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Arbitration As A Method Of Dispute Resolution

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Arbitration As A Method Of Dispute Resolution

Arbitration is a dispute resolution method whereby parties agree in writing to refer existing or future disputes between them to be heard by a third party. The third party is appointed by the consent of both parties. Unlike litigation, arbitration is conducted outside the publicity and formality of the courts of law and increasingly, arbitration is becoming popular as an alternative to litigation in resolving commercial disputes. This article introduces various types of arbitration, highlights the advantages and disadvantages of arbitration as a dispute resolution method compared to litigation, and introduces some prominent international arbitration bodies and the procedural rules used by them.

Types Of Arbitration

International And Domestic Arbitrations

The first distinction to be made is between international and domestic arbitrations. Generally, an arbitration is 'international' if the parties to the arbitration are of different nationalities or the subject matter of the dispute involves a state other than the state in which the parties are nationals. An international arbitration usually has no connection with the state in which the arbitration is being held, other than the fact that it is taking place on its territory. The parties to an international dispute are usually corporations or state entities, rather than private individuals, while domestic arbitrations involve small claims by individuals.

Many states, recognising that different considerations apply to international commercial arbitrations, have provided for a separate legal regime to govern arbitrations that are international in nature, such that there is less judicial intervention in the arbitration by the courts of the state in which the arbitration takes place.

Another difference between international and domestic arbitrations is that international arbitration awards have very wide enforceability in many countries. This is largely attributable to the acceptance of international treaties such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which allows for the enforcement of arbitration awards in many major countries, provided that the arbitration is international.

Institutional And Ad Hoc Arbitrations

Arbitrations can also be classified as ad hoc or institutional. An ad hoc arbitration is one in which parties, when agreeing to submit their dispute for arbitration, do not stipulate for procedural rules of any particular arbitration body to govern the conduct of their arbitration. Procedure in ad hoc arbitrations will either be drawn up specifically by the parties or left to be decided by the arbitrator when appointed.

As ad hoc arbitrations do not involve recourse to a specified arbitration body, there are potential savings in fees for the services of the external arbitration body. This makes ad hoc arbitrations cheaper than institutional arbitrations. However, the drawback of an ad hoc arbitration is that, in the event that the parties cannot agree on the procedure governing the arbitration, in particular, over the appointment of a choice of an arbitrator, a deadlock will result as no third party is able to provide guidance as to the next step. In this sense, an ad hoc arbitration is susceptible to sabotage and delay

tactics by an uncooperative party. Such deadlocks will not occur in institutional arbitrations as the rules of the appointed arbitration body will apply, directing the manner in which the arbitration is to proceed notwithstanding a refusal or delay on the part of one party to perform its obligations to bring about the arbitration process.

Advantages And Disadvantages Of Arbitration Compared To Litigation

Party Autonomy And Flexibility Of Arbitration Procedure

In litigation, there is strict adherence to court procedures and timelines. There is also considerable formality in proceedings as the judge represents the authority of the state. In arbitration, however, the parties to the arbitration are the masters of the arbitration – they define what the arbitrator can and cannot do and formulate by agreement the procedure to be followed in the arbitration. Party autonomy exists not only in ad hoc arbitrations but also in institutional arbitrations where rules provide that the arbitration procedure stipulated is subject to the agreement of the parties.

In exercising their autonomy, the parties can agree, on rules such as the following:

- how formal an arbitration they are comfortable with;
- the law of which state to apply to the arbitration;
- the pace of the arbitration;
- how evidence is to be presented, for example by documents only, or a combination of documents and oral testimony of witnesses;
- how extensive a discovery of documents they want;
- whether to adopt a common law adversarial system of proceedings (where each party presents their interpretation of the facts and law, and tests its opponent's case, with the arbitrator choosing one version to believe) or a civil law inquisitorial style (where the arbitrator, assisted by the parties, makes his own inquiries into the facts and law); and
- whether the dispute should be decided according to strict legal principles or according to standards of fairness and equity.

This freedom to formulate procedure allows the conduct of the arbitration to be tailored to fit the requirements of the parties. For instance, to save costs and time, parties may agree to have no hearing, with the arbitrator deciding the dispute only on the basis of documents. Similarly, parties uncomfortable with disclosing all relevant documents, even confidential internal memoranda (a requirement unheard of in civil law countries), may choose to have no or limited discovery.

The downside of being able to draw up procedures to the parties' liking is that it may be difficult and time-consuming for them to agree on every aspect of the arbitration. Thus, parties often agree that the rules of a particular arbitration institution will govern their arbitration.

Privacy Of Arbitration Proceedings

Unlike litigation and its hearings in open court, arbitration proceedings and the resulting award need not enter the public domain. Hearings are in camera, and outsiders are only admitted if the parties before arbitration agree. This ensures that allegations which often arise in commercial disputes such as bad faith, misrepresentation, technical or managerial incompetence, and lack of financial resources are not publicised.

Opportunity To Participate In The Selection Of The Arbitration Tribunal

Provided that parties have not conferred the right to appoint the arbitrator to a third party in the agreement to arbitrate, the choice of the arbitrator is in the hands of the parties. Parties are free to select an arbitrator familiar to them. This may give them more confidence in the arbitration proceedings. An arbitrator who understands the full repercussions of the dispute may also be able to render an award which is more satisfying to the parties. Another important factor is that an experienced arbitrator skilled in the area in which the dispute has arisen can shorten the length of the arbitration hearing since he requires less explanation of technical matters. Continuity can also be preserved with the same arbitrator being appointed to hear all disputes arising from one particular matter, allowing the arbitrator to develop a deeper understanding of the parties and their dispute.

Finality Of Arbitration Proceedings

The end result of an arbitration, if there is no settlement in the process, is an award binding on the parties. Unlike court judgments, which may be subject to several appeals, there are limited avenues for challenging awards. This affords certainty in the resolution of the dispute, and in the big picture, constitutes an advantage over litigation as time and costs incurred in an appeal are saved.

Wider Enforceability Of Arbitration Award

A valid arbitration award can be enforced as a court judgment. International awards have an important advantage over court judgments in terms of the degree of enforceability in other countries, due to the wider international acceptance of treaties such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as compared to treaties for the reciprocal enforcement of judgments.

Choice Of A Neutral Forum

When referring disputes for arbitration, parties may provide for the dispute to be fought in a neutral territory instead of on the home ground of one party or the other. Choosing a neutral forum is an important consideration in international transactions as the alternative to selecting an arbitrator to arbitrate in a neutral forum is to commence action in the courts of the defendant's home country or place of business. This can be disadvantageous to the claimant, who is likely to be unfamiliar with the workings of the foreign court. Secondly, the language of the foreign court may not be the language of the transaction, requiring relevant documents and evidence to be translated, which results in added costs, delay and opportunities for misunderstanding. The foreign court may also be inexperienced in adjudicating in international business transactions. Should the defendant be a state-linked entity, there is an added fear that the foreign courts would be inclined towards a finding in favour of an entity of their government.

Inability To Consolidate Arbitrations In Multi-Party Disputes

In multi-party disputes, it may be desirable to consolidate separate arbitrations to be heard in one arbitration instead of commencing a separate arbitration against another external party on the resolution of the first arbitration. However, unless all parties agree, the arbitrator unlike a judge, has no power to consolidate separate arbitration proceedings, even in respect of the same subject matter.

Lack Of Summary Procedures In Arbitration

Where the claimant has a strong case to which there is no defence, he is entitled, in litigation, to seek summary judgment to put an end to the dispute. Such summary procedures are not available in arbitration. Thus, where the claimant has a strong case, litigation would save time and expense.

Cost

Arbitration is unlikely to be cheaper than litigation. This is because unlike in litigation, where the cost of courtroom usage and administrative services are relatively affordable, the cost of hiring a venue for the arbitration (usually a hotel) and also the fees of the arbitrator may be considerably higher. However, a conscious effort to save costs can be made in an arbitration, for example by:

- getting the parties to narrow the issues in order to shorten preparation and hearing time;
- appointing an experienced and technically-skilled arbitrator who can easily grasp and resolve the issues in dispute without much involvement of lawyers; and
- having a 'documents-only' arbitration to save fees of the hearing.

Also, as mentioned earlier, the difficulty of challenging an arbitral award saves the costs of an appeal, which may in the long run, render arbitration a cheaper option than litigation.

Arbitration Regimes Used Internationally

Institutional Arbitration Rules

Prominent bodies which administer arbitrations include the International Chamber of Commerce's ('ICC') International Court of Arbitration in Paris, the London Court of International Arbitration ('LCIA') and the American Arbitration Association ('AAA'). Each of these institutions has formulated its own arbitration rules, namely, the ICC Rules of Arbitration, the LCIA Rules and the AAA International Arbitration Rules. Except for the AAA, which provides that its International Arbitration Rules apply only in the absence of any designated rules, the other two institutional rules will be applied to the arbitrations administered by the arbitration bodies.

All the institutional rules govern the commencement of the arbitration, the exchange of arbitration pleadings, the appointment and removal of arbitrators, the hearing, and interim measures of protection, among other rules. If parties have not agreed on the number of arbitrators, one arbitrator will be appointed, although the arbitration institution may appoint three arbitrators if it appears that the dispute warrants it.

In terms of the choice of arbitrator, the LCIA Rules provide that it alone is empowered to appoint arbitrators, although arbitrators will be appointed with due regard according to any criteria for selection agreed by parties in writing. The ICC Rules of Arbitration allow parties to nominate by agreement an arbitrator for the Court's confirmation, while the AAA International Arbitration Rules only require that parties notify it of any designation of an arbitrator.

Where the forum of the arbitration has not been agreed, the institution generally determines it with regard to the parties' contentions and the circumstances of the arbitration. However, the LCIA Rules provide that in such situations, the seat of the arbitration will be London, unless on the basis of the

parties' written comments, the LCIA Court deems another seat more appropriate in view of the circumstances.

Under the ICC Rules of Arbitration, a document known as the Terms of Reference containing a summary of the parties' claims, list of issues to be determined and applicable procedural rules must be drawn up. Although time-consuming, discussion of agreed issues has resulted in settlement. Also, arbitration awards must be submitted to the ICC Court for approval. There are no similar requirements under the LCIA Rules and the AAA International Arbitration Rules.

Ad Hoc Arbitration Rules

As mentioned earlier when discussing the distinction between ad hoc and institutional arbitrations, rules such as the United Nations Commission on International Trade Law ('UNCITRAL') Arbitration Rules serve to bridge the gap for parties who are unwilling to fork out additional expense to use the services of an arbitration body, but who do not wish to spend time agreeing to the details of a procedure to govern their arbitration. Apart from the fact that UNCITRAL Rules do not require institutional support to administer the arbitration, the UNCITRAL Rules are largely similar to the institution rules in content.

Conclusion

In disputes where no international element is involved, the debate whether to arbitrate or litigate may be finely balanced, depending on the circumstances of each case and the reputation and procedures of the local courts. Parties who are looking for a binding decision on a dispute will usually have an effective choice between a national court and domestic arbitration. However, it is advisable that in international disputes involving large commercial bodies, arbitration may be preferable. The advantages of arbitration such as flexibility, privacy of proceedings, ability to choose an arbitration tribunal to hear all disputes arising from a particular transaction and wide enforceability of award are likely to suit large multinational entities, while drawbacks such as higher cost and longer period of resolution are less likely to be vital considerations.

In choosing to arbitrate, parties will have a choice whether to pursue an institutional arbitration or an ad hoc one. If an ad hoc arbitration is chosen, there is again a choice of whether to specifically draft the procedural rules governing the arbitration from scratch, or to adopt an existing set of rules like the UNCITRAL Rules. Whatever it is, it should be borne in mind when considering whether to arbitrate that a dispute can only be arbitrated if both parties agree in writing, in advance or after the dispute has arisen, that the dispute is to be resolved by arbitration and not in court.