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Direct editorial inquiries and send materials for publication to: Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541.

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Editorial Office
American Arbitration Association
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To reach Customer Service:

Elizabeth Bain
Available 8:00 AM-5:00 PM Eastern Time
(401) 431-4837
baine@adr.org

Top 10 Issues in Arbitration Clauses in Singapore and Hong Kong

Paul Tan, Alex Wong, Jonathan T.R. Lai, and Viraen Vaswani[1]

In this article, the authors consider the top 10 issues regarding arbitration clauses that arise nowadays, and the extent to which the courts of Singapore or Hong Kong have dealt with them.

International transactions with Asian parties using arbitration as their preferred mode of dispute resolution continue to rise. In recent years, U.S. and European counterparties feature among the most frequent users of Singapore and Hong Kong as seats of arbitration.

Singapore and Hong Kong are regarded as two leading, pro-arbitration seats for international arbitration. As commercial transactions become more complex, parties have been seeking variations to the standard model arbitration clause to fit the specifics of their transactional requirements. No longer "midnight clauses," arbitration agreements deserve attention and scrutiny by parties because they can greatly influence how a dispute could unfold.

This article considers the top 10 issues regarding arbitration clauses that arise nowadays, and the extent to which the courts of Singapore or Hong Kong have dealt with them.

[1] The authors, attorneys with Gibson, Dunn & Crutcher LLP, may be contacted at ptan@gibsondunn.com, awong@gibsondunn.com, jlai@gibsondunn.com, and vvaswani@gibsondunn.com, respectively.

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Issue 1: Are Optional or Asymmetrical Clauses Enforceable?

Summary: Yes.

Both Singapore and Hong Kong have confirmed that optional arbitration clauses (giving parties the option, not obligation, to arbitrate their disputes), and asymmetrical arbitration clauses (entitling only one party the right to refer the dispute to arbitration) are enforceable. A lack of mutuality in obligations per se does not render the clause unenforceable.

In an optional clause, it is advisable to stipulate whether the other party is bound by the other party's choice (i.e., whether the first mover dictates the forum).

In an asymmetrical clause, it is advisable to stipulate a process (e.g., written notice of a dispute arising) that would trigger a longstop date by which the party holding the right to refer the dispute to arbitration has to exercise or forfeit it.

Issue 2: Are Pre-Arbitration Requirements (a) Enforceable, and (b) Treated as a Question of Admissibility or Jurisdiction?

Summary: Yes, pre-arbitration requirements are enforceable. Singapore and Hong Kong take different positions on whether such questions are treated as going to admissibility or jurisdiction.

Pre-arbitration requirements or arb-med-arb protocols or multi-tiered dispute resolution clauses are enforceable. The stringency with which such clauses will be enforced depends on the language used. Where clear obligations are imposed and expressed as mandatory, the court will require full and not merely substantial compliance.

A party's failure to adhere to conditions precedent to the arbitration is currently viewed as a matter going to admissibility under Hong Kong law such that it is only for the tribunal to decide

if the preconditions are met, and if not, to decide whether to stay proceedings pending satisfaction of those conditions.

Singapore law is not settled on this but there is authority suggesting that the tribunal lacks jurisdiction to proceed if the preconditions are not met. A party that disagrees whether the preconditions are satisfied may challenge jurisdiction before the tribunal and ultimately in court.

Issue 3: Can Parties Mix and Match Institutions and Arbitral Rules?

Summary: Possible; not advisable.

Only Singapore law has confirmed that a clause mixing institutions (e.g., ICC rules administered by the SIAC) and their arbitral rules can be enforced. However, this is not advisable and institutions like the ICC have now stipulated in their rules that only they can administer their own rules.

Issue 4: Are There Presumptions Relating to Parties' Choice of the Law Governing the Arbitration Agreement?

Summary: Yes; recommend stating the law governing the arbitration agreement.

The law governing the main contractual obligations of the parties is, in principle, distinct from the law governing the arbitration, which in turn need not follow the law of the seat (i.e., the procedural law).

Most contracts will at least stipulate the law governing the contract, and by the choice of the seat, they will have chosen the procedural law.

However, many contracts remain silent on the law governing the arbitration agreement itself (possibly on the assumption that the law governing the contract governs the arbitration agreement

as well). This has spawned a series of cases. It is advisable to specifically stipulate the law that parties desire to govern the arbitration agreement (which affects validity and interpretation).

In the absence of an express choice, the court will examine whether there is an implied choice of law. There is a presumption that the law governing the main contract governs the arbitration agreement. That presumption can be displaced by (1) the terms of the arbitration agreement, or (2) whether the effectiveness and validity of the arbitration agreement would be impacted by applying the presumption.

In the absence of an express or implied choice, the system of law that has the closest and most real connection to the arbitration agreement will govern.

It should be noted that this test follows the English position, which is about to be changed by statutory reform such that the law of the arbitration agreement will be presumed to follow the law of the seat. It remains to be seen whether the Singapore or Hong Kong courts adopt the new English position.

Issue 5: Can the Allocation of Costs and Interest Be Dealt with by Agreement, Including the Costs of Third-Party Funding?

Summary: Yes.

The allocation of costs and interest is a matter for the tribunal and the courts would not generally interfere in their award.

The default rule in both jurisdictions is that costs follow the event. Parties may agree for each party to bear their own costs. Unlike in England, there is no statutory prohibition in Singapore and Hong Kong against allocating all the costs to one party regardless the outcome.

Tribunals tend to award pre-award interest on a compounded basis to compensate the claimant for being out of the money, and post-award interest based on the prevailing statutory rate. Parties may also wish to stipulate whether and at what rate interest should apply.

Third-party funding is permitted in Singapore and Hong Kong for international arbitrations. There is no reason in principle why the costs of third-party funding cannot be awarded to the successful claimant and tribunals have allowed this. To avoid any dispute, parties may stipulate the tribunal may award such costs.

Issue 6: Can Parties Carve Out Issues for Judicial Determination? By Extension, May Parties Appeal Questions of Law?

Summary: Yes, parties can carve out issues for judicial determination, but no, parties may not appeal questions of law.

The scope of the arbitration clause is a matter for agreement by parties, and it can be as wide or narrow as parties deem appropriate. This means it is possible to carve out certain issues for judicial determination. This could be useful to obtain a ruling on a certain definition or clause that parties might be using across multiple contracts, or a standard term.

However, neither Hong Kong nor Singapore permits appeals on issues of law if otherwise those questions are referable to arbitration.

It is unclear whether parties can agree to refer certain issues to an "appellate tribunal," which some industry arbitration rules provide for. How such agreements square with the legislation in Singapore and Hong Kong remains untested.

Issue 7: Can Parties Address Multiparty or Consolidation Issues by Agreement?

Summary: With great caution.

Depending on the arbitral rules adopted, there may be default provisions as to the process to be undertaken in a multiparty or consolidated arbitration. The most important of which is that the original parties may not be able to appoint their own arbitrators.

It could be possible for parties to stipulate that the "anchor" parties get their choice of arbitrator. But this could raise issues of due process and equality. This explains why most institutional rules provide, e.g., that where a party is joined, the tribunal is then appointed only by the institution and not the parties, or that if there are multiple claimants or respondents, they have to agree on their arbitrator or the institution will appoint the arbitrators.

What can be useful is an express provision stipulating that parties agree that disputes arising out of a defined group of contracts are to be capable of consolidation and/or that parties to the defined group of contracts agree to be joined in any such proceedings.

Issue 8: Can Parties Agree on Expedition?

Summary: Yes.

It is possible for parties to stipulate that their arbitration should be conducted in accordance with the expedited rules of the institution, or simply that the arbitration is conducted and completed within a defined period of time.

Conversely, parties may stipulate that their arbitration will not be expedited even if it may qualify for expedition under the relevant rules.

Issue 9: Should Parties Pay Attention to Questions of Arbitrability?

Summary: Yes; ensure the disputed subject matter is arbitrable under laws of the arbitration agreement and the seat.

Typically, the law governing the arbitration agreement determines whether the dispute is arbitrable. This could be a trap for the unwary, and makes the choice of the law governing the arbitration agreement important (see above).

The Singapore courts have recently ruled that at the pre-award stage, a dispute cannot be referred to arbitration if it is

not arbitrable by both the law of the arbitration agreement and the law of the seat. Thus, while the choice of a "safe" seat like Singapore or Hong Kong should avoid most arbitrability issues, advice should be taken in relation to whether the governing law of the contract would regard any potential dispute as not being arbitrable.

In the commercial context, the question of arbitrability often arises when the dispute involves the validity of intellectual property rights and minority oppression claims.

Issue 10: Can Parties Choose Their Supervisory Court?

Summary: Yes, in Singapore.

In Singapore, the default supervisory court is the General Division of the High Court. However, parties may choose the Singapore International Commercial Court as their supervisory court.

In Hong Kong–seated arbitrations, the Hong Kong courts (specifically the Court of First Instance) will be the court of supervisory jurisdiction.

Conclusion

Notwithstanding the permutations open to parties to create bespoke arbitration agreements, one must be careful not to add unnecessary complexity. While some variations can be useful (e.g., provisions on costs and interest), one counterpoint to balance is that the further an agreement deviates from the standard model clause, the more opportunities a recalcitrant respondent may have to raise arguments challenging jurisdiction or admissibility.