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# Arbitration vs. Litigation

November 15, 2017

## Choosing Your Dispute Resolution Method Wisely

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## Introduction – Why is Choosing Your Dispute Resolution Method Important?

- Every transaction is different – so its method of dispute resolution should be considered in that context. One size may not fit all.
- Predictability of forum and process: avoiding unexpected places
- Ease of planning and consistent policies
- Enforcement considerations

## Different Dispute Resolution Options

- Litigation
- Arbitration
- Mediation
- Evaluation
- Expert determination
- DABs
- Escalation clauses
- Hybrid options – different methods for different disputes in same contract
- But...are they practical for your contract?

## Courts v. International Arbitration

- Advantages of a Court
- While it depends on the court, whether you are the claimant or the defendant, and the nature of the dispute, generally:
  1. More likely to get a decision based in the law
  2. Right of appeal
  3. The local forum might provide you with an advantage over your opponent
  4. Threat of court proceedings can be effective
  5. Strict rules of evidence
  6. Open to the public
  7. Broader discovery, and third-party discovery more likely to be available (in common law jurisdictions primarily)

## Courts v. International Arbitration

- Advantages of a Court (continued)
  8. Interim relief is easier
  9. Non-consensual (particular benefit to claimant)
  10. Local factors – for instance jury trials in US; quality, efficiency and impartiality of judiciary – in some jurisdictions
  11. Sanctions against non-compliant parties – can avoid “playing the system”
  12. Provides certainty and precedent for future
  13. Enforceability of judgments (sometimes)
  14. Ability to join in other parties

## Courts v. International Arbitration

- Advantages of International Arbitration

1. Arbitrators or Arbitrator more likely to have appropriate commercial or other expertise to provide a more logical result. Even with sophisticated courts, often it is a “roll of the dice” on the judge who will get your case.
2. More equitable result?
3. Can be less expensive and quicker to conclusion
4. Avoid risk of runaway jury (in US)
5. Minimize risk of “Home-Cooking”
6. Sophisticated finders of fact and law not constrained by strict rules of evidence
7. Possibility of confidentiality
8. Limited discovery



## Courts v. International Arbitration

- Advantages of International Arbitration

9. New York Convention and other treaties can make enforcement of arbitration and of any award more likely than a foreign court judgment
10. Opposing party more likely to agree to international arbitration than consent to trial in other's home country



## Discovery Issues

- It is expensive and time-consuming
- It was long considered one of the great advantages of arbitration that discovery would be limited
- Discovery is still disfavored in international arbitration but there is a growing trend to more document discovery
- Should assume that compulsory third-party discovery will be difficult if not impossible
- E-Discovery Issues

## Discovery Issues (cont'd)

- Depositions are still disfavored in international arbitration
- Prepared witness statements in international arbitration are considered a worthy substitute
- You can limit discovery and depositions by providing such in the contract

## Is the Right to an Appeal All That Valuable?

- If the parties do not want a jury, and want to limit costs of discovery, then why roll the dice on the potential judge vs. having a say in the selection of the arbitral panel?
  - The main answer would be that in a court, you likely have a right of appeal
  - But, how valuable is that appeal?
  - What are the standards of review in an appeal in that jurisdiction?
  - There are limited court reviews in an arbitration:
    - NY Convention, Article V
    - UNCITRAL Model Law on International Commercial Arbitration, Article 36
    - U.S. Federal Arbitration Act, 9 U.S.C. §10 (a); s67, s68 and s69 UK Arbitration Act

## International Arbitration Bodies

- ICC, ICDR, LCIA, SIAC, HKIAC or other regional bodies
- Ad hoc arbitration under UNCITRAL Rules or CPR Rules
- ICC Court has limited review of awards
- ICC Terms of Reference
- IBA Rules of Evidence
- ICSID and Bi-Lateral Investment Treaties (BITs) when dealing with foreign governments

## The Arbitral Panel

- One v. Three
- Special Qualifications—a “commercial person,” expertise, experience, nationality, neutrality, etc.
- Wing arbitrators—independent and neutral v. advocates
- Any special challenges
- Considerations in selecting the party-appointed arbitrator
- Considerations in the selection of the chair or sole arbitrator
- Inherent risks in the appointment by the appointing body

## Choice of Law Issues

- What law should apply?
- Do you want the law of the site of the project, the law of one of the parties, the law of the financing entities or a neutral law?
- A well-developed commercial, finance, corporate, energy, or construction law is preferred as it will lend to more predictable results
- Civil Law v. Common Law. The experience of the parties and the financing entities may dictate this
- If not reasonably related to dispute, courts may disregard a choice of law
- Arbitral body much less likely to disregard the choice of law

## Choice of Law Issues (cont'd)

- So, which law/jurisdiction?
  - Case specific
  - Consider procedural issues
  - Consider how costs and attorney's fees might be assessed under the law
  - Consider quality of the judiciary and likelihood the case law would be well-reasoned
  - Plaintiff-lawyer friendly jurisdiction? Statutes and case law may not be friendly to businesses
  - Other considerations – e.g. suites of documents?



## Goal is to Provide Certainty for Contracting Parties on the Applicable Law

- When possible, select a sophisticated body of law
- National origin of parties and experience can determine whether to select a law and/or jurisdiction based on common law or civil law
- Is the common law or civil law appropriate for the subject matter of the contract and the likely disputes? Would a civil or common law jurisdiction be more suitable?
- For example, in the U.S. certain jurisdictions may be well-versed in issues:
  - In financial contracts, New York law is often selected because it is well-established and sophisticated. Similarly, New York courts, particularly those in Manhattan, are likely to be experienced with sophisticated financial contracts, issues and laws
  - For corporate or securities issues, Delaware law and courts may be desirable
  - In energy cases, Texas law and courts may also be desirable for their experience

## Conclusions

- Numerous issues bear on the choice of dispute resolution method
- Key consideration is predictability – of process, outcome and enforceability
- Practicality is important too – parties may not have the resources to operate complicated, multi-faceted dispute provisions in practice
- Beware conflicting dispute resolution provisions in a suite of documents
- Consider the issues early – leaving it until the end of negotiations will decrease flexibility and choice

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