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Enforcing court orders in a foreign land

Singapore Management University

ENFORCING COURT ORDERS IN A FOREIGN LAND

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Give thought to crafting an arbitration clause in cross-border agreements to safeguard your business interests

In order to begin a project or strike a business deal, contracts and agreements are typically drawn at least between two parties. The document would also state the outcome of the negotiations to facilitate a healthy working relationship during the contractual period.

However, when the relationship goes awry, such as a breach of contract or failure in fulfilling contractual obligations by either party, the other party may want to seek redress through legal proceedings.

The matter is further complicated when the companies are located in different countries. Parties will then be bound by the dispute resolution clause in their contract on the type of relief they can seek and in what sort of legal proceedings. Typically, contracts may provide for a court from a certain country to determine such disputes or for the dispute to be solely resolved through arbitration.

Consider this scenario: A contract containing an arbitration clause was signed between Company A and Company B. Company A has succeeded in obtaining an arbitral award in Singapore against Malaysian-based Company B. To enforce this Singapore award in Malaysia, Company A would need to go through an additional legal process and risk resistance from company B.

“I had acted for a claimant company that had successfully obtained an arbitral award against a Malaysian company with the seat of arbitration in Singapore,” **Lee Shih** recalls of a successful enforcement of an arbitral award in Malaysia. He is a dispute resolution partner from Malaysian law firm Skrine.

“I then acted for that claimant company in successfully applying to enforce that award in the Malaysian Court. The Malaysian company heavily resisted the enforcement application and raised a litany of objections.

“Consistent with the global approach, there is only an exhaustive list of grounds to resist such an enforcement and the Court is reluctant to second-guess the arbitral tribunal’s decision. At the same time, the Malaysian company had attempted to set aside the award in Singapore but failed.”

However, Lee warns that a party that is successful in an arbitration “must be prepared to face an application for the setting aside of that award”. This means a court application is filed at the seat of arbitration to ask for the setting aside, which is similar to an annulment of the award.

“It is therefore important that when setting out the seat of arbitration, that party should put in thought as to whether the national courts in the seat of arbitration are likely to uphold arbitral awards or it is more likely to interfere or set aside awards.”

The need for an arbitration agreement

The cross-border nature of contracts will encourage companies to include an arbitration clause in such contracts, as in the case of commercial projects, says Lee.

“Rather than resorting to the national courts of either of the contracting parties, the parties may want to choose a more neutral forum through arbitration. Further, the great utility of arbitration is that at the conclusion of the arbitral proceedings, the successful party can enforce the award in 150 countries – by virtue of all these countries being signatories to the New York Convention.”

According to Renaud Sorieul, the Secretary of United Nations Commission on International Trade Law or UNCITRAL, the New York Convention is a United Nations treaty in the area of international trade law, and the cornerstone of the international arbitration system.

He said the New York Convention aims to "oblige state parties to ensure non-discrimination of foreign and non-domestic arbitral awards, such that these awards are recognised and generally capable of enforcement in their jurisdiction in the same way as domestic awards – can best be achieved through the uniform and effective application and interpretation of the Convention."[i]

In contrast to arbitration, let us consider the alternative scenario where the contract only provides for a specific national court to decide on any contractual dispute. This determination of the dispute may then lead to a foreign court judgment. There are then hurdles for a successful claimant company that is armed with a foreign court judgment to enforce it in another country.

“It is difficult to register or immediately enforce a foreign court judgment by a successful party because specific bilateral treaties would likely need to be signed between such countries,” says Lee.

“One country would not want to automatically recognise another country’s court judgment as there are issues of sovereignty and that foreign court’s jurisdiction. Some countries have a reciprocal arrangement to allow for a quicker route to register each other’s court judgments.”

“So for instance, Malaysia and Singapore would allow such a reciprocal arrangement. If there is no such arrangement, then the successful party would likely have to initiate a fresh set of court proceedings in that country in which the party wants to register or enforce its court judgment. This may amount to re-litigating the entire dispute afresh and with the need to have witnesses testify at trial.”

“In contrast, international arbitration can utilise the easier cross-border route of recognition under the New York Convention and with limited grounds in refusing the enforcement of an award.”

Drawing contracts

The lesson to be learnt here is that businesses should consider and negotiate the arbitration clause in the early stage of drafting the contract and “not leave it as a ‘midnight clause’”, says Lee.

“Some refer to the arbitration clause as the “midnight clause” since it is inserted into the contract so late in the day. The problem with a badly drafted arbitration clause is that it may then just lead into more disputes and arbitration proceedings, even court litigation.

“Rather than being able to resort to the dispute resolution mechanism through arbitration, one party may be able to frustrate the proceedings by challenging the validity of the arbitration clause.”

He adds such a “midnight clause” may be left so late because the parties negotiating are focused more on the elements of the deal and finalising the agreement. He advises companies to also spend some time thinking about questions such as: What if the worst case scenario occurs and the deal goes sour? What if a dispute arises? How easily can I rely on the dispute resolution mechanism in the contract?

In order to minimise the risk of having a dispute, Lee says, “Managers must be very clear on the terms of the contract and the safeguards that can be built in to the contract, whether it is through tightly-worded limitation of liability clauses, limitation of warranties or very clear obligations.”

“In the course of performing contracts, it is important to have the practice of reducing discussions or issues into writing. These contemporaneous documents are useful when a potential dispute arises. Any sort of admissions or discussions can then all be referred to and used to strengthen your company’s case.”

Lee Shih was the speaker at the Singapore Management University ***Enforcing Arbitral Awards and Foreign Judgments in Malaysia*** *on August 12, 2014.*