The adoption of institutional arbitration rules and their effect on the right to appeal in domestic arbitrations

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Introduction

In recent years, it has become increasingly commonplace for commercial parties involved in complex commercial transactions to include an arbitration clause as their chosen dispute resolution mechanism within the terms of the contract. Indeed, arbitration now seems to be commercial parties' first choice for dispute resolution in view of obvious benefits such as the clear policy of finality of arbitral awards, as well as confidentiality of arbitral proceedings.

In adopting the arbitral rules to govern the arbitration proceedings between parties, the arbitration clause (which in essence constitutes the arbitration agreement between the parties) typically provides that arbitral proceedings are to be governed by the arbitral rules of particular institutions. This commonly includes the adoption of International Chamber of Commerce (ICC) Rules, or Singapore International Arbitration Centre (SIAC) Rules. Yet, parties may not immediately be cognisant that in entering into such an arbitration agreement that adopts the said institutional rules, they may well be taken to have waived their right to appeal on questions of law insofar as domestic arbitrations are concerned.

The waiver of the right to appeal on questions of law

Article 35(6) of the 2017 ICC Rules (in force from 1 March 2017) states:

"Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made."

In similar vein, Rule 32.11 of the 2016 SIAC Rules states:

"…by agreeing to arbitration under these Rules, the parties agree that any Award shall be final and binding on the parties from the date it is made, and undertake to carry out the Award immediately and without delay. The parties also irrevocably waive their rights to any form of appeal, review or recourse to any State court or other judicial authority with respect to such Award insofar as such waiver may be validly made."

While at first blush, the provisions may not seem controversial, parties may not immediately recognise the true significance of the provisions. The transaction document typically makes reference to the institutional rules as a whole, and the issue of whether and how Article 35(6) of the ICC Rules or Rule 32.11 of the SIAC Rules operate to exclude a right to appeal may come to light only when there is a dispute that has gone to arbitration, and when the dissatisfied party seeks recourse against the award.

The provisions operate to exclude, in particular, recourse against an award in the form of an appeal to the High Court on questions of law pursuant to section 49 of the Arbitration Act (Cap 143A). Section 49(1) of the Arbitration Act provides:

“A party to arbitral proceedings may (upon notice to the other parties and to the arbitral tribunal) appeal to the Court on a question of law arising out of an award made in the proceedings.”

Of particular importance is section 49(2) which provides that parties may agree to exclude the jurisdiction of the Court under this section:

“Notwithstanding section (1), the parties may agree to exclude the jurisdiction of the Court under this section and an agreement to dispense with reasons for the arbitral tribunal’s award shall be treated as an agreement to exclude the jurisdiction of the Court under this section.”

Indeed, such agreement can be made by parties adopting institutional rules in their arbitration agreement which have the effect of excluding the right of appeal under section 49(1). It is doubtful, however, that such exclusion of right of recourse extends to the setting aside of an arbitral award under section 48 of the Arbitration Act. This is simply by reason of the absence of an equivalent section to section 49(2) whereby parties may agree to exclude the jurisdiction of the Court.

By adopting and agreeing to submit disputes to arbitration under the ICC Rules or the SIAC Rules, parties hence agree to exclude their right to appeal on questions of law in domestic arbitrations. The operation of the principle first came before the Singapore Court in *Daimler South East Asia Pte Ltd v Front Row Investments Holdings (Singapore) Pte Ltd* [2012] SGHC 157 (Daimler).

In Daimler, pursuant to a joint venture agreement, the plaintiff and defendant agreed that all related disputes were to be finally settled under the Rules of Arbitration of the International Chamber of Commerce. Subsequently, parties entered into arbitration proceedings which resulted in a partial award in favour of the defendant. By way of an originating summons, the plaintiff sought leave of the High Court to appeal against the partial award on a question of law. The defendant then applied to strike out the originating summons on the ground that any and all rights of appeal under section 49 of the Arbitration Act had been waived and were thereby excluded when parties agreed to submit their disputes to arbitration under the ICC Rules. The Court found in favour of the defendant and held that it was undisputed that parties could exclude the right of appeal by adopting institutional rules of arbitration. Accordingly, on the facts, parties had agreed to exclude their right of appeal under section 49(1) of the Arbitration Act by adopting the ICC Rules.

The operation of the above principle and the holding in Daimler have recently been applied again by the Singapore High Court, and the Court again had no difficulty with striking out the plaintiff’s originating summons seeking leave of the High Court to appeal the arbitral award on a question of law.

Conclusion

While commercial parties may turn to arbitration as the choice dispute resolution mechanism in its transaction document, parties are advised to be alive to the fact that by adopting certain institutional arbitration rules within the arbitration agreement and conducting the arbitration under the auspices of those institutions, they will be taken to have agreed to waive their right to recourse against the award by way of appeal on a question of law in the context of domestic arbitrations. Being mindful of the necessary implications would prevent any unwelcome surprises at preclusions from appeal during a later stage.

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