

All Business Is Global: The Benefits of International Arbitration

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Introduction

Whether you have a supplier or manufacturer in Asia or distributors in the European Union or South America, all successful product manufacturers do business globally. In fact, you would be hard pressed to find any product manufacturer that does not have an international business partner. As manufacturers and brands continue expanding to tackle the growing global economy, companies are being forced to consider how to adequately protect their interests in the event of a legal dispute occurring outside one's border. While no company enjoys contemplating the prospect of a business deal gone sour, doing so, and selecting the appropriate dispute mechanism with your international business partners, can provide a company with a well-equipped forum to resolve issues quickly and effectively. In the right circumstances, international arbitration—as opposed to a traditional judicial proceeding—can do just that, and better equip manufacturers with the necessary tools to safeguard their interests and protect brand integrity.

Below are a few key features of international arbitration, which businesses should consider when evaluating how to resolve cross-border disputes, and when drafting dispute resolution provisions in their agreements.

Single, Neutral, Forum

International disputes regularly fall within the jurisdiction of multiple courts. These jurisdictional questions can be challenging, time consuming, and costly—particularly in light of the fact that choice-of-jurisdiction clauses are not universally recognized. Arbitration can resolve these jurisdictional concerns. Specifically, the New York Convention (Convention), which has been ratified in more than 165 countries, including the United Kingdom, China, Japan, India, and Australia,¹ requires ratifying parties to give effect to one's decision to arbitrate.² The Convention's near universal acceptance

provides companies with confidence their decision to arbitrate will be recognized and the dispute will be heard in a single forum.

Additionally, when resolving international disputes, the neutrality of the presiding party is paramount. However, one contracting party's national court is not generally viewed by the other as a fair or neutral forum. Parties are often reluctant to resolve issues in their adversary's judicial system for fear that doing so may provide the opposition with the proverbial "home court advantage." This concern may also exist—or intensify—when dealing with courts in emerging or underdeveloped nations, a state-owned adversary, or a dispute involving national interests.

Again, a well-drafted international arbitration provision that clearly mandates international arbitration, and specifies the key features for that arbitration, can significantly alleviate these concerns. In arbitration, parties typically engage in an agreed-upon process by which an arbitrator or arbitral tribunal is chosen. This collaborative selection process often assuages the fear of partiality or bias that may exist when litigating in an adversary's home court. Parties are also frequently able to choose the law governing the arbitration, procedural rules, and seat of arbitration, providing further comfort the dispute will be decided in an impartial manner.

Certainty and Familiarity

The rules governing judicial proceedings vary between countries, and the rules governing one's home jurisdiction may differ significantly from those of its adversary. For example, practices common in one party's national court, such as extensive pretrial discovery or the ability to cross-examine a witness, may not be available in a foreign jurisdiction. Evidentiary rules, governing substantive law, and the nature and amount of relief awarded may also differ depending upon where the dispute is heard.

The decision to arbitrate greatly reduces the risk a party will find itself in a proceeding governed by unknown procedural and substantive rules. Through arbitration, parties may agree on a clear and defined governing framework, select the substantive law governing the proceeding, and customize procedural regulations. The ability to exert control over the arbitration process provides parties with the assurance their dispute will be adjudicated in a familiar forum, with clearly defined rules, and alleviates concerns that counsel will be ensnared by unforeseen local rules and regulations.

Efficient and Cost Effective

In some circumstances, international arbitration can be more efficient and cost effective than judicial proceedings. For starters, arbitration hearings can be scheduled at a time convenient for all parties, as opposed to being tacked onto an already overbooked court docket. Parties may also be permitted to tailor the proceeding in a manner that more efficiently resolves the dispute at hand. This may include negotiating certain timetables and deadlines, limiting discovery,³ or modifying the structure of the arbitration hearing in order to reach a just resolution more quickly.

The parties' ability to choose an arbitrator or arbitral tribunal experienced in the issues at hand can also increase the speed and limit the cost of the arbitration process. International disputes regularly involve complicated or highly technical issues for which national judges may not have the requisite knowledge to handle. Selecting an arbitrator or tribunal with a background or expertise in the relevant area may greatly reduce the need for experts, supplemental briefing or hearings, and ultimately lead to a quicker and cheaper resolution.

Furthermore, arbitrations are typically not subject to the same types of appeals as traditional judicial proceedings. As discussed more fully below, arbitral awards can only be challenged on limited grounds, often shortening the time it takes to reach a final resolution.

Interim Measures and Relief

As in judicial proceedings, parties to international arbitrations are able to seek interim measures, which offer swift relief for breaching conduct. Well-established international rules empower an arbitrator or tribunal with broad authority to impose such measures, which often mirror interim relief sought in court.⁴ For example, the United Nations Commission on International Trade Law (UNCITRAL) rules effectively permit an arbitrator or tribunal to issue injunctions in order to “maintain or restore the status quo pending determination of the dispute.”⁵ In fact, parties are also often permitted to seek interim relief directly from courts during the arbitration process.⁶ Parties may also have the option to seek interim relief before the arbitral tribunal is constituted through “emergency relief” provisions.⁷

Similarly, parties to an arbitration are generally able to seek the same types of final relief as they would in court, including compensatory damages and lawyers’ fees. However, parties should be aware that, while arbitration costs and lawyers’ fees are typically borne by the losing party, the majority of international arbitration rules give broad discretion to the arbitrator or tribunal to award costs and legal fees based on a case’s particular facts and circumstances.⁸

Confidentiality

Unlike the majority of court filings and proceedings, arbitration filings, arguments, and proceedings are typically confidential. Additionally, most international rules require that confidentiality be maintained among the parties and arbitrator(s). Party names are also generally omitted from any published award. For these reasons, arbitration can be an attractive avenue for prominent businesses, disputes involving confidential or proprietary information, or any business wishing to minimize the exposure of its legal issues.

Enforceability

Perhaps the preeminent feature of international arbitration is that the award is effectively enforceable across the globe. Unlike court judgments—for which no universal treaty exists to recognize foreign judgments—the Convention requires contracting countries to recognize and enforce arbitration awards.⁹ Arbitral awards can therefore be enforced like local court judgments in all countries that are parties to the Convention.

The broad enforcement of arbitral awards is particularly beneficial for businesses with international operations or activity. While Western European nations tend to be more inclined to recognize U.S. judgments, such is not the case in other areas of the world.¹⁰ For example, China has only enforced three U.S. court judgments to date.¹¹ International arbitration is therefore an easy way to avoid enforceability challenges and facilitate the receipt of a declared award.

Finality

In addition to being widely recognized and enforced, arbitral awards are typically final. While some arbitral rules do permit parties to agree to allow substantive challenges to an award within the arbitration process,¹² judicial challenges are typically unsuccessful and are limited to challenges

related to procedural issues, lack of jurisdiction, lack of due process, arbitrability of the dispute, or violations of public policy. Court challenges based upon incorrect findings of fact or law are generally not permitted. Moreover, challenges can only be brought in courts located in the seat of arbitration, which the parties may be permitted to select.

Conclusion

For these reasons, businesses engaging in international transactions or with international partners should strongly consider selecting arbitration as the dispute resolution mechanism, and should carefully draft provisions in their agreements that specify key elements, including the arbitral institution, the scope of the dispute, the number of arbitrators and method of selection, the seat of the arbitration, the designated language, and the governing law of both the underlying contract and the arbitration agreement itself. A well-drafted arbitration provision can provide predictability and eliminate disputes over the process. While the facts and circumstances of the specific business dealing will bear heavily on the appropriate dispute resolution system, arbitration can provide entities with the assurance that the adjudication of their dispute will be fair and impartial, and that any award entered in its favor will be recognized and enforced worldwide.

FOOTNOTES

¹ THE NEW YORK ARBITRATION CONVENTION, Contracting States – List of Contracting States, available at: <https://www.newyorkconvention.org/list+of+contracting+states>.

² THE NEW YORK ARBITRATION CONVENTION, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. II, available at: <https://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf>.

³ Generally, arbitrations do not include lengthy pretrial discovery. For example, depositions, interrogatories, and third party document collections are typically not permitted.

⁴ INTERNATIONAL CHAMBER OF COMMERCE, 2021 Arbitration Rules, Article 28(1), available at: <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>; UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, UNCITRAL Arbitration Rules (2021), Article 26, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf.

⁵ UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, UNCITRAL Arbitration Rules (2021), Article 26, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf.

⁶ INTERNATIONAL CHAMBER OF COMMERCE, 2021 Arbitration Rules, Article 28(2), available at: <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>.

⁷ INTERNATIONAL CHAMBER OF COMMERCE, 2021 Arbitration Rules, Article 29, available at: <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>.

⁸ INTERNATIONAL CHAMBER OF COMMERCE, 2021 Arbitration Rules, Article 38, available at: <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>; UNITED NATIONS

COMMISSION ON INTERNATIONAL TRADE LAW, UNCITRAL Arbitration Rules (2021), Article 43, available

at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf.

⁹ THE NEW YORK ARBITRATION CONVENTION, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. III, available

at: <https://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf>.

¹⁰ Fitch Law Partners LP, *Advantages to International Arbitration: Enforceability*, available

here: <https://www.fitchlp.com/blog/2020/10/advantages-to-international-arbitration-enforceability/>.

¹¹ China Justice Observer, *The Third Time! Chinese Court Recognizes U.S. Judgment*, available

at: <https://www.chinajusticeobserver.com/a/the-third-time-chinese-court-recognizes-u-s-judgment#:~:text=In%202020%2C%20Ningbo%20Intermediate%20People's,have%20been%20enforced%20in%20China.>

¹² See AMERICAN ARBITRATION ASSOCIATION, Optional Appellate Arbitration Rules, at A-10, available

at: https://www.adr.org/sites/default/files/AAA-ICDR_Optional_Appellate_Arbitration_Rules.pdf; see

also THE INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION, Appellate Arbitration Procedure, at Rule 8.2(a), available

at: <https://www.cpradr.org/resource-center/rules/arbitration/appellate-arbitration-procedure>; JAMS,

JAMS Operational Arbitration Appeal Procedure, Rule (d), available

at: <https://www.jamsadr.com/appeal/>.

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