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# RESOLVING COMPLEX INTERNATIONAL DISPUTES

## USE OF THE ENGLISH JURISDICTION FOR EFFECTIVE DISPUTE RESOLUTION

Andrew Manning Cox

Tel: +44 (0) 121 393 0427

Email: [andrew.manningcox@wragge-law.com](mailto:andrew.manningcox@wragge-law.com)



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# CHOOSING A PROPER FORUM AND DRAFTING AN ENFORCEABLE DISPUTE RESOLUTION CLAUSE

# I. Dispute Resolution Options

## 1. BINDING

### ■ Litigation

- National courts
- Public

### ■ Arbitration

- Method of private, binding resolution emanating from the agreement of the parties (but note possibility of jurisdiction conferred on arbitral tribunal by Bilateral Investment Treaty)

Note that binding system may include a non-binding element such as mediation or amicable resolution attempts by management.

## 2. NON-BINDING

### ■ ADR

- Mediation
- Conciliation
- Adjudication
- Expert Determination (Non-binding)
- Others

## II. Choice of Forum: Litigation, Arbitration or Expert Determination

### Considerations:

- Enforcement
  - Does the counterparty have Assets in a Jurisdiction where the Decision of the Court or Tribunal can be Enforced?
- Neutrality
- Speed
- Confidentiality
- Choice of Tribunal/Expert with particular background and expertise

# III. Litigation

## 1. National Courts

- Home Court Advantage?

## 2. New York Courts

- Difficult to Enforce outside U.S.

## 3. English/European Courts

- Enforceable within EU/EEA under Brussels 1 Regulation

## 4. 'Local' Courts

- Concern over possible 'Home – Court' advantage for local parties and governments

# IV. Advantages of Arbitration

## The Principal Consideration

- Enforcement
  - 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
  - Over 100 Contracting States
  - No Equivalent Mechanism for Enforcement of Court Judgments

## Other Considerations

- Greater Informality
- Speed?
- Costs?
- Finality
- Simplified Procedures (e.g. no mandatory discovery)

# V. Disadvantages of Arbitration

- Intervention of courts
- Disputes arising out of pathological arbitration clauses and disputes as to jurisdiction
- Joinder and consolidation issues
- Procedural uncertainty
- No enforcement advantage over municipal courts in domestic disputes
- Competence/neutrality of arbitrators
- Costs of institutional arbitration
- National Laws barring arbitration

# VI. Institutional v. Ad Hoc Arbitration

## A. Institutional Arbitration (“Administered” or “Supervised” Arbitration)

### 1. Major Institutions

- i. ICC
- ii. LCIA
- iii. AAA/ICDR
- iv. SCC
- v. DIAC
- vi. ICSID (Only Investment Disputes – jurisdiction may arise from arbitration clause OR Bilateral Investment Treaty (**BIT**'))

### 2. Advantages of Institutional Arbitration

- Tried and tested rules
- Infrastructure of institution
- Experienced Administrators
- Separation of administrative tasks from legal tasks
- Scrutiny of draft award
- Enforcement

# VI. Institutional v. Ad Hoc Arbitration (cont)

## A. Institutional Arbitration (continued)

### 3. Disadvantages of Institutional Arbitration

- Cost
- Delay
- Sovereign States may reject institutional oversight

# VI. Institutional v. Ad Hoc Arbitration (cont)

## B. Ad hoc Arbitration

1. Advantages of Ad hoc Arbitration
  - Tailored procedure (but must be carefully drafted)
  - Costs
  - UNICITRAL rules – a framework
2. Disadvantages
  - Unpredictability of resolving issues not covered by rules
  - Potential for abuse and dilatory tactics
  - Enforcement Difficulties

# VII. Place of Arbitration - Situs

1. Enforcement
2. Role of national courts
3. Mandatory procedural requirements
4. Influence on character of arbitration

## VIII. Arbitration Under Local Laws

- Usually based on UNCITRAL Model Law
- May permit Appointment of Arbitrators by local courts

# IX. Drafting The Arbitration Clause

Factors to consider:

- Seat of arbitration (this is a legal not a geographical choice, i.e. a choice of procedural law)
- Ad hoc or institutional
- Which institution - LCIA/ICC/AAA/Local?
- Number and qualification of arbitrators
- Multiple Parties?

# IX. Drafting The Arbitration Clause (cont)

- Stick to essentials such as seat, appointment mechanism, number of arbitrators
- Keep it simple – use the model ICC or LCIA clause
- Additional language e.g. on the appointment of arbitrators is usually unnecessary
- Be careful if the contract is between more than two parties. If so, UNCITRAL rules should generally not be used
- Sub-contract/back-to-back multi-party agreements require careful consideration
- Waiver of Sovereign Immunity where one party is a State

# IX. Drafting The Arbitration Clause (cont)

To Avoid:

- Non-existent institution
- No seat
- No method for appointing arbitrators if parties cannot agree
- Procedural provisions inconsistent with law of seat
- Error in Choice of Law: no express choice or meaningless choice (e.g. “the laws of the United Kingdom” should be “English law”)

Optional Arbitration clause

- Often used for finance documents – giving lender the option of litigation or arbitration. Requires careful drafting!

# X. Arbitration Clauses

## 1. Standard or Model Arbitration Clauses

### (a) Sample Institutional Clauses

#### i. ICC

*“All disputes arising in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”*

#### ii. LCIA

*“Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration, which rules are deemed to be incorporated by reference into this clause.”*

# X. Arbitration Clauses (cont)

1. Standard or Model Arbitration Clauses (continued)
- (b) Sample Ad-hoc Clause

UNCITRAL

*“Any dispute, controversy, or claim arising out of or relating to this contract, or the breach, termination, or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules in effect on the date of this contract.”*

# X. Arbitration Clauses (cont)

## 2. Defective/Pathological Clauses

- Parties shall attempt to resolve any disputes amicably by negotiation
- If they cannot agree to another method of resolution, either party may submit the dispute to the ICC in Geneva
- Each party may appoint an arbitrator, and the umpire shall be appointed by the President of the International Court of Justice
- The ICC shall have no authority to confirm or handle challenges to the arbitrators
- The arbitration shall be expedited, and the arbitrators and umpire shall decide the case within 60 days of their appointment
- The umpire shall be a national of Switzerland who is fluent in both English and Spanish, with an engineering degree, substantial experience as an international arbitrator and at least 20 years' experience as an executive of an international energy company
- The procedural law of the arbitration shall be the Civil Code of France and the Civil Code of Venezuela, with due regard for the law of the place of the arbitration

# X. Arbitration Clauses (cont)

## 2. Defective/Pathological Clauses (continued)

Any dispute of whatever nature arising out of or in any way relating to the agreement or to its construction **may be** referred to arbitration. Such arbitration shall take place in the U.S.A. and shall proceed in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce.

Disputes arising under this contract shall be subject to arbitration. Such an arbitration decision shall be binding on both parties. **The Arbitral Tribunal will apply French law and will decide the manner within a period of three months running from the date of the agreement to arbitrate.**

# X. Arbitration Clauses (cont)

## 2. Defective/Pathological Clauses (continued)

All **three parties** to this contract agree to submit all disputes arising under this contract to arbitration by **three arbitrators** in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce sitting in Paris, France.

All disputes arising under the contract shall be submitted to arbitration according to the Rules of the International Chamber of Commerce. Such arbitration shall take place **either**: in New York **with the law of the State of New York** applicable to the dispute, or in Paris **with French law** applicable to the dispute, as will be determined by the choice of the plaintiff in such dispute. The tribunal will be composed of three arbitrators: the president shall be the honorable **Mr. Fish**, and the two remaining arbitrators shall be chosen by each party.

# X. Arbitration Clauses (cont)

## 2. Defective/Pathological Clauses (continued)

In the event that the Parties, **notwithstanding the use of reasonable endeavours so to do, are unable** to resolve a difference or dispute between them arising out of or in connection with the Agreement (including, without limitation, any question regarding its existence, validity or termination) within thirty (30) Days of such difference or dispute arising, then either Party shall be entitled to require that such matter be referred to arbitration for resolution.

## 3. Problematic Clauses

### ■ Different Rules provided for in same clause:

Any Dispute relating to a claim with an aggregate value of less than or equal to US\$10 million shall be referred to and finally resolved by arbitration to be conducted in Nigeria pursuant to the Arbitration and Conciliation Decree 1988. The arbitration shall be conducted in English by a single arbitrator, and his decision shall be binding on the Parties. If a decision is not reached within twelve (12) months of the commencement of such arbitration, the arbitration shall be conducted in London, England pursuant to the Rules of the LCIA. Unless otherwise agreed any Dispute relating to a claim with an aggregate value greater than US\$10 million shall be referred to and finally resolved by arbitration to be conducted in London, England pursuant to the Rules of the LCIA.

# X. Arbitration Clauses (cont)

- Different Governing Laws provided for in same clause:

This Contract shall be governed and interpreted in accordance with principles of law common to the law of the Azerbaijan Republic and English law, and to the extent that no common principles exist in relation to any matter then in accordance with the principles of the law of New York (except for laws regarding conflicts of laws). This Agreement shall also be subject to the international legal principle of *pacta sunt servanda* (agreements must be observed).

# XI. Other Forms of Dispute Resolution

1. **Expert Determination/Dispute Boards/Adjudication: Binding or subject to “Appeal” to Arbitration/Courts**
  - Any dispute, controversy, difference or claim arising out of or in connection with this Agreement (a “**Dispute**”) shall first be referred for determination by a person appointed in accordance with this clause (an “**Expert**”)

The procedure for the appointment of an Expert shall be as follows:

The decision of the Expert regarding a Dispute shall be final and binding on the Parties (save in the case of fraud or manifest error) [unless written notice of dissatisfaction with the decision is given by one Party to the other Party, with a copy to the Expert, within thirty (30) Days of such Party’s receipt of the Expert’s decision, in which event such Dispute shall be settled by arbitration pursuant to clause [x].

NOTE: EXPERT DETERMINATION MAY REQUIRE ARBITRAL AWARD OR COURT JUDGMENT FOR ENFORCEMENT

# XI. Other Forms of Dispute Resolution (cont)

## 2. Negotiation/ADR

- “The Parties shall use all reasonable efforts to resolve any dispute, controversy or claim arising out of or relating to this Agreement or any Project Document (including without limitation any dispute as to the existence, validity, interpretation, breach or termination thereof) (a “**Dispute**”), including (i) discussion and negotiation, (ii) involvement of executives or senior management representatives of the Parties and (iii) use of mediation or another mutually agreed alternate dispute resolution process. Prior to any Party commencing arbitration proceedings, the Parties shall seek such an amicable resolution for a period of 60 days from the date that written notice of a Dispute has been provided.”
- Note: Obligation to negotiate may not be enforceable.

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