, the next mechanism is then attempted; frequently the last mechanism specified is a binding decision from an arbitral tribunal or the court.

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[24] To the writer's knowledge, perhaps the only country where the law can be said to be well settled is Australia where its case law in this area is relatively more developed compared to the other jurisdictions.

[25] Boulle and Teh, *op. cit*., p. 318.

[26] See generally Michael Pryles, *Multi-Tiered Dispute Resolution Clauses* 18 J Int'l Arb 159 - 176 (2001) and Tanya Melnyk, *The Enforceability of Multi-Tiered Dispute Resolution Clauses: The English Position* [2002] Int. A.L.R. 113 – 118.

[27] See for example, FIDIC Conditions of Contract for Construction (1999) Clause 20.

5.2 The reason for such prevalence is possibly due to the widespread use of ADR as a dispute resolution mechanism and the effective and successful campaign of the ADR movement. Cost and efficiencies and the desire to avoid determinative/adjudicative methods which may sour relationship can also be factors contributing to this. The present writer's experience in drafting commercial agreements too points to this trend of incorporating multi-tiered dispute resolution clauses.

5.3 As has been pointed out before, problems can arise from poorly drafted mediation clauses and if a dispute resolution clause contains a combination of non-binding and binding determinative/adjudicative dispute resolution mechanisms as in a multi-tiered dispute resolution clause, it can only be expected that the problems can be compounded and multiplied.

5.4 Much of the discussion with respect to the enforceability of mediation clauses discussed above will equally apply in a multi-tiered dispute resolution clause if one of the dispute resolution mechanisms specified is mediation. It may be that proponents of multi-tiered dispute resolution clauses can find comfort in the judgment of Lord Mustill in *Channel Tunnel Group Ltd and another* v. *Balfour Beatty Construction Ltd and others*[28] where His Lordship said,

> "It is plain that cl 67 was carefully drafted, and equally plain that all concerned must have recognised the potential weaknesses of the *two-stage procedure* and concluded that despite them there was a balance of practical advantage over the alternative of proceedings before the national courts of England and France. Having made this choice I believe that it is in accordance, not only with the presumption exemplified in the English cases cited above that *those who make agreements for the resolution of disputes must show good reasons for departing from them*, but also with the interests of the orderly regulation of international commerce, that *having promised to take their complaints to experts and if necessary to the arbitrators, that is where the appellants should go*."[29] (emphasis supplied)

5.5 It is important to appreciate that, despite the *dicta* quoted above, a multi-tiered dispute resolution clause is not an arbitration agreement *per se*[30] as it is strictly a clause providing for a series of (usually non-binding) dispute resolution

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[28] [1993] 1 All ER 664, hereafter referred to as "*the Channel Tunnel's case*". See also *Hooper Bailie Associated Ltd* v. *Natcon Group Pty Ltd* (1992) 28 NSWLR 194.

[29] *Ibid*., at p. 678 *d – f*. Clause 67 referred to in the judgment of Lord Mustill is the dispute resolution clause which requires the parties to first submit their disputes to a panel of three experts and failing which to an arbitral tribunal. Lord Mustill has helpfully reproduced the clause in pp. 672 – 673 of the judgment.

[30] Lord Mustill has, in his speech in *the Channel Tunnel's case*, stated that the clause 67 referred to therein did not fall within section 1 of Arbitration Act 1975 (England) as an arbitration agreement to which the section applies as it "falls short either because of some special feature of the dispute-resolution clause, or because for some reason an agreement to arbitrate cannot *immediately*, or effectively, be applied to the dispute in question.": *The Channel Tunnel's case* at p. 677 *g* (emphasis supplied).

mechanisms concluding with a binding adjudicative procedure, frequently arbitration. With the existence of such a clause, an application for a stay of legal proceedings pending arbitration is thus strictly not applicable to a party at the onset of a dispute before the non-arbitral procedure(s) has (have) been exhausted.[31] It will thus be a moot point as to *when* an application for a stay of legal proceedings ought to be brought, or must be brought, pending arbitration. This also brings into focus an important point in drafting such a multi-tiered dispute resolution clause: there must be provision to the effect that the commencement and conclusion of each stage of non-arbitral dispute resolution procedure must be clear and unambiguous. The use of subjective criteria as the determining factors on when a procedure ends which prompts the beginning of the next must be strictly avoided. It also brings into focus that each of the different dispute resolution procedures must be clearly defined and identified. It also goes without the need for much elaboration that each of the procedures should itself be enforceable.[32] Preferably the procedures should be drafted in *Scott* v. *Avery*[33] form. This also means that for each of the procedures earlier to be invoked, the completion of which is a condition precedent to the commencement of the next. A warning may also be made here: the unenforceability of one procedure may affect the enforceability of the other. It is also for this reason that the procedures in such a multi-tiered dispute resolution clause be made separate and distinct. A provision to the effect of the non-inclusion and separability of unlawful or unenforceable provision can also be included.[34]

5.6 However, a draftsperson of a multi-tiered dispute resolution clause must also ensure that the clause is not rendered invalid by *completely* ousting the jurisdiction of the court.[35]

6.0 DRAFTING ARBITRATION AGREEMENTS: SOME PRELIMINARY CONSIDERATIONS

6.1 Arbitration as a dispute resolution mechanism is unique in several ways. It has a long history and it seems to defy any definition in modern legislations.[36] It stands

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[31] The legislature however has intervened in England. To reflect the *dicta* of Lord Mustill in *the Channel Tunnel's case* quoted above, Arbitration Act 1996 (England) has provided *via* section 9(2) that an application for a stay of legal proceedings may be made even where the matter cannot be referred to arbitration *immediately* due to the parties' agreement to first use other dispute resolution procedures. The provision essentially lends weight to the greater use of the multi-tiered dispute resolution clauses in England. Reading Article 7 of the Model Law together with Article 8 both of which relate only to arbitration agreements, it is opined that there is no similar provision in Model Law.

[32] For example, the reference to "good faith" as a means of enforceability must be avoided. Though there has been much debate as to whether, other than insurance contracts, there is such a concept as "good faith" in commercial law and in general contract law (in common law jurisdictions); this is far from settled.

[33] 10 ER 1121.

[34] This is important especially for those jurisdictions where the enforceability of the non-arbitral ADR procedures is very much in doubt.

[35] See for example Exception 1 to section 29 Contracts Act 1950 (Malaysia).

above other forms of dispute resolution procedures in that there is statute regulating it in most countries and is the preferred method of settling international commercial disputes compared to other methods. The advantages, perceived or actual, of arbitration *vis-à-vis* other forms of dispute resolution mechanisms have been well documented. It is my considered opinion that though arbitration is not devoid of its advantages, its limitations must also be well understood. A draftsperson of an arbitration agreement/clause, either in its own or as the final mechanism in a multi-tiered dispute resolution clause, must fully understand and appreciate what arbitration entails before advising for its inclusion. In fact, the writer will even go to the extent of stating that drafting an effective arbitration clause demands a good knowledge of virtually the full spectrum of arbitration law and its practice.[37]

6.2 Arbitration, in contrast to what have been popularly perceived and written, may not be cheap in some circumstances in the experience of the present writer and is thus not recommended when the amount in dispute is unlikely to be substantial. Legal fees aside, the arbitrator's (s') fees have to be paid (usually upfront) together with his (their) travelling and other disbursements.[38] It will not be wrong to say that arbitration, or for that matter, dispute resolution, is now virtually an industry.[39]

6.3 The nature of disputes which are likely to arise from the agreement to be entered into between the parties is also to be taken into consideration: arbitration is recommended when the disputes are likely to involve complex technical issues which will be beyond the ready appreciation and comprehension of a lay person, including a generalist judge, however learned he or she may be.

6.4 An arbitration agreement/clause will thus have to be appreciated for its legal significance. As a consensual process, it is the arbitration agreement which expresses the consensus in this regard. As an agreement, the parties must have

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[36] There is no meaningful definition of what arbitration is in Model Law which only defines arbitration as "any arbitration whether or not administered by a permanent arbitral institution": Article 2(a). There is also no statutory definition of arbitration in Arbitration Act 1952 (Malaysia); the legal anomaly of this is that section 30(7) Limitation Act 1953 (Malaysia) provides that "the expressions 'arbitration' … have the same meanings as in the Arbitration Act 1950" (*sic*)!

[37] For learned and comprehensive treatises on this subject, see, for example, Sir Michael J Mustill and Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd Edition (1989) (hereinafter as "*Mustill & Boyd*") and its *2001 Companion*; see also what I would regard as the Malaysian equivalence, Sundra Rajoo, *Law, Practice and Procedure of Arbitration* 1st Edition (2003). For Indian books, O. P. Malhotra, *The Law and Practice of Arbitration and Conciliation* 1st Edition (2002) and K.K. Venugopal *et al*. (eds.), *Justice Bachawat's Law of Arbitration and Conciliation* 3rd Edition (1999) are both recommended. See further Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* 3rd Edition (1999).

[38] Professor Pierre Lalive, a noted Swiss international arbitrator, made headline news with his fees of 4,697,258 pounds sterling for an arbitration: see Yves Dezalay and Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*, p. 19.

[39] "The commercialisation of the arbitral process … has greatly accelerated … it is now undeniable that arbitrating has become a business …": *per* Lord Mustill and Stewart Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition*, p. 166.

the capacity to enter into the agreement.[40] It also defines the scope of the disputes or differences which may be referred to arbitration by the party or parties; conversely it also defines or limits the ambit of the arbitral jurisdiction; it may also express the parties' intention of how and where they want the arbitral process to be conducted and how the award of the tribunal is to be arrived including the choice of laws governing the respective processes. Though it may not need to be expressly provided for in the arbitration agreement itself, it is submitted that a draftsperson of arbitration agreements/clauses will also have to consider the question of where and how the award is to be enforced if it is made in favour of his/her client, including what law is applicable.

6.5 An arbitration agreement/clause is thus the very cornerstone of arbitration; it defines the five "W's" of the whole arbitral process; i.e. the whats, hows, wheres, whos and whens. When drafting an effective arbitration clause, it is submitted that all these have to be considered or catered for. The importance of ensuring the validity of the arbitration agreement drafted thus cannot be over-emphasised.[41] The arbitration agreement must be legally valid in both substance and form.

Ad Hoc Arbitration vs. Institutional Arbitration

6.6 It is therefore at this stage that a draftsperson or advisor to the parties will have to make an informed decision if the arbitration to be conducted shall be of *ad hoc* in nature or institutional in nature. Broadly, an *ad hoc* arbitration is one which is conducted under rules of procedure which are adopted for the purposes of the arbitration and an institutional arbitration is one that is administered by one of the many specialist arbitral institutions under its own rules of arbitration.[42]

6.7 The draftsperson or the advisor will have to have a detailed knowledge of the provisions of the institutional rules chosen (if the choice is to go for institutional arbitration). It is frequently the case that the chosen rules from one of the established arbitral institutions or if UNCITRAL Rules are chosen[43], the draftsperson of the arbitration agreement will have to decide if certain provisions

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[40] For example, section 34(2)(i) Arbitration Act 1996 (India) renders an arbitral award liable to be set aside if "a party was under some incapacity at the time of entering into the 'arbitration agreement'". See also Article V.1(a) of the New York Convention.

[41] The arbitration agreement must not be "null and void, inoperative or incapable of being performed": see, respectively, Article 8(1) and Article II.3 of The Model Law and New York Convention. A similar phrase has also been adopted in Arbitration Act 1996 (England): see section 9(4).

[42] The definitions are taken from Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 3rd Edition (1999), p. 44. See also the discussions in pp. 43 – 53.

[43] For international contracts, see for example American Arbitration Association (www.adr.org), China International Economic & Trade Arbitration Commission (www.cietac-sz.org.cn), ICC Court of Arbitration (www.iccwbo.org), Kuala Lumpur Regional Centre for Arbitration (www.klrca.org), London Court of International Arbitration (www.lcia-arbitration.com), Singapore International Arbitration Centre (www.siac.org.sg) and others. For domestic contracts, rules published by trade or professional institutions can be incorporated if found to be suitable and acceptable, e.g. for engineering contracts arbitration rules published by Institution of Engineers, Malaysia. It is also to be noted that UNCITRAL Rules are not institutional rules and are suitable and indeed designed for use in *ad hoc* arbitrations.

of the rules, if any, may have to be contracted or opted out and that certain provisions may need to be added or enhanced. The chosen rules of these established arbitral institutions provide virtually a complete code for the conduct of arbitration. After making this choice, the draftsperson will have to ensure the valid incorporation of the chosen rules into the arbitration agreements.

6.8 There is no fixed and ready answer as to whether *ad hoc* arbitration or institutional arbitration is to be preferred as a host of factors have to be taken into consideration, including cost and practicality. Legal considerations have also to be taken into considerations, in particular enforceability of the awards and also the availability or otherwise of interim measures of protection. For example, if the rules chosen are those of the Kuala Lumpur Regional Centre for Arbitration, this automatically evokes the operation of the (in)famous section 34 Arbitration Act 1952 (Malaysia), the same will apply if the arbitral rules chosen are the UNCITRAL Rules of Arbitration and if the arbitration follows the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965 (i.e. ICSID arbitration).[44]

7.0 SCOPE OF AN ARBITRATION AGREEMENT

7.1 As arbitration is a consensual process, the parties can define and limit what disputes the parties themselves would want to refer to an arbitral tribunal for determination. It is however the experience of the present writer that in most instances, an arbitration clause is drafted so that the parties shall submit *all* disputes arising between them to arbitration and this practice is recommended. The reason for not recommending only certain disputes to be referred to arbitration is that there is risk that when a dispute arises, one party may take the stand that the dispute does not fall within the scope of the arbitration clause, thus causing delays and unnecessary costs.

7.2 What has been stated above in para 7.1 is important because it also directly defines the ambit of the arbitral jurisdiction. As Raja Azlan Shah J (as His Royal Highness then was) said in *Cheng Keng Hong* v. *Government of the Federation of Malaya*[45]:

[44] For case laws on section 34, see *Klockner Industries-Anlagen GmbH* v. *Kien Tat Sdn Bhd* [1990] 3 MLJ 183, *Soilchem Sdn Bhd* v. *Standard-Elektrik Lorenz AG* [1993] 3 MLJ 68, *Syarikat Yean Tat (M) Sdn Bhd* v. *Ahli Bina Pamong Sdn Bhd* [1996] 5 MLJ 469, *Sarawak Shell Bhd* v. *PPES Oil & Gas Sdn Bhd & Ors* [1997] 4 MLJ 280 (HC), [1998] 2 MLJ 20 (CA), *Jati Erat Sdn Bhd* v. *City Land Sdn Bhd* [2002] 1 CLJ 346 and the just reported decision of *Thye Hin Enterprises Sdn Bhd* v. *Daimlerchrysler Malaysia Sdn Bhd* [2004] 3 CLJ 553. For commentary, see Vinayak Pradhan, *Kuala Lumpur Regional Centre of Arbitration: Arbitral Awards* [1994] 2 MLJ cxxiv, PG Lim, *Practice and Procedure under the Rules of the Kuala Lumpur Regional Centre for Arbitration* [1997] 2 MLJ lxxiii and Sundra Rajoo, *Issues Related to Arbitrations Conducted Under the KLRCA Arbitration Rules* [2003] 3 MLJ xlix. Sundra Rajoo's article was expressly approved by Mohd Ghazali JCA in *Thye Hin*, *supra*.

[45] [1966] 2 MLJ 33.

> "In my view, an arbitrator derives his authority from the agreement between the parties and therefore his powers and duties are those the parties have agreed to place upon him. It is therefore necessary to see what the agreement stipulates."[46]

This brings into focus the importance of some finer points which will require close attention in drafting arbitration agreements.

"Dispute" or "Difference"?

7.3 It is trite law that if there is no dispute or difference, there is nothing to refer to arbitration.[47] However, it is to be noted that Arbitration Act 1952 (Malaysia) uses the word "difference" and the word "dispute" is never used therein.[48]

7.4 The word "difference" is usually considered as having a wider ambit compared to the word "dispute". It is the experience of this writer that in almost all arbitration clauses drafted or which I have seen, both the words are used in the arbitration agreement itself. This is to be encouraged and is recommended for there are judicial authorities which point to the difference between the two words[49] even though for most practical purposes, the two words should carry the same meaning.

"Arising out of"; "Relating to"; "In connection with" etc[50]

7.5 Such phrases are commonly used and encountered in arbitration agreements. Some of the phrases have been judicially interpreted and some have been held to have a wider coverage compared to the others. It is recommended that a broad coverage phrase be adopted and in this regard, "arsing out of" seems to be the choice.[51] It will be appreciated that any phrase used will be subject to judicial scrutiny as to its ambit and thus the coverage of the arbitration agreement and thus also the jurisdiction of the arbitral tribunal.[52]

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[46] *Ibid.*, at pp. 37 – 37. See also the judgment of Edgar Joseph Jr FCJ in *State Government of Sarawak* v. *Chin Hwa Engineering Development Co* [1995] 3 MLJ 237 where His Lordship said, at p. 245, "It is obvious that the perimeters of the arbitrator's jurisdiction must be determined having regard to the interpretation of the particular agreement in each case." It is submitted that the position is similar in all jurisdictions. See also Article V.1(c) New York Convention.

[47] See, for example, *Elf Petroleum* v. *Winelf Petroleum* [1986] 1 MLJ 177.

[48] See section 2 Arbitration Act 1952 (Malaysia). Article 7 of Model Law uses the word "disputes" and the word "differences" is not used. Arbitration Act 1996 (England) has however defined the word "dispute" as including "difference": see section 82(1).

[49] See for example, *Sykes* v. *Fine Fare Ltd* [1967] 1 Lloyd's Rep 53. For a Malaysian case, see *Accounting Publications Sdn Bhd* v. *Hoo Soo Furniture Sdn Bhd* [1998] 4 MLJ 497.

[50] For a comprehensive discussion on this, see *Mustill & Boyd*, pp. 119 – 121.

[51] See *Mustill & Boyd*, p. 120 which states that this phrase covers "every dispute except a dispute as to whether there is a contract at all." (footnote omitted).

[52] See, for example, *Chin Hwa Engineering* cited above *per* Edgar Joseph Jr FCJ at pp. 245 – 246.

7.6 However, it can be said here in passing that modern development of arbitration law to date is for a liberal interpretation of the arbitration agreement.[53]

"Shall" or "May"?

7.7 In line with the recommendation given earlier for mediation clause, it is also strongly recommended that the mandatory word "shall" is to be used in lieu of the less than obligatory word "may"; thus, the clause should be drafted to read "… in the event that any dispute or difference arises out of the contract between the parties, such dispute or difference *shall* be referred to arbitration …" and not "… *may* be referred to arbitration …".

7.8 This choice of word is advised as there are some unfortunate judicial decisions to the effect that stays of legal proceedings pending arbitration will not be ordered if the arbitration agreement provides that the parties "may" refer to arbitration as it is opined that in such a case, there is no mandatory provision compelling the parties to go for arbitration, what the agreement provides is only an option to do so and in the case of one party refusing to refer the dispute or difference to arbitration; the stay applied for will not be granted. This is exactly what was held by Nik Hashim J (as His Lordship then was) in *Westbury Tubular (M) Sdn Bhd* v. *Ahmad Zaki Sdn Bhd*.[54] His Lordship said in his judgment:

> "Unlike the cases of **Perbadanan Kemajuan Negeri Perak**, supra; … which used the phrase "**shall** be referred to arbitration" in their respective arbitration clause, the instant case however, uses the phrase '**may** be referred to arbitration' clause in the sub-contract. Thus, to my mind, the usage of the word '**may**' in cl. 35 suggests that it is not mandatory on the part of the Plaintiff to refer the disputes to arbitration. Since it is not a mandatory provision to be bound, the Plaintiff cannot therefore be faulted for not exhausting the dispute resolution process by not referring the disputes to arbitration before filing the civil suit."[55] (emphasis original)

Other Considerations

7.9 A qualification will have to be put to the statement made earlier that the scope of arbitration will have to be ascertained from a construction of the arbitration agreement itself: certain matters are not arbitrable and thus are beyond the parties' contractual rights to refer them to arbitration. For example, criminal matters are not to be referred to arbitrator. In Malaysia, it seems that questions of fraud

[53] See *Ashville Investments Ltd* v. *Elmer Contractors Ltd* [1988] 2 Lloyd's Rep 73.
[54] [2001] 5 CLJ 67. See also the discussion and the cases cited in Renwyck Niemann, *Arbitration Agreements – Where Are We Up To?* (2000) 16 BCL 14 – 20.
[55] *Westbury Tubular, Ibid*., at p. 71.

cannot be referred to arbitration.[56] The issue of arbitrability, and the often related issue of public policy, are large topics and are thus not dealt with here.

7.10 Arbitration Act 1952 (Malaysia) can be said to be a museum piece if viewed from the perspectives of other countries who have since revised or adopted Model Law (either incorporated *in toto* or modified or adapted); the Malaysian Act is essentially Part I of Arbitration Act 1950 (England) and has been in our statute book for more than half a century. With respect to arbitral jurisdiction, thus, the doctrine of *kompetenz-kompetenz* is not applicable in Malaysia.

8.0 THE ARBITRAL TRIBUNAL

8.1 Party autonomy is often said to be one of the main principles of commercial arbitration[57] and one example often cited to substantiate this is that the parties are free to choose person or persons of their choice to resolve the disputes between them. The success or otherwise of an arbitration can to a large extent depend on the choice of arbitrator or arbitrators forming the arbitral tribunal. The choice of arbitrator(s) should thus be one of the first considerations which a party should consider and it is thus strongly advised that detailed thoughts be put on this issue.

Qualification of Arbitrators

8.2 The parties can, in anticipation of the likely nature of the disputes between them, provide for the "qualification" required of any arbitrators and failing such qualification a person cannot be appointed as the arbitrator or be a member of the arbitral tribunal.[58] For example, for building or engineering contracts where the disputes arising between the parties are likely to be of technical in nature, an engineering, architecture or quantity surveying qualifications (for example) may be included as the required qualification, including membership of professional institution.[59]

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[56] "… I am satisfied that one of the substantial matters at issue is the question of the perpetration of fraud or something in the nature of fraud …a matter which it would seem to me to be outside the arbitrator's power to decide. In my view this is not the type of dispute that should be properly referred to an arbitrator." *per* Abdul Hamid J (as His Lordship then was) in *Malaysia Government Officers' Co-Operative Housing Society Ltd* v. *United Asia Investment Ltd* [1972] 1 MLJ 113 at 115. See also *Boon Chang (M) Engineering & Construction Sdn Bhd* v. *Tejana Trading Corporation Sdn Bhd & Ors* [2000] 6 CLJ 305. See further section 25(2) Arbitration Act 1952 (Malaysia) which essentially establishes the legislative policy that the question of fraud is best left for the determination of the High Court. See however a contrary opinion in *Mustill & Boyd*, p. 116.

[57] Arbitration Act 1996 (England), for example, in a departure from 'usual' English legislative drafting, has provided a statement of general principle to this effect: see section 1(b). See also Article 19(1) Model Law.

[58] *Rahcassi Shipping Co* v. *Blue Star Line Ltd* [1967] 3 All ER 301. In this case, the arbitration agreement requires the arbitrator to be a "commercial man" and it was held that a lawyer was not such a "commercial man"!

[59] As construction law/law relating to engineering and building contracts is complex, it can also be advised that engineers, architects etc with legal background may have some advantage.

8.3 It is also possible that the arbitrator be named in the arbitration agreement itself[60] but this is not advised as subsequent death, incapacity, "refusal to act" etc can delay the commencement of the arbitral process. It is opined that this *per se* will not render the arbitration agreement void or unenforceable as either party in such a situation can always apply to the court to make an appointment.[61]

Number of Arbitrators and their Appointment

8.4 It is frequently the case that in the absence of any provision in the arbitration agreements, it will be implied that the parties had intended that one arbitrator will be appointed as sole arbitrator.[62] The established arbitration rules provide the mode of appointment, usually an appointing authority will have to be named in the event of the parties failing to concur in the appointment of any arbitrators. It is suggested that the arbitration agreement must provide for the confirmation of arbitrators within a certain time period which is ascertainable rather than allowing an elastic time period for certainty purpose.

8.5 In Malaysia, it is important to note the appointment mode if the number of the arbitrators is to be three for complications can arise whether the third arbitrator is an arbitrator or an umpire.[63]

8.6 Cost and practicality are obviously factors influencing the choice if the number of arbitrators is to be one or three. For international contracts where, for example if the number of arbitrators is three, it may not be easy to find common free dates for all three arbitrators possibly of different nationalities which also coincide with the free dates of busy counsels of both parties. However, with the virtue of finality of arbitral awards being touted as one of the pillars of international arbitration, the trend is that national courts may be increasingly reluctant to set aside awards and it is with this in mind that there will be instances when three arbitrators may be preferable, even desirable especially when substantial sums are at stake. Given the combined wealth of experience and learning of three arbitrators, it is submitted that errors of judgment may be less likely. Cynics may also point out that with three arbitrators, impropriety will be very much less likely.

8.7 One more point regarding arbitrators may be made. The writer discourages and does not recommend the authorisation of arbitrators to act as *amiable*

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[60] Section 2 Arbitration Act 1952 (Malaysia).

[61] Section 12(b) Arbitration Act 1952 (Malaysia).

[62] See section 8 Arbitration Act 1952 (Malaysia), section 9 International Arbitration Act (Singapore, Cap 143A) and section 15(3) Arbitration Act 1996 (England). Model Law however provides that in the absence of any agreement, the number of arbitrators shall be three: Article 10(2). Compare however the more flexible approach of International Court of Arbitration of ICC where in the absence of any agreement, the Court (i.e. the International Court of Arbitration of the ICC) shall appoint one arbitrator "save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators": see Article 8(2) ICC Rules of Arbitration.

[63] See *Sabah Shipyard Sdn Bhd* v. *Jackson Marine (Malaysia) Sdn Bhd* [1991] 2 CLJ 1020.

compositeurs in the arbitration agreements.[64] This is especially so if the arbitrator is sitting as sole arbitrator and the concept of *amiable composition* has still not found international acceptance. Though not alien to international arbitrations, it is opined that more understanding of this concept will be necessary before one incorporates it into arbitration agreements.[65]

9.0 CHOICE OF APPLICABLE LAWS[66]

9.1 This will not be usually an issue for agreements where the parties involved are of the same nationals. For international arbitration agreements, the following sets of laws may be applicable:[67]

(a) the law applicable to the arbitration agreement itself;
(b) the law applicable to the arbitration proceedings ("the *lex arbitri*");
(c) the law applicable to the substance of the dispute ("the *lex causae*");
(d) the law applicable to the enforcement of any resulting award.

There can also be the law applicable to determine the capacity of a party entering into the arbitration agreement and this will usually be the law applicable to the place of creation or formation of the party.[68]

Law Applicable to Arbitration Agreement

9.2 This strictly will not affect drafting of the arbitration agreements. Issues such as the doctrines of the severability of the arbitration agreements and arbitrability of the disputes are governed by the law applicable to the arbitration agreement and this aspect of applicable law is thus not discussed here.

The *Lex Arbitri*; The Seat of the Arbitration

9.3 The choice of the seat of arbitration (*locus arbitri*) is one which the parties must consider for incorporation into the arbitration agreements. The seat or *locus arbitri* is the place or territory of a sovereign state in which the arbitration is held. This choice is directly linked to the arbitration law governing the arbitration which will usually have provisions such as appointment of arbitrator(s) if the parties fail to concur in their appointments, removal or "revoke the authority" of the chosen or appointed arbitrator(s), court assisted procedural assistance such as subpoena of witnesses, discovery, security for cost and a host of others. It has to

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[64] See Article 28(3) Model Law which provides that "The tribunal shall not decide as amiable compositeur or ex aequo et bono *unless that parties have expressly authorized it to do so.*" (emphasis supplied) See also Article 33(2) UNCITRAL Arbitration Rules.

[65] This is regulated by the *lex causea* of the arbitration, see *infra*.

[66] See generally Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 3rd Edition (1999), Chapter 2, pp. 75 – 134. See also Steven J. Stein, *The Drafting of Effective Choice-of-Law Clauses* 8 J. Int'l Arb 69 – 76 (1991).

[67] See for example the judgment of Lord Mustill in *the Channel Tunnel's case*, pp. 682 – 683.

[68] See Article V.1(a) of the New York Convention.

be accepted as a reality that much as the delocalisation theory of international arbitration may find acceptance in some quarters, an arbitration cannot be conducted in a legal vacuum.

9.4 An illustration may be necessary. Arbitration Act 1952 (Malaysia) for example is not applicable to a foreign arbitration i.e. if the seat of arbitration is not in Malaysia.[69] The same also applies to Arbitration Act 1996 (England).[70] The choice of the seat of the arbitration and with that the choice of the *lex arbitri* will thus be of extreme importance and is one which should not be made without an understanding of the provisions of the law involved. Though it is possible in theory that the relevant arbitration law/act of the seat of the arbitration may by agreement between the parties be different from that chosen by the parties, it is however difficult to envisage such a situation which may arise in practice.

9.5 It may also be relevant to mention in passing here again of the concept of party autonomy in commercial arbitrations in the choice of *lex arbitri*. For example, a casual reading of Arbitration Act 1952 (Malaysia) will reveal that the phrase "unless a contrary intention is expressed (in the arbitration agreement)" appears in many of its provisions governing the arbitral proceedings.[71] Arbitration Act 1996 (England) similarly provides for the concept of mandatory and non-mandatory provisions.[72] This allows the parties to opt out or contract out of the relevant provisions in this chosen *lex arbitri* if this is found to be necessary. It is observed by the present writer that there are some arbitration agreements drafted in Malaysia for international contracts which invariably contain a provision which reads, for example, "The arbitration shall be conducted in accordance with the provisions of Arbitration Act 1952". This provision, it is submitted, may not co-exist comfortably with some other provisions of the arbitration agreement itself or with the elaborate provisions of the chosen institutional arbitral rules or applicable procedural laws. This also brings into focus the importance of choosing, and understanding, the seat of the arbitration and (hence) the chosen *lex arbitri*.

The *Lex Causae*

9.6 This is the law chosen by the parties to govern their substantive rights and liabilities *inter-se*. This is also the law to be applied by the arbitral tribunal in declaring the rights and liabilities of the parties as a consequence of the dispute. This choice must also be reflected in the arbitration agreement itself or in the agreement proper for which the arbitration agreement is a clause therein contained. Once specified, the arbitral tribunal will have to apply the substantive

[69] See the judgment of Lord Mustill in *the Channel's Tunnel case*, at pp. 683 – 684. The case is of course not binding on Malaysian courts but it is submitted that this is of very high persuasion; this is also in view of the fact that Arbitration Act 1952 (Malaysia) is in *pari materia* with Part 1 of Arbitration Act 1950 (England, since repealed) which Lord Mustill made the analysis and came to the conclusion as His Lordship did.

[70] Sections 2 and 3 Arbitration Act 1996 (England).

[71] This phrase appears in sections 3, 8, 9, 10(1), (2) & (3), 13(1), (2), (3), 14(1), 15, 16, 17, 18 and 19(1).

[72] Section 4 Arbitration Act 1996 (England).

law which the parties have agreed to govern their rights and liabilities arise from the agreement between them. The arbitral tribunal will not have the freedom to depart from this.

The Law Applicable to the Enforcement of Award

9.7 The law applicable is the law of the country where recognition and enforcement of the award is sought and this includes the procedure to be adopted and available defences to enforcement. This is seldom of practical importance in the drafting of an arbitration agreement.

10.0 MISCELLANEOUS PROVISIONS

10.1 As advised earlier in para 9.5, *supra*, the arbitration clause or agreement should be coordinated and consistent with and reflect the provisions of the *lex arbitri* and also those of the chosen rules of arbitration. Mandatory provisions of the *lex arbitri* may not be overcome by contractual provisions in the arbitration agreements. It is thus advised again that a party should carefully review both the chosen arbitral rules and the procedural arbitration law to ascertain that there will not be any potential pitfalls to any arbitration to resolve the disputes that may arise between the parties. Some provisions suggested below may however be considered.

Choice of Language

10.2 If the parties are from different countries with different languages, it is important to provide for the language of the arbitration. It is suggested that it is also advisable to so provide even if the two parties are from Malaysia i.e. in the case of domestic arbitration. This provision should be regarded as a mandatory provision in all arbitration agreements.

Confidentiality[73]

10.3 It used to be assumed that confidentiality is an inherent feature of commercial arbitrations and an implied term of arbitration agreements until the momentous decision of the Australian High Court in *Esso Australia Resources Ltd* v. *Plowman*.[74] Nevertheless, confidentiality in commercial arbitrations continues to be upheld in most jurisdictions, both statutorily and by the courts.[75] It may also

[73] See generally Olivier Oakley-White, *Confidentiality Revisited: Is International Arbitration Losing One of its Major Benefits?* [2003] Int.A.L.R.29 - 36.

[74] (1995) 128 ALR 391. This however is a close 3:2 majority decision.

[75] See for example, section 14 of Arbitration Act 1996 (New Zealand); *Ali Shipping Corporation* v. *Shipyard Trogir* [1999] 1 WLR 314 and the Singapore High Court's decision of *Myanma Yaung Chi Oo Co Ltd* v. *Win Win Nu* [2003] 2 SLR 547. It was as a result of *Esso* v. *Plowman* that the New Zealand Law Commission recommends amendment to section 14 of the New Zealand Act: see New Zealand Law Commission, *Improving the Arbitration Act 1996: A Discussion Paper*, Preliminary Paper 46 (2001) and also Report 83 (2003). Singapore has gone one step further in this confidentiality provision by way of

be pointed out that there are confidentiality provisions in all the established institutional arbitration rules.[76]

10.4 The problem of drafting a comprehensive confidentiality provision is that the provision will need to consider the questions: What are to be confidential? Who are bound by this confidentiality provision? For how long? Under what circumstances can this confidentiality obligation be relaxed? and others.[77] If strict confidentiality is desired, for example in intellectual property disputes, a detailed study will have to be studied on the questions posed above and the legal enforceability of such a provision.[78]

Consolidation and Multi-Party Arbitrations[79]

10.5 It is established law, and one following from the concept of private nature of arbitrations, that an arbitrator will not without the consent of the parties have jurisdiction to consolidate disputes arising from different arbitration agreements, this is generally the case even if both the parties are similar in the various arbitration agreements.[80] However, the development of modern commerce is such that more than one agreement involving various parties may stem from a single transaction or project and the facts giving rise to the dispute may be the same or related. For example, this is often the case in construction projects which are complex and span over a considerable duration and the parties involved may be the developer or the promoter of the project, the various technical consultants, the contractors and the various sub-contractors (domestic or nominated).

10.6 In such a situation, it may be practical and indeed desirable for the parties to consolidate all the possible actions into one arbitral proceeding. The advantages are obvious: time, cost and the consistency of arbitral findings and decisions. The parties may therefore envisage this situation and provide for this in the arbitration agreement. The situation is complex, so is the drafting of such a provision. Generally the following factors must be taken into consideration:

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sections 22 and 23 of International Arbitration Act (Cap 143A) where *inter-alia* a party may apply to court for any application under the Act to be heard otherwise than in open court.

[76] See for example Article 30 of LCIA Rules for Arbitration: this confidentiality provision is more comprehensive compared to other institutional rules such as that of UNCITRAL and ICCC Arbitration Rules which only concerns the non-public nature of awards.

[77] See for example the litigation arising from a set of elaborately drafted confidentiality provision in the Privy Council opinion in *Associated Electric & Gas Services Ltd* v. *European Reinsurance Company of Zurich* [2003] 1 WLR 1041.

[78] See for example a comprehensive provision in Article 52 of World Intellectual Property Organisation (WIPO) Arbitration Rules (available in http://www/arbiter.wipo.int/)

[79] See for a detailed discussion, Phillippe Leboulanger, *Multi-Contract Arbitration* 13 J. Int'l Arb 43 – 97 (1996). For a brief overview and a suggested clause, see Martin Bartels, *Multiparty Arbitration Clauses* 2 J. Int'l Arb 61 – 66 (1985).

[80] See the oft-cited case of *Oxford Shipping Co Ltd* v. *Nippon Yusen Kaisha, The Eastern Saga* [1984] 3 All ER 835 on this point. For an exceptional situation, see the Malaysian Court of Appeal's decision of *Bauer (M) Sdn Bhd* v. *Daewoo Corp* [1999] 4 MLJ 545.

(a) all parties whose separate arbitration proceedings are to be joined and consolidated must have contractually consented to such a consolidation;

(b) all parties involved must have equal say and decision on the choice of arbitrator the constitution of the arbitral tribunal;

(c) the choice of seat and *lex arbitri* must be the same for all parties;

(d) the choice of *lex causea* must be similar in all agreements; and

(e) there must be common language to be used in the arbitral hearings/proceedings.

It is submitted that for a dispute to reach to the stage of being referred to arbitration, little will be agreed between the parties and more so on such a delicate question of consolidation. It is thus advised that this be incorporated into the arbitration agreement/clause prior to the conclusion of the agreements. This is a strategic decision that needs to be considered and made by the various parties involved.

Specific Provisions for Certain Industries

10.7 A draftsperson may consider incorporating into the arbitration clause a provision which is specific to the industries or impose certain time limitation for the initiation of arbitral proceedings.

10.8 For example, in building and engineering contracts, the arbitration agreement can provide that the arbitrator is empowered to "open up, review, and revise" decisions, opinion, of and certificates issued by, the Engineer/Architect.[81] The same clause can also contain a provision that initiation of arbitral action must commence within a certain period of the issuance of a Final Certificate by the Engineer/Architect.

11.0 DEFECTIVE ARBITRATION CLAUSES[82]

11.1 An arbitration agreement/clause must not be "null and void, inoperative or incapable of being performed"[83] and the agreement/clause must satisfy this requirement in both substance and form. Recognition and enforcement of an award may be refused if the arbitration agreement is itself not valid.[84] Pursuant to

[81] The empowerment of the Arbitrator in this regard will not deprive the Court of similar power: see the House of Lords' decision in *Beaufort Developments (NI) Ltd* v. *Gilbert-Ash NI Ltd* [1998] 2 All ER 778 which overrules *Northern Regional Health Authority* v. *Derek Crouch Construction Co Ltd* [1984] 2 All ER175.

[82] See generally Clive M. Schmitthoff, *Defective Arbitration Clauses* [1975] JBL 9 – 22.

[83] See Art. 8(1) of Model Law, Art. II.3 of New York Convention and section 9(4) Arbitration Act 1996 (England).

[84] Art. 34(2)(a)(i) and Art. 36(1)(a)(i) of Model Law and Art. V.1(a) of New York Convention.

the provisions of New York Convention and the Model Law, the only requirement as to form imposed is that the arbitration agreement must be in writing.[85] With respect to substantive requirement, the main factors which can render an arbitration agreement defective are inconsistency, uncertainty and inoperability. Even though courts may generally uphold the validity of arbitration agreements and refer the parties to arbitration, these three factors may generally mar that effort.

11.2 By way of examples, the following clauses are regarded as defective:

(a) "In the event of any claims, the parties shall refer these to arbitration in Malaysia or Singapore and the Court in Malaysia shall have exclusive jurisdiction." This clause is defective for being inconsistent and uncertain.

(b) "In the case of arbitration, the KLRCA Rules shall apply. In the case of litigation, any dispute shall be brought before the courts in Malaysia or Singapore as the parties may decide." There is an evident lack of reference to arbitration.

(c) "Any arbitration if the parties so desire shall be conducted using KLRCA Rules in Singapore."

11.3 The following are recommended to be avoided:[86]

(a) Equivocation: "the failure of the parties to state clearly that the parties have agreed to binding arbitration";

(b) Inattention: "drafting an arbitration clause with insufficient attention to the transaction to which it relates";

(c) Omission: "a clause that expresses an agreement to arbitrate, but fails to provide guidance as to how or where to do so";

(d) over specificity: "Rather than providing insufficient details, the drafter provides too much", "When the arbitration clause is excessively detailed, those layers of detail can make it difficult or impossible to arbitrate a dispute when one arises";

(e) unrealistic expectation: "imposing unrealistic deadlines on the parties, … arbitrator";

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[85] Art. 7(2) of Model Law and Arts. II (1) & (2) of New York Convention. See also section 5 Arbitration Act 1996 (England) and section 2 Arbitration Act 1952 (Malaysia). This requirement has however been criticised; see Neil Kaplan, *Is the Need for Writing as Expressed in the New York Convention and Model Law out of Step with Commercial Practice?* 12 Arb Int 27 – 45 (1996).

[86] Adapted and taken from John M. Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins* 58 Dispute Resolution Journal 1 – 7 (2003), including all quotes herein this paragraph.

(f) litigation envy: "… the drafter of an arbitration clause cannot be reconciled to the thought of letting go of the familiar security blanket of litigation"; and

(g) overreaching: "… the drafter cannot resist the temptation to tilt the arbitration process in favor or his or her client".

12.0 CONCLUSIONS

12.1 Though it can confidently be said that no businessman loves disputes, it must be accepted that much as goodwill, business acumen and judgment and the Asian "culture" may dictate, disputes will inevitably occur, or will be caused, due to a host of factors. Adopting an ostrich-style approach will not prevent disputes from happening or being caused, neither will it help to resolve them. Anticipating the disputes and plan for ways of preventing or resolving them are the positive outlook of a businessman.

12.2 This paper has identified that there are ways of resolving disputes rather than resorting to litigation. Having identified that, mechanisms must be set in place in anticipation of resolving the disputes if and when they arise.

12.3 The use of ADR is advocated, with emphasis on mediation which is arguably the most common form of ADR procedure. It is submitted that the use of ADR is here to stay.[87] It may even be said that it would be "politically incorrect" to suggest otherwise. Even though the "A" in the acronym ADR stands for "Alternative", the use of ADR is very much within the "main stream" jurisprudence despite the word "alternative" may otherwise suggest or connote.[88]

12.4 The use of mediation to resolve commercial disputes can thus be said to be the continuing international trend. At least in Malaysia, it may be premature at this stage to agree with the following statement of George H Golvan QC but given time and with the increasing popularity of mediation as a means of dispute resolution, and with all infrastructures for the use of mediation properly in place, a concurring note may be unreservedly given. The statement is this:

> "Mediation is such a suitable process for resolving commercial disputes that it may well be arguable in the future that a lawyer who fails to take advantage of an available mediation procedure, and has instead committed

[87] Sir Anthony Colman, *ADR – An Irreversible Tide?* 19 Arb Int 303 – 311 (2003). The learned author, as Colman J, delivered the decision in *Cable & Wireless*, *supra*. See also Anthony Connerty, *The Role of ADR in the Resolution of International Disputes* 12 Arb Int 47 – 55 (1996).

[88] Writing extra-judicially, Sir Laurence Street has suggested that the "A" in ADR should stand for "Additional" but, as Sir Laurence himself readily concedes, the phrase "Alternative Dispute Resolution" is now "too deeply entrenched to be able to be recommitted": see Sir Laurence Street, *The Language of Alternative Dispute Resolution* [1992] ADRLJ 144 at p.144.

> his or her client to protracted and expensive litigation, could well be *guilty of a breach of professional duty*."[89] (emphasis supplied)

12.5 The paper has further discussed the drafting of mediation clauses and offered views on the legal pitfalls in particular the enforceability of such clauses. The drafting of multi-tiered dispute resolution clauses is also discussed.

12.6 Arbitration as a dispute resolution mechanism has a unique place in the dispute resolution sphere and thus comparatively more elaborate treatment has been given, with a slant towards international arbitrations. Drafting arbitration agreements, as stated earlier,[90] demands virtually a good knowledge of the full spectrum of arbitration law and practice. What has been given here can only be an overview. Arbitration is the first among equals among the dispute resolution processes; unlike mediation, it ends with a binding decision. It is the emperor among them, and it is fully clothed.

21 September 2004
1 January 2006 (slightly updated)

[89] George H Golvan QC, *The Use of Mediation in Commercial and Construction Disputes* (1996) 7 ADRJ 188 at p. 196.
[90] See para 6.1, *supra*.