When Is An Arbitration Agreement Not An Arbitration Agreement?

Arbitration is a global dispute resolution forum which is diverse in legal, cultural and economic systems where the parties range from governments, state owned entities, multinational businesses involved with international commercial transactions. Each state has its own law regulating what constitutes an arbitration agreement.

By way of illustration the United Arab Emirates (UAE) an arbitration agreement is not enforceable unless it is made by persons having the legal capacity. Under Article 203(4) of the Law of Civil Procedure an arbitration agreement may be validly made only by a person who has the capacity to make a disposition over the right of the dispute. This is because an arbitration agreement involves a waiver of the right to bring an action before the courts of the UAE, with the guarantees that it affords to litigating parties. Dubai Court of Cassation has held[1] that a director of a limited company has the power to bind the company to an arbitration agreement unless the articles of association restricts his authority or prohibit him from making certain dispositions or expressly prohibit him from agreeing to arbitrate.

A party entering into a contract with a UAE sovereign entity or federal government department must ensure that the approval has been given by the Ministry of Justice or the Ruler of Dubai has given consent to the arbitration agreement. Failure to do so may provoke a defence to any arbitral award that there is no valid arbitration agreement.

English Law

On the other hand in England Section 6 of the Arbitration Act 1996 provides:

(1) In this Part an 'arbitration agreement' means an agreement to submit to arbitration present or future disputes (whether they are contractual or not).

(2) The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.

Model Law article 7(1) provides:

> *"Arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement."*

[1] Judgment No.51 of May 28, 2005 and case No. 164 of 2005

New York Convention at Article II (2) provides:

> *"The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."*

These rules clearly provide that all disputes may be referred to arbitration whether it be an existing dispute or a dispute in the future.

English case law dictates that there is no need to mention the word arbitration in order for an arbitration agreement to come into force see ***David Wilson Homes Ltd [2001] 1 All ER (Comm.) 449 [2001] BLR 267*** whereby a clause in an insurance policy provided:

> *"any dispute or difference arising hereunder ….. shall be referred to a Queen's Counsel of the English Bar to be mutually agreed … or in the event of disagreement by the Chairman of the Bar Council"*

Notwithstanding the fact that the clause did not say in terms that disputes were to be referred to arbitration or an arbitrator *per se* it was held to be an arbitration agreement within Section 6. It was concluded that it was sufficient that an agreement was reached to resolve the dispute in a manner other than through the courts.

Further, an arbitration agreement may refer to a written arbitration clause to be found elsewhere, provided the latter is effectively incorporated by reference into the agreement. The authorities were comprehensively reviewed by Judge Bowsher QC in ***Secretary of State for Foreign and Commonwealth Affairs v. The Percy Thomas Partnership [1968] CILL 1342*** whereby he concluded that an arbitration clause contained in standard conditions of contract which has been incorporated by reference into a contract was binding, even though no specific reference was made to the clause in the incorporating provisions.

Model Law and Subs (2) agrees insofar as it provides:

> *"The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract."*

In summary the courts are ready to accept that arbitration clauses may arise by (a) reference to a dispute being referred to an alternative jurisdiction such as a third party determiner or (b) incorporation of a document containing an arbitration agreement.

However, an agreement to attempt arbitration will not exclude the jurisdiction of the court. The latest case to be challenged in the court is ***Christian Kruppa v Alessandro Benedettii [2014] EWHC 1887 (Comm)***. In this case the clause read:

> *"In the event of any dispute between the parties pursuant to this Agreement, the parties will endeavor to first resolve the matter through Swiss arbitration. Should a resolution not be forthcoming the courts of England shall have non-exclusive jurisdiction."*

Cooke J held that this clause was not an 'arbitration agreement' in the context of Section 6(1) explaining:

> "*14. …. The very nature of that obligation shows that there is not a binding agreement to arbitrate but merely an agreement to attempt to resolve the matter by a process of arbitration which has not been set out in the clause or elsewhere in the contract. The absence of provision relating to the number of arbitrators, the identity of the arbitrators, the qualifications of candidates for arbitration or the means by which they should be chosen shows the need for the parties to reach a further agreement on the subject because the reference to 'Swiss arbitration' does not specify the seat of the arbitration nor the court which could make any appointment in lieu of the parties' agreement. The requirement to submit finally to a binding arbitration is absent and would, on the face of the clause, be inconsistent with its terms because of the two stage process envisaged.*
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> *15. in the circumstances, I hold that the clause does not require the parties to refer any dispute to arbitration in the sense required by [the Act] but merely envisaged the parties attempting to refer the matter to arbitration by agreement between them. It provides for the parties' failure to reach such circumstances on a non-exclusive basis. The defendant's applications must therefore be dismissed with costs."*

Accordingly an agreement between the parties to attempt arbitration to resolve the matter under a two-stage process of dispute resolution is not an arbitration agreement pursuant to Section 6(1) of the Act.

Summary

In summary, parties to a contract need to be aware of the nuances in the various arbitration systems required to draft a binding arbitration agreement.