Page 379 - 395 **DOI:** https://doij.org/10.10000/IJLMH.118257

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 7 | Issue 5

2024

© 2024 International Journal of Law Management & Humanities

Follow this and additional works at: https://www.ijlmh.com/
Under the aegis of VidhiAagaz – Inking Your Brain (https://www.vidhiaagaz.com/)

This article is brought to you for "free" and "open access" by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact **Gyan@vidhiaagaz.com**.

To submit your Manuscript for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to **submission@ijlmh.com.**

Arbitration Agreement: A Cornerstone of Arbitration in Tanzania Mainland

MARKO ANTHONY NSIMBA[1]

ABSTRACT

Arbitration is the basic method of commercial dispute resolution in Mainland Tanzania which is done either through ad hoc arbitration or arbitral tribunal, it is a pure private court whereby the parties choose who to settle their dispute and the decision is of the arbitrator and binging the parties themselves. Because of the development of the modern commercial transaction necessities the parties to settle their disputes through amicable ways by invoking the arbitration as the method of settling their disputes on which the parties choose who settle their disputes and the decision becomes of the arbitrator and binding the parties in dispute.

The arbitral jurisdiction is basically provided in either the arbitration clause or the major contract of which the court of law cannot interfere with the arbitration clause or agreement stipulated. The sanctity of the agreement must be respected because the arbitration agreement is the cornerstone of the arbitration which is the subject of this discussion. This article expounds on the arbitration agreement, principles of arbitration, and the essential elements of arbitration. It further emphasises that an arbitration agreement is the foundation of arbitration disputes settlement in arbitration jurisdictions. Hence, there is no arbitration that can be adjudicated without the arbitration agreement as it sets the foundation for arbitral procedures. Contrary to that the procedure thereof can be declared void.

***Keywords**: Tanzania Mainland, Arbitration Agreement and Cornerstone.*

I. INTRODUCTION

Dispute or conflict is unavoidable in human relationship, it is indeed ubiquitous whenever there is a dispute, it must be resolved in either way. Arbitration being one of the alternative dispute settlement methods can be categorized in domestic or international level[2].The keystone of arbitration is the agreement of the parties to resolve their disputes through arbitration of which it requires the parties' consent to submit to arbitration mode of settlement[3]. The consent is

---

[1] Author is a LL.M. Candidate and an Advocate of the High Court of Tanzania and Court Subordinate, Tanzania.

[2] S. A. Fagbemi "The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality, Afe Babalola University of Sust. Dev". Vol.No.5, issue 1, *Law and Policy*(1,2015,) 222

[3] Ibid at page 224

© 2024. International Journal of Law Management & Humanities [ISSN 2581-5369]

indispensable to any process of dispute resolution outside the courts of law. Such agreement is concluded by the parties to submit to arbitration disputes or disagreements which have arisen or ought to arise between them regarding a defined legal relationship whether contractual or not[4]. Before there can be a valid arbitration, there must be a valid agreement to arbitrate, this is recognized both by national law and by international treaties.[5]

Article 7(1) of the Model Law[6] provides that Arbitration Agreement as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them regarding a defined legal relationship, whether contractual or not. An arbitration agreement may be as an arbitral clause in a contract or in a separate agreement.

This definition gives clear elaboration as in order to have an arbitration jurisdiction there must be arbitral agreement or clause that will later aid the settlement of the dispute. Also, the dispute must be between the parties who have either defined legal relation, contractual relationship or non contractual relationship. The clause or the agreement can stipulate on the specific or general disputes in the agreement which can be settled amicably. But Article 7(2) of the Model Law[7] provides for the requirement that the arbitration agreement shall be in writing

The law provides for the contents of the written arbitration agreement; as it is stipulated in Article 7(3) of the Model Law[8] that an Arbitration agreement should be in writing. If its contents are recorded in any form, whether the arbitration or contract has been concluded orally, by conduct or by other means. Further, Article 7(4) of the Model Law[9] provides for the requirement that an arbitration agreement to be in writing and which can be accessible through electronic communication if the need be. information contained therein must be accessible and useable for subsequent reference. in this matter, electronic communication means any communication that the parties make by means; data message means information generated, sent, received or stored by electronic, magnetic, option or similar means, including but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

Furthermore, Article 7(5) of the Model Law provides that an arbitration agreement is in writing if it contains an exchange of statements of claim and defense in which the existence of an

[4] Ibid at page 15

[5] Blackaby.N. et.all. (2015) *Redfern and Hunter on International Arbitration, 6th edn*. Oxford, Oxford University Press, at page 15

[6] United Nations Commission on International Trade Law on International Commercial Arbitration, 1985 with amendments as adopted in 2006.

[7] Ibid

[8] United Nations Commission on International Trade Law on International Commercial Arbitration, 1985 with amendments as adopted in 2006.

[9] Ibid

© 2024. International Journal of Law Management & Humanities [ISSN 2581-5369]

agreement is alleged by one party and not denied by the other.

The law went further to provides the references in a contract which constitutes written arbitration. Article 7(6) of the Model Law[10] provides that, the reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to clause is such as to make that clause part of the contract. Similarly, Article II(1) of the New York Convention[11] provides that, each contracting State shall recognize an agreement in writing under which the parties undertakes to submit to arbitration all or any differences which have arisen or which may ought to arise between them regarding a defined legal relationship, whether contractual or not, concerning a matter capable of settlement by arbitration. Further, Article II (2) of the New York Convention[12] provides that the term agreement in writing shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letter or telegram.

Under this definition it entails that agreement to arbitrate must be in writing, in which the parties agreed to submit either to all disputes or certain disputes in the agreement. However, agreement to arbitrate must be under the defined legal relationship and that agreement can be either under contractual or not but also there must be subject in dispute which is capable for settlement by arbitration.

It is the requirement of the law that, where there is an agreement to arbitrate no court of law shall entertain the matter before being submitted for arbitration as agreed by the parties in dispute. In arbitration this has met both nationality and internationally by a policy of indirect enforcement[13]. Rules of law are adopted to provide for, if the party to an arbitration agreement to bring proceedings in a national court in breach of that agreement. Those proceedings shall be stopped at the request of any other party to arbitration agreement unless there is good reason, they should not be[14]. Therefore, if a party wishes to pursue its claim, he or she must honor the agreement it has made and it must pursue its claim by arbitration, since this is the right jurisdiction to file a cause of action for the breach of the subject agreement[15].

In the case of *Jovet Tanzania Limited vs Bavaria. N .V(supra),* Court of Appeal of Tanzania at

[10] United Nations Commission on International Trade Law on International Commercial Arbitration, 1985 with amendments as adopted in 2006.
[11] The Convention on the Recognition and Enforcement of the Foreign Arbitral Award,1958
[12] Ibid
[13] Blackaby.N. et.all. (2015) *Redfern and Hunter on International Arbitration, 6th edn*. Oxford, Oxford University Press, at page 20
[14] Blackaby.N. et.all. (2015) *Redfern and Hunter on International Arbitration, 6th edn*. Oxford, Oxford University Press, at page 20
[15] Ibid

page 20-21 held that, the parties have already agreed on how dispute between them should be resolved, that was final between them, and the court cannot decide otherwise. The sanctity of the agreement between parties prevails. The principle embodied in the Latin maxim of pacta sunt servanda is relevant in this case. This maxim simply means the agreements must be kept. Similarly,n *East African Breweries Ltd vs GMM Company Ltd* (supra) the court ruled, among other things, that filing a lawsuit in court without reference to arbitration where there was an arbitration agreement, violated the arbitration clause. Also in the case of *Independent Power Tanzania Limited vs VIP Engineering and Marketing Limited (supra),* Court of Appeal of Tanzania held, among other things, that the High Court erred in allowing the respondent to make an oral application for an interim order instead of referring the parties for arbitration.

II. Types of arbitration agreement

Historically, there were two types of arbitration agreement, which are arbitration clause and arbitration agreement. The first which is still very much the most commonly used is the arbitration clause in a contract[16].

(A) Arbitration Clause

Arbitration clause as it is known in a civil law relates to disputes that might arise between the parties in the future, it will be short and to the point[17] that an agreement that any dispute is to be settled by arbitration would constitute an arbitration agreement[18].

Arbitration clause clarifies that the parties have agreed that any dispute which arises out of or in connection with the contract will be preferred to arbitration either ad hoc or under the rules of arbitral institution[19]. Since arbitration clauses are drawn up and agreed before any dispute has arisen, they necessarily look to the future, to the possibility that, a dispute may arise and that if it does, it will if necessary be resolved by recourse to arbitration rather than to the courts of law[20].

The arbitration clause or agreement is the basis of all extra-judicial proceedings, it is contained either in the main contract or as a separate written agreement by which the parties to a contract agree. The agreement must contemplate if the dispute arises between them in the execution of the contract between them the only forum to be referred is arbitration and the decisions made

[16] Blackaby.N. et.all. (2015) *Redfern and Hunter on International Arbitration, 6th edn*. Oxford, Oxford University Press, at page 15
[17] Ibid at page 18
[18] Ibid
[19] Ibid at page 15
[20] Ibid

thereof shall be final and binding upon the parties. As it can be referred [21]in the case of ***Tanzania Motor Services Ltd and Another vs Mehar Singh t/a Thaker Singh***[22] ***,*** Court of Appeal held that, an arbitration clause in a contract is distinct from the other clauses and that its breach can be specifically enforced by the machinery of the Arbitration Act. *In* ***Jovet Tanzania Limited vs Bavaria. N .V (supra),*** Court of Appeal of Tanzania held that, arbitration clause binds and survives even after the agreement is terminated.

In addition, such a clause usually sets out the number of arbitrators to be appointed, the matter of appointing them, the powers of the arbitrators, their qualifications, the place and language of the arbitration, the applicable law[23].

(B) **Arbitration Agreement**

The second type of arbitration agreement is one that is made after a dispute has actually arisen[24]. This is called a submission agreement, it is usually more detailed than an arbitration clause because once a dispute has arisen, it is possible to spell out in some detail what dispute is about and how the parties proposed to deal with it[25].

The law relating to Arbitration in Tanzania also recognizes the principles underlying an arbitration agreement. Section 3 of the Arbitration Act[26] provides that, arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not. The Arbitration Act does not give reference to the submission to arbitration.

An arbitration agreement which is drawn up to deal with dispute that have already arisen between the parties is generally known as submission agreement, a *compromis* or compromise. It is usually a fairly detailed documents, dealing with the constitution of the arbitral tribunal, the procedure to be followed, the issues to be decided, the substantive law and other related matters. This at one time, it was the only type of arbitration agreement recognized by the law of many States[27], since recorded to arbitration was only permitted in respect of existing disputes, in some States this still the position[28].

---

[21] Mashamba, C.J, (2015) *Arbitration in Tanzania: Law and Practice in Tanzania*, Dar es Salaam, Theophlus Enterprises at page 75

[22] Civil Appeal No.115 of 2005 [2006] TZCA 5, Court of Appeal of Tanzania at Dodoma (Unreported)

[23] Mashamba, C.J, (2015) *Arbitration in Tanzania: Law and Practice in Tanzania*, Dar es Salaam, Theophlus Enterprises at page 75

[24] Ibid

[25] Ibid

[26] No.2 of 2020

[27] Blackaby.N. et.all. (2015) *Redfern and Hunter on International Arbitration, 6th edn*. Oxford, Oxford University Press, at page 19

[28] Ibid

(C) Agreement to Arbitrate

These two traditional types of arbitration, the arbitration clause and the arbitration agreement have now been joined by a third[29], this is an agreement to arbitration which is deemed to arise under international instruments such as a Bilateral Investment Treaty entered into by one State with another[30]. It is a future of such treats that each State party to the Treaty will agree to submit to international arbitration, in relation to any dispute that might arise in the future between itself, and an investor whom not being a State is not a party to the treaty and whose identity will be unknown when the treaty is made[31]. This agreement in effect constitutes a standard offer by the State concerned to resolve any dispute through arbitration[32].

The agreement to arbitrate can either be in the main agreement thus is arbitration clause or it can be in separate agreement under the arbitration agreement. The arbitration agreement which is entered by the parties where the dispute has already occurred is known as the submission agreement.[33] However, the agreement to arbitrate under the arbitration clause , refers to the dispute that may rise between the parties in the future[34]. It is the agreement entered by the parties before the dispute arises and agreed that if the dispute arises shall be resolved in a certain way.

III. Importance of the arbitration agreements

Arbitration agreement is primarily a substantives contract between the parties; the agreement is central to arbitration proceedings, hence its importance has been attributed to many factor.

(A) Party Autonomy

The arbitration agreement reflects the party autonomy to settle their dispute through arbitration rather than the court of law. Since arbitration agreement as a binding promise made between two or more parties to a contract to settle the present and or the future disputes through arbitration instead of dealing with them in the national courts[35]. Thus, when the parties draft the arbitration agreement they enjoy wide freedom to construct a dispute resolution system of their choice, therefore an arbitration agreement derives its power from parties' autonomy[36].

---

[29] Blackaby.N. et.all. (2015) *Redfern and Hunter on International Arbitration, 6th edn*. Oxford, Oxford University Press, at page 15

[30] Ibid

[31] Ibid

[32] Ibid at page 15-16

[33] Ibid at page 19

[34] Ibid at page 18

[35] S. A. Faghemi"The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality", Vol.6, Issue No.1, Afe *Babalola University of Sust. Dev. Law and Policy,* 2015 at page 226

[36] Ibid

(B) **Consent by the Parties to Resolve their Dispute by Arbitration**

Basically, the arbitration agreement fulfils several important functions[37].The major important function is that of making it plain that the parties have consented to resolve their disputes by arbitration. This consent is essential, without it, there can be no valid arbitration[38].The arbitration proceedings are the expressions of the will of the parties based on parties' autonomy and that commercial arbitration should be free from the constraints of national law and treaties denationalized or delocalized[39]. Consent is an essential rule of principle of arbitration where two parties freely enter into an arbitration agreement whereby there are a few restrictions on their functions, on their freedom to formulate their own terms of the agreement or to design a process which cater precisely their needs[40].

Once parties have validly given their consent to arbitration, that consent cannot be unilaterally withdrawn[41]. Even if the arbitration agreement forms part of the original contract between the parties and that the contract ends. The obligation to arbitrate usually survive as it is an independent obligation separable from the rest of the contract[42].

(C) **Severability from the Contract.**

This doctrine of the autonomy of an arbitration agreement, under which it is deemed to be severable from the contract in which it is contained is now well established[43]. It means that even if the contract containing an arbitration clause ends or has its validity challenged, the arbitration agreement remained in being[44]. This allows a claimant to begin arbitration proceedings based on the survival of the arbitration agreement as a separate contract. It also allows an arbitral tribunal which is appointed under that obligation agreement to decide its own jurisdiction including any objections regarding the existence or validity of the arbitration agreement itself[45].The tribunal is competent to judge its competence[46].

---

[37] Blackaby.N. et.all. (2015) *Redfern and Hunter on International Arbitration, 6th edn*. Oxford, Oxford University Press,at page 19
[38] Ibid
[39] Ibid
[40] S. A. Faghemi"The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality", Vol.6, Issue No.1, Afe *Babalola University of Sust. Dev. Law and Policy,* 2015 at page 226
[41] Ibid
[42] Ibid at page 19-20
[43] Blackaby.N. et.all. (2015) *Redfern and Hunter on International Arbitration, 6th edn*. Oxford, Oxford University Press, at page 20
[44] Blackaby.N. et.all. (2015) *Redfern and Hunter on International Arbitration, 6th edn*. Oxford, Oxford University Press, at page 20
[45] Ibid
[46] Ibid

© 2024. International Journal of Law Management & Humanities

(D) **Capable of Being Enforced at Law**

An arbitration agreement ,like any other agreement , must be capable of being enforced at law, otherwise , it will be a mere statement of intention which, whilst morally binding is without legal force[47]. However, an agreement to arbitrate is a contract of imperfect obligation, if it is broken, an award of damages is unlikely to be a practical remedy given the difficulty of quantifying the loss sustained and an order for specific performance is equally impracticable[48], since a party cannot be compelled to arbitrate if it wishes to do so, as the saying goes, you can lead a house to water, but you cannot make it drink[49].

(E) **Obligation to Arbitrate.**

Generally, an arbitration agreement does not merely establish the obligation to arbitrate, it is also a basic source of the powers of the of the arbitral tribunal to arbitrate[50]. In principle, and within the limits of public policy an arbitral tribunal may exercise such powers as the parties are entitled to confer upon it whether expressly or by implication; together with any additional or supplementary powers that may be conferred by law governing the arbitration[51]. The parties to an arbitration are the masters of the arbitral process to an extent impossible in proceedings in a court of law[52].

(F) **Jurisdiction of the Arbitral Tribunal**

Under the arbitration process or proceedings, it is the arbitration agreement that establishes the jurisdiction of the arbitral tribunal, the agreement of the parties is only source from which this jurisdiction can come[53]. In the ordinarily legal process, whereby disputes are resolved through public courts, the jurisdiction of the relevant court may come from several sources. An agreement by the parties to submit to the jurisdiction will be only one of those sources, it is uncommon for a defendant to find itself in court against its will. In the arbitral process which is a private method of resolving disputes, the jurisdiction of the arbitral tribunal is derived simply and solely from express or impliedly agreement by the parties[54].

(G) **The Need for Dispute**

The need for dispute in any arbitration is very essential, be it domestic or international

---

[47] B
[48] Ibid
[49] Ibid
[50]Ibid at page 21
[51] Ibid
[52] Ibid
[53] Blackaby.N. et.all. (2015) *Redfern and Hunter on International Arbitration, 6th edn*. Oxford, Oxford University Press,at page 21
[54] Ibid at page 19

commercial arbitration. There must be a dispute for parties to go for the arbitration. At the first glance, this may seem to be an unnecessary question, surely, it might be said, if the parties are not in dispute, there is nothing to resolve[55].

(H) **The dispute must be an existing dispute or future dispute,**

The existing dispute or future dispute is very essential in any arbitration. It is recognized under the International Conventions. The Geneva Protocol[56] provides for the existing dispute and future dispute. Article 1 of the Protocol provides that each of the Contracting States recognizes the validity of an agreement whether relating to existing or future differences between parties, subject respectively to the jurisdiction of different contracting States by which the parties to a contract agreed to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject. Similarly, the same is recognized under the New York Convention[57]. Article II(1) of the New York Convention[58] which is to the effect that Each contracting State shall recognize an agreement in writing under which the parties undertakes to submit to arbitration all or any differences which have arisen or which may arise between them.

(I) **Arbitrability**

The arbitrability of a dispute is very essential in any arbitration. The Dispute must capable for arbitration, it must be a dispute capable of being settled, even if the dispute existing, this may not be sufficient, it must be a dispute which is capable for settlement by arbitration[59].Article II(1) of the New York Convention[60] provides that, Each contracting State shall recognize an agreement in writing under which the parties undertakes to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject capable of settlement by arbitration

The arbitration concept of a dispute which is not capable for settlement by arbitration is not meant as an adverse reflection on arbitrators or on arbitral process. Arbitrators are or should be

[55] Ibid at page 22
[56] Geneva Protocol,1923, Protocol on Arbitration Clauses.
[57] The Convention on the Recognition and Enforcement of the Foreign Arbitral Awrd,1958
[58] The Convention on the Recognition and Enforcement of the Foreign Arbitral Awrd,1958
[59] Blackaby.N. et.all. (2015) *Redfern and Hunter on International Arbitration, 6th edn*. Oxford, Oxford University Press, at page 23
[60] The Convention on the Recognition and Enforcement of the Foreign Arbitral Awrd,1958

© 2024. International Journal of Law Management & Humanities [ISSN 2581-5369]

just as capable of determining a dispute as a judge[61]. The dispute which is not arbitrable cannot submitted for arbitration. If there in fact no dispute the matter should not be referred to arbitration, this allows the court to deal with the case if the judge is satisfied that, there is no in fact the dispute to be referred for arbitration and or the subject is not capable for settlement by arbitration[62].

(J) Commencement of Arbitration and Appointment of the Arbitral tribunal.

a. Notice

In order to start an arbitration, some form of notice will have to be given; in ad hoc arbitrations the notice will be sent or delivered to the other party[63]. In an institutional arbitration the notice is usually given to the relevant institution by the request for arbitration or similar document, and the institution then notifies the respondent or respondents[64].

b. Constitutes of the Arbitral Tribunal

Following the notice of arbitration, an arbitral tribunal will have to be constituted, this is a crucial moment in the life of any arbitration[65]. One of the principle features which distinguishes arbitration from litigation is the fact that, the parties to an arbitration are free to choose their own tribunal[66]. Although sometimes, it is true, that this freedom is unreal because the parties may implicitly have delegated the choice to a third party such that as an arbitral institution. However, where the freedom exists such party should make the sensible use of it; a skilled and experienced arbitrator is a key element of a fair and effective arbitration[67].

The choice of a suitable arbitrator involve many considerations, arbitration be it domestic or international arbitration demands different qualities in arbitrators from those required for a purely national or domestic arbitration, this is because of different systems of law and the different rules that applies and also because the parties will almost invariably be of different nationalities and arbitration itself will often take place in a country that is foreign to the parties themselves[68].

Choosing the right arbitrator for a particular dispute is very essential; the qualities demanded

---

[61] Ibid

[62] Ibid

[63] Blackaby.N. et.all. (2015) *Redfern and Hunter on International Arbitration, 6th edn*. Oxford, Oxford University Press, at page 22

[64] Blackaby.N. et.all. (2015) *Redfern and Hunter on International Arbitration, 6th edn*. Oxford, Oxford University Press, at page 22

[65] Ibid at page 25

[66] Ibid

[67] Ibid

[68] Blackaby.N. et.all. (2015) *Redfern and Hunter on International Arbitration, 6th edn*. Oxford, Oxford University Press, at page 25

for good arbitrator are many; they include experience of the of the arbitral process itself and of the different institution or ad hoc rules that may govern a particular arbitration, good case management skills, an ability to work with others, integrity and a strong sense of fair play.[69]

c. Arbitral Proceedings

The rule governing arbitration be it domestic and or international arbitration is the same. Because it is not like litigation in the court of law, there is no volume containing the rules of court, no code of civil procedures to govern the conduct of arbitration and litigator who produce their own country's book or code of civil procedure will be told to put them aways[70].This means that the tribunal and the parties have the maximum flexibility to design a procedure suitable for the particular dispute which they are concerned[71], this is one of the major attractions of arbitration be it domestic or international arbitration.

Arbitration, it is a flexible method of dispute resolution in which the procedure to be followed can be tailored by the parties and the arbitral tribunal to meet the law and facts of the dispute[72].There are no fixed rule of procedure, institutional and ad hoc rules of arbitration often provide for the outline of the various steps to be taken. But detailed regulations of the procedures to be followed are established either by the agreement of the parties or by directions from the arbitral tribunal or a combination of the two[73].

The flexibility that this confers on the arbitral process is the reason the parties choose arbitration be it domestic or international arbitration over other forms of dispute resolution[74] .The rules of civil procedure that governing proceedings in national courts do not apply in arbitration unless the parties expressly agrees to adopt them[75].An arbitral tribunal must conduct the arbitration process under the procedures agreed by the parties, if it fails to do so, the award may be set or refused recognition and enforcement. However, the freedom of the parties to dictate the procedure to be followed in the arbitration is not totally restricted[76].

The procedures they establish must comply with any mandatory rules and public policy requirements of the law of the judicial seat of arbitration. It must also take into account that the international Convention on arbitration that aims to ensure that arbitral proceedings are

[69] Blackaby.N. et.all. (2015) *Redfern and Hunter on International Arbitration, 6th edn*. Oxford, Oxford University Press, at page 26
[70] Blackaby.N. et.all. (2015) *Redfern and Hunter on International Arbitration, 6th edn*. Oxford, Oxford University Press, at page 26
[71] Ibid
[72] Ibid at page 26-27
[73] Ibid at page 363
[74] Ibid
[75] Ibid
[76] Ibid

© 2024. International Journal of Law Management & Humanities [ISSN 2581-5369]

conducted fairly, indeed, the balance must be struck between the parties wishes concerning the procedure to be followed and any overriding requirements of the legal regime that governing the arbitration.

d. **The decision of the Tribunal**

In arbitral proceedings, a settlement may be reached between the parties, the rules of arbitration usually make provisions for this[77]. If before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for termination of the arbitral proceedings of if requested by both parties and accepted by the arbitral tribunal, record the settlement as the arbitral award on the agreed terms and the arbitral tribunal is not obliged to give reason for such an award[78].

Where the parties cannot resolve their dispute, the arbitral tribunal is to resolve for them by deciding in a form of a written award. [79]An arbitral tribunal does not have power or prerogative of a court, but in this respect it has a similar function to that of the court, namely that of being entrusted by the parties with the right and the obligation to reach a decision which will be binding upon the parties[80].

The power to make a decision is of a fundamental importance, it distinguishes arbitration as a method of resolving disputes from other procedures such as mediation and conciliation which aim to resolve dispute by a negotiated settlement[81].The procedure that must be followed in settling a dispute through arbitration in order to arrive at a binding decision is flexible one adopted to the circumstance that arbitral tribunal must act fairly and impartially as between the parties giving each party a reasonable opportunity of putting his case and dealing with that of the opponent[82]. No similar enforceable requirement governs the procedures to be followed where parties are assisted in arriving at a negotiated settlement by mediation, conciliation or some other process of this kind[83].

Where the arbitral tribunal consists three arbitrators, making decision is both easier and more difficult[84]. It is easier, because the decision does not depend upon one person, the argument of the parties can be discussed, opinions can be tested, the facts of the case can be reviewed, and

[77] Blackaby.N. et.all. (2015) *Redfern and Hunter on International Arbitration, 6th edn*. Oxford, Oxford University Press, at page 27
[78] Ibid
[79] Ibid
[80]Ibid at page 28
[81] Ibid
[82]Ibid
[83] Ibid at page 27-28
[84] Blackaby.N. et.all. (2015) *Redfern and Hunter on International Arbitration, 6th edn*. Oxford, Oxford University Press, at page 28

so forth. It is at the same time more difficult, because three opinions may well emerge during the tribunal's deliberation. It will then be necessary for the presiding arbitrator to try to reconcile these differences[85].

e. **Enforcement of the Award.**

Once an arbitral has made its award, it has fulfilled its function and its existence ends.The award itself, however, it gives rise to important, lasting and potentially public legal consequences, although the award is the result of the private arrangement and is made by a private arbitral tribunal. It constitutes a binding on the dispute between the parties tribunal[86]. If the award is not carried out voluntarily it may be enforced by legal proceedings both locally in the place in which it was made and internationally under such provisions as the New York Convention[87].

An agreement to arbitrate carries with it an agreement not only to take part in any arbitral proceedings, but also an agreement to carry out any resulting arbitral award. Otherwise, the agreement to arbitrate would be pointless.

IV. Why the Arbitration Agreement is a Corner Stone of Arbitration

When parties agree to arbitrate their dispute, they give up the right to have those disputes decided by a national court, instead they agree their dispute to be resolved privately, outside of any court system[88]. The arbitration agreement thus constitutes the relinquishment of an important right to have the dispute resolved judicially and create other rights[89]. The rights it creates are the rights to establish the process for resolving the disputes[90].

In their arbitration agreement , the parties can select the rules that will govern the procedure, the location of arbitration, the language of the arbitration, the law governing the procedure and frequently, the decision makers who the parties may choose because of their particular expertise in the subject of the parties' dispute[91].The parties' arbitration agreement gives the arbitrators the power to decide the dispute , and defines the scope of that power. The parties create their own private system of justice[92].

---

[85] Ibid
[86] Ibid at page 29
[87] Ibid
[88] Mosses, M.L (2008) *the Principle and Practice of International Commercial Arbitration*, Cambridge, Cambridge University Press at page 17
[89] Ibid
[90] Ibid
[91]Mosses, M.L (2008) *the Principle and Practice of International Commercial Arbitration*, Cambridge, Cambridge University Press at page 17
[92] Ibid

(A) Arbitration Clause and Submission to Arbitrate

The parties' arbitration agreement is frequently contained in a clause or clauses that are embodied in the parties' commercial contract[93]. The agreement to arbitrate is thus entered into before any dispute has arisen, and is intended to provide a method of resolution if a dispute will arise[94]. However, If there is no arbitration clause in the parties contract, and a dispute arises the parties can nonetheless enter into an agreement to arbitrate, if both sides agree, such an agreement is referred to as a submission agreement[95]. However, submission agreements can much less common that arbitration clause in contracts, because once a dispute arises, the parties often cannot agree on anything for that reason, it is better for the parties to agree to arbitrate at the begging of the relationship, when they are still on good terms[96].

(B) Separability

Even though the arbitration clause is most often contained within the contract between the parties, under most laws and rules are considered a separate agreement. It thus may continue to be valid even if the main agreement that is, the contract where the arbitration agreement is found may be potentially invalid[97]. In most jurisdiction, this doctrine of separability permits the arbitrators to hear and decide the dispute even if one side claims, for example, that the contract is terminated or never existed in the first place or is invalid because it was fraudulently induced[98].

Such claims would not deprive the arbitrators jurisdiction because they pertain to the main contract and not specifically to the arbitration clause because the arbitration clause is considered a separate agreement and distinct agreement, it is not affected by claims of invalidity of main contract, and still confers jurisdiction on the arbitrators to decide the dispute, the separability doctrine is embodied in numerous arbitration laws and rules[99].

(C) Validity

An important aspect of validity of the of arbitration agreement is that, it does not depend of the validity of the general contract between the parties, meaning that it is possible that the contract should be null and void and yet the arbitration agreement contained therein should be

[93] Ibid
[94] Ibid
[95] Ibid
[96] Ibid
[97] Ibid at page 18
[98] Ibid
[99] Mosses, M.L (2008) *the Principle and Practice of International Commercial Arbitration*, Cambridge, Cambridge University Press at page 18

apart and decided upon as valid.[100]

In the light of the important that are extinguished when the Parties agree to arbitrate, the question of arbitration agreement's validity is critical. Arbitration is a creature of consent, and that consent should be freely, knowingly and competent given. Therefore, to establish that parties have actually consented, many national laws, as well as the New York Convention, require that an arbitration agreement be in writing.[101]

In addition, the Convention requires that in some circumstance the written agreement be signed by both parties. Whether the agreement was in writing, signed, and therefore valid, is likely to arise when one party seeks to renege on its agreement to arbitrate[102]. Although the party may have agreed to arbitrate, after a dispute arises it may decide that it would rather go to court, and will therefore commence litigation[103].

Besides that, arbitration agreements applicability to specific parties may arise when one party assists that it never signed the agreement, or when a non-signatory tries to enforce the agreement against a signatory[104]. In these situations, a party may call upon the court for assistance.

(D) Enforcement of the Arbitration Agreement

There is a clearly a trend today to support prompt enforcement of arbitration agreement and the awards. In recommending that, the more favorable rights provision be applied to arbitration agreement and to awards UNCITRAL is recommending a solution already followed by some courts[105]. When a part can take advantage of domestic laws in the enforcing court that are not as limited as the writing requirement. Article II of the Convention, the parties' expectations will likely be met. A more Morden approach to the writing requirement means that parties who agreed to arbitrate are much less likely to be thwarted because of a failure to meet formalities requirements[106].

V. Limitation of Arbitration Agreement

Although the arbitration agreement serves the critical function of creating a framework for the

[100] J. Dolinger "International Commercial Arbitration*", El Derecho De Asilo y ela Acnur,*at page 119

[101] Mosses, M.L (2008) *the Principle and Practice of International Commercial Arbitration*, Cambridge, Cambridge University Press at page 19

[102] Ibid

[103] Ibid

[104] Mosses, M.L (2008) *the Principle and Practice of International Commercial Arbitration*, Cambridge, Cambridge University Press at page 19

[105] Mosses, M.L (2008) *the Principle and Practice of International Commercial Arbitration*, Cambridge, Cambridge University Press at page 28

[106] Ibid

parties' own private dispute resolution system outside of national courts[107], it has limitations.

The arbitration agreement serves the critical function of creating a framework for the parties' own private dispute resolution system outside of the national courts.

(A) Subject in the arbitration Agreement not capable of being settled by Arbitration

For an arbitration agreement to be enforceable, the subject has to be arbitrable, it has to be a subject that it is capable and appropriate to be arbitrated. In most jurisdiction issues such as criminal matters, child custody, family matters, and bankruptcy are not arbitrable. It would be against the law or public policy of the local jurisdiction to try to arbitrate dispute in these areas, in addition, in patent law, the validity of the patent will not be arbitrable because that is considered being an issue for a local regulatory agency, or for a court. On the other hand, disputes arising out of an agreement to license a patent normally Would be arbitrable, because those disputes because those are basically contract disputes.[108]

(B) Null and Void

Arbitration agreement could be considered null and void if there was lack actual consent because of fraud, duress, misrepresentation, undue influence, or waiver, in addition, a lack of capacity by a party could render the agreement null and void capacity issue may came up when a party did not have authority or necessary approvals to enter into an arbitration agreement[109]. An arbitration agreement may also be considered a nullity because the language of the clause is so vague that the parties intent cannot be determined, the arbitration clause may be viewed as so vague that it simply nullifies the agreement[110].

(C) Inoperable

An arbitration agreement may be inoperable as to a particular dispute if it is bared by res judicata, because the identical issues between the same parties have been decided in another legal forum. It could become inoperable because the parties revoked it, or entered into an agreement to settle the dispute. Another possibility would be that a required time limit had expired[111]

(D) **Incapable of Being Performed**

An arbitration agreement that is incapable of being capable performed may also be inoperable,

---

[107] Ibid at page 39

[108] Mosses, M.L (2008) *the Principle and Practice of International Commercial Arbitration*, Cambridge, Cambridge University Press at page 28

[109] *Ibdia* at page 32

[110] Ibid

[111] Ibid

© 2024. International Journal of Law Management & Humanities [ISSN 2581-5369]

and nullity in some cases the overlap of terms may make them seem synonymous. An arbitration agreement could be incapable of being performed, if there was a contradictory language in the main agreement indicating the parties intended to litigate, more, if the parties had chosen a specific arbitrator in the agreement , who was, at the time of dispute, deceased or unavailable, the arbitration agreement could not be effectuated[112]. In addition, if the place of arbitration was no longer available because of political upheaval, this could render the arbitration agreement incapable of being performed, if the arbitration agreement was itself too vague, confusing, or contradictory, it could prevent the arbitration from taking place.

(E) Arbitration Agreement does not bind the non-signatories

Although there is a trend today toward finding an arbitration agreement enforceable even if not all formalities are strictly met, courts still have justifiable concern about requiring a party to arbitrate if it appears that the party did not agree to do so[113]. A question whether a party signed a contract containing an arbitration clause can raise the issue of intent and formal contract validity. Moreover, in some instance, a question may arise about a third party who did not sign a contract that was valid between at least two other parties. Here, the validity of the contract is not an issue, rather the question is whether a particular party a non-signatory can be required to arbitrate, or whether a non-signatory can compel arbitration with a signatory because consent to arbitration is fundamental Court has asserted that arbitration agreement apply to non-signatories only in rare circumstances[114].

VI. Conclusion

This article highlighted arbitration agreement as a cornerstone of arbitration. It has also shown the elements of the arbitration agreement, the, types of arbitration agreement, and the reason why arbitration agreement is the cornerstone of arbitration. Also, it has shown the limitations of the arbitration agreement. An arbitration agreement is a cornerstone of arbitration, without an arbitration agreement no arbitration shall be conducted and take place because the arbitration agreement gives the jurisdiction to arbitrate. From the arbitration agreement parties agreed who to arbitrate, law applicable, procedures to be applicable seat of arbitration and place of arbitration.

*****

[112] Ibid at page33
[113] Ibid
[114]Mosses, M.L (2008) *the Principle and Practice of International Commercial Arbitration*, Cambridge, Cambridge University Press at page 33