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The International Comparative Legal Guide to:

International Arbitration 2015

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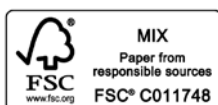
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Advantages of International Commercial Arbitration

Clyde & Co

Maurice Kenton



Peter Hirst



1 Introduction

In international trade and commerce, arbitration has become exceptionally strong and widely accepted as a means of resolving disputes. Exactly how widely accepted is probably impossible to know, but some commentators have suggested that a figure as high as 90% of all international contracts are governed by an arbitration clause.

Rapid globalisation has meant a corresponding growth in the volume of international contracts with clauses providing for international arbitration. In turn, the availability and effectiveness of international arbitration has been seen by many as a spur to cross-border commerce and investment.

As the focus of the world economy has tilted towards the higher growth economies in emerging markets, the disputes brought to international arbitration are increasingly drawn from trade with and between emerging economies. Although the traditional centres of international arbitration in Western Europe and North America are busier than ever, they are facing strengthening competition from elsewhere.

In particular, an increasing number of countries have modernised their arbitration laws and supporting judicial practices, and an ever-widening choice of arbitral institutions worldwide now offer their services to potential customers. Meanwhile in some jurisdictions the courts themselves are fighting back and making attempts to attract international disputes away from arbitration.

This exciting but increasingly complicated legal landscape presents an array of choice to international parties as to how they manage and resolve their disputes. Business needs will always vary depending on the context, but some general guidance can be drawn from an analysis of those aspects of international arbitration which have typically been seen as most advantageous for international parties while minimising perceived disadvantages of international arbitration.

2 Neutrality

The traditional perception that it was inevitable that the courts of a contract breacher's home country may be likely to favour that party in any international dispute is a viewpoint that still has its adherents today, and all the more so if the counter-party is under state control. This, combined with the perception that it may not be possible or desirable to litigate in the courts of a country which lacks a connection with any of the parties or with the subject matter of the dispute, is one of the drivers towards parties seeking reference to

international arbitration. International arbitration is seen as a way of securing a high degree of neutrality in the dispute resolution process.

Arbitrators can, if the parties so wish, be chosen so that they are of different nationalities from any of the parties, or they can be chosen in a way that gives a balance between the nationalities of the parties. Likewise, the legal seat of the arbitration can be chosen, if the parties require, so that it is in a neutral location.

However, there are other aspects of neutrality as well and, in particular, in commercial arbitration there is the ability for the parties to draw from a pool of experienced international arbitrators whose attitudes and values are likely to be pro-business and more in tune with the culture of international commerce.

The same considerations can sometimes underlie the choice of arbitral institution, since, particularly in emerging jurisdictions, government has to tread a fine line between on the one hand making efforts to promote arbitration by instigating a national arbitral institution, and on the other hand ensuring that the newly created arbitral institutions are perceived to be genuinely independent of government. In the early years of any arbitral institution, the income for the institution from case-flow will probably not be sufficient to cover the costs of establishment and promotion of the arbitral institution, and the task of gaining recognition as well as a reputation for independence presents challenges.

In today's global business environment, and with modern transport and communication links, the parties may value the highest degree of neutrality in the process over any inconveniences of travel, preferring neutral arbitrators in a neutral venue, even if it is necessary for long-distance travel to be undertaken. Even so, international arbitration can often be flexible and, where appropriate, hearings, or parts of hearings, can be held at a location away from the "legal" seat of the arbitration. In the same way, site visits by members of the arbitral tribunal can sometimes overcome the sense that valuable local knowledge about the subject matter of the claim is lost when the dispute is referred to international arbitration in a way designed to secure neutrality.

In addition, there is normally a more business-like atmosphere in an arbitration, where the arbitrators and the parties are not in a court room and will be wearing ordinary business clothes.

It seems likely that the same assumptions and perceptions will continue to apply to some extent in future. However, as businesses themselves become less tied to one particular country, with operations in many different countries, deploying an international workforce and with an international shareholder base, it seems reasonable to suppose that there may in future be rather less emphasis than there is at present on the nationality of the decision-makers.

Moreover, while the seat of the arbitration is important because it is the national courts of the seat which exercise supervisory jurisdiction over the arbitral process, the trend has been towards, if not homogeneity of arbitration law, then only relatively minor departures from an internationally accepted standard approach. Some 70 jurisdictions, located in all parts of the world, have adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, often with no or only small amendments. Currently therefore, the practice of the courts is often a more important consideration for parties if the Model Law has been already adopted, since there is regrettably still a wide divergence between the courts of some states which have a proven track record of supporting the arbitral process while also efficiently rejecting unwarranted challenges to it, and the national courts of other states whose approach is either largely untested or known to involve significant delay or unreliability. However, over time the practice of national courts seems likely to converge to some extent, eroding to some degree the perceived sense of lack of neutrality gained through selection of a seat in one country rather than another.

In some countries the courts have not only reformed themselves so as to be more supportive of international arbitration and their countries more attractive to international arbitration, they have gone one step further and actively sought to attract international disputes away from elsewhere and into their courtrooms. The Singapore International Commercial Court, newly opened for business in January 2015, aims squarely at the international disputes market, and with its panel of international judges, ability for representation by foreign legal counsel, and limited rights of appeal, its offering obviously aims to be very different from the type of national court which previously drove those seeking neutrality to international arbitration. The Singapore court lines up alongside the Dubai International Financial Centre Courts, which also offers a panel of international judges.

However, court centres in Europe have also been at work, the English Commercial Court settling into its modern premises equipped with three “super courts” designed to handle the very largest international disputes in a complex that is claimed to be “*the largest specialist centre for the resolution of financial, business and property litigation anywhere in the world*”. The bold claims in the 2007 brochure “*England and Wales: The jurisdiction of choice*” were swiftly followed by counter-blasts from elsewhere in Europe, such as the 2008 brochure “*Law – Made in Germany*”, and other efforts which are still ongoing to promote the legal systems of continental Europe. In particular, a number of continental European jurisdictions have been debating the extent to which English can be used as a language of the national courts, at least in part in order to attract the international disputes which are perceived as being lost to elsewhere.

It remains to be seen how profoundly competition between national courts will affect international arbitration’s perceived advantage as providing greater neutrality, but it is clear that the new type of international disputes court now being promoted is of a very different character to the national courts which in previous years enabled and encouraged international arbitration to achieve such dominance in international dispute resolution.

3 Decision-Maker Selection and Expertise

One area where international arbitration will always have an advantage over any court system is in the extent of party control, and this is reflected most strongly in the ability in many cases for parties to select arbitrators through a mechanism of their choice.

While there are of course many experienced and competent judges, and many judges specialise in large-scale commercial disputes, it is often the case that judges sitting in a national court will have to deal with a very wide range of cases, and will frequently need to balance the limited resources of the court system between their caseload. However dedicated and skilful they are, they may not be best equipped to deal with a dispute arising in the context of international trade and commerce, which typically may involve both a high degree of factual complexity as well as particular issues of fact or law arising from the international dimension.

Moreover, it is often the case that an individual who has excelled to the extent of reaching the rank of judge in a national court system will be very strongly influenced by his or her own national law and the various assumptions and principles which underlie it, rather than focused on the interplay of different systems of national law with one another and issues of international law.

A further feature of most court systems is that it is not possible for the parties to choose the judge for their case, and so even where a national court system’s judiciary includes judges who may be considered by the parties to be highly suitable, the parties still run the risk that the process of allocation of judicial resource may result in a judge being appointed in their case who the parties consider, for one reason or another, to be inappropriate for the task.

However, although the situation regarding the appointment of arbitrators is obviously very different, the approach is not uniform. Indeed there are divergent views in the international arbitration community as to how fundamental the right of party nomination of arbitrators is. The LCIA Rules, updated last year, remain relatively unusual in that the default position does not permit the parties to nominate an arbitrator to a panel of three. Instead, if the parties require that right, they must specifically state that in the arbitration agreement. In international arbitration more generally, there is a wide range of practice for selection of sole arbitrators or panels of three, with variation in the extent of party involvement. Nonetheless, in international arbitration there is a spectrum which at one end permits a high degree of control by the parties over the choice of arbitrator, and if the parties find themselves at the other end of the spectrum with limited party control over nomination, that is only due to the parties’ own choosing.

Arguably more fundamental to international arbitration than the right of party nomination is the notion that those appointed are well suited to their task, and indeed more suited to the task than a judge in a national court would be. It is often possible to find well qualified and experienced arbitrators who will combine commercial knowledge with their legal skills and adopt a more international and pro-business outlook. As international arbitration has continued to grow, there has been a corresponding growth in the number of potential arbitrators, and while there remains a need to build further capability as well as diversify the range of those available to sit as arbitrators, there is nowadays a wealth of choice.

These advantages to international arbitration are lost if insufficient attention is paid to arbitrator selection, and there is a view that to some extent a contested arbitration in any particular case can only be as good as the arbitrators.

4 Confidentiality and Privacy

A further strength of commercial arbitration is that of confidentiality and privacy. In many countries, court proceedings are in public to some extent and they can, particularly in high profile cases, result in a distracting “trial by media”, with parties contacting the press, or unwelcome attention being attracted to the case by pressure groups or even competitors.

By contrast, whether or not arbitral rules provide for confidentiality in the arbitral process, it is normally open to the parties to reach agreement that the process is private and confidential. A significant issue for many parties is the commercial confidentiality of their business dealing and this confidentiality is more likely to be preserved in arbitral proceedings.

5 Co-ordinated Dispute Resolution

In addition to the increasing internationalisation of business, the past few decades have seen an escalation in the complexity of economic activities. The growth of regional trade blocks, such as the EU, is, in part, a recognition of the reality that modern business is conducted on a supra-national or global scale, with national boundaries having lost much of their former significance in that regard.

While national courts and systems of national law are confined within national boundaries, the danger is that a dispute relating to modern global business will be subject to the courts of different countries engaged in parallel proceedings, or having difficult and lengthy proceedings concerned with the question of which courts have jurisdiction. All of that, with appropriate forethought, can be avoided with well-drafted arbitration clauses giving an international arbitral tribunal as wide a jurisdiction as possible. In that way, there is scope for exploiting the enormous advantage of having all relevant aspects of the dispute considered in one arbitral forum, and for the arbitral tribunal to have appropriate powers over the entirety of the issues in dispute.

That said, it is not uncommon for there to be disputes over the arbitral tribunal's jurisdiction and this serves to emphasise the need to take care in drafting the arbitration clause with precision. Even the most well-drafted clause, however, may not be able to anticipate everything that may eventuate, and a common issue is that the arbitration agreement may not cover all potential disputes which arise, particularly if there are multiple contracts or multiple parties.

Depending on the arbitral rules chosen, it may be possible to effect joinder or consolidation of claims. To a degree also, the law has sometimes permitted the inclusion in the arbitration of non-signatories to the arbitration agreement, although the extent to which this is possible is limited and there is an ongoing debate as to where exactly the limits of that power should lie.

None of these difficulties at the margin detract from international arbitration's clear advantage over national and state courts in providing a co-ordinated forum for resolution of all the disputes between international parties, notwithstanding the geographical distribution of the subject matter giving rise to the disputes.

6 Finality of Decision

To a much greater extent than litigation in the courts, international arbitration provides finality in the decision-making process. One of the disadvantages of the court process is that judgments can sometimes be subject to one or more appeals, and these can take years to be resolved. As already discussed above, there has been some movement towards a new style of court specifically targeting international disputes work, and towards a restriction on the ability to appeal, but this remains the exception rather than the norm.

A feature of many appeals through the court process is that, by their nature, they can focus on principles of law which the appeal court may often want to formulate in a way that is generally applicable, or at least consistent with its other decisions. The court, in paying attention to the wider legal landscape, inevitably does not decide the

case solely by reference to the particular circumstances and facts of that case, and may be tempted to shy away from the just decision on the facts of the particular case, in favour of a decision that fits more appropriately to the interpretation of the law itself.

This delay and potential diversion towards scrutiny of legal principle is largely avoided in the arbitral process, where the arbitral tribunal's decision is final other than usually limited grounds of challenge in the courts.

Although in the most arbitration-friendly jurisdictions, the courts are keen to emphasise their willingness not to interfere in the arbitral process, they cannot properly surrender their rights entirely, and there is even in these jurisdictions a range of limited grounds on which the award can be challenged. In other less arbitration-friendly jurisdictions, the scope for an award to be challenged may be much wider.

In practice, almost as important as the extent of the grounds for challenge of an arbitral award, is the speed with which the courts will reject an unmeritorious challenge. Particularly in emerging market jurisdictions, it is commonplace for even an unmeritorious challenge to take months or years before it will be dismissed, and there develops as a result a culture in the legal community of challenging every international arbitration award and thus delaying its enforcement for years or even indefinitely. The process of altering the practice of the courts, the substantive law, and the legal culture, is not something that can be done instantaneously, but it is a process that is underway in many jurisdictions, illustrated by the experience and aftermath of *White Industries* in relation to India.

Where arbitral awards are set aside by the courts, the appeal court will normally not substitute its own decision and, at worst, will require a further arbitration to be held in light of its ruling.

The inability to appeal awards is seen as a strength generally, but parties sometimes express concern about the lack of any corrective mechanism which could remedy obvious errors. To some extent, concerns in that regard are allayed by the ability of the parties to choose their arbitrators and the lack of any likely remedy beyond the decision of the arbitrators is a strong encouragement to exercise care when choosing the appointment mechanism for arbitrators and in nominating arbitrators.

7 Costs and Speed

It is sometimes said that arbitrations can bring benefits in terms of costs and speed, and certainly the procedure can be tailored to save time and money.

Despite this, there are many examples of arbitrations being expensive and the process lasting a long time. In some instances, this is in part because parties may prefer a more thorough process and will opt for a detailed examination of the issues, in the knowledge that this is more likely to produce a fair result.

To some extent, the parties are able to decide the approach which they would like the arbitral tribunal to take and the consequences in terms of costs and speed.

Nonetheless, it is fair to say that there are some procedures within court processes which can sometimes curtail expense and, for example, in the English courts it is possible to apply for a summary determination of the case without a trial. Under most arbitral rules, there is no similar procedure for summary determination. However, while in a clear case the summary procedure will shorten the length of the court process, in a more complicated case it may result in time being wasted on an unsuccessful application, with the effect of extending the length of the court process even further.

Some arbitral rules provide the option of an expedited process or set a time limit for the award to be granted. Moreover, it is open to the parties to agree between themselves a timetable which suits their wishes as to speed. Furthermore, there is scope for the parties to agree, either at the time of drafting the arbitration clause or subsequently, to limit within reasonable bounds the extent of processes which would otherwise be time-consuming or expensive, such as the extent of document disclosure and/or the extent to which particular facts must be proved.

Ultimately, it is difficult to make a comparison at a very general level between the costs and speed of arbitrations, as opposed to the costs and speed of litigation in the court. No doubt there are many cases in which litigation can be an attractive option, but in numerous cases of international disputes, international arbitration offers a more flexible model with the capacity to tailor itself more closely to the parties' expectations and requirements regarding costs and speed.

8 Enforcement

A notable advantage of international arbitration is the ability to enforce international arbitration awards through the New York Convention. Most countries in the world are now signatories to this Convention and the number of countries which have joined continues to grow.

Although it is often possible to enforce the court judgments of one jurisdiction in another jurisdiction, the ability to do this is by no means guaranteed and the procedures for doing so are often complex and slow. As yet, enforcement of court judgments in other jurisdictions has no equivalent to the New York Convention. There are exceptions to this overall picture, however; most notably the EU, where issues of enforcement of court judgments and arbitral awards have recently been affected and clarified by the introduction of the new Brussels Regulation, but where nonetheless, the enforcement of the judgments of the courts of one Member State in the courts of

another Member State is probably as a general rule no more difficult than enforcement in a Member State of awards of a tribunal seated in another Member State. Accordingly the advantage accruing to international arbitration in enforcement largely occurs in relation to matters not wholly within the EU.

Nonetheless, enforcement through the New York Convention is not without its problems and these should not be underestimated, particularly in emerging market jurisdictions. The increasing trend of countries to have adopted the UNCITRAL Model Law, or a variant of it, has helped to standardise the approach to international arbitration worldwide and has in turn made enforcement easier under the New York Convention, but there remain very clear difficulties in enforcing in some jurisdictions – as is the case in a number of countries in the Middle East, for example.

It is necessary to go to the domestic court in the country where the party is seeking to enforce and that court has a reviewing role, which may nonetheless be interpreted in different ways in different countries. However, the experience drawn from this is that, particularly in relation to emerging jurisdictions, the process of enforcing under the New York Convention will invariably be less difficult than enforcing a court judgment.

9 Conclusion

The rapid and continual state of change in international trade means that the choice for businesspeople whether to arbitrate international disputes in preference to litigation in the courts, and exactly the manner of arbitration, will often be complex decisions requiring careful consideration and wise counsel. There are many instances in which the right decisions can lead to an international arbitral process which is optimal in meeting the needs of the parties, offering as it does a system of dispute resolution tailored to the parties' needs and recognising the need for a business-like resolution, so as to allow trade to continue.

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Peter has arbitrated and litigated in more than 50 international jurisdictions, from the Far East, Middle East, Central Asia, North Africa, US and South America where he has wide variety of experience in all arbitral institutions and areas of commercial law.

As well as being Co-Chair of Clyde & Co's Global Arbitration Group, Peter also leads the Clyde Latin America team in London and is a registered foreign lawyer of the Brazilian Bar (OAB).

Peter sits as an arbitrator and mediator and as well as being an accredited CEDR mediator is a Fellow of the Chartered Institute of Arbitrators.

Recent experience includes acting in a US\$1bn claim arising from damage to the world's largest hydroelectric power construction project, acting for South American mining contractors in four LCIA arbitrations, advising a government on an international treaty dispute, and successful defence of an ICC arbitration concerning a US\$2bn contract.

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