



Law of Arbitration

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Week III

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Reference to Arbitration

- i) Arbitration clause/arbitration agreement**
- ii) Matters should be within the scope of arbitration clause**
- iii) Parties have to prove that they are willing to refer the matter to arbitration**

What is arbitration?

- Absence of a statutory definition
- Article 2 (a) of the UNCITRAL Model Law “any arbitration whether or not administered by a permanent arbitral institution”.
- *Collin V Collin* [1858] 28 LJ Ch 186
 - Is a reference to the decision of one or more persons of a particular matter in difference between the parties.
- The arbitral tribunal derives its jurisdiction:- 1. consent of the parties 2. order of the court 3. statute. See *Dallal V Bank Mellat* [1986] QB 441: Where a statute refers disputes to tribunal for a binding decision, it amounts to arbitration.

What constitutes Arbitration?

- *Mustill and Boyd, Commercial Arbitration:-*
- 1. AA must contemplate that the decision of the tribunal must be binding on the parties.
- 2. jurisdiction of tribunal derives from consent, order of ct or statute.
- 3. the AA must contemplate that the substantive rights of the parties will be determined by the agreed tribunal.
- 4. the tribunal will determine the right of the parties in an impartial and judicial manner
- 5. AA and decision must be enforceable in law
- 6. AA must contemplate that the tribunal will make a decision upon a dispute

- Bernstein, Tackaberry and Marriot:
 - Mechanism for dispute resolution,
 - pursuant to an agreement b/n 2 or more parties
 - Parties agree to be bound by the decision to be given by the arbitrators
 - According to law
 - Agreed by both parties
 - Decision being enforceable at law
- Halsbury's Law of Malaysia:
 - Process by which a dispute as to their legal rights and liabilities referred to
 - Determined judicially
 - Binding effect by the application of law
 - By one or more persons (arbitral tribunal).

Arbitration v Litigation

- 1. Consensus of the parties
- 2. Less delays
- 3. Neither bound to be represented by lawyers nor are they prohibited from being represented by them
- 4. Evidence Act does not apply.
- 5. Free to choose an arbitrator
- 6. Privacy As a matter of law:
- 7. Confidentiality: Prior and after award.

Scope of Arbitration

- There needs to be a dispute eg. the performance of a specific contract, a claim of unfair or illegal treatment in the workplace, a faulty product
- Matter of capable of being decided in civil proceedings
- Mutual legal rights and liabilities
- Does not extend to a criminal charge

Types of Arbitration

- Adhoc
- Institutional
- Statutory
- Look-Sniff
- Flip-flop
- Documents-Only
- Domestic and International
- Courts of Judicature Act 1964

Ad hoc arbitration

- Agreed to and arranged by the parties themselves without assistance from or recourse to an arbitral institution.
- in position to devise a procedure fair and suitable to both sides by adapting to suitable arbitration rules.

Institutional Arbitration

- Administered by an arbitral institution.
- For eg. KLRCA, SIAC, HKIAC, ICC, LCIA, ICSID, CIETAC, AAA, WIPO.
- Well-trying and tested set of arbitral rules.
- Have panels of experienced arbitrators.

Statutory Arbitration

- A creature of statute.
- Source of arbitration is not an agreement but a section of particular act
- Statutory arbitrators are also a creature of statute and they are governance by the statute.
- Eg in Australia.
- Eg. Industrial relation Act 1967, Arbitration in Malaysia is said to be voluntary when both the parties jointly request the Minister to refer the dispute to the industrial court, failing which compulsory arbitration may ensure at the discretion of the Minister when he refers the dispute to the industrial court under section 26(3) of the Act.

Look-Sniff Arbitration

- Quality arbitration
- Normally in commodity field.
- Disputes purely on quality.
- Specialised knowledge, expertise and experience
- Eg. The Malaysian Rubber Exchange- deal with disputes affecting rubber.

Flip-flop Arbitration

- Pendulum arbitration
- Quantum disputes
- Parties will formulate their respective cases beforehand.
- The arbitrator will choose one of the two.

Documents-only Arbitration

- On the basis of exchange of written documents only.
- Eg claims by holiday makers against tour operators.

Court of Judicature Act 1964

- S 24 COJA the HC may refer a matter before it to any special referee or arbitrator.
- Uncertain. Not being utilised by litigants.

Malaysian Model of Arbitration

- Arbitration Act 2005: Royal Assent on December 30, 2005, commencement date as March 15, 2006
- Based on the UNCITRAL Model Law on International Commercial Arbitrations 1995
- It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice.

International Arbitration

- International Arbitration means an arbitration where –
- (a) one of the parties to an arbitration agreement, at the time of the conclusion of that agreement, has its place of business in any State other than Malaysia; or
- (b) one of the following is situated in any State other than Malaysia in which the parties have their places of business:
 - (i) the seat of arbitration if determined in, or pursuant to, the arbitration agreement;
 - (ii) any place where a substantial part of the obligations of any commercial or other relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
- (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one State.

Domestic Arbitration

- any arbitration which is not an international arbitration

Domestic Arbitration	International Arbitration
Part I:	Part I
Part II:	Part II
Part IV	Part IV
Part III shall apply in whole or in part unless the parties agree otherwise in writing	Part III shall not apply in whole or in part unless the parties agree otherwise in writing

Who choose the arbitral tribunal?

- 1. The parties
- 2. Third person in accordance with the procedure in the AA
- 3. The Court
- Arbitrators enjoy immunity from actions for negligence in the performance of their functions. S 47 Arbitration Act 2005.

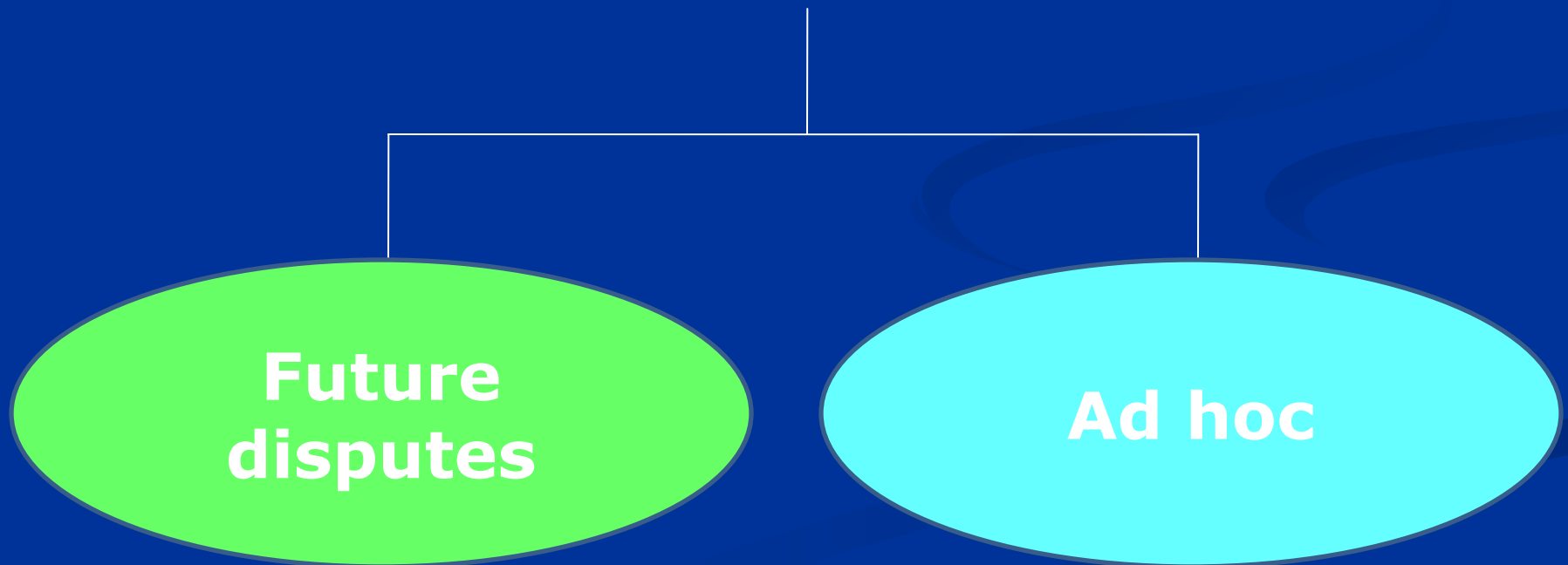
Arbitration Agreement

- Where parties entered a contract which incorporates by reference a written arbitration clause, it will constitute an arbitration agreement.

Arbitration Agreement

- **Based primarily upon the consensus of the parties to submit all existing and future disputes to arbitration**
- **Section 9 (1) Arb Act 2005**
'an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise btw them in respect of a defined r'ship, whether contractual or not'.
- **Section 9(2) Arb. Act 2005 provides that it may be in the form of an arbitration clause /separate agreement.**

TYPES OF ARBITRATION AGREEMENT



FUTURE DISPUTES AND AD HOC

Derived from S.9(1) of Arb Act 2005
... have arisen or which may arise...



Ad hoc

Future
disputes

ARBITRATION AGREEMENT

- **No specific words /forms**
- **Clear and certain**
- **Intention to arbitrate must be unequivocal**
- **Arbitration agreement can be in the form of arbitration clause in a contract or in a separate document dealing with arbitration**

SECTION 4(1)

If parties have agreed to submit to arbitration under an arbitration agreement, such matter will be determined by arbitration unless the arbitration agreement is contrary to public policy.

ROLE OF ARBITRATION AGREEMENT

- i. It confers powers upon the arbitrator**
- ii. It confers jurisdiction upon the arbitrator to decide disputes**
- iii. Arbitration agreement may contain procedure or formula to be adopted for arbitration**

CONTENT OF ARBITRATION AGREEMENT

- i. Clear reference to arbitration**
- ii. Name of arbitrator/institution from which the tribunal is to be picked**
- iii. Place of arbitration**
- iv. Law governing the contract**
- v. Procedural law to be used during the arbitration proceedings**

Additional Content

- Vi. How and by whom the arbitral tribunal is to be constituted
- Vii. What shall be the qualification and number members of the arbitral tribunal
- Vii. The mode and manner of filling vacancies
- Viii. The language of the arbitral tribunal
- Ix. Privacy and confidentiality.

SAMPLE 1

1.1 Should there arise at any time any matter or thing not provided for herein as to which there is ambiguity or any difference or dispute of any kind arising in connection with this Agreement, the parties hereto shall consult one another with regard to the same and use their best endeavor to resolve it amicably.

1.2 In the event that no amicable settlement can be achieved, any such dispute shall be settled by arbitration in accordance with the Arbitration Act 2005 or any statutory re-enactment or re-certification thereof for the time being in force.

1.3 The arbitration shall be heard and determined by one (1) arbitrator appointed in accordance with the said Act that the decision of such arbitrator shall be final and binding to the parties hereto.

1.3 The arbitration shall be decided in accordance with the laws of Malaysia and it will be held in Malaysia.

SAMPLE 2

For the case of any dispute initiated by the Contractor, this Agreement and performance hereunder shall be governed by and interpreted in accordance with Malaysian Arbitration Act, 2005 and shall be held in Malaysia. For the case of any dispute initiated by the Purchaser, this Agreement and performance hereunder shall be governed by and interpreted in accordance with the Rules of the Korean Commercial Arbitration Board and shall be held in Malaysia.

SAMPLE 3

Any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof shall be decided by arbitration in accordance with the law of Malaysia and the Rules for Arbitration of the Kuala Lumpur Regional Arbitration Centre.

SAMPLE 4

All disputes, differences or claims in connection with the construction, interpretation and performance of this Agreement shall be settled by means of cordial and constructive negotiation provided that if the parties cannot settle such dispute, difference or claim within thirty (30) days of first conferring, then such dispute, difference or claim shall be submitted to arbitration. Unless otherwise agreed in writing by the parties: -

(i) the arbitration shall be conducted by a single arbitrator jointly appointed by the parties hereto in accordance with the Arbitration Act 2005. If the parties fail to agree on the appointment of the arbitrator, the arbitrator shall be appointed by the Director of the Kuala Lumpur Regional Centre for Arbitration whose decision shall be final and binding on the parties.

(ii) The language of the arbitration proceedings and reports and documentation submitted or distributed by the arbitration panel shall be in the English Language.

(iii) The arbitration shall take place in Malaysia.

(iv) Proceedings shall commence as soon as possible and shall proceed thereafter with all deliberate speed to a conclusion.

(v) The award of the arbitrator shall be final and binding upon the parties.

(vi) The reference of any dispute, difference or claim to arbitration pursuant to this clause and/or the continuance of any arbitration proceedings consequent thereto shall in no way operate as a waiver of the obligations of the parties to perform their respective obligations under this Agreement.

WRITING?

• Section 9(3), 9(4) and 9(5) Arb. Act 2005 provide that it shall be in writing.

• *Thiagarajah Pooinpatarsan v. Shanmugam Paramsothy* [1990] 2 CLJ 312

The arbitration clause in each of the two agreements is very clear that the parties had agreed that all differences btw them should be resolved by arbitration

- *London Sack and Bag Co Ltd v Dixon & Lugton Ltd* [1943] 2 ALL ER
 - The AOA of ltd companies providing for arbitration were sufficient submissions in writing.
- *Aitken v Bachelor* [1893] 62 LJBQ 193
 - The indorsements signed by each counsel on his own brief constituted together a valid submission
- *Zambia Steel and Building Supplies Ltd v James Clark and Eaton Ltd* [1986] 2 Lloyd's Rep 225
 - The buyer was bound by the arbitration clause printed on the reverse of the seller's quotation.

- **Parties can also formulate ad hoc agreement immediately preceding the arbitration proceeding.**
- **Without arb. agreement in writing, parties are unable to claim protection afforded by the Act.**
eg: S. 36(1), 38

Incorporation of Arbitration Clause by Reference

- An arbitration clause may be incorporated by a reference to a standard form of contract or the particular term of another contract in which the clause is set out, even without express reference to the clause, is established by a long line of cases.
- The parties intended the arbitration clause to apply.
- Eg. Shipping: the terms of charter party may be incorporated into the bills of lading issued by the charterer on behalf of the shipowner.
- Eg. Construction: the terms of main contract may be incorporated into the subcontracts.

5 Requirements

- Arbitration clause contained in some other documents will be binding and operative if:-
 - 1. Express or implied reference in the main contract under which the dispute has arisen to the other document containing the arbitration clause
 - 2. any words appropriate to encompass the arbitration clause
 - 3. the terms of arbitration clause are appropriate to disputes arising under the contract in which it has been incorporated
 - 4. the arbitration clause is not repugnant to the main contract.
 - 5. Distinct and specific words expressing the intention of the parties to bring about incorporation to be used.

- *Merak (Cargo Owners) v Merak Owners* [1965] 3 ALL ER 638

- The arbitration clauses was expressed to apply to disputes under both the charter party and any bill of lading.

- *United Asian Bhd v Owners of the Fushi Hoshi Maru* [1981] 2 MLJ 333

- The words of incorporation must be specific.

SIGNATURE?

• No requirement of signature is provided in S. 9 Arb. Act 2005

S. 9(3) - ...shall be in writing...

S. 9(5) - ...provided that the agreement is in writing...

Baker v Yorkshire Fire and Life Assurance Co [1892] 1 QB 144

- Bound by an arbitration clause although he had not signed the policy