Kluwer Arbitration Blog

Approaches to Arbitration in Australia and Singapore

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The different approaches to arbitration between courts in Australia and Singapore have been illustrated in two cases in the last 2 years – *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd* [2017] SGHC 32 and *Hursdman v Ekactrm Solutions Pty Ltd* [2018] SASC 112. The Singapore approach typified by *KVC* is to give judicial support to arbitration and take a pragmatic, commercial, common-sense, approach. The Australian attitude can be far more legalistic, ignoring practical realities and the desirability of encouraging arbitration.

Of course, not every purported arbitration agreement should be enforced. If a clause is truly defective, the arbitral award obtained thereunder may be unenforceable under the laws of the enforcing state.[1)]

The Singapore approach

Singapore's approach has been noted on this blog, and was articulated by the Court of Appeal in *Insigma Technology Co Ltd v Alstom Technology Ltd*[2)]:

> …where the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars…so long as the arbitration can be carried out without prejudice to the rights of either party and so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party.

In *KVC*, the court enforced a bare arbitration clause that said:

> The Seller and the Buyer agree that all disputes arising out of or in connection with this agreement that cannot be settled by discussion and mutual agreement shall be referred to and finally resolved by arbitration as per Singapore Contract Rules.

The clause did not specify the place of arbitration, mechanism for constituting the tribunal, or the applicable arbitration rules.

Nonetheless, the court held that the clause was a valid arbitration clause which was capable of being performed, and that the court could assist with appointing arbitrators to ensure the parties' intentions for arbitration were not defeated. The court said at [71]:

> …a Singapore court would be prepared to step in to directly appoint an arbitrator, *provided the dispute had some connection with Singapore*…such a decision could be justified either on the basis of contract law…with the appropriate use of implied terms…or as an exercise of the court's inherent jurisdiction to prevent injustice.

This, the judge said, was "consistent with Singapore's public policy (which includes strong support for the smooth functioning of international arbitration) and jurisprudence (which recognises the common law right…of access to justice, including the maxim *ubi jus ibi remedium*[3])".

As previously discussed on this blog, the Singapore courts find many friends in adopting a pro?arbitration policy, including the Swedish courts and the Swiss courts.

The Australian approach

Compare that approach with that in *Hurdsman* which, while admittedly dealing with a different aspect of arbitration agreements, perhaps illustrated the underlying philosophy. The court in *Hurdsman* refused to enforce the following clause:

> 28.3 If the parties have been unable to resolve the Dispute within the Initial Period, then the parties must submit the Dispute to a mediator for determination in accordance with the Rules of the Singapore International Arbitration Centre (**Rules**), applying South Australian law, which Rules are taken to be incorporated into this agreement.
>
> 28.4 A party may not commence court proceedings in respect of a Dispute unless it has complied with this clause 28 and until the procedures in this clause 28 have been followed in full, except where:
>
> 28.4.1 the party seeks injunctive relief in relation to a Dispute from an appropriate court where failure to obtain such relief would cause irreparable damage to the party concerned; or
>
> 28.4.2 following those procedures would mean that a limitation period for a cause of action relevant to the issues in dispute will expire.

The problematic word was the reference to a mediator rather than an arbitrator. The contract in question followed a memorandum of understanding (**MOU**) which stipulated 'arbitration in

accordance with the rules of the Singapore International Arbitration Centre (**SIAC**)'.

However, the court held that it was not obvious on the face of the agreement that the word 'mediator' was intended to be 'arbitrator', that the agreement was neither one to arbitrate or mediate, and that the submission to the jurisdiction of South Australian courts would have no work to do if Clause 28.3 were an agreement to arbitrate.

It is not difficult to imagine how this clause would have been dealt with in Singapore.

First, the clear arbitration agreement in the MOU strongly suggests the parties intended for arbitration. No reason was suggested why the parties would change their minds between the MOU and the contract.

Second, the words 'for determination' following 'mediator' strongly indicate arbitration over mediation. There is nothing a mediator determines; whereas arbitrators determine disputes by delivering an award. Curiously, the judgment makes no mention of this phrase.

Third, the reference to 'the Rules of the [SIAC]' strongly indicates arbitration. This is because the SIAC publishes rules for arbitration, not mediation.

Fourth, contractual submission to courts is not a contraindication of arbitration. Such clauses still have work to do where arbitration is validly chosen. It is common for parties to submit to the jurisdiction of named courts, while stating that disputes are to be resolved by arbitration. The MOU itself contained submission to the courts of South Australia, "*subject to arbitration*". Where that occurs, submission to jurisdiction indicates the seat of the arbitration and hence the courts which would supervise the arbitration by appointing arbitrators, granting interim measures, etc.[4)]

Fifth, while the right to commence court proceedings to avoid the expiration of limitation periods sat more comfortably with the clause being a mediation agreement (since commencing arbitration typically satisfies limitation concerns), this arguably reflects parties' ignorance of arbitration. Here, under the principle of effective interpretation, the courts should salvage the true intentions of parties, even if distorted by infelicitous drafting.[5)]

The court's decision effectively sanctioned a violation of the parties' agreement, by allowing the plaintiff to pursue court proceedings without first commencing *either* mediation or arbitration. Perhaps this flows from the defendant dropping its contention to replace 'mediator' with 'arbitrator' in Clause 28.3.

In contrast, in another Singapore decision, the Singapore court said it would be prepared to replace the word 'umpire' in an arbitration clause with the word 'president' (*BNP v BNR* [2018] 3 SLR 889).

The court said this would give effect to the parties' intention for arbitration and "make such an arbitration workable and feasible".

The court ultimately dismissed the challenge against the tribunal's jurisdiction, which was made on the basis that while the clause provided for the third arbitrator to "act as an umpire", the third arbitrator was acting as president.

Based on *KVC* and *BNP*, it seems a Singapore court would uphold the clause in *Hurdsman* as a workable arbitration agreement.

Conclusion

Professor Waincymer has proposed on this blog that a court hearing an application to stay court proceedings in favour of arbitration should "simply ask whether a reasonable tribunal hearing all evidence could find validity". He submits that this fits the deferential approach courts should adopt, pursuant to the UNCITRAL Model Law and New York Convention.

Professor Waincymer's proposal may have made a difference in *Hurdsman*.

This is because in *Hurdsman*, there was "some ambiguity" in the clause: the court noted it was "neither this nor that…not quite an arbitration agreement and not quite a mediation agreement".

However, the court did not, it appears, have the benefit of seeing witnesses cross-examined, or a full body of relevant material. This is not surprising. As Professor Waincymer notes:

> …presentation and testing of detailed evidence via contemporaneous documents and cross-examination of witnesses would not be the norm…there would invariably be reluctance to allow a full hearing with cross-examination, or allow for the generation of a full body of relevant material evidence …

The court was therefore tasked with deciding the matter without a full appreciation of the facts.

Under Professor Waincymer's approach, the court may well (a) have accepted that a reasonable tribunal hearing *all* the evidence (unlike the court, which only heard some evidence) *could* find that the clause was a valid arbitration agreement, and (b) therefore granted a stay in favour of arbitration.

However, until Professor Waincymer's approach is accepted, parties should beware the different levels of scrutiny their dispute resolution clauses may face in different courts.

Parties should seek appropriate early advice, to avoid unnecessary skirmishes and unpredictable decisions. Such 'fights over where to fight' are like being stuck on a disrupted Tube service – time?consuming, but largely avoidable, if you had only planned your route more carefully.

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References

?1 Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at [4.43].

?2 *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR 936 at [31].

?3 "Where there is a right there is a remedy".

?4 Jeffrey Waincymer, *Procedure and Evidence of International Arbitration* (Wolters Kluwer 2012) at [3.5].

?5 *Insigma v Alstom* [2009] 3 SLR(R) 936 at [39].

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