Quickguides

Dispute Resolution Clauses: an Overview

ashurst

AUSTRALIA BELGIUM CHINA FRANCE GERMANY HONG KONG SAR INDONESIA (ASSOCIATED OFFICE) ITALY JAPAN PAPUA NEW GUINEA
SAUDI ARABIA SINGAPORE SPAIN SWEDEN UNITED ARAB EMIRATES UNITED KINGDOM UNITED STATES OF AMERICA

Dispute Resolution Clauses: an Overview

This guide highlights the key considerations that should be borne in mind when drafting dispute resolution clauses.

This guide covers:

- General issues to consider when drafting dispute resolution clauses
- Choice of forum: arbitration vs. litigation
- An overview of the issues to consider when drafting litigation and international arbitration clauses
- A brief overview of the other dispute resolution options, including:
  - Split/hybrid clause
  - Expert determination
  - Tiered dispute resolution
- Issues that can arise with related contracts
- Additional considerations to bear in mind including:
  - Address for service
  - State immunity

For detailed guidance on the drafting of the clauses themselves, see the following Quickguides:

- Jurisdiction clauses
- International Arbitration Clauses
- Expert determination
- Tiered dispute resolution clauses

Dispute Resolution Clauses: an Overview

Dispute resolution clauses are often relegated to the end of contractual negotiations; or are dismissed as "boilerplate" and given standard wording without any thought as to the context. But these clauses can have profound implications for how any dispute is resolved and the contractual rights and obligations enforced.

Is the dispute to be decided by a panel of arbitrators or by a judge? Will it be heard in England, in Europe, or in another part of the world? Will the dispute resolution method take months or years, and can it then be appealed? Will it result in a judgment that can be easily enforced or something that will need further litigation before it can be translated into monetary value? The answers to these questions can radically affect the outcome of a dispute and can make a difference in how a dispute is resolved that may be worth many thousands of pounds in costs.

These questions are answered by looking at the dispute resolution clause in a contract. Litigators turn to such clauses as the very first step in examining a dispute: these, together with the governing law clause, are the basic rules of engagement in any dispute and any contract negotiator must view dispute resolution clauses in this light when sitting down to negotiations. Simply because they are at the end of a contract by custom does not mean that they should be relegated to the end of the list of important provisions.

This guide looks at the issues to consider when drafting dispute resolution clauses.

1. General principles

The dispute resolution clause should be clearly drafted and unambiguous. The English courts will endeavour to give effect to the parties' agreement on how they wish to resolve their disputes, but if such agreement is not clear because the clause has been poorly drafted, parties could find themselves in a different forum to the one they chose.

A distinction should be drawn between the governing law clause and the dispute resolution clause. The former deals with the substantive law governing the agreement. The latter sets out the forum in which the parties want any disputes arising under the agreement to be resolved. Although distinct, these principles are often confused and uncertainties arise when both governing law and choice of forum for disputes are dealt with in the same clause. As a matter of best practice they should be dealt with separately.

As a point of categorisation, the expression "dispute resolution clause" refers to the contractual provisions by which parties specify how their disputes are to be resolved: this includes arbitration, mediation and reference to litigation through the courts (commonly referred to as a "jurisdiction clause"). As such a jurisdiction clause is simply another species of dispute resolution clause and should only be included where parties want a particular court (or courts) to decide a dispute. It should not be included where an alternative forum for dispute resolution is preferred.

2. Choice of forum: arbitration or litigation?

When drafting the dispute resolution clause, the first decision to make is which forum to choose for the resolution of any dispute arising under the agreement. There are several options and parties can either elect one forum or a combination of different forums. The common starting point is deciding whether court litigation or arbitration is more appropriate. This requires an understanding of the advantages and disadvantages of the different forums as, in each case, the transaction will be better suited to one or the other.

Enforceability

Generally speaking, arbitration awards are easier to enforce than court judgments. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention") provides an extensive enforcement regime for international arbitration awards. Most industrialised nations are signatories (see the UNCITRAL website[1] for a list). There is no real equivalent for enforcement of court judgments.[2] Having

[1] http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

said that, enforcement of an English court money judgment within the EU and in other Commonwealth countries should be fairly straightforward.[3] However, if you are likely to need to enforce in a country outside the EU and the Commonwealth, arbitration is the preferable option.

Flexibility

There is much greater scope for the parties to adapt procedures to the needs of a particular dispute in arbitration than in court. In arbitration, parties are generally free to agree a suitable procedure, hold hearings in a neutral country, and appoint arbitrators who are of a different nationality compared to the parties. Arbitrators can also be empowered to decide a dispute under different substantive and/or different procedural rules than the rules which a court is compelled to observe.

Privacy/Confidentiality

English court trials are open to the public save in the most exceptional circumstances (e.g. Official Secrets), statements of case are publicly available (unless the court orders otherwise) and judgments are published. In comparison, arbitration hearings are held in private and the documents produced and awards issued are generally confidential. Thus commercial secrets and "dirty linen" need not be exposed in public – although in some disputes there may be an advantage to have the dispute in the public arena, to put pressure on the opposing party and to create precedent for later cases. Where parties are choosing arbitration for privacy reasons they are always well advised to ensure that an express confidentiality provision is included in the arbitration agreement or procedural order as attitudes to confidentiality will vary in different jurisdictions.

Multiple parties and multiple agreements

Court procedure permits the joinder of all relevant parties to a dispute so all aspects can be resolved in one hearing. It also permits the consolidation of related actions, for example, where they all arise in respect of related contracts. There is no compulsory right of joinder or consolidation in arbitration as an arbitral tribunal only has jurisdiction over those parties which have entered into the arbitration agreement. This means that where there are multiple parties and multiple agreements there is a risk of parallel proceedings and inconsistent outcomes. Provision for joinder and consolidation in arbitration can be made but requires careful consideration and drafting beforehand.

Quality of the judges

Generally the quality of English High Court judges is top-class and so the judgment given is sensible, correct and justifiable. The quality of an arbitral tribunal may be more variable given the freedom of the parties to choose arbitrators (though there are many top-class arbitrators throughout the world as well). Arbitral tribunals also lack the "safety-check" afforded by an appeal system.

Market knowledge

If a dispute is likely to raise technical or scientific issues of fact, arbitration permits the parties to choose a tribunal with the relevant technical expertise. Depending on the nature of the (likely) dispute this can have great benefits compared to a court where you may have a trial before a judge who has no such knowledge and has to have explained at length (and cost) what would otherwise be a "given".

Speed

It used to be said that arbitration was quicker than litigation. However, this has become less accurate with the increasing involvement of lawyers in arbitration, together with the difficulties in convening a three-man tribunal. The process has now slowed down to a similar pace as that of the courts. Overall it is difficult now to make a

---

2 The Hague Convention on Choice of Court Agreements of 2005 is the litigation equivalent of the New York Convention. However, to date only Mexico, the US and the EU have signed. It will be a while before it has the impact of the New York Convention.

3 Under the various reciprocal enforcement treaties in place: Council Regulation (EC) No 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (commonly referred to as the Brussels Regulation); The Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters; The Administration of Justice Act 1920; and The Foreign Judgments (Reciprocal Enforcement) Act 1933.

generalised comparison between the speed of arbitration and litigation as this will depend on many factors. It is relevant to note here though that if there is an appeal of a court judgment, arbitration will be significantly faster than litigation given the fact that there is little possibility of appealing an arbitration award (see below on finality of decision).

Summary determination

Although in principle an arbitral tribunal can determine claims and defences summarily, in practice this power is rarely used. In contrast, English court judges are happy to determine matters at an early stage – whether by way of preliminary issue or summary judgment. Therefore, if claims are likely to be straightforward and are indisputably due, court proceedings may be preferable.

Finality of decision

The circumstances in which an arbitrator's award can be appealed in England and Wales (to the High Court) is now very limited indeed, and the same is true in the case of international arbitrations in most other jurisdictions. In contrast, a High Court judgment can be appealed relatively easily to the Court of Appeal, as in many other jurisdictions, involving more delay, cost and uncertainty.

Neutrality

In international contracts there can be a perceived disadvantage in having a dispute referred to the "home" court of a counterparty, particularly if the counterparty is a State entity. Arbitration permits the parties to refer their disputes to a neutral forum. In addition, the consensual nature of arbitration means that the parties can ensure that the composition of the tribunal, as well as the seat of the arbitration and the location of any hearing, are neutral.

Cost

Arbitration is often perceived as being cheaper than litigation but this is now rarely the case. The fact that parties are not required to pay for the judge's time and the hire of the court, and the availability of procedures such as summary judgment, mean that court litigation can be cheaper. However, there is a substantial amount of front loading of costs in court proceedings, and in arbitration flexible and more cost efficient procedures can be agreed, but this is dependent on the parties co-operating.

Recalcitrant parties

There is more scope for a party to delay matters in arbitration: arbitral tribunals' coercive powers are much more limited than that of a court and, generally speaking, judges tend to be less tolerant of such behaviour and more robust in imposing sanctions.

No precedent

An arbitration award is for most purposes confidential to the parties. Furthermore, although persuasive, it does not give rise to any binding precedent or res judicata vis à vis other parties. Where, therefore, a final and generally binding ruling on the meaning of a standard form contract is required, court litigation will be preferable.

3. Jurisdiction clauses

A jurisdiction clause should be included where the parties want all disputes arising under their agreement to be determined by a particular national court or courts. A party expressly submitting to the courts of a particular jurisdiction will find it difficult to argue that those courts are not the appropriate forum for the trial of disputes.

Drafting considerations

The issues to consider when drafting a jurisdiction clause include the following:

- **Which jurisdiction?** Factors influencing this decision will include convenience, the preferred judicial system and enforcement. It is possible to specify more than one jurisdiction where agreement on one cannot be reached.

- Should the clause be **exclusive or non-exclusive?** Exclusive clauses, where the parties submit to the exclusive jurisdiction of one particular court offer certainty and greater protection against proceedings being commenced in a different court. On the other hand non-exclusive clauses, whereby both parties agree that a particular court has jurisdiction but without prejudice to the right of one or other of the parties to take a dispute to the courts of any other appropriate jurisdiction, offer greater flexibility.

- **Scope of the clause**. Do you want all conceivable disputes to be determined by a particular court? If yes, the clause will need to be drafted widely so as to avoid arguments over whether a particular dispute falls within the scope of the clause.

Formalities

Jurisdiction clauses should always be expressly written into the contract; it is vital that a contract clearly records the parties' agreement to a particular jurisdiction. Do not leave it to invoices sent after the contract has been concluded, or fall into the trap of allowing the parties' standard terms to be swapped thereby practically guaranteeing a "battle of forms" argument over whose terms - and exclusive jurisdiction clause - apply.

See our Quickguide: "Jurisdiction Clauses" for more detail.

4. International arbitration clauses

As with all contract clauses, to introduce a "standard" arbitration clause into all contracts can be unhelpful since there is no such thing as a "standard" contract or a "standard" dispute. Rather, the parties should consider whether there are any matters that the clause ought to address in the particular circumstances.

Key questions to consider

- **Which arbitration rules should be used?** In particular, is ad hoc or institutional arbitration preferable and, if the latter, which institution?

- **Where should the arbitration take place?** The place, or seat of the arbitration as it is commonly known, is one of the most important factors to consider as it affects not only the procedure and attitude of the courts to the arbitration but, more importantly, the enforceability of the arbitration award.

- **How many arbitrators should there be?** Usually arbitrations are heard by one or three arbitrators. Sole arbitrators mean less expense and delay. However, in high-value international disputes it is usual to provide for the appointment of a tribunal of three arbitrators.

Drafting considerations

These basic elements should be included in an arbitration clause.

- **Reference to arbitration**. Arbitration is consensual. There therefore has to be a clear agreement to refer disputes to arbitration (the "reference" to arbitration). In most cases parties will want to ensure that all disputes are determined in arbitration. To achieve this the scope of the arbitration clause must be wide enough to encompass all possible disputes and claims (including tort and other non-contractual claims). The clause should therefore incorporate wide wording such as "disputes relating to" or "arising in connection with" the contract. This avoids the situation where some claims or disputes fall outside the jurisdiction of the tribunal.

- **Incorporation of the rules governing the arbitration.** It is common for the clause to specify the rules that are to govern the arbitration. These could be institutional rules, such as those of the LCIA, or if an ad hoc arbitration, the UNCITRAL rules.

- **Seat of the arbitration.** As mentioned above it is essential to specify this. This does not prevent the parties from specifying a different venue for the arbitration and this can be provided for separately in the clause if the parties wish to have the hearing take place elsewhere.

- **Choice of language.** This should be agreed as this will be the language of all the written submissions and the hearings.

- **Preferred number of arbitrators.** It is preferable to agree this in advance and, if any disputes are likely to be technical in nature, consider whether the clause should state that any arbitrator appointed is to have particular professional or industry experience.

The following may also be relevant depending on the circumstances.

- **Multiple parties or related contracts.** Given the consensual nature of arbitration it is not possible to join third parties to arbitration unless they consent. Equally, if there are connected disputes but arising under separate contracts with separate arbitration agreements, it is not possible to consolidate the arbitrations. However, it is possible to draft the clause or clauses so that joinder and consolidation is possible but careful drafting is required.

- **Excluding rights to appeal.** Finality is one of the attractions of arbitration and therefore it is common for parties to agree to exclude rights to appeal to the extent permitted by the laws of the relevant state. Certain institutional rules already make provision for this (e.g. ICC, LCIA).

- **Provision for interim measures**. The ability of the parties to apply to the arbitral tribunal or national courts for interim relief will depend on the chosen procedural law and the powers given to the arbitration tribunal under the rules governing the arbitration and the clause itself.

- **Confidentiality.** In certain jurisdictions, including England and Wales, confidentiality of the arbitration is already protected but in other jurisdictions such protection will only apply if the clause includes confidentiality provisions.

For more detailed guidance see our Quickguide: "International Arbitration Clauses".

5. The other dispute resolution options

Traditionally the main choice for dispute resolution was arbitration or litigation. However, the last few years have seen contracting parties become more creative in their adaptation of these forums and, in some areas, are moving away from it altogether. Parties are now choosing more cost-effective, efficient and bespoke ways of dealing with their disputes and are catering for this in their contracts. Dispute resolution clauses are, as a result, becoming longer and more complex. If drafted clearly and with thought they can ensure that disputes are resolved in a way that best supports the commercial interests of the parties. If not, parties can find themselves in delayed and protracted proceedings in the forum they were particularly keen to avoid.

What follows is a brief overview of the principal mechanisms being used and drafting pointers.

Split/hybrid clauses

The term "split" or "hybrid" clause covers a variety of hybrid dispute resolution clauses, the most common being a clause which provides for both court jurisdiction and arbitration coupled with a mechanism allowing one or both parties the right to determine the procedure once a dispute arises. Such clauses tend to be used when one party has a superior bargaining position, the stronger party utilising the clause to optimise its position in any given dispute. So, for example, the clause would provide that disputes are to be resolved in the English High Court but with Party A also being permitted to elect that the dispute in question be referred to arbitration.

Such clauses are increasingly appearing in financing agreements, in particular international derivatives and loan transactions with counterparties in jurisdictions where English court judgments may not easily be enforced. They

have the obvious advantage of allowing the stronger party to control where any proceedings are to be commenced, the usual choice being between arbitration or litigation.

Caution should be used whenever such a clause is considered. Although valid as a matter of English law other jurisdictions may take a different approach. In some jurisdictions split clauses may be deemed invalid on the basis that they do not provide a proper reference to arbitration (where only one party has the right to refer the matter to arbitration) or they are unfair and against public policy (given that they strongly favour one party). If your contract incorporates a split clause check the governing law of the contract to make sure that it recognises their use and validity and also check the law of any relevant jurisdiction, for example, any jurisdiction where enforcement of any judgment or award might be sought.

When drafting such clauses clarity is essential. Also consider carefully how the clause is to operate. It is important to set out clearly the precise circumstances in which the option may be exercised and the extent of control of the stronger party. For example, is the stronger party to have an effective right of veto so that if the other party commences proceedings in the specified forum, the stronger party can then step in, have those proceedings stayed and proceedings commenced in their choice of forum?

Expert determination

Expert determination is a form of alternative dispute resolution whereby the parties to a contract ask an independent expert to give a binding decision on a dispute. If the clause is drafted properly and used in the right circumstances expert determination can offer an efficient and cost-effective means of settling a dispute. It is typically used for disputes of a technical nature or where a valuation is required.

Expert determination clauses operate wholly on a contractual basis. The parties can choose who they want to deal with the relevant issue and the exact confines of his authority without interference of the courts. There is no legislative back-up as there is for arbitration (for example, the Arbitration Act 1996 which supports arbitrations in England and Wales). As a result the process is often much quicker and much cheaper than litigation or arbitration. The downside is that there are very limited grounds on which an expert's decision can be appealed; if the expert gets it wrong the parties are stuck with the decision. An expert's decision is also not enforceable as of right in the same way as an arbitration award or court judgment. Enforcement has to be by way of fresh proceedings for breach of contract.

These issues can be dealt with by careful drafting. Of all the dispute resolution clauses an expert determination clause requires the most care and tailoring to the specific circumstances. See our Quickguide: Expert Determination for more detail.

Tiered dispute resolution clauses

Structured negotiation and/or mediation provide contracting parties with alternatives to arbitration and litigation offering faster, less expensive and more flexible methods of dispute resolution. Mediation, a process whereby a neutral third party (the mediator) tries to "broke" a settlement agreement between the parties, is particularly successful in assisting parties in dispute to avoid costly litigation or arbitration. It is becoming more common for these methods to be provided for by inclusion in a tiered dispute resolution clause (also referred to as a "stepped" or "escalation" clause). Such clauses allow a claim to be escalated in stages. For example, a typical stepped clause would provide for negotiation at different levels within each party's business, mediation and then litigation or arbitration. If drafted carefully they can provide parties with a commercial and cost-effective dispute resolution mechanism. Conversely, poor drafting can add an extra layer of bureaucracy and, at worst, leave parties without proper recourse to the courts or arbitral tribunal.

Further guidance on drafting these clauses can be found in our Quickguide: Tiered Dispute Resolution Clauses.

6. Multiple contracts: conflicting dispute resolution clauses

Transactions will often involve a suite of documents. Where that is the case, those drafting the contracts should consider the overall dispute resolution strategy. In particular, is there to be consistency throughout the documents as to where disputes should be resolved? While consistency is preferable, often it will not be possible.

In those circumstances care needs to be taken as difficulties can arise when disputes fall under more than one contract. In particular:

- there is an increased risk of parallel proceedings – if the dispute falls within the scope of different contracts, separate proceedings could be commenced in accordance with the dispute resolution clause of each contract;

- inconsistent clauses can give rise to uncertainty and the possibility of satellite litigation as the parties end up in court trying to work out which dispute resolution clause applies; and

- decisions to commence proceedings under one contract may impact on any similar fact disputes arising under another contract.[4]

Risks can be minimised by thinking about the dispute resolution strategy at the transaction stage. In particular, think carefully where you want any disputes which go to the heart of the transaction to be heard. That choice should then be inserted into the main contracts and this will assist in ensuring that disputes that could potentially fall under several of the contracts will be heard in that forum. Alternatively, and particularly if arbitration is used, consider drafting an umbrella agreement which clearly sets out the position as to where any disputes which go to the heart of the transaction should be heard.

7. Additional considerations

Whatever forum for dispute resolution is chosen, parties should also give thought as to whether they need to provide for an address for service or whether the contract requires a sovereign immunity waiver clause.

Address for service

An address for service clause is basically a clause which provides that when a dispute arises, proceedings are to be served on a particular address. Such clauses are essential if disputes are to be resolved in the English High Court and one or more of the parties resides outside the jurisdiction (i.e. England and Wales). If not, time can be lost in ensuring that valid service is effected outside the jurisdiction once a dispute arises. Where arbitration is the chosen forum an address for service within the jurisdiction is not essential but is still highly recommended for practical purposes so that both parties know where they are to serve proceedings in the event a dispute arises.

Sovereign immunity

If one of the parties is a state or state entity then a waiver of sovereign immunity clause is required in order to ensure that any judgment or arbitration award can be enforced.

[4] As highlighted by recent English court decisions: *UBS Securities LLC -v- HSH Nordbank AG* [2009] EWCA Civ 585, *Sebastian Holdings Inc -v- Deutsche Bank AG* [2010] EWCA Civ 998, *Deutsche Bank AG -v- Tongkah Harbour Public Co Ltd*; *Deutsche Bank AG -v- Tungkum Ltd* [2011] EWHC 2251 (QB); *PT Thiess Contractors Indonesia -v- PT Kaltim Prima Coal and another* [2011] EWHC 1842 (Comm).

Ashurst Quickguides

Ashurst's Quickguides are a regularly updated mini-library of short legal summaries on a range of key issues relevant to businesses. For a full list of current titles and the most up-to-date versions, please visit the publications section of our website (www.ashurst.com).

If you would like further information on this guide, please speak to your usual contact at Ashurst or one of our contacts listed below.

Simon Bromwich
T: +44 (0)20 7859 1572
E: simon.bromwich@ashurst.com

David Capps
T: +44 (0)20 7859 1397
E: david.capps@ashurst.com

Tom Connor
T: +44 (0)20 7859 1638
E: tom.connor@ashurst.com

Tom Cummins
T: +44 (0)20 7859 1051
E: tom.cummins@ashurst.com

Lynn Dunne
T: +44 (0)20 7859 3242
E: lynn.dunne@ashurst.com

Jon Gale
T: +44 (0)20 7859 1630
E: jon.gale@ashurst.com

James Levy
T: +44 (0)20 7859 1810
E: james.levy@ashurst.com

Angela Pearson
T: +44 (0)20 7859 1557
E: angela.pearson@ashurst.com

Tim Reid
T: +44 (0)20 7859 1548
E: tim.reid@ashurst.com

Matthew Saunders
T: +44 (0)20 7859 1339
E: matthew.saunders@ashurst.com

Edward Sparrow
T: +44 (0)20 7859 1573
E: edward.sparrow@ashurst.com

Iain Travers
T: +44 (0)20 7859 1618
E: iain.travers@ashurst.com