Recording Arbitration Agreements in Writing

Introduction

It is commonly understood that an arbitration agreement has certain formalities, such as the requirement of being in writing. However, recent amendments have extended what it means for an arbitration agreement to be "in writing". The scope of this provision was examined in the recent case of AQZ v ARA [2015] SGHC 49.

The case dealt mainly with an oral agreement which imported an arbitration agreement from a separate written contract. Even though the contract was oral and not in writing, the High Court accepted the arbitration agreement as valid because it had been recorded 'in writing' in the separate written contract, and in a written draft of the contract (albeit an unsigned draft).

It is not uncommon for contracts to be concluded orally or by conduct. Where such contracts contain arbitration agreements, it is important to know if the arbitration agreement will be valid, and this judgment provides some insight as to when an arbitration agreement in such instance will be found to be "in writing".

Brief Facts

This case involved an application to set aside an arbitral award. The Parties had entered into a contract for the shipment of coal (the "First Shipment contract"). The Supplier disputed the existence of a further contract for a second shipment (the "Second Shipment contract"). The Buyer issued a Notice of Arbitration against the Supplier, alleging a breach of the Second Shipment contract.

The First Shipment contract was concluded in writing, and contained an arbitration agreement. However, the Second Shipment contract was not concluded in writing, having been allegedly concluded orally instead.

In spite of the Supplier's challenge that there was no valid and binding arbitration agreement in the Second Shipment contract, the arbitrator found that the tribunal had jurisdiction and that the Supplier was liable to the Buyer (the "Award"). The Supplier then applied to the Singapore High Court to set aside the Award on the ground that the arbitrator lacked jurisdiction to hear the dispute.

Holding of the High Court

The Court did not grant the application to set aside the Award, finding that there was a valid and binding arbitration agreement in the Second Shipment contract.

In Singapore, the requirement for arbitration agreements to be in writing is contained in the International Arbitration Act ("IAA"). Section 2A(4) of the IAA also states that an arbitration agreement is in writing if "its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct or by other means."

Here, the Court found that the arbitration agreement in the Second Shipment contract had in fact been 'recorded in any form'. The arbitration agreement was thus 'in writing' even though the contract itself was oral in nature.

First, the Court held that the arbitration agreement in the Second Shipment contract had been recorded in the First Shipment contract. The Court found that the terms of this Second Shipment contract were, apart from the shipment period, identical to the terms of the First Shipment contract. Therefore, since the
Parties had agreed that all the terms of the First Shipment contract would apply to the Second Shipment contract, the arbitration clause in the First Shipment contract was a sufficient record of the arbitration agreement in the Second Shipment contract.

Second, the Court held that the arbitration agreement was recorded in the written draft of the Second Shipment contract. That draft contained an arbitration clause that was identical to the arbitration clause in the First Shipment contract. Although the Buyer never signed the draft, the Court found that there was no evidence that its failure to sign was related to disagreement with the terms of the arbitration clause. Therefore, the draft contract for the Second Shipment could also serve as a record of the arbitration agreement.

Interestingly, the Supplier had tried to argue that the extended definition of an arbitration agreement ‘in writing’ did not apply because the agreement had been entered into in 2009, before the 2012 amendments to the IAA took effect. However, the Court confirmed that the 2012 amendment applied to all arbitral proceedings commenced on or after 1 June 2012, and not only to arbitration agreements entered into on or after that date.

**Concluding Words**

This decision highlights the practical approach taken by the Court in the recognition of a valid arbitration agreement. In allowing an arbitration agreement to be contained in an oral contract or a contract by conduct as long as it is recorded in some form, the Court has adopted a commercially oriented position which still affords a measure of certainty to arbitral parties.

Notably, the Court confirmed that the requirement in section 2A(4) would be satisfied even where one party to the arbitration agreement unilaterally records it in writing. It would not matter that the written version was neither signed nor confirmed by all the parties involved. Therefore, an arbitration agreement may be found in a written draft of a contract, or even in a previous contract between the parties containing identical terms.

Nonetheless, parties are well-advised to clearly record their arbitration agreements to prevent uncertainty as to whether a matter should proceed for arbitration.

Parties seeking to consult on arbitration matters or on any legal claims or proceedings may contact our team below.

Please feel free to also contact Knowledge and Risk Management at eOASIS@rajahtann.com
INTERNATIONAL ARBITRATION

Contacts

Ng Kim Beng
Partner
D (65) 6232 0182
F (65) 6428 2056
kim.beng.ng@rajahtann.com

Avinash Pradhan
Partner
D (65) 6232 0234
F (65) 6428 2059
avinash.pradhan@rajahtann.com
Our regional presence

Our regional contacts

RAJAH & TANN | Singapore
Rajah & Tann Singapore LLP
9 Battery Road #25-01
Straits Trading Building
Singapore 049910
T +65 6535 3600  F +65 6225 9630
sg.rajahtannasia.com

R&T SOK & HENG | Cambodia
R&T Sok & Heng Law Office
Vattanac Capital Office Tower, Level 17, No. 66
Preah Monivong Boulevard, Sangkat Wat Phnom
Khan Daun Penh, 12002 Phnom Penh, Cambodia
T +855 23 963 112 / 113  F +855 963 116
kh.rajahtannasia.com
*in association with Rajah & Tann Singapore LLP

RAJAH & TANN REPRESENTATIVE OFFICE | China
Rajah & Tann Singapore LLP
Shanghai Representative Office
Unit 1905-1906, Shui On Plaza, 333 Huai Hai Middle Road
Shanghai 200021, People’s Republic of China
T +86 21 6120 8818  F +86 21 6120 8820
cn.rajahtannasia.com

RAJAH & TANN NK LEGAL | Myanmar
Rajah & Tann NK Legal Myanmar Company Limited
Office Suite 007, Inya Lake Hotel No. 37, Kaba Aye Pagoda Road, Mayangone Township, Yangon, Myanmar
T +95 9 73040763 / +95 1 657902 / +95 1 657903
F +95 1 9655537
mm.rajahtannasia.com
Rajah & Tann Singapore LLP is one of the largest full service law firms in Singapore, providing high quality advice to an impressive list of clients. We place strong emphasis on promptness, accessibility and reliability in dealing with clients. At the same time, the firm strives towards a practical yet creative approach in dealing with business and commercial problems. As the Singapore member firm of the Lex Mundi Network, we are able to offer access to excellent legal expertise in more than 100 countries.

Rajah & Tann Singapore LLP is part of Rajah & Tann Asia, a network of local law firms in Singapore, China, Lao PDR, Vietnam, Thailand and Myanmar, as well as associate and affiliate offices in Malaysia, Cambodia, Indonesia and the Middle East. Our Asian network also includes regional desks focused on Japan and South Asia.

The contents of this Update are owned by Rajah & Tann Singapore LLP and subject to copyright protection under the laws of Singapore and, through international treaties, other countries. No part of this Update may be reproduced, licensed, sold, published, transmitted, modified, adapted, publicly displayed, broadcast (including storage in any medium by electronic means whether or not transiently for any purpose save as permitted herein) without the prior written permission of Rajah & Tann Singapore LLP.

Please note also that whilst the information in this Update is correct to the best of our knowledge and belief at the time of writing, it is only intended to provide a general guide to the subject matter and should not be treated as a substitute for specific professional advice for any particular course of action as such information may not suit your specific business and operational requirements. It is to your advantage to seek legal advice for your specific situation. In this regard, you may call the lawyer you normally deal with in Rajah & Tann Singapore LLP or e-mail Knowledge & Risk Management at eOASIS@rajahtann.com.