

LITIGATION IN REVIEW

THE IN-HOUSE COUNSEL'S GUIDE TO ALTERNATIVE DISPUTE RESOLUTION



INTRODUCTION

The legal profession is in the midst of unprecedented change, driven by increasing sophistication of IT systems, economic hardship and, in the UK at least, deregulation. The role of in-house counsel in driving and shaping some of these trends has been key. As clients demand more flexible, more transparent billing, including alternative fee arrangements, external law firms have been forced to respond – realigning resources as required and tinkering with their economic models to compete.

Procurement of legal services is almost unrecognisable from even a decade ago. In certain sectors, law firms routinely compete against each other for panel appointments through carefully engineered reverse auctions in which they bid blind against each other online to offer the lowest viable hourly rate.

The democratisation of knowledge across the Internet has extended into the law, and external counsel have no monopoly on know-how. More sophisticated IT systems have made commoditisation of the law a reality in certain areas of practice, and at all levels of the market, consolidation and change are the norm.

Law firms have responded in various ways to meet the challenge while maintaining profitability. Regionalisation under various guises - offshoring, nearshoring, even "North shoring" - aims to offer the same quality of service with reduced overheads. In the UK, substantial numbers of support staff and fee-earners are shifting from the capital to cities like Manchester and Belfast where overheads might be 30 per cent of those in London.

Litigation has not been immune to these pressures, but change has been controversial, and concessions made only grudgingly. Broadly, clients are less willing to engage in processes that are destructive of hard-won commercial relationships, and more willing to challenge open-ended budgets. In this regard, they have had the support of the courts in England and Wales, which in the face of strong opposition have implemented costs budgeting in commercial cases, with tough penalties for those who don't stick to them.

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Such change reflects commercial realities: clients are less willing to pay trainees and associates to learn on the job; they are more selective about what work is really worth lawyers' time and expertise, and what work other professions could handle more appropriately and effectively.

At the same time that litigation has become disaggregated – that is, split up and parcelled out to a range of professionals within and outside the law - procedural changes, good intentions notwithstanding, have made litigation more complex, more arcane, and some would argue, just as expensive.

For that reason, businesses facing disputes need to be properly informed, prepared and equipped to meet the challenges of managing time and cost when balancing commercial objectives and justice.

THE ROLE OF ADR

Alternative dispute resolution (ADR) has a critical role to play for in-house counsel seeking to do more with less, but it remains something of a novelty as compared to the centuries-long tradition of courtroom litigation.

While there were many international arbitrations in the nineteenth century and into the early twentieth century, they tended to be pursuant to treaties under public international law with states acting against other states on behalf of their nationals and their commercial interests. Such arbitrations tended to be between imperial powers – British, Dutch, Portuguese or Soviet – and only following the dismantling of these empires and the consequent explosion in the number of independent nation states did international arbitration become the mainstream concern it is today.

Mediation is a more recent phenomenon, propelled into existence in the United States in the mid-1970s, as a response to spectacular increases in the number of civil and commercial disputes during the 1950s and 1960s and fear of the consequences of this trend if left unchecked. Uptake of mediation outside of the United States in the absence of such pressures has been uneven.

Nevertheless, mediation has been adopted for different reasons in different jurisdictions, and is now a mainstream, though not always well-understood, option in the UK. While its roots can be traced back to the late 1980s in the UK, only with the advent of the CPR following the Woolf Reforms of 1999, did commercial mediation receive judicial support, and then only weakly.

Since then, commercial mediation has grown in stature and case volume, and the process itself has evolved and adapted to meet market demands. In 2016, most, but not all, cases heading to court will be mediated at some point along the way. Quite when the mediation could and should optimally occur is a substantial and much-debated topic.

For companies dealing with disputes – as either a claimant or a defendant – a grounding in the available dispute resolution options is a pre-requisite for a satisfactory outcome.



MEDIATION AND ARBITRATION – WHAT ARE THEY?

MEDIATION AND ARBITRATION ARE THE TWO MOST COMMON ALTERNATIVES TO LITIGATION IN COURT. THEY ARE MARKEDLY DIFFERENT, BUT FALL UNDER THE UMBRELLA TERM “ADR”. THEIR PRINCIPAL DISTINGUISHING FEATURE IS THAT ARBITRATION IS, GENERALLY SPEAKING, BINDING, AND MEDIATION IS NON-BINDING. BOTH ARE, IN DIFFERENT DEGREES, CONSENSUAL AND, UNLIKE COURT, OFFER PROCEDURAL FLEXIBILITY AND CONFIDENTIALITY.

Arbitration is better established and has a longer history; despite its private and confidential nature, it is similar to court in that parties will present their case to a tribunal, which will make a determination by which the parties will be bound. They are, however, bound by consent: the parties have agreed by contract to give the tribunal jurisdiction over their dispute and agreed to be bound by their findings.

In most cases, the determination is final and not subject to appeal in the way that superior courts hear appeals from lower courts. It is fundamental that parties have the right to select and appoint the tribunal of their choosing, subject to the agreement of any other parties in the case. The tribunal will then agree on a procedure with the parties, which will include a timetable, the scope of document disclosure (if any), the role of witnesses (if any), whether an oral hearing is necessary and, if so, whether cross-examination is desirable or appropriate. Procedurally, therefore, each arbitration has the potential to be different, according to the facts and the demands of the parties. The resulting award has the power of a contract and can be enforced internationally, if required, in almost every country under the New York Convention (1958).

Whereas arbitration can fairly be described as a “creature of contract”, mediation is altogether less formal. Unlike arbitration, which operates with the support of legislation and the approval of the courts, mediation floats free. At its simplest, mediation is a facilitated negotiation; until an agreement is reached and reduced to writing the parties have no obligations.

The mediator has no power to compel witnesses or document disclosure, and no power to impose a settlement on the parties. The parties are free to engage or disengage with the process as they wish. Much therefore depends on the personal power, skill, charisma and gravitas of the mediator to drive discussion forward productively to a mutually agreeable outcome. All negotiations are confidential and without prejudice to further proceedings if the matter does not settle. From this privileged position, a skilful mediator can deploy a range of skills and tactics to sustain dialogue, explore workable solutions and, in the vast majority of cases, produce a settlement.

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WHEN MEDIATION IS USED AND WHY

Mediation can be successfully deployed at any point in the timeline of a dispute – either before proceedings are issued, afterwards, up to, and even during trial. It is, after all, a facilitated negotiation and represents an opportunity to settle early, reducing stress, acrimony and legal costs. Defining mediation is arguably a futile task: in the same way we accept that “beauty is in the eye of the beholder”, mediation is whatever users can imagine and can agree it to be. Thus, there are many different approaches, which vary widely according to users’ needs and the demands and timing of the case.

EARLY MEDIATION

The clear advantage of mediating early in the timeline of a dispute is the potential cost saving derived from early settlement. An early mediation can often address the issues in dispute before the parties become entrenched in their positions. The litigation process has a polarising effect, and parties become more distant and often more hostile as lawyers optimise arguments and prepare to put their best case to a judge. Early mediation can circumvent many of these issues.

However, facts often take time to develop and if the issues are insufficiently clear resolution may not be forthcoming. In that scenario, an initial mediation may not result in a settlement. However, having previously established a roadmap to resolution and narrowed the points in issue, a follow-up mediation will more than likely succeed.

MID-STAGE MEDIATION

Settlement windows open at various points en route to trial. Mediations are often held six to nine months before trial when all the necessary documentation is available, and the parties can be confident of the facts. While the factual backdrop may be more certain, the parties by this point may have incurred 85 per cent of the costs of going to trial and the costs themselves can become an obstacle to resolution. Nevertheless, industry averages suggest that between 70 per cent and 90 per cent of such mediations result in a settlement.

LATER-STAGE MEDIATION

There is a long tradition in England and Wales of settling on the steps of the court. While common, it is plainly unsatisfactory for litigants to have borne the misery and cost of litigation over a period of months and years, only for a settlement to emerge at the 11th hour – particularly when the same result could have been achieved earlier. Nevertheless, an impending trial concentrates the mind, and it is not unknown for cases to continue to be mediated during a trial – formally or informally – and a settlement reached before judgment.

In conclusion, parties should remain mindful of the option to mediate along the entire course of the litigation. Even a mediation that doesn't result in a complete settlement will likely narrow the issues to the point where parties can settle the matter themselves, or substantially reduce the scope and time of any subsequent hearings.

CASE STUDY: PASSING OFF/ TRADEMARK INFRINGEMENT

A TYPICAL MATTER CAME BEFORE THE COMMERCIAL COURT IN LONDON. THE CLAIMANT, A WELL-KNOWN CONFECTIONARY MANUFACTURER, WAS SUING A SUPERMARKET CHAIN FOR PASSING OFF AND TRADEMARK INFRINGEMENT AND WAS SEEKING AN INJUNCTION TO PREVENT FURTHER MANUFACTURE AND DISTRIBUTION OF COUNTERFEIT CHOCOLATE BARS BEARING THEIR BRAND.

The supermarket had been producing its own version of a multi-pack of confectionary in non-standard sizes, using the manufacturer's branding on the packaging, and was selling it without a licence. The presiding judge was short with the parties and warned that neither side would like what he was going to say about the case. He stayed proceedings and sent the parties to mediation.

What emerged in the course of the mediation was that the supermarket had spotted a lucrative gap in the market for multi-packs of the manufacturer's confectionary. It had, in fact, approached the manufacturer about making such a product, but lower management had dismissed the suggestion out of hand. At that point, the supermarket simply had another supplier produce the product, which then sold very well.

While undoubtedly infringing trademarks, the supermarket had proved its point about the desirability of the product and market demand. The dialogue left the manufacturer's with a straight choice between pursuing the injunction and damages (and risking the wrath of the judge) and rebuilding the commercial relationship along near-certainly profitable lines. The manufacturer's senior management conceded that there was no principled or commercial reason for their initial refusal to manufacture multi-packs in a non-standard size and that it could easily be accomplished.

The outcome – as is always the aim in mediation – was a win-win. A commercial relationship was preserved, and a worthwhile and profitable new product was brought to market, backed by empirical market research. The contrast with the available remedies in court could not be more stark.

This mediation is a classic illustration of commercial interests prevailing over legal merits. Obstructed dialogue and miscommunication was, as is commonly the case, the source of the dispute, and mediation was the right forum for this to be addressed. The irony, of course, is that it took a judge to see it.





WHEN ARBITRATION IS USED AND WHY

In almost all instances, arbitration must be contemplated at the contract drafting stage. Parties may, of course, agree to take a dispute to arbitration at any stage, but once a dispute has broken out, positions become polarised, and agreement is accordingly less likely. The reasons for preferring arbitration clauses to the more usual reference to the courts – in a commercial context – boil down to the so-called “three Es”: expedition, expertise and enforcement.

To elaborate, one of arbitration's key strengths is that parties don't join a waiting list for a trial date and the attention of a judge in interlocutory proceedings. They are free to choose their arbitrator and should do so mindful of availability and disposition to run an efficient procedure. Not only should arbitration run to a tighter timetable than is possible in many courts, but also the final and binding nature of the award eliminates the possibility of a decision being deferred until all appeal routes have been exhausted.

It is worth noting here that the option to incorporate an appeals procedure into the arbitration process exists, which some parties – as an arguable safeguard – choose to use. The convention remains, however, that arbitration is a one-shot process. The risk of the “wrong” result is generally considered an acceptable trade-off for speed and certainty.

The approach to document disclosure in arbitration is inherently narrower in scope than is commonplace in court: individual rather than classes of documents are identified, and the procedure is not driven by rigid rules. There are further savings of time in hearings – which tend, consistent with the consensual underpinnings of arbitration, to be less theatrically hostile and bullying than court proceedings – because advocacy is often limited by the so-called Chess Clock Procedure, which allocates time for presentations that cannot be exceeded.

Expertise is the second of the three “Es”. The courts of England and Wales are very much the exception in having specialist sub-divisions, including a patents court, the companies court, technology and construction court, the commercial court (recently augmented with the Financial List), and the admiralty court. The presiding judge will likely have spent a career (usually as a barrister) trying precisely the kind of case over which they now sit as a judge.

Even so, if the facts of a particular case turn on the mechanics of a hydro-electric dam, for example, it is arguable that others would be better placed to come to a view on the facts. Such a possibility is central to arbitration's commercial appeal. It is not uncommon for arbitration clauses to call for a retired professional from a particular industry or sector. The result can be time saved on teach-ins for the tribunal and, accordingly, greater confidence in the final award.

Enforcement is the final of the three “Es” and, in an international context, perhaps the most important. While mutual recognition of court judgments exists in the EU and, in a more limited context, as a matter of common law, between the United States and the UK, such recognition is patchy and inconsistent compared with the near-universal recognition of arbitral awards under the New York Convention (1958). The convention provides for the recognition of foreign arbitral awards – at the time of writing – in 153 states. It permits parties to enforce part of their award in one jurisdiction, and part in another, if necessary. The result being that wherever a defaulting party trades their assets can be seized.

In addition to the above, arbitration clauses should always be considered where confidentiality is commercially significant. Joint venture disputes are a case in point where exposure of commercially sensitive material, including details of existing and future business arrangements, could impact positions in the marketplace. Likewise, a court case concerning licensing of intellectual property can be a gift for competitors, and even a victory can be counter-productive.

All of the above should be considered at the contract drafting stage. Further guidance is available here in the JAMS International Clause Workbook: <https://www.jamsadr.com/international-clause-workbook/>

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CASE STUDY: ARBITRATION

IN AN INTERNATIONAL CONTEXT, ONE OF THE PRINCIPAL ADVANTAGES OF ARBITRATION OVER LITIGATION IS NEUTRALISATION OF HOME-COURT ADVANTAGE. WHILE THE SEAT OF ARBITRATION HAS IMPLICATIONS FOR THE LAW GOVERNING PROCEDURAL ASPECTS OF THE ARBITRATION, IT HAS LITTLE BEARING ON THE TRIBUNAL'S ABILITY TO DECIDE THE CASE DISPASSIONATELY AND FREE FROM INTERFERENCE.

The point is illustrated by a recent arbitration involving a JAMS arbitrator, sitting as one of three, in a dispute between a subsidiary of a Chinese state-owned entity and a US aircraft manufacturer.

Subsidiaries of the Beijing-based Aviation Industry Corporation of China (AVIC) - described by Forbes as "China's 800-pound gorilla of all things commercial aviation" - entered an agreement in 2009 with a subsidiary of the Pennsylvania-based Triumph Group for the supply of aircraft parts for Boeing 747-8 commercial aircraft.

The dispute resolution clause provided for arbitration under the rules of the ICC (International Chamber of Commerce), to be governed by Californian law and seated in Los Angeles. The clause was somewhat unusual as, where possible, Chinese state entities tend to prefer a seat in China, and arbitration pursuant to CIETAC (China International Economic and Trade Arbitration Commission) Rules.

In 2014 AVIC subsidiaries filed a claim, a year after Triumph stopped paying for aircraft parts. For convenience's sake, the parties agreed to move the seat of arbitration to New York, and a ten-day hearing followed in January 2015.

Per ICC Rules, each party had selected an arbitrator: AVIC selected a Singapore national, resident in the United States, and fluent in Mandarin. Triumph selected a JAMS neutral (a US national) with substantial experience in international arbitration. Per ICC rules, the party appointees selected a chairperson. The chairperson was another US national - a full-time arbitrator-in-residence at a major US law school.

An award followed promptly in July 2015, with the tribunal finding in favour of AVIC. The award was for \$20m plus interest calculated at 10%. The result was believed to be the first time that a Chinese entity has prevailed against a US company in a US-seated arbitration.

Commenting on the case, Global Arbitration Review, a trade newspaper, said: "For Chinese companies, the award is evidence that they can receive a sympathetic hearing in the US, which is often questioned." Its implications for Sino-US commercial relations are clear, confirming the independence and impartiality of the arbitral process.

In addition to the final result, it is also worth noting that from initiation to completion of the process took 18 months, comparing favourably to what might have been years to reach a conclusion in either US or Chinese courts.

THE BENEFITS AND PITFALLS OF MEDIATION

THE BENEFITS

Mediation has numerous, obvious benefits: saving time, capping risk, and exploring wider settlement options than are available through the courts. All discussions are confidential and without prejudice to further proceedings, and mediation often represents the best chance of preserving a commercial relationship when disputes arise. Given that parties now run costs risks in the English court if found to have unreasonably refused an offer of mediation, the more relevant questions are not whether to engage with mediation, but how and when.

A common question, given that the overwhelming majority of disputes settle without the intervention of the third party neutral, is whether and in what circumstances mediation is preferable to inter partes negotiation. One of the best reasons to opt for mediation where negotiations are stalling is efficiency. Mediation brings structure to the negotiation, identifying and tackling the major points in issue. It also brings a different emphasis, shifting parties away from rights-based remedies (as defined by law) and onto commercial interests. This shift in mindset is often enough to reinvigorate seemingly intractable negotiations.

Unlike court, or inter partes negotiations, mediation offers the parties the chance to discuss the past and vent frustrations. In some instances, pent up emotions are the obstacle to settlement, even if it's "just business". From such a position, it is possible for the mediator to encourage information exchanges and initiate a forward-looking approach to finding a solution.

In summarising positions and interests, the mediator can be useful to both counsel and management in terms of re-evaluating not only their initial views of the merits of the case but also, and importantly, their commercial goals. In this way, mediators are often adept at breaking deadlock where other processes have failed. Such an assessment or suggested solution is often more acceptable when coming from a neutral third party than from a counterparty or one's own counsel. This is human nature.

A mediation hearing initiates its own momentum: having committed the time and expense of traveling to attend the hearing, expectations of settlement are raised, and once the commercial parties are given a platform to meet and discuss the differences in a defused, neutral and privileged environment, the chances of a settlement are all the greater.



THE PITFALLS

While mediation enjoys the backing of commercial clients, legislators, the judiciary, and favourable civil procedure rules in many jurisdictions, the process has its limitations and critics. Some commentators remain culturally opposed to the idea of mediation, viewing the court – with its legal precedents and procedural safeguards – as the proper forum for the resolution of disputes. Others are reluctant to engage with mediation because of cost and the lack of certainty as to the outcome.

Let's look at the ideological arguments against mediation. "Mediation is not about just settlement, it is just about settlement," said UCL's Professor Dame Hazel Genn, arguably the UK's most outspoken critic of mediation. The context of her remarks was a denunciation of a longstanding government policy to continue cutting public funding of legal aid and cutting investment in court infrastructure and resources. In Genn's view, the expectation was that private sector operators offering ADR would spring up to fill the gap, robbing the general public of the safeguards of due process and access to justice.

The comments, however, make a number of dubious assumptions. First, they presuppose that justice is only that which is handed down by someone in a wig and robe; they also fail to take into account the emotional cost of litigation, and the irrecoverable damage the losing side suffers – often through no fault of their own. Moreover, it is not possible to label mediation intrinsically "unjust" with any authority unless the observer could make a side-by-side comparison of the results at trial. Even then, the results – when considering award of damages – are silent as to the value a claimant might attach to matters such as immediate payment.

There is much to be said concerning ideological arguments, but in the interest of brevity, one should note that mediation works best in tandem with strong, well-funded, properly functioning civil justice systems. Mediation is not and cannot be a replacement for a functioning justice system.

Moving on to more practical considerations, mediation is non-binding, and though statistically likely, a result is not guaranteed. To view a mediation that doesn't settle as a "failed mediation" is inaccurate as it doesn't tell the whole story. First, those mediations that do not settle on the day frequently do so in the weeks and months that follow. One litigator estimated that of the 20 to 30 per cent that do not result in settlement on the day, 80 per cent settle in the immediate aftermath. Secondly, an unsettled mediation often has a value: in narrowing issues, in gaining a better understanding of one's own arguments and those of the counterparty. Few participants consider a mediation a waste of time and money in the event that settlement is not achieved.

Other criticisms of mediation concern making compromises. Bullish litigants may believe that they have a case they can't lose; no respectable lawyer, however, would ever advise in those terms. All experienced lawyers have lost cases they believed that they would win and vice versa. The law is not a science, and litigation risk is often underappreciated, downplayed or miscalculated.

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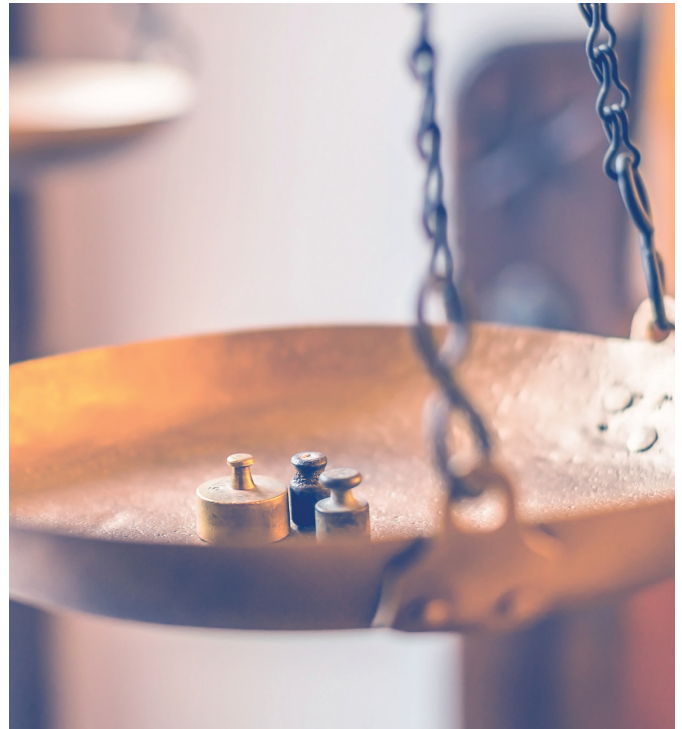
THE BENEFITS AND PITFALLS OF ARBITRATION

THE BENEFITS

When properly managed arbitration offers certainty, finality, a quicker, cheaper result than going to court and an award enforceable worldwide. Arbitration is, therefore, the default choice for cross-border contracts, providing for institutional or ad hoc proceedings before either a sole arbitrator or a panel of three. The composition of the tribunal is critical to achieving an acceptable result, and the opportunity to select arbitrators according to their sector expertise and/or disposition relative to your side's arguments can be major advantages.

Under a tri-partite neutral arbitration system, the convention is that each side appoints a single arbitrator and those arbitrators then appoint a chairman. Each arbitrator must meet the necessary standards of independence and impartiality. Selecting an arbitrator, therefore, is a question of finding someone maximally disposed to your side's arguments with the minimum appearance of bias. So-called party-appointed arbitrators are not there to advocate for your side's arguments, but can ensure that those arguments are considered by the tribunal.

Arbitration is inherently business friendly: selection of tribunal members permits a degree of sector specialism unavailable through the court system; the consensual nature of proceedings makes for a less formal, more flexible procedure, and hearings and the resultant awards are private and confidential. Nevertheless, issues of cost and time pervade the field, and users should be aware of potential pitfalls. Most stem from so-called "due process paranoia".



According to a recent survey¹, due process paranoia describes a reluctance by tribunals to "act decisively in certain situations for fear of the arbitral award being challenged on the basis of a party not having had the chance to present its case fully. Many interviewees described situations where deadlines were repeatedly extended, fresh evidence was admitted late in the process, or other disruptive behaviour by counsel was condoned due to what was perceived to be a concern by the tribunal that the award would otherwise be vulnerable to challenge. Notably, even arbitrators identified this phenomenon as both problematic and commonplace".

¹ Source: 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration <http://www.arbitration.qmul.ac.uk/research/2015/>

The effect is to unnecessarily elongate the process, adding to cost and delaying the final award. It is a question of striking an appropriate balance, and there are no easy solutions. Nevertheless, section 33(b) of the English Arbitration Act 1996 defines the general duty of the tribunal as follows: "(To) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined."

Much therefore depends on the arbitrator(s) selected and their interpretation of their duties. This reveals a paradox: parties should be careful to seek reassurances that arbitrators are not overtrading and have time to make appropriate procedural orders, and time to produce the award within an acceptable timescale after formal close of proceedings. At the same time, those arbitrators most familiar with the process will likely be those most confident in taking a robust view of their duties in respect of avoiding unnecessary delays. Finding experienced arbitrators with sufficient time is a conundrum all parties face.



INSTITUTIONAL VERSUS AD HOC ARBITRATION

In recent years, there has been a trend towards greater use of institutional arbitration and away from unadministered and ad hoc proceedings. Institutional arbitration offers numerous advantages in respect of controlling the process to the advantage of the parties. These include offering pre-established rules and procedures, which ensure that the arbitration proceedings begin in a timely manner; they offer administrative assistance, often from a secretariat or court, and a list of vetted, experienced, and qualified arbitrators to choose from; assistance in encouraging reluctant parties to proceed with arbitration; and an established format with a proven record. Institutions are also on hand to provide assistance and advice to the parties. Without such a facility parties would be dependent on the court of the seat of arbitration – at further cost and expense - for assistance with taking the arbitration forward.

In selecting an arbitration institution, there are numerous factors to consider, including administrative fees (which vary from institution to institution), whether bureaucratic oversight may help or hinder progress, and whether the institution's rules provide for realistic time frames for parties to respond.

The advantages of ad hoc arbitration are principally concerned with cost, and the process is therefore typically thought more suited to smaller claims. It offers greater flexibility than institutional arbitration, enabling parties to agree on the procedure themselves. The downside, of course, is that cooperation between opponents is not always forthcoming in the context of a dispute. Likewise, where language and cultural differences are a factor, misunderstandings on procedural points can add to delays and ultimately cost.

It is worth considering figures from the International Chamber of Commerce Court of Arbitration in relation to institutional costs. The overall costs of an international arbitration, on average, were in the following proportions: tribunal 16 per cent; administration 2 per cent; counsel 82 per cent.

“THE ADVANTAGES OF AD HOC ARBITRATION ARE PRINCIPALLY CONCERNED WITH COST, AND THE PROCESS IS THEREFORE TYPICALLY THOUGHT MORE SUITED TO SMALLER CLAIMS.”

Some question the use of ad hoc arbitration on cost-saving grounds. The website out-law.com (provided by law firm Pinsent Masons) concludes as follows:

In reality, an ad hoc arbitration may not prove to be less expensive than the institutional process. Firstly, the parties are required to make arrangements to conduct the arbitration, but they may lack the necessary knowledge and expertise. Arbitrations are generally conducted by people who are not lawyers - however, this may result in misinformed decisions especially in international commercial arbitration.

Secondly, where there is a lack of cooperation between the parties or delay on the part of the tribunal conducting the arbitration or writing the award, a party may need to seek court intervention. Litigation costs would not only negate the cost advantages of ad hoc arbitration, but also the parties' intention to avoid the courts through alternative dispute resolution methods.

Thirdly, in complex cases, the tribunal may seek to appoint a secretary to deal with the considerable administrative work involved. The additional costs of the secretary's fees will add to the cost burden of the arbitration.

Although ad hoc arbitration is more flexible and often best suited to the parties' individual needs, it will only be cost effective where:

- there is the required cooperation between the parties;
- the parties understand arbitration procedures; and
- the arbitration itself is conducted by experienced arbitrators.

CONCLUSION

It remains the case that the vast majority of contracts provide for litigation before the courts of a particular jurisdiction, usually the same jurisdiction as the governing law. There are notable exceptions in certain sectors like construction, (re)insurance, and maritime law, where arbitration has long been the norm. Likewise, most cross-border contracts default to international arbitration – not necessarily as a first choice, but rather, because it represents an acceptable compromise for both parties.

The spread of ADR into other sectors has been constant, if undramatic, underpinned by legislation, treaties, and the support of the judiciary in many jurisdictions. On one level the adoption of ADR is political: it stems from a belief that commercial entities have a right to determine or resolve their disputes without interference from state actors. As such, proponents of arbitration in particular regard it as a fundamental right, on a par with free assembly and free speech. Looked at another way, it represents a pragmatic, commercial solution to the difficulties of enforcement internationally, as well as a potential fix for problems inherent in many legal systems, including time, cost, expertise and questions over judicial independence in certain states.

Whatever the reasons for adopting ADR, it is a growing and valuable worldwide phenomenon whose entry into the mainstream is reflected in a movement towards relabelling ADR as “appropriate”, or “additional” dispute resolution.

Disputes remain a regrettable fact of life to which there are no perfect solutions. And while there are few certainties in the field of dispute resolution, it can be said with some confidence that those who fail to grapple with the principles of ADR, who fail to understand the potential and possibilities (as well as the pitfalls) such processes offer, will in all probability achieve a suboptimal result in the event of a dispute.

Maximising benefits and minimising risks should not be left entirely to external counsel. The savings in time, cost, acrimony and bad publicity all accrue to the client company: the end user. General Counsel have driven profound changes in the legal profession, and their adoption of ADR represents a further potential evolutionary advance.



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