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Michael Hwang
ICC
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The Prospects for Arbitration and Alternative Dispute Resolution
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By Michael Hwang S.C.
Senior Counsel & Arbitrator, Singapore
michael@mhwang.com

Why Arbitration ?

- Arbitration is confidential and private.
- Arbitration is viewed as a more neutral process than litigation, especially in developing countries, where there is greater distrust by foreign investors of national courts. This is especially so if the arbitration is conducted under the auspices of an established arbitration institute (e.g. International Chamber of Commerce, London Court of International Commercial Arbitration in Europe, Singapore International Arbitration Centre and Hong Kong International Arbitration Centre in Asia).
- An established arbitration system can lead to an increase in foreign investments because of investors' distrust of local courts and local laws. This is especially so in emerging markets.
- Arbitration allows parties to choose the governing law of the dispute
- Arbitration allows parties to appoint arbitrators with specialist backgrounds, for example, arbitrators with an accounting background.
- Arbitration is more flexible compared to national court procedure, and therefore, more suitable for company disputes, which often require creative remedies.

[1] Experts Group Meeting on Dispute Resolution and Corporate Governance, 25th June 2003, UNCITRAL Secretariat, Vienna International Centre, Vienna, Austria

- Arbitration is viewed as more cost-effective and timely compared to litigation in national courts (which may take a longer time because of the appeals system).
- Arbitration allows parties to select the language of the dispute resolution process as well as their preferred lawyers.

Suitability of Arbitration in Company Law Disputes

(i) What kinds of company law disputes are particularly suitable for arbitration?

- In general, actions which involves prayers for financial relief are more suitable for arbitration than actions which involve requests for injunctive relief or declarations of status.
- In some jurisdictions, a number of company law disputes have been held to be suitable for arbitration. One example of this is executive-employment agreements.
- Other kinds of company law disputes which are suitable for arbitration include shareholder disputes in privately held companies and breaches of joint-venture agreements, particularly foreign joint-ventures.

(ii) What kinds of company law disputes are not suitable for arbitration?

- In general, actions which require orders in rem rather than orders in personam are less suitable for arbitration, i.e., actions in which declaratory rights are to be made in respect of the status of the company or matters under national company law which require a Court order, such as winding-up actions, reduction of capital and schemes of arrangement, declarations of validity of corporate acts, granting of relief from officers' liabilities for breaches of duties.
- Shareholder disputes in public-listed companies
- Derivative actions and class actions[2].

[2] However, some national legal systems do allow such actions to be arbitrated. These types of actions have been held to be arbitrable in the United States. See the case of Re Salomon Inc. Shareholders' Derivative Litigation, No. 91 Civ. 5500 (RPP), 1994 WL 533595 (SDNY Sept 30 1994) and Green Tree Financial Corp. v Bazzle, 2003 WL 21433403 (US). In contrast, the Singapore High Court has held that a derivative

Difficulties of Arbitration in Company Law Disputes

- The root of the difficulties of arbitration in company law disputes is that arbitration is contractual in nature. Arbitration in company law disputes therefore requires parties to the arbitration to have signed up for arbitration in advance. This also explains why disputes involving joint venture agreements are more suitable for arbitration.

- Although disputes involving members of a privately-held company are particularly suitable for arbitration, arbitration of such disputes first requires a valid arbitration clause in the charter (i.e. the memorandum and articles of association) of the company. Therefore, unless there is a valid arbitration clause in the charter, arbitration will not be available as a remedy for intra-company disputes.

- Where the dispute involves the company itself, the company itself must be a party to the arbitration agreement or arbitration clause in the charter of the company or, as in the case of disputes involving joint venture agreements, in the joint venture agreement itself. This is especially so in the case of joint ventures, where the company is usually not a party to the joint venture agreement which contains the arbitration clause.

- Another difficulty in arbitration of company law disputes lies in the common law qua member principle, i.e., that the charter of the company only binds shareholders in their capacity as shareholders. This is particularly difficult where the disputes relate to, for example, a director of the company who is alleged to have breached fiduciary duties even if he is also a shareholder and the charter allows the arbitration of disputes between shareholders and directors. . The problem with arbitrating such a dispute is that it may be difficult to join the director as a party to the arbitration

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action can only be brought in court and not in arbitration. See Kiyue Company Limited v Aquagen International Pte Ltd (2003) 3 SLR 130 (This decision has been affirmed by the Singapore Court of Appeal).

because he is being joined in his capacity as a director (since the directors are not usually parties to the company's charter), and not as a shareholder of the company[3].

- In the case of minority oppression, there is again the problem of whether such actions and minority rights may be enforced where such rights are not specified in the charter of the company or the joint venture agreement. Further, one of the remedies a national court may order is the winding-up of the company where it finds that there has been minority oppression. However, arbitrators are not usually able to make an order of winding-up. This leaves the minority shareholders with one less remedy[4]. However, the arbitral tribunal can make an order directing a shareholder to take steps to wind up a company or to sell his shares or buy another shareholder's shares.

- There is also the issue of what might be a valid arbitration agreement, where such an agreement is found in the company's charter. Under the New York Convention[5], an arbitration agreement is defined as including *"an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams*". The problem with an arbitration clause in a company's charter is that it is not signed by subsequent shareholders (although as members of the company they are bound by the charter by the operation of law), and therefore, the question is whether or not such an arbitration clause amounts to an arbitration agreement under the New York Convention. This problem has yet to be resolved.

- As for public-listed companies, the difficulty of arbitrating disputes of such companies lies in the fact that the shareholders are potentially vast and geographically dispersed. This gives rise to concerns over whether these shareholders have given binding consent to arbitration, and whether they have been given sufficient notice

[3] This is because of the well-established principle in English law that a shareholder may not enforce rights in a capacity other than as a shareholder. See for example Eley v Positive Government Life Assurance Co (1876) 1 Ex D 88.
[4] Under section 12 of Singapore's International Arbitration Act (Cap 143A), arbitrators are given powers to "award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court", although no court decision has yet to interpret the scope of this provision, and whether this power extends to the making of a winding-up order by an arbitrator.
[5] Article II (2)

when arbitration has begun. Further, there is also the question of whether consent procedures which are developed in favour of arbitration of company law disputes (especially in developed markets) are unconscionable because they are coercive, represent contracts of adhesion and effectively deny investors access to a dispute-resolution forum.

- Policy concerns, such as the inherent State interest in applying and interpreting its own company law, the perceived value in judicial enforcement of standards for public-listed companies and the likely intersection of company law issues with issues such as employment[6], insolvency and tax law, which have a high public-interest element, has resulted in difficulties in the acceptance of arbitration of company law disputes in some countries.

- On a practical level, there are concerns over the adequacy of arbitration in complex cases, as well as the sufficiency of incentives for plaintiff's lawyers to pursue claims before an arbitral tribunal.

Enforcement

- Lastly, an arbitral award has little value unless it can be enforced. The New York Convention (with 134 signatories) provides for the recognition and enforcement of foreign arbitral awards by national courts, unless one of the limited exceptions applies. The difficulty here lies in the interpretation of these exceptions. How national courts interpret these exceptions vary widely, and expansive interpretations arising from ignorance, bias or corruption on the part of national courts (especially in emerging markets where the legal system is less developed) can result in the setting aside of arbitral awards and the effective gutting of shareholder rights. In this respect, there is a need for training and education of judges, particularly in emerging markets.

[6] For example, in some states of the United States, it has been held that an arbitration clause in an employment contract is unconstitutional because the right of the employee to a jury trial is effectively taken away by the arbitration process.

Conclusion

- Notwithstanding the various legal, policy and practical difficulties with arbitrating company law disputes, there is a growing interest in enlarging the scope of arbitration in company law disputes, and this is the task that OECD is now exploring with the assistance of UNCITRAL, the ICC and other arbitration institutions.