WHETHER TO CHOOSE ARBITRATION OR LITIGATION?

Whether a sophisticated user of disputes mechanisms, or fairly new to the industry, one point to consider at an early stage of the contract negotiations, or latest before commencing proceedings is whether to litigate or arbitrate any dispute, which following the vote to leave the EU is a particularly relevant issue. This Client Guide highlights the points to consider in arriving at that decision.

Advantages of arbitration

Brexit

Arbitration will fall outside of the issues Brexit may create, especially in relation to enforcement on which please see further below, therefore when faced with an EU based counterparty we recommend that arbitration is adopted as the dispute resolution mechanism.

Enforcement

In international disputes enforcement is a key concern that should be addressed at the contract stage, or at the latest before proceedings are commenced.

Thought should be given to the likely place of enforcement and whether there are any reciprocal enforcement treaties in place between the country in which the dispute will be heard and the country in which the enforcement will take place. Recognition and enforcement of arbitration awards (as opposed to court judgments) is often easier in foreign courts of developing countries, as a result of the New York Convention on Enforcement of Arbitral Awards 1958 (the NYC), under which some 159 states, including the UK, have agreed to enforce arbitration awards from other NYC signatory countries within their jurisdiction without the need to review the substantive case.

Confidentiality

In contrast to litigation proceedings, arbitration proceedings are private, that is the hearing is held in private.

In England and many other countries there is also an *implied obligation of confidentiality*, and details of awards and documents in the arbitration are not published, and will only become public if a party wishes to enforce the award through the courts. However as the law in many countries is unclear and confidentiality may not be automatic, if confidentiality is a priority, parties should agree it as a term in their arbitration agreement.

Confidentiality will not however apply to public arbitrations such as investment treaty arbitrations e.g. under ICSID.

Flexibility

Arbitration gives the parties greater flexibility to decide the methods by which the dispute is resolved including agreeing the:

- Tribunal – parties can nominate their arbitrators, and can use this to ensure they have sufficient expertise, or industry knowledge, which can be used for tactical gain.

- Institutional/ad hoc rules – these will govern the framework of the arbitration e.g. disclosure obligations, and can minimise the opportunities for court intervention.
- Language – parties are able to nominate the language to be applied to the proceedings.

Neutrality

Arbitration allows the parties to agree where the dispute is heard (the 'seat' of the arbitration) which will govern the procedural aspects of the proceedings, providing a neutral forum in which the dispute can be heard. This is important because parties are often reluctant to agree to litigate in the opposing party's home courts.

Neutral factors

These factors may be advantageous or disadvantageous depending on the nature of the dispute and should be considered on a case by case basis.

Time and Cost

The length and cost of an arbitration will depend on the rules and procedure adopted by the parties. Notably, parties will be required to pay arbitrators' costs, administering institutional costs which may be based upon the value of the claim (e.g. ICC), or by reference to set staged or hourly costs (e.g. LCIA), and the hire costs of the venue. Generally, smaller domestic or trade disputes will often be less costly to arbitrate than to litigate, and the costs in complex international disputes will have costs comparable to those incurred in litigation.

Finality (certainty)

Under English law, appeals on arbitration awards are only allowed in limited circumstances e.g. appeals under section 69 Arbitration Act 1996 (appeals on a point of law) are not mandatory and can be excluded, which they are by many institutional rules e.g. LCIA, which assists with certainty.

This is a benefit to the parties where the facts have been correctly identified, as the substance of the dispute cannot be re-opened. Arbitration should therefore provide finality to the parties and will avoid satellite litigation e.g. on points of procedure.

Disclosure

Disclosure in arbitration in not automatic, and even when required its scope is usually agreed between the parties, and in a far smaller scale than would be the case in English litigation, even following the introduction of the Disclosure Pilot introduced in January 2019, for more on which please see our Disclosure Pilot Client Guide at http://www.hfw.com/Client%20Guide-The-new-English-Court-Disclosure-Pilot for more information.

Disadvantages of arbitration

Powers of compulsion/interim remedies

Arbitrators have limited powers over third parties, and any procedural orders from the tribunal cannot be enforced against those who are not parties to the arbitration.

Enforcement of interim measures granted by a tribunal is considerably more complicated than enforcement of a court order, and so if asset freezing is a priority litigation will be preferred.

Multiparty disputes

Consolidated arbitrations are possible, however only where all the parties agree to consolidation. Difficulties arise when the parties do not agree, as the tribunal can not compel consolidated proceedings. Where this is an issue litigation will be preferred.

Precedent setting

If it is important to set a precedent, which can be applied in future matters, litigation would be preferable due to the private and confidential nature of arbitration.

Summary judgment

In cases where the evidence is strongly weighted in favour of one party, litigation may be preferred as it will provide an opportunity to obtain summary judgment (a procedure allowing judgment to be obtained quickly). This is not something common to arbitration and even where the arbitrators have the power to grant similar 'judgments', they will be reluctant to exercise it for fear of appearing biased.

Reviewed: 1 April 2019

This client guide was produced by the HFW Knowledge Management team, should you require any further information or assistance with any of the issues dealt with here, please do not hesitate to contact them at KM@hfw.com or your usual HFW contact to discuss.

NICOLA GARE
Professional Support Lawyer
Dispute Resolution
T +44 (0)20 7264 8158
E nicola.gare@hfw.com