Navigating Current Considerations in International Arbitration

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What is arbitration?

Arbitration is a form of alternative dispute resolution (ADR) that provides a private and binding method for resolving disputes outside of traditional court litigation. Arbitration is a voluntary and consensual process, and an arbitral tribunal only has jurisdiction if all parties to the dispute have agreed to submit their disputes to arbitration, typically through an arbitration clause in their contract. These arbitrators have the authority to hear evidence, weigh arguments, and render a binding decision known as an award.

Arbitration in cross border contracts

Arbitration is often preferred in cross-border contracts where parties may be from different jurisdictions or which may have connecting factors to different countries. One key attraction is parties can choose a neutral venue as the seat of arbitration and appoint independent arbitrators, which may confer more comfort than to have disputes resolved before the home courts of the contractual counterparty. Another attraction is arbitration proceedings are private, which helps protect sensitive information from becoming public. This is especially important in international business where confidentiality can be crucial. The arbitration process is more flexible and can be tailored to the needs of the parties involved. Arbitration awards are usually final and binding, with limited options for appeal, which helps avoid prolonged legal battles across different jurisdictions.

Enforcement of international arbitration awards

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention, was adopted by a United Nations diplomatic conference on 10 June 1958 and entered into force on 7 June 1959. The New York Convention currently has 175 contracting parties and is widely considered the foundational instrument for international arbitration. It is the primary mode of enforcement of international awards across different jurisdictions.

The New York Convention requires courts of contracting states to give effect to private agreements to arbitrate, recognize and enforce arbitration awards made in other contracting states, so long as the awards are not considered as domestic awards in the state where recognition and enforcement is sought. A contracting state may refuse to enforce an award only under specific circumstances, such as the arbitration agreement was not valid, or if enforcing

the award would be contrary to public policy. Arbitral awards are generally easier to enforce internationally due to the New York Convention compared to court judgements.

Arbitration Agreement

The arbitration process is governed by an arbitration agreement, which is usually in writing and specifies key aspects such as the seat of arbitration, the number of arbitrators, and the procedural rules to be followed.

Institutional v ad hoc arbitration

Arbitration can be conducted under institutional rules or on an ad hoc basis. The main difference between institutional and ad hoc arbitration lies in the administration and structure of the arbitration process. Institutional arbitrations are administered by a specialized institution, which provides a set of pre-established rules and procedures to guide the arbitration process. These institutions, such as the International Chamber of Commerce (ICC) or the London Court of International Arbitration (LCIA), offer administrative support, including a secretariat or court of arbitration, and a list of qualified arbitrators to choose from.

Institutional arbitration is often preferred for its structured framework and administrative assistance, which can help ensure the proceedings begin in a timely manner and provide a proven record of effective dispute resolution.

In contrast, ad hoc arbitration is not administered by an institution. The parties involved must agree on the arbitration procedures themselves, which can include adopting existing rules like the UNCITRAL Rules or creating bespoke rules for their specific case. In theory, ad hoc arbitration offers more flexibility and can be more cost-effective since there are no institutional fees.

However, the effectiveness of ad hoc arbitration heavily relies on the cooperation between the parties. If one or both parties are uncooperative, it can lead to delays and may require court intervention, which negates the cost and time advantages of arbitration. Additionally, parties have to negotiate arbitrators' fees directly, which can be uncomfortable and may not always result in cost savings. Parties must also agree on managing the arbitration process themselves, which can be time-consuming and complex. If not properly managed or in the absence of agreement between the parties, this can lead to ambiguities and inefficiencies in the arbitration process.

There are many arbitral institutions to choose from, and the more preferred institutions are:

- the International Court of Arbitration at the International Chamber of Commerce (ICC);
- the Singapore International Arbitration Centre (SIAC);
- the Hong Kong International Arbitration Centre (HKIAC);
- the London Court of International Arbitration (LCIA); and
- the China International Economic and Trade Arbitration Commission (CIETAC).

When selecting institutions, the track record and reputation of the institution may be key considerations. As a general rule, newly formed institutions or institutions without a proven track record may not be an ideal choice. The parties are free to choose an institution

independently of the choice of seat or governing law, but it is noteworthy that should parties fail to select a seat of arbitration, their chosen institutional rules may dictate the seat. For example, the LCIA Rules provide that the default arbitral seat in the absence of agreement between the parties is London. In contrast, under the SIAC Rules if parties were to fail to agree on a seat of arbitration, the Tribunal shall determine the seat of arbitration.

Arbitral institutions have different levels of involvement in managing and administering arbitrations. Institutions such as the HKIAC promote their "light touch" approach with rules that emphasise party autonomy. On the other hand, the ICC takes a more involved approach towards administering arbitrations. ICC and SIAC engage in the mandatory scrutiny and approval of draft awards of the tribunal, and in contrast the HKIAC and LCIA neither scrutinise nor approve the award.

Different institutions also have different methodologies to calculate arbitrators' fees and administrative fees. The ICC and SIAC calculate both their administrative fees and their arbitrators' fees by reference to the amount in dispute. On the other hand, the LCIA calculate administrative and arbitrators' fees based on time spent and capped hourly rates.

Whilst confidentiality of proceedings is one of the key advantages of arbitration, and the seat of the arbitration often determines the level of privacy and confidentiality provided, it must be borne in mind that not all institutions provide for confidentiality of proceedings as a default rule. The LCIA Rules, for example, have strict confidentiality obligations. The ICC Rules, on the other hand, do not automatically oblige parties to keep awards, materials and documents confidential, but simply empower the tribunal, on the request of a party, to make orders concerning the confidentiality of proceedings or of any other matters in connection with the arbitration. Further, the ICC has adopted an opt-out approach to publication of its awards: from 1 January 2019, unredacted awards may be published within two years of notification, unless a party objects or requests redaction.

Most institutions recommend sample clauses for use when their institutional rules are being adopted. These are revised from time to time and so it is best to check the website when drafting the arbitration agreement.

Choice of seat

The choice of seat in arbitration significantly affects the arbitration process. The seat of arbitration determines the legislative framework that governs the arbitration. This framework includes national laws that may fill gaps not addressed by the procedural rules chosen by the parties. Many countries base their arbitration laws on the UNCITRAL Model Law, which aims to standardize arbitration practices across different jurisdictions. The national law of the seat provides the courts with powers related to arbitration, such as supporting the arbitration process, challenging tribunal decisions, and enforcing awards. The level of court support or intervention can vary significantly depending on the jurisdiction, with some being more supportive and others more interventionist.

The seat of arbitration gives the award a nationality, which is crucial for enforcement. It is important that the country of the seat is a signatory to the New York Convention, as this facilitates the recognition and enforcement of arbitral awards in other signatory countries.

The Tribunal

Parties are allowed and quite frequently specify the number of arbitrators in their arbitration clauses. Parties are not always entirely free to determine any number of arbitrators, however, as many national laws and procedural rules require the number to be uneven in order to avoid split decisions. Most procedural rules also provide that the parties are free to choose to have one or three arbitrators, but the number has to be uneven. In the absence of the parties' agreement, the number of arbitrators will be determined by the appointing authority and/or the arbitral institution.

The costs of arbitration are significantly lower in case of a single arbitrator when compared to a three-person tribunal. Having a dispute decided by a sole arbitrator has several advantages, especially in lower-value contracts where the amount in dispute is unlikely to be high. Sole arbitrators tend to resolve disputes more efficiently, and available statistics indicate that sole arbitrators typically issue their awards within less time than a three-member tribunal although the difference is not that substantial. However, a sole arbitrator can also have disadvantages.

Available statistics show that there is a slight tendency towards having a tribunal of three arbitrators over sole arbitrators. Having three arbitrators reduces the risk of errors and mistakes. Considering that there is usually no possibility of an appeal against an award, this is even more important to reduce the risk of mistakes. A tribunal of three also has a higher likelihood of being more balanced in terms of background and perspective, and this may increase the likelihood of a more wholistic discussion with different perspectives of the issues in dispute being considered.

Procedural nuances

The parties' expectations (or those of their advisers) of how an arbitration proceeds spring from their familiarity with the procedural rules of the courts of their own jurisdiction. Although under most sets of arbitration rules arbitrators have considerable procedural discretion, their starting-point when making procedural directions may be the court procedural rules with which they are most accustomed, albeit tempered where necessary by an appreciation of the parties' jurisdictional backgrounds.

The civil law and common law approaches in contentious proceedings differ primarily in:

1. **Document Production**: In civil law jurisdictions, the approach to document production is generally more restrictive. The tribunal may take a more interventionist role, limiting the scope of documents that can be requested and produced. In contrast, common law jurisdictions often allow for broader document production, similar to what is seen in US or English litigation, where parties have more freedom to request documents from each other.
2. **Role of the Tribunal**: Under civil law, the tribunal may play a more active role in gathering evidence and questioning witnesses, reflecting a more inquisitorial system. In common law systems, the tribunal is typically less interventionist, with parties taking the lead in presenting evidence and cross-examining witnesses.
3. **Cross-Examination**: Common law arbitration often involves US or English-style cross-examination of witnesses and experts by the parties, whereas civil law systems may not emphasize this aspect as strongly, focusing instead on written submissions and the tribunal's inquiries.

As such, parties should consider when entering into arbitration agreement whether they have procedural preferences, and if so to have these expressly provided for in the arbitration agreement. Otherwise, these issues will have to either be agreed between the parties when the dispute arises which is likely to be difficult, or decided by the tribunal which may lead to unfulfilled expectations of a party.

Conclusion

Arbitration may be a suitable dispute resolution mechanism in international contracts. If arbitration is chosen as the dispute resolution mechanism in a cross border contract, the sample clauses of the applicable arbitral institution may be a good starting point and the following 3 issues must be addressed in the arbitration agreement:

- Which arbitral rules should be used? In particular, is ad hoc or institutional arbitration preferable?
- Where should the legal place or seat of the arbitration be?
- How many arbitrators should there be?

Parties should also consider if there may be specific procedural preferences which may be included in the arbitration agreement.