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CLIENT GUIDE: CHOOSING ARBITRATION

Arbitration is a contractually agreed method of resolving disputes. It is an alternative to court proceedings, and so if parties to a dispute have agreed to arbitrate that dispute, they will not be able to go to court to resolve it instead.

Factors to Consider

A key factor in choosing arbitration will be **enforcement** – depending on what type of arbitration you opt for, the arbitration award could be enforceable in countries where another country's court judgment is (or is not so easy) to enforce. If you can envisage that as a result of a dispute arising out of your contract you may need to enforce the decision elsewhere, an arbitral award could well be the best option depending on the countries involved.

Another important factor is that the arbitral process is **confidential**, unlike court proceedings. Parties may prefer not to have details of their dispute made public, although it does mean the public 'vindication' obtainable through court proceedings will not be possible.

The arbitral process can be much more **flexible** than that of court proceedings. As long as the parties agree, they can choose how the arbitration will work – who the arbitrators should be, what procedural rules should apply and so on. In practice, however, the procedure followed is not dissimilar to court proceedings (see below for further information on this).

For international contracts, arbitration is often perceived as being a **neutral** option, allowing parties to avoid opting for one party or the other's national courts.

It is generally much more difficult to appeal an arbitration award than it is a court judgment, and so the **finality** of an arbitration award can be desirable (although it may no longer prove to be so if you are unhappy with an award that you cannot challenge).

In terms of **costs**, there is generally little difference between arbitration and court proceedings.

There can be difficulties where the dispute involves **multiple parties**. Arbitration is not as flexible as litigation but the problem can be overcome in some cases, for example by ensuring complimentary arbitral agreements are in place with sub- contractors.

The Agreement to Arbitrate

For there to be a valid arbitration clause, all there needs to be is a clear written commitment to arbitrate disputes. This normally appears as a separate clause within a wider contract. However the arbitration agreement is considered to be separable from the main contract, so even if the wider contract is held to be invalid, the agreement to arbitrate could still be valid. It is also possible that different laws could apply to the arbitration agreement and the rest of the wider

contract, although careful drafting should avoid this. What law applies to the arbitration agreement could be important because this is the law that will determine questions about the arbitration, such as the validity of the arbitration agreement itself, or what the scope of the arbitration agreement is.

Arbitration Rules and Administration

Parties normally choose an arbitral institution to provide the rules for the arbitration and to administer the process - this is called 'institutional arbitration'. There are various such institutions, the most common include the International Chamber of Commerce (ICC) and London Court of International Arbitration (LCIA), but there are many around the world. It is usually more convenient for the institution to administer the process than the parties, the parties can have confidence in using established rules and following a tried and tested procedure, and there is a process for reviewing an award before it is issued. The parties pay a fee to the institution.

There is no requirement to use an arbitral institution, the parties could instead have what is called an 'ad hoc' arbitration. This is where the parties manage the process themselves and rely on a country's arbitration law to fill in any gaps. Most countries have legislation to support arbitrations which provide a backstop procedure for those parties who do not agree the procedure in their arbitration agreements (as well as helping the parties where necessary in getting to a valid award and enforcing that award). The relevant legislation in this country is the Arbitration Act 1996. The parties can decide upon their own procedure or adopt stand¬alone rules such as the UNCITRAL arbitration rules (UN Commission on International Trade Law). There is no supervision or support from any institution in relation to the conduct of the proceedings, and there is no review of the award by an arbitral institution. In theory an ad hoc tribunal saves costs (because you avoid the institution's fees), but this may not be the case, especially if the parties are not able to co-operate sensibly.

Seat of the Arbitration

The parties can decide where the 'seat' of the arbitration should be. The seat of the arbitration determines which country's laws apply to the arbitration procedure. If the parties have not chosen the law of the seat then the tribunal will determine it, or the applicable rules may provide a default.

The parties should give careful thought to the choice of seat, as it may have important procedural and other consequences. Also if the law of the seat and the law of the dispute are different, legal input may be necessary from two sets of lawyers. For example, if the substantive dispute is governed by English law but the seat is in Switzerland, it may be necessary to use English lawyers to advise on the substantive dispute, but use Swiss lawyers to assist with any procedural issues.

The Tribunal

The arbitration agreement may set out who the arbitrators will be, how many, and how they will be appointed, either expressly, or by reference to institutional rules. If necessary, the courts can resolve disputes over appointment of an arbitrator. The parties pay the arbitrators' fees.

There are no particular requirements to being an arbitrator, although the arbitration agreement may set out specific requirements. However arbitrators must be impartial and disinterested, and it is possible to challenge arbitrators if this is not the case.

The powers of the tribunal are derived from the arbitration agreement (including any applicable rules). The seat of the arbitration may also impose certain mandatory duties on the tribunal, for example for arbitrations where the seat is England or Wales, the tribunal must act fairly and impartially between the parties, adopt suitable procedures and avoid unnecessary delay and expense.

What happens in an Arbitration

In theory the procedure is flexible. It is not tied to a court procedure, and parties can seek to tailor a procedure to meet their particular needs. In practice, the procedure and evidence will be decided by the appointed arbitrator(s).

Generally the arbitral process will be commenced by a request for arbitration made by one party to a dispute to other, who will then respond to that request. An arbitrator will then be appointed, and the parties will agree the arbitrator's terms of reference. There will be a preliminary hearing where the tribunal will set out the timetable for the arbitral proceedings, which will

include dates for the parties to submit their written submissions, and produce their documentary and witness evidence. After a hearing, the tribunal will give its award.

The above process is not set in stone, but whilst the arbitral tribunal can dispense with procedures, it must exercise its powers with care so as not to deprive a party of a reasonable opportunity to put its own case or to respond to its opponent's case, otherwise it may be possible to challenge the award.

COSTS

The usual costs award is that the loser pays the winner's costs, but this can be varied depending on the arbitral rules and the circumstances of the case.

Note that if your opponent refuses to pay its share of the arbitrators' fees or the arbitral institution's fees, you will have to make up the shortfall in order to allow the arbitration to proceed and for an award to be issued.

CHALLENGING THE AWARD

Whether an award can be challenged or set aside is generally governed by the law of the seat of the arbitration, and the possibility of such challenges is normally much more limited than that for court judgments. That is certainly the case where the seat is in England and Wales, where either; there must have been a serious irregularity affecting the tribunal, proceedings or award that has caused substantial injustice (where the "tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it be corrected"); the award contains a mistake of law; or the tribunal lacked substantive jurisdiction.

ENFORCEMENT

Arbitral awards are enforceable in other countries by virtue of international conventions to which those countries have signed up. The most important of these is the New York Convention, to which this country is a signatory. This Convention requires courts of contracting states to give effect to private agreements to arbitrate and to recognise and enforce arbitration awards made in other contracting states, and the grounds for refusing to enforce awards are very limited.

The procedure for enforcing awards depends on the laws of the country where enforcement is to take place. For enforcement in England and Wales, leave must be sought from the High Court to enforce the award in the same manner as an English judgment.

FIND OUT MORE

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