



ក្រុមប្រឹក្សា អេស៊ី កម្ពុជា
ASIA CAMBODIA LAW GROUP
亚洲柬埔寨法律集团
LEGAL & ADR

LEGAL INSIGHT

“ARBITRATION CLAUSE IN THE AGREEMENT”

Asia Cambodia Law Group

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INTRODUCTION

This research aims to provide a brief explanation and description on general understanding of arbitration and the way to make the arbitration clauses enforceable in the agreement.

I. Understanding about Arbitration

1. General understanding

a. What is Arbitration?

Arbitration is mediation of disputes using the Tribunal is within or outside the scope of the institution of a conciliatory institution, and the dispute above referred to commercial disputes only. (Article 2 of Commercial Arbitration law).

b. The Advantages and Disadvantages of Arbitration

- The Advantages (Commerce, Dispute Resolutions):

Neutral Forum - A major advantage of arbitration is that it can provide a more neutral forum, eliminating the “home court” advantage of a well-connect litigator.

Cost and Time Saving - Arbitration-particularly in relative small or non-complex dispute-is generally considered to be more expedition and less expensive than court proceeding.

Flexible Representation for Parties - Counsel in arbitration proceeding need not, in most jurisdictions, be admitted to the bar of the jurisdiction in which the arbitration is conducted. Indeed, a party in arbitration need not be represented by a lawyer at all.

Thus, corporations may employ in-house counsel or other technically knowledgeable personnel to conduct arbitrations in the country or abroad. Cost savings can result from the repeated use of the same expert attorneys, or other personnel, familiar with both the arbitration process and frequently disputed issues in the company's contracts.

Arbitration Experience in Field or Industry - Arbitrators, who need not be attorneys and can be selected for their special expertise, are often more likely than judge to be experienced in the field of the controversy and familiar with the type of the issues in dispute. Consequently, less time is lost in “educating” an arbitrator. This factor becomes particularly important when issues such as

trade usage, quality of goods or performance and other technical facts are likely to be involved.

Informality - Technical, procedural and evidentiary rules are not always strictly observed and need not be as matter of law.

Arbitration Need Not Follow the Law - In arriving at their decisions, some arbitrators tend to focus on the equities of the situation. In so doing they may ignore or misapply substantive rule of law, including the choice of law designation of the parties and other contractual limitation.

- Disadvantages:

The disadvantages of an arbitration is that once a ruling or determination has been made, the decision becomes final and binding. Unlike the court ruling, arbitration decisions cannot be appealed. The only way that an arbitration decision can be appealed or set aside is if a party proves that the arbitrator was biased or unfair when making the decision and as a result violated some type of public policy. In addition, arbitrations do not have an automatic discovery process where parties are required to exchange information. Parties must agree to include a discovery requirement in their arbitration clause. Finally, arbitrations are usually more costly and expensive than court litigations.

- Arbitration compared to court proceedings (Commerce, Dispute Resolutions)

Arbitration	Court Proceedings
Flexible hearing schedule permits speedier resolution of disputes.	Scheduling is affected by crowded court calendars.
Arbitration do riot normally participate in settlement discussions.	Judges more often take active roles in encouraging settlement.
Although documents are frequently exchanged between the parties, other discovery is not regularly available (unless expressly provided for) the absence of discovery permits prompt commencement of hearings, but may result in longer hearing.	Discovery devices reduce chance of surprise and assist counsel in preparing case, but may result in harassment, particularly of poorly financed party.
Parties need not be represented by counsel	Counsel is customary in all but the smallest cases.

Counsel, If utilized, need not be a member of local bar; non-lawyers can also be used.	Counsel must generally be a member of local bar to try case in court, or must be specially admitted.
Cases may be decided by persons experienced in industry and familiar with subject matter of dispute.	Case are decided by judges or juries with no special expertise in area of controversy.
Arbitrator need not be an attorney.	Judge are almost always attorneys.
Arbitrator may render compromise verdicts.	Jury trial presents danger of runaway verdict, particularly to large non-local corporate defendants.
Procedural rules, including the rule of evidence may not be strictly observed.	Procedural and other evidentiary rules are generally followed, especially in jury trials.
Arbitrators are not necessarily bound by the substantive law government a dispute, including the parties' choice-of-law designation, and most "error" are not appealable.	Judge are bound to follow the law. Legal error may be corrected on appeal.
Arbitrations are normally conducted in private and the press does not typically have access to papers or testimony involved.	Court session are open to the public and the press.
Ground for appeal of arbitral awards are extremely limited and do not afford means of reviewing merits of award	Full legal ground for appeal are available
Arbitration is more conducive to resolution of dispute while permitting parties to maintain a friendly working relationship	Court-based litigation is generally more disruptive of parties working relationship than arbitration.
Arbitration can fashion remedies, including provisional equitable relief, which a court could not.	Court are limited by various technicalities as to the nature of the relief they can award
Arbitration can be authorized to fashion creative solution.	Courts are usually limited to conventional legal and equitable remedies.

2. Scope of disputes for NCAC's jurisdictions

The term dispute here is defined as Commercial dispute. According to Article 2 (i) of the Commercial Arbitration Law of the Kingdom of Cambodia 2006 provided that the term "**commercial**" should be given a wide

interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of good or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; and carriage of goods or passenger by air, sea, rail or road.

II. How Arbitration Clause works in the Agreement

1. The importance of arbitration clause

An arbitration clause is a section of a contract that deals with the parties' rights and options in the event of a legal dispute over the contract. Arbitration is the most comprehensive and cooperative way for resolving disputes arising from the domestic and international commercial relationships whereby the parties mutually agrees to reconcile the dispute by entering into an agreement. The parties have an option to incorporate the separate agreement or as a clause within the contract defined as "Arbitration Clause" which binds a party to a type of resolution outside the court.

2. What can we mention in arbitration clause?

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity, performance or termination, shall be referred to and finally resolved by:

1. Choose the right arbitration's jurisdiction - The parties must make a fundamental choice whether to bring the dispute to adhoc arbitration or institutional arbitration. Adhoc arbitrator refers to a qualified and experienced arbitrator who is not listed with National Commercial Arbitration Center (NCAC), but may be listed by or associated with other local or international Arbitration Center/Institution. On the other hand, in institutional arbitration, the task of agreeing the relevant procedure can be fairly easy as all institutions have their set of rules

governing the conduct of the arbitration process if there is no contrary agreement between the parties.

As for selecting the 'right' arbitration institution, most parties may consider the cost of arbitration and the arbitration rules, the aim is to enable businesses to find the 'right' arbitration institution for the dispute in hand.

Here are some arbitration institutions to be selected, namely:

- the International Court of Arbitration of the International Chamber of Commerce (ICC)
- the London Court of International Arbitration (LCIA)
- the Arbitration Institute of the Stockholm Chamber of Commerce (SCC)
- the Singapore International Arbitration Centre (SIAC)
- the Istanbul Arbitration Centre (ISTAC)
- National Commercial Arbitration Center (NCAC)

2. Arbitration Rules - The rule of the judicial arbitral institution which the party of dispute applied to. E.g. Where the parties agreed to refer the dispute to NCAC, Rules of the National Commercial Arbitration Center of the Kingdom of Cambodia dated 11-July-2014 shall be applicable and being in force at the time of commencement of arbitration. The arbitration proceedings shall commence on the date which the Notice of Arbitration for that dispute to be referred to arbitration is received by a respondent according to Rule 7 (7.7).

3. Place of arbitration - The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the agreement of the parties according to Art 28-1. The parties must specify the place of arbitration because the award will have a great enforcement potential if the arbitration is performed in a place with a favorable legislation to arbitration.

4. Number of arbitrator - The parties are free to determine the number of arbitrators. The number of arbitrators shall be odd number. Failing such determination, the number of arbitrators shall be three (3) according to Art 18.

5. The language of the arbitration - The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral

tribunal shall determine the language or languages to be used in the proceedings (Art 30).

6. Applicable Law - It determines the extent of the parties' respective rights and obligations and helps to fill gaps in contractual provisions. It is normal that a party wants to choose their own national law, because it is the legislation the party is more familiar with. However, not always the own rules are the most advantageous. Occasionally, this provision is set forth in the agreement to settle the dispute arising out (Domínguez, 2007). The parties may refer their dispute to any international arbitration or the domestic one. Such award is enforceable unless its decision to be made does not contrary to the law of the Kingdom of Cambodia.

7. Costs and Fee - The cost of arbitration shall consist of registration fee, administration fee, arbitrator appointment fee, tribunal fee and any expense included by tribunal and NCAC (Rule 41 of NCAC rule).

8. Binding or Nonbinding Arbitration - Arbitration can be binding (which means the participants must follow the arbitrator's decision and courts will enforce it) or nonbinding (meaning either party is free to reject the arbitrator's decision and take the dispute to court, as if the arbitration had never taken place) (Richard Stim, n.d.). Binding arbitration is more common. According to Rule 37 an award shall be final and binding on the parties from the date it is issued and sealed.

3. The prospective risks that may raise regarding arbitration clause

Choosing adhoc and institutional arbitration - An ad-hoc arbitration usually takes place when the arbitration clause in the original agreement between parties provides for arbitration without designing any arbitral institution and without referring to any particular set of institutional rules". Whereas that an institutional arbitration "is one that is administered by one of the many specialist arbitral institution under its own rules of arbitration" (Domínguez, 2007)

Pathological clauses - which were wrongly drafted, whether by rush, or lack of both expertise and experience of the parties.

Ambiguity - An arbitration clause is considered to be ambiguous when the parties do not express clearly that in case of conflict the method to use in order to settle the disagreements will be arbitration. Hence, parties are compelled to refrain from signing confusing agreements to arbitrate, because the general rule is that arbitration is prompted out of the contract, and if there is not an explicit arbitration clause within the contract it would not be an agreement to arbitrate (Domínguez, 2007).

Negligence - The parties draft an arbitration clause negligently when they address improperly an institution in charge of administer the arbitration process, or name the arbitral institution incorrectly or referring to the out of date rule of the arbitration.

Exclusion of Essential or Necessary Elements - The parties must state an element necessary or essential to write an effective arbitration clause including without limitation, the place of arbitration, arbitration rules, number of arbitration, language, and law applicable.

Unrealistic expectations - The agreement in the drafting of an arbitration clause when the proceeding is divided in a series of steps which are allotted a short period of time to be performed. This is a double troubling matter, on the one hand it is the time, and on the other the specific stages. The method of dispute settlement is considered to be faster than litigation. However, it does not mean that the parties will get an immediate resolution of their dispute. Regarding the arbitration agreements that impose specific stages to be applied to the potential arbitration process, namely those with a strict schedule to present the requirement for arbitration, the written submissions, ways of conduct the presentation of documents, hearings, etc. This is deemed to be counterproductive. It would mean that the arbitrators will not be allowed to use their discretion while directing the process (Domínguez, 2007).

Abusive clauses - an abusive clause is one that has been drafted manifestly favoring the interest of one of the parties. Generally, the benefited is the strongest economic party, which imposes unfair conditions through contracts of adhesion, or by reference.

Sometimes these stipulations are so unequal that the courts refrain from enforce them (Domínguez, 2007).

CONCLUSION

In sum, arbitration is the very helpful method by using ADR to settle the kind of commercial dispute. Having mentioned and choosing the right arbitration clauses in the agreement, it will bring parties to a harmonized and saving way to settle any dispute arising out of or in connection with their agreement, otherwise, their agreement as well as arbitration award will become unenforceable and unconscionable.

References

- Commerce, M. o. (n.d.). Dispute Resolutions. In M. o. Commerce, Dispute Resolutions (p. 11). Phnom Penh: Ministry of Commerce.
- Commerce, M. o. (n.d.). Dispute Resolutions. In M. o. Commerce, Dispute Resolutions (p. 16). Phnom Penh: Ministry of Commerce.
- Domínguez, L. A. (2007, December). Causes and Consequences of Faulty Arbitration Clauses. Retrieved from Estud. Socio-Juríd vol.9 no.2 Bogotá July/Dec. 2007:
http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S0124-05792007000200005
- Richard Stim, A. (n.d.). Arbitration Clauses in Contracts. Retrieved from Nolo:
<https://www.nolo.com/legal-encyclopedia/arbitration-clauses-contracts-32644.html>

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