JUS MUNDI

STAY AHEAD

Arbitration Toolkit for In-House Counsel

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Foreword

*At **Jus Mundi**, we are aware that not all legal departments have a dedicated arbitration or disputes team.*

To make your life extra easy, Jus Mundi is publishing this Arbitration Toolkit for In-House Counsel to provide you with the tools to be more autonomous in the management of your arbitration strategy, collaborate better with your external counsel, and save on legal costs.

Jus Mundi and our contributors with thorough expertise in arbitration – in-house counsel, lawyers, and arbitrators – are happy to share their advice and the best tools that will help you to prepare for, avoid if possible, and successfully face arbitration, when necessary.

What is inside this Arbitration Toolkit?

Get data-backed insights and experts' practical tips about:

- **The contract negotiation phase**, so you are armed to prevent risks and implement dispute avoidance techniques,
- **The pre-arbitration phase**, so you have the best tools to evaluate settlement opportunities and your chances of victory in arbitration
- **The arbitration phase**, so you can efficiently collaborate with your external counsel to develop a winning strategy and select the right arbitrator, and
- **The post-arbitration phase**, so you can quickly recover damages.

While this guide is no substitute for specialized counsel, we hope that it is a valuable resource which helps you and your team to become more autonomous in dealing with arbitration.

We extend our sincere gratefulness to our contributors, who candidly shared their practical advice tailor-made for in-house counsel!

THE AUTHOR & EDITOR

Clémence Prévot

Content Marketing Manager
Jus Mundi

Clémence Prévot is a former arbitration lawyer, qualified in NY and Paris, who now manages Jus Mundi's Blog, content collaborations, newsletters, and our famous Industry Insights Reports. She brings practical insights to the content created at Jus Mundi, thanks to her all-around experience in arbitration. She worked in law firms but also in an arbitral institution, as a mediator, and with third-party funders, in different jurisdictions.

Reach out to her with feedback, content ideas, and suggestions! (She doesn't bill for her time anymore, so don't hesitate to get in touch!)

Presentation of the contributors

Adenike Esan, PhD

Head of Dispute Resolution & Corporate Governance

Addax Petroleum

Adenike Esan, PhD is the Head of Dispute Resolution & Corporate Governance at Addax Petroleum Development (Nigeria) Ltd, an upstream oil and gas company. She has an LLB from the OAU, Ile-Ife; an LLM in Petroleum Law and Policy, and a PhD in international investment law from the Centre for Energy, Petroleum and Mineral Law and Policy at the University of Dundee and the University of Aberdeen, respectively. She teaches international arbitration as an adjunct lecturer of the Centre for Petroleum, Energy Economics and Law, University of Ibadan. She is also a Member of the Body of Neutrals of the Oil and Gas Alternative Dispute Settlement Centre, NOGEC – NUPRC.

Sebastiano Nessi

Partner in International Arbitration & Disputes

Curtis, Mallet-Prevost, Colt & Mosle

Sebastiano Nessi is an international arbitration and disputes Partner at Curtis, Mallet-Prevost, Colt & Mosle based in Geneva. He has a wealth of experience in representing clients in complex international commercial, investment and sports arbitration matters both *ad hoc* and under all major institutional rules, as well as in enforcement and setting-aside proceedings (including before the Swiss Supreme Court). In addition to his counsel work, Sebastiano Nessi, who is a Fellow of the Chartered Institute of Arbitrators, sits frequently as an arbitrator.

Natasha Peter

Counsel

Gide Loyrette Nouel

Counsel at Gide Loyrette Nouel and a tenant at Cornerstone Barristers, lawyer at the Bar of England and Wales since 2001, and in Paris since 2010, **Natasha Peter** specializes in international arbitration and alternative dispute resolution. Natasha advises French or foreign clients on disputes, including joint venture and mergers and acquisitions contracts, complex contractual disputes, enforcement proceedings before courts and arbitrations on issues in the fields of finance, telecommunications, intellectual property, renewables, energy and construction.

Mark Baker

Global Head of
International Arbitration
Norton Rose Fulbright

Mark Baker is Global Co-Head of International Arbitration at Norton Rose Fulbright and a member of the Firm's Global Supervisory Board. A member of the litigation and disputes team, he practices in the areas of complex commercial arbitration, investment arbitration, business litigation and alternative dispute resolution (ADR). He has extensive experience in international and domestic arbitration, acting as both counsel and as arbitrator under all the major arbitral rules as well as ad hoc disputes under UNCITRAL rules.

Avinash Pradhan

Deputy Head of
International Arbitration
Rajah & Tann

Avinash Pradhan is the Deputy Head of Rajah & Tann's International Arbitration practice. He also practices in Malaysia as a partner of Christopher & Lee Ong, a firm within the Rajah & Tann Asia network. He has wide-ranging experience in international arbitration, both institutional and ad hoc, and he regularly appears as counsel in Court proceedings. He has broad experience of projects disputes in the construction, infrastructure & energy sectors.

Chris Campbell

Senior Counsel,
Litigation
Baker Hughes

Christopher Campbell is a Litigation Counsel for Baker Hughes and advises on commercial dispute resolution matters in the Oil & Gas, Energy & Technology sectors.

During his career, he obtained an LL.M in Chinese Law and International Arbitration, and has worked on commercial & legal matters across multiple continents.

He also hosts a podcast, **"Tales of the Tribunal"**, which profiles the dynamic and interesting backgrounds of figures in international arbitration, law and business.

Introduction

Arbitration has many benefits:

- **Parties' autonomy and procedural flexibility**:
  Some say it is an "à la carte" dispute resolution mechanism (choose the seat, the law, the rules, the schedule, etc), but also avoids the nitty-gritty of national procedures and domestic courts. Procedure streamlined!
- **Neutrality of the forum**:
  With globalization, many different companies from different jurisdictions may be involved in a single project. Which legal system and jurisdiction should you refer your potential disputes to? How will you agree with your partners? How about fear of corruption? Arbitration ensures that you don't have to worry about any of that.
- **Specialized "judges"**:
  Parties choose their arbitrators, which allows them to select someone with technical expertise, a cultural understanding of dealings in a specific region, language skills, and so much more.
- **Time-efficiency and cost-management**:
  Some countries have backed up court logs that delay procedures, sometimes for decades. Legal costs can therefore run high. Arbitration is more efficient and awards tend to be final, avoiding baseless appeals.
- **Enforceability**:
  Awards also tend to be more readily enforceable around the world, thanks to Treaties and Conventions. Arbitration therefore ensures you have all the chances to recuperate your company's damages.

That being said, there is no denying arbitration can be costly, requiring a strong strategy from the beginning.

Your dispute resolution strategy does not start only once a dispute arises. As part of the in-house legal team, you are the guardian of your company's legal interests from contract negotiations to enforcement of arbitral awards.

Our Toolkit will give you the tools to truly become the internal asset and business partner you are meant to be, while keeping budgets in line.

WORD TO THE WISE

Chris Campbell

Senior Counsel, Litigation
Baker Hughes

Tips for in-house counsel to tackle costs:

- **Understand your company's position:**
  To keep the costs down, first thoroughly understand your company's position in the dispute and the opposing side's position. This includes the commercial and industry impacts of each. Once you have determined your company's position, decide whether to pursue or defend the claims and evaluate if a more commercial route is feasible to the company's internal stakeholders.
- **Hire external legal counsel:**
  Once you have determined your position, decide whether you need to partner with an external counsel. Measure if it's cost-effective to do so.
  For example, some disputes may require a lawyer in the local jurisdiction or a skillset that the in-house team does not have but that the law firm does.
- **Automation & technology:**
  To manage disputes effectively and intelligently means using automation tools, dispute management tools, and arbitration legal research tools.
- **Invest early in creating internal resources**, such as drafting the company's guidelines on dispute resolution methods, policies on hiring external counsel, etc. Coach your product line and business colleagues within the company to prepare them to address matters early and efficiently by creating templates, coaching sessions, and other valuable resources.
- **Get recommendations** on neutrals (arbitrators, mediators) and experts from trusted sources—*i.e.,* other internal colleagues, the legal counsel community, industry organizations, and other in-house counsel.

The Ultimate Arbitration Checklist: A Practical Guide for In-House Counsel

Contract Negotiation Phase: Prevent Risks and Implement Dispute Avoidance Techniques

BUILD INTERNAL RELATIONSHIPS AND MAKE YOURSELF KNOWN AS A VALUABLE RESOURCE BY THE CONTRACT MANAGEMENT TEAM AND OTHER OPERATORS

You need to be on top of the kind of contracts that your company enters into to ensure you are a valuable part of the contract conclusion process. You should also be in charge of drafting or, at the very least, reviewing the legal clauses, *e.g.*, dispute resolution/arbitration clause, choice of law clause.

Conduct internal trainings, create templates and other valuable resources for your product line, business colleagues, operatives, and other "on the ground" executives of the contract. The goal is for them to be prepared to address issues and reach out to you for directions early on. This will allow you to step in preemptively to perform a risk assessment and act or react fast.

MONITOR YOUR COMPANY'S PARTNERS, COMPETITORS, AND INDUSTRY TO ANTICIPATE THREATS AND MITIGATE RISKS

Staying updated on arbitration developments should be an integral part of your legal strategy regardless of your level of involvement in managing your arbitration cases. Whether you delegate your dispute resolution strategy to an external counsel or work alongside them, you can prevent disputes altogether by knowing what to be mindful of in your contracts:

- Pay special attention to notoriously claim-generating clauses, *i.e.,* that you know can become problematic later on (*e.g.,* liability clauses and caps, liquidated damages, extension of time claues). This is much easier if you keep yourself abreast of legal and industry news and developments.
- Be aware of issues faced by or involving your partners so you can mitigate potential future contractual risks.

DRAFT AN EFFECTIVE ARBITRATION CLAUSE AND/OR ACTIVELY REVIEW IT

A clear arbitration clause is a vital preemptive step. Dispute resolution clauses are famously called "midnight clauses" because they are often reviewed last minute before signing a contract. They may seem unimportant compared to other substantive clauses of a contract.

However, it is your role to educate internally about the tremendous importance of such a legal clause.

Unfortunately, once a dispute arises, the damage is done. The financial consequences of an ineffective or unclear dispute resolution clause can be catastrophic. On top of the contractual dispute, which can already be costly, you could be entangled in a dispute resolution/arbitration clause-related dispute. This is counterproductive in terms of time-efficiency and cost-management, thereby diminishing the benefits of using arbitration.

Models of effective arbitration clauses can be found on most arbitral institutions' websites. Jus Mundi's **Arbitral Institution Profiles** provides comprehensive analytics and insights into institutions' caseload to choose the relevant institution and **rules** for the arbitration clause.

However, there is no "one-size fits all" dispute resolution clause, as there are different circumstances in your commercial relationships, specific to your contract or your industry, that may factor into the key elements the clause must address.

☐ **Consider an internal tiered dispute resolution clause policy, if suitable for your industry or specific contracts**

This encourages using non-adversarial dispute resolution methods in your dispute resolution clauses (such as mediation) as a first recourse. If this first step fails, consider whether arbitration is suitable as your next course of action. If so, some elements are "must-haves" while some are "best to haves".

☐ **Decide whether to use institutional or *ad hoc* arbitration**

Both have their advantages but beware: do not think that avoiding the administrative fees of an arbitral institution will necessarily make your arbitration less costly. **Ad hoc arbitration** requires some level of experience with the arbitral process, as the arbitral tribunal and the parties manage the proceedings themselves. Poorly led, such an arbitration may end up entangled in litigation and, therefore, more costly than an efficiently led **institutional arbitration**.

☐ **Choose the arbitral institution, if you decide to avoid *ad hoc* arbitration**

Discover the **arbitral institutions** most chosen in your sector and the trends in arbitration in your industry through our **Industry Insights Reports**. For instance, the **International Chamber of Commerce (ICC)** is a popular choice in **Construction**, **Oil & Gas**, and **Mining** arbitrations. But *ad hoc* arbitration is favored in **Shipping** disputes.

Asians and Middle-Eastern parties tend to prefer submitting their disputes to local arbitral centers, such as the **Singapore International Arbitration Centre (SIAC)** and the **Dubai International Arbitration Centre (DIAC)**. Their arbitrations are therefore managed with a more specific cultural understanding of regional business dealings.

The degree of administration a given arbitral institution's rules entail, and their fee structure may vary widely. In addition, they may have diverse focuses: some are specialized in particular subject matters, while some center around disputes in a specific region. Some also offer expedited procedures.

For instance, some institutions only administer proceedings under their own rules. At the same time, others can also assist in administering ad hoc proceedings by intervening as an appointing authority (*i.e.*, to help the parties select and appoint the members of their arbitral tribunal), while some can administer *ad hoc* proceedings under the **United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL)**.

You have plenty of options, depending on the criteria that matter most to your business. To make the most appropriate choice for your bottom line, you can estimate the overall cost of resolving a dispute via international arbitration through some institutions' cost calculators or Reed Smith's Arbitration Pricing Calculator.

☐ Choose the arbitral rules applicable to your arbitration

There are 501 arbitral rules currently available on Jus Mundi.

These rules guide your entire arbitral process as they provide for the specifics of an arbitral procedure. However, the way an arbitration is conducted depends on the selected arbitrators who act within these rules. You may want to specify the number of arbitrators you wish to sit in the arbitral tribunal to ensure this is agreed upon beforehand.

It is common to choose a three-arbitrator panel, each party appointing one arbitrator and the president either selected by these party-appointed arbitrators, the parties or the arbitral institution. Ben Juratowitch QC shared his advice on how parties can agree on a presiding arbitrator in a timely and cost-effective manner in a Protocol for Agreeing on a Presiding Arbitrator. Also, look at Jus Mundi's Masterclass on Arbitrators' Appointment Mechanisms for tips from leading arbitration practitioners.

The choice of your arbitral institution is important, but the choice of the seat of arbitration has more legal consequences.

☐ Identify the seat of arbitration

The seat of arbitration determines the legal framework within which an arbitration takes place, *i.e.*, the procedural law applicable to the arbitration, the courts responsible for applying procedural law, and the "nationality" of the award for enforcement or setting-aside purposes. The seat may also determine the level of privacy and confidentiality of arbitration seated in that jurisdiction. It may also deal with the fate of multi-party disputes, as can the arbitral rules.

While the seat and place of arbitration tend to coincide in practice, it is important to make the distinction if you would like to ensure a specific physical location is used for the hearings and other procedural steps.

For instance, you may choose to seat your arbitration in London (United Kingdom), which entails the application of the English Arbitration Act 1996 to your arbitral procedure but to hold physical hearings in Kuala Lumpur for convenience.

Note that there may be significant differences in arbitration laws around the world. While some have more restrictive approaches, others, in contrast, are more liberal and arbitration-friendly, so the choice of the seat is imperative. Read our Industry Insights Reports to find out the most selected seats of arbitration in your industry.

☐ Choose the language in which the arbitration is to be conducted

Decide on the language in which all your written submissions and hearings are to be conducted. A different language other than the one in which your contract negotiations, documentation, or exchanges with your co-contractors are drafted will require translation, likely increasing legal costs.

☐ Provide for the confidentiality of the arbitration

Depending on the sensitivity of the matter, provide specifically for the confidentiality of the arbitration, rather than rely on general confidentiality provisions applicable to the underlying contract. Some arbitration rules already contain express confidentiality provisions.

DRAFT A CHOICE OF LAW CLAUSE

While the dispute resolution clause sets out the mechanisms by which the dispute is to be resolved, the choice of law clause sets out the law governing the contract itself and its execution as well as the rights and obligations of the parties. This is the law applicable to substantive issues, such as the breach of contractual obligations, disagreement on the interpretation of a contractual clause, etc.

This specific choice can be based on several elements: the subject matter of the contract and how a jurisdiction deals or does not deal with it (*e.g.*, trusts only exist in some jurisdictions); the law of the jurisdiction of the legal department of a company is mainly based and therefore familiar with; and such.

It is important to clearly determine the legal system you refer to in your clause, *e.g.*, prefer New York law to United States law. You may also refer to customs and practices established in your trade, such as *Lex Mercatoria*, for instance. Be aware that choosing the law of a European Union Member State may make European Union law, directives, and precedents applicable to your dispute.

Pre-Arbitration Phase: Evaluate Settlement Opportunities and Your Chances of Victory in Arbitration

PERFORM A CASE ASSESSMENT TO EVALUATE YOUR POSITION IN THE DISPUTE AS WELL AS THE OPPOSING SIDE'S AND DECIDE IF YOUR CASE IS WORTH PURSUING

Read up on legal concepts specific to arbitration and search for similar disputes to see what outcomes can reasonably be expected. Jus Mundi's multilingual search engine with more than 29 filters helps you find exactly what you need in a few clicks. For instance, you can search specific paragraphs of an award, such as "Reasoning of the Tribunal", to eliminate the noise from other sections that may not be relevant at this stage of your case analysis.

Knowing the strengths and weaknesses of your position at any given time will also be an asset when negotiating with your partner to resolve issues as they come during the execution of contracts. Again, keeping abreast of the legal developments in your industry will also help you be efficient at this stage so you can mitigate risk early on and save on legal costs.

FOLLOW THE PRE-ADVERSARIAL STEPS AND TIMELINE ESTABLISHED IN YOUR DISPUTE RESOLUTION CLAUSE

For instance, if you agreed, in your clause, on trying out negotiation, mediation, or a cooling-off period before lodging a Request for Arbitration, you must go through these steps before launching an arbitration. An arbitral tribunal would likely refuse to hear the case before such steps were followed.

Be aware that you must act in good faith in any of these steps to avoid potential liability for not suitably submitting to the pre-adversarial steps of your dispute resolution clause.

DETERMINE YOUR CHANCES OF VICTORY BY RESEARCHING AND/OR SEEKING ADVICE FROM AN EXTERNAL LEGAL COUNSEL

To save on legal costs, you may choose to only involve external counsel once your in-house team has independently managed the settlement discussions or mediation. You should be able to confidently lead such discussions, since, by then, you will have assessed the strengths and weaknesses of the case and know your company's legal position well.

Here are a few tips for selecting your external counsel:

- **Use a uniform process to request bids from external counsel:** It is essential to carry out a comparative analysis of the different bids. Be mindful of the fact that your usual corporate lawyers may not be qualified to handle a specific technical dispute or familiar with international arbitration as a dispute resolution mechanism. Choosing arbitration practitioners and experts in the substantive issue at stake will ultimately save you on legal costs as the proceedings are more likely to be handled efficiently and give you better chances of prevailing. Jus Connect by Jus Mundi helps you comb through arbitration practitioners' profiles to identify the lawyers and experts you need.
- **Consider alternative fee arrangements:** This includes a breakdown of fees by stages of arbitration.
- **Ensure that your external counsel proposes cost incentives aligned with your business's goal for the dispute:** If the goal is to settle and negotiate an amicable resolution of the dispute, even during arbitration proceedings, your external counsel can propose a regressive incentive depending on the state at which the arbitration is settled.
- **Secure third-party funding, if necessary:** Third-party funding is a mechanism by which a third- party to your dispute pays some or all of the legal costs associated with a dispute in exchange for a share of the damages you may be awarded, should you win. This can include the arbitral institution, arbitrators' and external counsel fees, for instance. External counsel can assist in building a strong case to secure third-party funding so as to remove the costs of arbitration from your balance sheet.

SELECT THE TYPE OF COUNSEL THAT UNDERSTAND YOUR COMPANY'S INTERESTS

The right external counsel should be a strategic partner, not completely take over your dispute resolution strategy. After all, you are the guardian of your company's business, legal, and financial interests.

They should, therefore, understand that you oversee the dispute, meaning you should be regularly updated on your case's progress and make the strategic decisions that best suit your company's interests. They should also issue clear invoices as you need to justify the expense internally.

Here are a few tips for selecting the right fit for your business:

- **Check past pleadings**: You can find exclusive pleadings submitted to arbitral tribunals in Jus Mundi's search engine, which may assist you in determining if an external counsel is right for you.
- **Get a diverse counsel team:** Different perspectives and mindsets are assets in developing a strong and creative arbitration strategy. It ensures that your team of counsel has a global vision of the dispute and arbitral proceedings often involving different legal systems and languages, as well as the subject matter of the dispute. Jus Connect by Jus Mundi offers a range of filters to help you find what you are looking for in an external counsel. We add new filters regularly.
- **Check firm profiles with caseload information**: Jus Mundi's Firms Profiles can help you identify law firms with arbitration experience and get specific analytics about their expertise.

Arbitration Phase: Develop a Winning Strategy

ESTABLISH A DOCUMENT MANAGEMENT PROTOCOL

Locate and gather all relevant documents, pre-contractual, contractual, and execution exchanges with the opposite side. Your role is to obtain all information from the business and create access for your external counsel. This will also enable you to identify potential witnesses that may need to draft affidavits or witness statements to support your claims.

LODGE A REQUEST FOR ARBITRATION OR ANSWER TO THE REQUEST FOR ARBITRATION

The Request for Arbitration includes at least a summary of the claims. If you are Respondent in the case, you will need to answer the Request for Arbitration to defend yourself and present your counterclaims. This may be sent to the opposite side as a preliminary step to launch negotiations, with or without the involvement of external counsel.

- **Be mindful of a potential time limit** to lodge these with the selected arbitral institution. Your chosen arbitral institution rules may prescribe what should be in your notice to arbitrate. The Notice usually includes, at the very least, a description of the issue in dispute, a summary of the claims, and clearly identifies the parties involved. Depending on your arbitral rules, you may also need to nominate an arbitrator at this stage.
- **Pay the provision fees to the arbitral institution:** You will usually need to pay a provisional advance on costs to the arbitral institution at this stage.
- **Check examples to be independent at this stage of the arbitration and avoid the cost of involving external counsel if possible.** See the examples of Notices of/Requests for Arbitration specific to your contractual issues, for instance, on Jus Mundi.

SELECT YOUR ARBITRATOR AND APPOINT THE ARBITRAL TRIBUNAL

- **Follow the arbitral rules:** The nomination of your arbitrator may need to occur in your Notice or Answer to the Notice or once the arbitral institution has been referred the case. The arbitral tribunal runs the proceedings and decides on their own jurisdiction if needed (which should not be the case if you drafted an efficient arbitration clause), as well as on the merits of the dispute.
- **Actively propose arbitrators to your external counsel:** To choose the right arbitrator for the dispute, take the lead and propose arbitrators to your external counsel. At the very least, be actively involved in the selection process, as this is a key choice in your arbitration, which has a direct effect on your final award.

  Availability, expertise, languages, fees, and diversity are examples of key elements to consider for your business's bottom line, which may not be as essential to your external counsel in appointing your arbitrator.

  Conduct your own due diligence and check for conflicts of interest.

  Typically, either a sole arbitrator is to be agreed upon by the parties or appointed by the arbitral institution, or a three-arbitrator panel is to be constituted of one appointment per party, and a chair agreed upon by the two party-appointed arbitrators or appointed by the arbitral institution.

  Once all arbitrators are appointed, the tribunal is constituted and takes over the conduct of the arbitration. Usually, the arbitral rules provide for the payment of an advance on costs in an amount likely to cover the fees and expenses of the arbitrators and institution administrative expenses.

SET THE ARBITRATION STEPS AND TIMETABLE WITH THE CONSTITUTED ARBITRAL TRIBUNAL

The arbitral tribunal may draw up its Terms of Reference, *i.e.,* a document identifying all the parties and arbitrators, the seat of arbitration, a summary of the parties' claims/counterclaims and relief sought, and other relevant information.

A case management conference may be scheduled to establish a provisional procedural timetable for the conduct of the arbitration.

The appeal of arbitration is particularly striking at this stage as you can decide whether any particular procedural step is necessary, such as discovery/disclosure of documents, some hearings or whether they are to be conducted in person or virtual, the number of pleadings exchanges, etc.

TYPICAL STEPS OF ARBITRATION ARE PRIMARILY HANDLED BY YOUR EXTERNAL COUNSEL UNDER YOUR OVERSIGHT, AND USUALLY INCLUDE BUT ARE NOT LIMITED TO:

- ☐ **Document production requests**
- ☐ **Submission by Claimants of their full Statement of Claim, along with evidence, witness statements and experts reports**
- ☐ **Submission by Respondents of their full Statement of Defense and Counterclaim, along with evidence, witness statements and experts reports**
- ☐ **Submission by Claimants of their Reply and Defense to Counterclaim**
- ☐ **Submission by Respondents of their Rejoinder**
- ☐ **Physical, virtual or hybrid hearings**
- ☐ **Post-hearings submissions**
- ☐ **Deliberation of the arbitral tribunal and rendering of their award.**
- ☐ **Enforce the award, if the opposite side does not voluntarily comply with it.**

If parties do not voluntarily comply with an arbitral award rendered against them, enforcement proceedings in jurisdictions where these parties hold assets will be necessary, as can be subsequent execution proceedings.

This ensures an award is recognized and executed similarly to a domestic judgment in a specific jurisdiction. As this is a jurisdiction-specific step, procedures vary from one country to another.

We hope you found this checklist helpful. It is meant to be a valuable resource you can use repeatedly.

Arbitration Clause Drafting 101

Introduction

As a preamble, an important distinction must be made when it comes to drafting clauses. There are two main types of arbitration mechanisms:

1. **In Investor-State Arbitration (also referred to as ISDS):** you usually do not need to draft or review an arbitration or dispute resolution clause. Treaties of public international law under which foreign investments are made in a host country govern the dispute resolution mechanism, *i.e.*, the "clause" is included in the Treaty. It will not contain some of the elements required in a commercial arbitration clause, and the consent to arbitration arises under the Treaty.
2. **In International Commercial Arbitration:** the consent to arbitration arises from the dispute resolution/arbitration clause contained in the contract(s) it governs. The authority of arbitral tribunals arises from the consent of the parties granted in their arbitration clause. They have no inherent jurisdiction, unlike domestic courts.

   Therefore, it is up to the parties to carefully agree on the terms of the clause and ensure its validity, as it is the source of the arbitral tribunal's power to adjudicate their disputes.

   A poorly drafted arbitration clause may lead to jurisdictional disputes, usually relating to the scope of the arbitration clause, consent of the parties and its signatories.

In this article, we will provide tips on how to confidently draft and review commercial arbitration/dispute resolution clauses and never use claim-generating or pathological clauses again.

Note that you can always agree to arbitration once a dispute has arisen, even if the contract does not contain an arbitration clause. However, it is known to be harder to agree with the adverse party once a conflict is born.

RECOMMENDATIONS:

- First read Arbitration Checklist, as a whole section is dedicated to the contract negotiation phase and how to prevent risks as well as implement dispute avoidance techniques.
- Legal monitoring is tremendously important to stay abreast of legal developments in the interpretation of clauses, including arbitration agreements. In addition to paying special attention to the clauses in your contract, pre-contractual risk assessment should also involve a thorough evaluation of potential business partners and co-contractors.

The Dire Financial & Legal Consequences of Concluding an Unclear or Pathological Arbitration Agreement

As previously discussed, arbitration has many benefits.

However, these benefits can be nullified by a claim-generating arbitration clause, which can lead you to court before you even start your arbitration.

Dispute resolution clauses are familiarly called “midnight clauses” because these clauses are often reviewed last minute, before signing a contract. They may seem unimportant compared to other substantive clauses of a contract, especially compared to financial clauses. It is your role to educate internally about the tremendous importance of such legal clause, to ensure sufficient time is spent drafting or reviewing it.

Indeed, choosing arbitration over litigation is meant to save your business time and, hopefully, cost but can quickly become a legal issue in and of itself with dire financial consequences. If you do not draft a clear and unambiguous arbitration clause right from the get-go (*i.e.*, the contract negotiation stage), you could end up entangled in a dispute resolution clause-related dispute, on top of the actual substantive contractual dispute.

This would increase the legal cost of your dispute, the time spent in arbitration and, potentially, litigation, which ultimately means you may be defending yourself or may not recuperate damages for many years. It also implies that the dispute may impact your business’ books/cash flow for many years, potentially having a negative impact on your reputation with the general public and affecting the level of trust with your shareholders.

WORD TO THE WISE

Adenike Esan, PhD

Head of Dispute Resolution & Corporate Governance
Addax Petroleum

An arbitration process’ efficiency, effectiveness, and success start with a well-drafted explicit dispute resolution clause. Arbitration Agreements that are null & void, inoperable, or incapable of being performed are likely to occasion time and cost-consuming disputes on the arbitration clauses’ validity and may render an award unenforceable.

Thus, **to avoid drafting such pathological, defective, or claim-generating arbitration clauses**:

- Contracting parties should deem the **arbitration clause a major provision** which ought to be deftly dealt with and not left to the end of negotiations as a boilerplate clause;
- Transactional lawyers negotiating contracts should obtain **inputs from experienced arbitration practitioners** who have good knowledge of the arbitration process, know the nuances associated with different arbitral institutions, implications of applicable seats, governing laws etc;
- Contract drafters must assume that a dispute will crystallize in future and be intentional about **incorporating a valid and enforceable arbitration clause** fitting for the parties, the contract’s purpose, terms, and price; and
- Consider if a short and simple **arbitration clause** is sufficient or if Parties are better served adopting an elaborate and complex version.

GOOD TO KNOW:

Even if your contract is alleged to be void, cancelled, or terminated, the arbitration clause will remain applicable. It is widely recognized as an independent agreement in and of itself, meaning separate from the main contract. Therefore, the arbitration clause still applies, and arbitration remains the means to resolve a dispute regarding a void or terminated contract. A party attempting to go to domestic courts would likely be sent back to arbitration, as required by the clause.

Top Tips to Draft an Effective Arbitration Clause: Must-Have...

AN EXPLICIT REFERRAL OF DISPUTES TO ARBITRATION

The question you must ask yourself is: Do you wish for all disputes arising from and related to the contract to be referred to binding and final arbitration?

- If so -which is often the case-, you must choose the terms identifying the **scope of the arbitration clause** carefully to ensure it does encompass any and all disputes related to the underlying contract and potential ancillary contracts.
- Note that the arbitral tribunal is not at liberty to extend its own jurisdiction over disputes that are not included in the arbitration clause, unless the parties so agree.

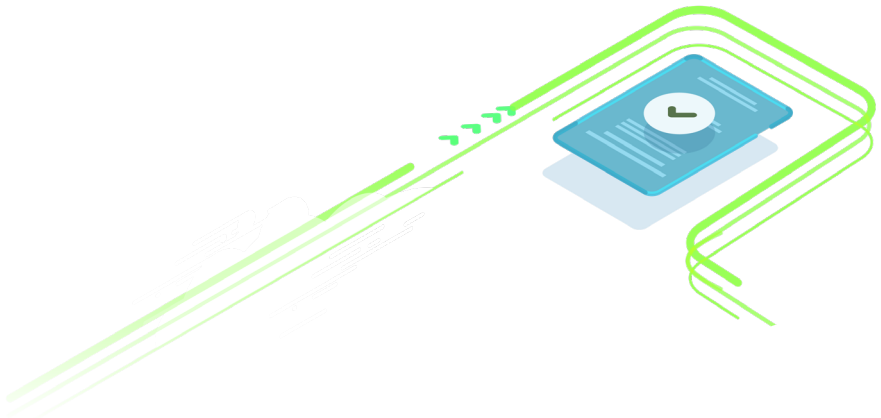
Example of terms commonly used to define broadly the scope of the arbitration clause:

> *"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination"*

- If you wish to exclude certain categories of disputes from the scope of the arbitration clause, you can precise the other means to resolve them, such as expert determination.

  These clauses require careful drafting. Including provisions for the resolution of disputes regarding the category in which a dispute falls is good practice in such cases.

  Note that some disputes may not be arbitrable under the applicable law of the contract.



Institutional arbitration	
PROS	**CONS**
Predefined set of rules to handle the administration and procedure of the arbitration	In addition to the arbitrators and adverse parties, all communications must usually also be addressed to the institution
No need for an additional level of agreement regarding the details of the procedure	Less flexibility in personalizing the procedure
Assistance in getting parties involved in the arbitration	No possibility to diverge from the rules of the institution, or to use other rules than the institution's generally
Administrative support provided by the institution	Administrative fees can be deterring
Predefined format of the arbitration procedure	
Assistance in constituting the arbitral tribunal, inc. the possibility to select specialized arbitrators from the institution's rosters or the suggestions of knowledgeable case managers	
Support of the institution which ensures that arbitrators are working with a reasonable timeline	

Useful resources:

To make the most appropriate choice for your bottom line, you can estimate the overall cost of resolving a dispute via international arbitration through some institutions' cost calculators or Reed Smith's Arbitration Pricing Calculator.

Our insight:

Unless you act in the shipping/maritime industry (according to our data, 76% of arbitrations are ad hoc in this sector), institutional arbitration is usually preferred as it brings a certain level of security to the arbitral process, which is managed by a third-party neutral.

Poorly led, an ad hoc arbitration may actually end up costing more than an efficiently led institutional arbitration.

To find out which arbitral institutions are most selected in your industry, take a look at our Industry Insights Reports.

A CLEARLY IDENTIFIED ARBITRAL INSTITUTION (AND ITS RULES) TO ADMINISTER THE ARBITRATION

As discussed in the Arbitration Checklist, these choices are extremely important.

You have plenty of options, depending on the criteria that matter most to your business and a given contract, such as whether the institution is specialized in a specific subject matter (for instance, EDAC for energy disputes), or whether a specific institution is a pillar in a region of interest (for instance, SIAC or HKIAC in the APAC region).

Pitfalls to avoid:

- Do not use vague names to identify an institution. Make sure there cannot be any interpretation as to which institution is referred to.
- Do not use hybrid clauses, *i.e.,* do not choose an arbitral institution and another one's rules. This is not permitted by many institutions' rules and, even if it were, creates procedural uncertainty as well as jurisdictional disputes. In general, the choice of an arbitral institution entails the choice of its rules to govern an arbitration.

OUR TIPS:

- Jus Mundi's Arbitral Institution Profiles provide comprehensive analytics and insights into institutions' caseload. This helps narrow down the choice of the institution and rules for the arbitration clause.
- Take a look at the rules of the institutions you are interested in to ensure you understand beforehand how an arbitration and its procedure would be handled.
  501 arbitral rules are currently available on Jus Mundi.
- Finally, to guarantee that the institution and its rules are properly identified in the arbitration clause, take a look at the website of the institution you are considering. Many of them propose a model clause which includes a reference to that institution and its rules. You cannot go wrong using the institution's own arbitration clause! You can then modify as appropriate.

THE SEAT OF ARBITRATION

As discussed in our Arbitration Checklist, the choice of the seat of arbitration influences your whole arbitration and should not be taken lightly.

The seat of arbitration determines the legal framework within which an arbitration takes place, *i.e.*, the procedural law applicable to the arbitration, the courts responsible for applying procedural law, and the "nationality" of the award for enforcement or setting-aside purposes. In addition, the seat of arbitration may determine the national laws applicable to the question of the validity of an arbitration agreement/clause or interim remedies.

There may be significant differences in arbitration laws around the world, some have more restrictive approaches while others are more liberal and arbitration-friendly, so the choice of the seat is of material importance.

What you should consider:

- Choose a jurisdiction which has a friendly stance toward arbitration, so national courts tend to interpret arbitration clauses to make them enforceable in most cases (even when they have some deficiencies).
- Get informed as to the state of the judiciary in the chosen jurisdiction, *i.e.,* ensure that it is independent, efficient, and preferably, has experience of complex commercial cases.
- Make sure that the chosen jurisdiction is a signatory of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (also called New York Convention). This may make a considerable difference once an arbitral tribunal has rendered an award: you may challenge the award on the grounds established in the New York Convention or use it to enforce the award in any signatory jurisdiction.
- The seat and place where the arbitration is to take place usually coincide.
  - If so, take into account how convenient and/or costly choosing a certain seat may be. Also look into the infrastructure such as the internet connection if you intend to have witnesses join hearings virtually, for instance.
  - If not, clearly differentiate one from the other in the arbitration clause.

OUR TIPS:

- Read our Industry Insights Reports to find out the most selected seats of arbitration in your industry.
- Take a look at Delos Guide to Arbitration Places (GAP) to read up on over 50 jurisdictions and find out which are considered “safe seats”.

WORD TO THE WISE

Sebastiano Nessi

Partner | International Arbitration & Disputes
Curtis, Mallet-Prevost, Colt & Mosle

Considerations for in-house counsel selecting a seat of arbitration:

The seat of arbitration is crucial because it determines the procedural law applicable to the arbitration, the supervisory jurisdiction of the courts of the seat over the arbitration proceedings, and the nationality of the arbitral award for enforcement purposes. However, a seat of arbitration does not necessarily refer to where hearings will be held.

Key factors to consider:

- **Modern and effective arbitration law:**
  Favor a seat with a modern, clear and effective arbitration law which recognises and respects the parties' choice to arbitrate, limits court intervention and strikes a balance between confidentiality and transparency.
- **Flexibility:**
  Favor a seat with judicial and/or political facility to adapt quickly to changing user needs, such as the ability to implement technological advances to maintain procedural efficiency and effectiveness.
- **Quality of judiciary:**
  Favor a seat with an independent and impartial judiciary experienced in international arbitration.
- **Enforcement prospects:**
  The choice of seat should ideally be in a country that has joined the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to increase the likelihood of successfully enforcing the award.
- **Setting aside prospects:**
  The viability of a successful challenge to an interim or final arbitral award may also be determined by the seat. Careful consideration should be given to:
  - the grounds for setting aside an award as there are important differences amongst seats (*e.g.* in some jurisdictions, an award may be challenged based on a manifest disregard of the law or an error of law, while in others courts have no power to review the correct application of the law by the arbitral tribunal);
  - duration and costs of setting aside proceedings (*e.g.* the setting aside of arbitral awards is limited to one instance in Switzerland, while in other jurisdictions an award can be challenged before two or three consecutive instances); and
  - local language(s) of the seat (court proceedings are likely to be in the local language of the seat, yet some jurisdictions like Switzerland allow for setting-aside submissions to be filed in English).
- **Accessibility and facilities:**
  Logistical factors such as availability of hearing rooms and associated services at the seat of arbitration are sometimes cited as relevant considerations. While such facilities are important in a hearing venue, they are not however decisive, especially since hearings can take place elsewhere should the parties desire.

WORD TO THE WISE

Avinash Pradhan

Deputy Head of International Arbitration

Rajah & Tann

Why should global in-house counsel consider Singapore for their seat of arbitration:

- **Singapore** is one of the most pro-arbitration jurisdictions, both in terms of its legislative framework and judiciary. In the last 20 years, it has been at the forefront of arbitration and very progressive.
- Singapore is a secure seat with a system that encourages arbitration and makes sure that arbitration progresses.
- Singapore is also very international: there is a great sense of cultural awareness that can translate into arbitration. If you have an international dispute, culture is very important. Sometimes in a western seat, arbitration may fit one culture or gender but miss the intricacy of other cultures. A lot of the arbitral institutions now encourage gender and cultural diversity. So, Singapore is ahead of the curve, which is important to in-house counsel.
- In-house counsel should also look for a legal system that can deal with a spectrum of disputes. Disputes come in all shapes and forms. Results are of tremendous importance. Quantum of claim, clients etc. You want a system that allows for various permutations and requirements that you may face. Singapore provides a scope of service.
- The quality of solicitor support in Singapore is as good as what you get in other jurisdictions, but our fees are more competitive. Historically, that is what has allowed the market to grow. We are competitive because we believe in an open environment: other seats may not be quite so open.

THE GOVERNING LAW OF THE CONTRACT

The governing law is the law applicable to substantive issues, such as the breach of contractual obligations, disagreement on the interpretation of a contractual clause, etc.

OUR INSIGHT:

- Different considerations can influence this material choice: the subject matter of the contract and how a jurisdiction deals or does not deal with it (*e.g.*, trusts only exist in some jurisdictions); the law of the jurisdiction the legal department of a company is mainly based in and therefore familiar with; and such.

OUR TIPS:

- To guarantee clarity, the governing law/choice of law clause of the contract and the arbitration clause should be drafted separately. If the governing law of the contract is, indeed, not included directly in the arbitration agreement, ensure that it does not conflict with it (*e.g.,* by referencing disputes to courts).
- It may prove useful to include both the governing law of the arbitration agreement and the governing law of the underlying contract. Some choose the governing law of the arbitration agreement to follow the law of the seat, while others choose to extend the contract's applicable law to the arbitration agreement.

Nice To Have...

A MULTI-TIERED OR ESCALATION DISPUTE RESOLUTION CLAUSE

These types of clauses are more complex and can therefore easily become pathological and void. However, requiring that parties go to mediation or use a cooling-off period to negotiate an amicable resolution, before even considering going to arbitration, may help salvage the business relationship between partners and save on legal cost.

Multi-tiered dispute resolution clauses have many advantages:

- They are non-adversarial, as a first recourse, and can, therefore, avoid burning bridges between long-term or continuous business partners.
- They are helpful to resolve a dispute amicably and expediently while saving on legal costs.
- They can assist in avoiding going to arbitration altogether.
- Mediation or negotiation before bringing the case to court or arbitration can help you better understand your case's strengths and weaknesses, as well as your chances of success, if you were to go to arbitration.

OUR TIPS:

Create a timeline for the execution of the multi-tiered dispute resolution clause. What steps are required, in what order, within what timeframe, etc. This will ensure the clause is clear or might not be misinterpreted. It can also serve as a reference document for operatives.

NUMBER AND METHOD OF APPOINTMENT OF THE ARBITRATORS COMPOSING THE TRIBUNAL

The arbitral rules tend to provide for the number and method of appointment of the arbitrators composing the arbitral tribunal. However, it is recommended to crystallize the decision in the arbitration clause. Some national arbitration laws impose that this information appear in the arbitration clause.

Remember that it is easier to agree on such "details" while the relationship with the co-contractor(s) is amicable, rather than once a dispute has arisen.

It is common to choose to have a three-arbitrator panel, each party appointing one arbitrator and the president either selected by these party-appointed arbitrators, the parties or the arbitral institution. The arbitral institution may provide help and advice in constituting the tribunal if need be.

A MENTION OF THE LANGUAGE IN WHICH THE ARBITRATION IS TO BE CONDUCTED

Decide on the language in which all your written submissions and hearings are to be conducted. A different language other than the one in which your contract negotiations, documentation, or exchanges with your co-contractors are drafted will require translation, likely increasing legal costs.

A PROVISION FOR THE CONFIDENTIALITY OF THE ARBITRATION, IF IT MATTERS TO YOU

Depending on the sensitivity of the matter, provide specifically for the confidentiality of the arbitration, rather than rely on general confidentiality provisions applicable to the underlying contract. Some arbitration rules already contain express confidentiality provisions.

WORD TO THE WISE

Natasha Peter

Counsel
Gide Loyrette Nouel

No one likes to think about divorce on their wedding day, but this is exactly what drafting a disputes clause in a contract requires you to do. You should tailor the clause to fit the disputes that are likely to arise in your particular circumstances, while remaining sufficiently flexible to cater for unexpected eventualities.

A well drafted clause should:

- **Be as simple as possible**. Complicated and unorthodox formulations can be hostages to fortune when a recalcitrant party is seeking to delay the resolution of a dispute. Sometimes it is appropriate just to use the model clause proposed by your chosen arbitral institution, although bespoke amendments are required for more complex situations.
- Absent special circumstances**, be broad in scope**, covering all disputes that are likely to arise from the contract or the relationship. It is usually cheaper, quicker and more consistent for all disputes to be resolved in the same forum.
- Where appropriate, **encourage or require the parties to use alternative dispute resolution methods prior to arbitration or litigation** - for example, negotiation, mediation, expert determination or adjudication. Sometimes these methods work magic, but in other circumstances they can be just one more expensive and time-consuming hoop to jump through.
- **If it is a multi-tiered clause**, be precise about the scope and timing of the ADR requirements, as well as the consequences of a failure to respect these requirements. If the dispute is to be finally resolved by arbitration, make sure that your clause clearly states that this is mandatory, not optional.
- Take into account the potential impact of **linked contracts or associated third parties**. Joinder of parties or consolidation of proceedings can be important for the efficient resolution of a complex dispute, and is often only possible if expressly agreed by all parties.
- Remember to **specify the seat and language of the arbitration, as well as the governing law of the contract.**
- Be clear about the **governing law of the disputes clause**. It is not always necessary to specify this expressly, but you should be aware of the default position in the relevant jurisdiction and ensure you are happy with this. Different jurisdictions adopt different approaches, as is illustrated by the recent English case of Enka v Chubb [2020] UKSC 38.

Mitigate Business, Financial & Legal Risks Through Arbitration Intelligence & Legal Monitoring

How is Legal Intelligence in Arbitration Any Different from Legal Monitoring & Compliance? What is at Stake?

Most companies and their legal department, if not all, whatever their size or industry, are familiar with legal monitoring and its importance. Organizations must act responsibly and obey ever-changing regulations from workplace safety and labor law, to finance and accounting standards.

Compliance departments are now a staple in major companies, as they face the increasing challenges of keeping up to date with an enormous flow of legislative updates, new regulations, and case law developments affecting their business. For global organizations, the need to remain abreast of legal developments does not stop at one jurisdiction, increasing the human and financial resources required to stay compliant.

Companies need to be agile to stay up to date and comply with new legal developments. The risks of non-compliance are tremendous: from hefty fines, and reputational damage, to loss of business opportunities and partners' trust.

While it may seem like no such sanctions would occur for lack of a proper legal watch in arbitration (after all, we are not talking of legally-required compliance here), its importance should not be underestimated. The stakes may differ but a business's risk management and resource savings are still the ultimate goals.

However strategic legal intelligence in arbitration is, it is no easy feat! **Fortunately, we have tips and tools to help!**

Legal Intelligence in Arbitration: Its Importance & Tools to Make it Easy

Simply put, legal intelligence provides the legal insights and business intel that in-house counsel need to mitigate risks and save cost for their business.

Legal intelligence is three-fold:

1. LEGAL MONITORING SPECIFIC TO THE SUBJECTS OF YOUR BUSINESS PROJECTS & CONTRACTS

- This is not necessarily specific to arbitration. Whether engaging in arbitration or not, in-house legal teams must **keep abreast of legal developments** that may impact their company's contracts or dispute resolution strategies.

  For instance, companies with activities in the oil & gas industry should stay abreast of legal developments in jurisdictions of interest (*i.e.,* where they have invested or are considering investing), such as changes in Bilateral Investment Treaties, or tax regimes applicable to foreign investors.

  Legal monitoring ensures that you can efficiently react as early as possible to legal changes that impact your business's bottom line, avoid making costly uninformed strategic decisions and stay competitive in the market.

- Efficient legal monitoring provides strategic legal insights and turn legal departments into cost-saving centers, creating new business or financial opportunities for their company.

  For instance, earlier this year, Singapore passed a bill to permit conditional fee arrangements in selected proceedings, including arbitration. Businesses can now fund their legitimate claims through different fee arrangements to share risks with their lawyers or deploy their cash flow elsewhere.

  Even though such legal changes do not directly impact a company's activities, they permit businesses to financially plan for their disputes in different ways and seize new opportunities.

OUR INSIGHT:

- → The financial returns of efficient legal monitoring can be great, above simply reacting to legal risks.
- → Effective legal monitoring can make you both the guardian of your business's external interests and an internal strategic partner to your company's management.

OUR TIPS:

- → Sign up for law firms' industry-specific or region-focused newsletters to remain in the know of changes in your industry's legal environment.
- → Track new case law on issues that may impact your organization's contracts and projects. For instance, stay in the know of developments regarding wrongful termination of contracts by setting a personalized alert on Jus Mundi. Try it for free.

2. ARBITRATION-SPECIFIC MONITORING

Arbitration is a legal field in and of itself. Staying abreast of arbitral developments is as important as industry-specific legal developments. In fact, both are highly intertwined and should be conducted as one.

- **Staying updated on arbitration developments** should be an integral part of your legal strategy regardless of your level of involvement in managing your arbitration cases.

  We previously discussed the importance of **monitoring contractual disputes related to arbitration clauses** in order to avoid the pitfalls and dire financial consequences of poorly drafted dispute resolution clauses.

  Whether you delegate your dispute resolution strategy to an external counsel or work alongside them, you can prevent disputes altogether by knowing what to be mindful of in your contracts.

A related example is a choice of paramount importance: the **seat of arbitration**. Knowledge is power: in addition to other considerations of due process and procedural efficiency of a jurisdiction, familiarity with its arbitral legal framework is essential.

- Although **case law** is not binding in international arbitration, precedent does play a persuasive role in arbitrators' decision-making.

  For instance, following the Achmea Saga has been a must in arbitration over the last few years. Legal decisions and awards shaped the fateful future of intra-EU investor-State arbitration, which impacted all types of industries.

  The dispute resolution strategy primarily lies with in-house counsel. Information is therefore key. Reduce legal costs by staying informed of arbitral developments in order to better collaborate with external counsel and manage your arbitration cases more efficiently.

Tracking arbitration-related developments enable legal departments to limit their organization's exposure to legal risks and keep their budgets in line.

OUR TIPS & TOOLS:

- → Follow trends in arbitration in your industry through data-backed reports of arbitral institutions or Jus Mundi's Industry Insights Reports.
- → Occasionally peruse arbitral concepts "cheat sheets" to save time while staying updated on main developments. Jus Mundi's Wiki Notes, for instance, are drafted by experts in the field, objectively presenting all arguments surrounding a concept, and regularly updated with the latest awards and decisions.
- → Make your work simpler and more efficient by setting up personalized alerts on combinations of keywords and filters on Jus Mundi.

- **Arbitrator due diligence** is also tremendously important. As parties select their arbitrators, the choice must not be taken lightly. Many elements should factor into that decision.

  Information on specific arbitrators can be difficult to find and can require time-consuming research, as they may be scattered or simply inaccessible. That is why a number of in-house counsel entrust their external counsel with that decision.

  Unfortunately, doing so induces numerous billable hours and does not ensure the best choice for your company.

  In-house counsel are better positioned to make the best choice for their organization: they understand both the needs of a specific arbitration case and dispute resolution strategy while keeping in mind their business's bottom line.

  With the right tools and information, in-house counsel can be empowered to decide for their company.

OUR TIPS & TOOLS:

- → Jus Connect by Jus Mundi is our professional network tailor-made for the arbitration industry. It provides all the insights you need to choose a suitable arbitrator for your dispute and your business's bottom line.
- → In addition, external counsel and experts also have profiles that you can "follow". Stay updated on arbitrators' new appointments, disqualifications, and new documents.

3. BUSINESS & MARKET INTELLIGENCE

Arbitration is also about whether partners can be trusted. It usually entails that no appeal can be lodged, and partially rely on the parties' goodwill to participate in the arbitral process and voluntarily enforce subsequent awards.

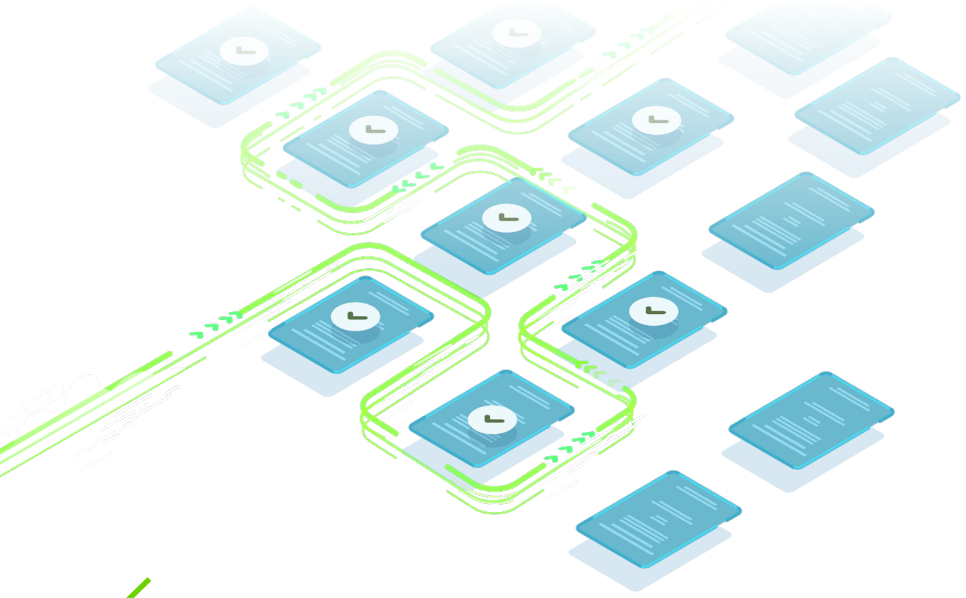
Therefore, monitoring your company's partners, competitors, and industry to anticipate threats and mitigate risks is a must.

- **Avoid unnecessary risks** by getting informed about potential partners before contracting with them.

  Make informed decisions as to which organizations your business should contract with by looking into their current arbitration cases, whether they tend to comply with arbitral awards, in which area they tend to not comply with their contracts, and more.

- Be aware of **issues faced by or involving your partners and competitors** so that you can mitigate your own potential future risks.

  For instance, set up an alert on Jus Mundi on a competitor or partner, either through a keyword search or our new "Party" filter, and the filter "notice of intent" to be notified of a new arbitration case involving your competitor or partner.



OUR TIPS & TOOLS:

- Use RSS feeds to stay generally informed of the players in your industry.
- Make your life easy by setting up personalized alerts which arrive straight to your inbox, rather than manually combing through mountains of information. Learn more about our Monitoring & Alerts feature.

For all these reasons, monitoring legal and arbitral developments is critical.

Knowing what arbitral decisions are impacting your industry, how arbitrators rule on specific issues of interest, and how your partners and competitors deal with arbitration, are only a few of the breadth of information accessible to you through legal intelligence.

Jus Mundi is a unique legal intelligence solution empowering your in-house team to protect your company's business and financial interests. We help you mitigate arbitration risks and maximize potential rewards while keeping costs and budgets in line. Try Jus Mundi for free and unleash the power of data.

Perfecting the Art of Selecting Legal Professionals for Your Arbitration and Conducting Arbitrators Due Diligence

Introduction

Arbitration is sometimes unavoidable.

The selection and due diligence of arbitrators are critical steps in the process. Fortunately, in-house counsel can take part in the decisions which ultimately lead to the selection of a de facto judge of their dispute by collaborating closely with their external counsel. Doing so effectively ensures savings on legal fees, as well as more control over the legal strategy adopted.

Due to their strategic position, in-house counsel can both advise on the legal strategy and the business's bottom line. External counsel do not have the same outlook, as they are not privy to all of their clients' legal, financial and commercial interests.

It is therefore primordial to carefully select external counsel you can effectively collaborate with.

How to Select Arbitration Counsel Who Will Be Strategic Partners?

To have the best chances of success in your arbitration while managing costs, choosing the right law firm and external counsel for your business is a crucial first step.

Even though in-house counsel may already have an established relationship with their trusted and usual corporate counsel or litigator, retaining them to represent your interest in arbitration may not be the best strategic choice. Indeed, as explained in our **Arbitration Checklist**, arbitration is a very specific form of dispute resolution which requires experience in the arbitral process and, often, specific expertise in the subject matter of the dispute.

OUR INSIGHT:

- Counsel specialized in arbitration are the most suited to handle your arbitral needs. Not only do they have the expertise, but their vast experience will ensure efficiency in the process and procedure, which may ultimately help you make savings on legal fees.
- The right external counsel should be a strategic partner, not completely take over your dispute resolution strategy.

  In-house counsel hold a pivotal role in the dispute resolution strategy: they are representing the interests of their company while also informing the legal decisions taken by external counsel. In addition, in-house counsel have access to witnesses, documents, and the insights as to how to gather the evidence required for their arbitration case.

  As such, "helicopter" external counsel are not the best decision for your arbitral strategy, however competent they may be. Involving the in-house counsel of their clients should be a priority to external counsel that wish to personalize the approach they take towards a case.

  They should, therefore, understand that you, as the guardian of your company's interests, oversee the dispute's strategy, meaning you should be regularly updated on your case's progress and make the strategic decisions that best suit your company's interests. One such decision regards the selection of arbitrators, which will be discussed below.

OUR TIPS:

Word of mouth can be useful but, to convince your C-suite of the interest of a specialised external counsel, data rules over any personal recommendations.

WORD TO THE WISE

Avinash Pradhan

Deputy Head of International Arbitration
Rajah & Tann

Considerations on choosing external counsel:

- Cultural sensitivity is important both in an arbitrator and external counsel.
- In addition to the conversations on merits and fees, in-house counsel should discuss how to make the process most efficient with their external counsel. Some of the tasks do not need to be outsourced to external counsel and might be done internally in a more cost-effective manner.
- It is therefore essential to have a discussion with your law firm about striking a balance between the steps you need to be involved in and those that can be completely delegated to the external counsel so they are dealt in the most cost and time effective manner. Flexibility is therefore critical.

Make the right choice for your business's needs by:

- **Checking past pleadings** to determine if an external counsel is right for you.

You can find exclusive pleadings submitted to arbitral tribunals in Jus Mundi's search engine.

- **Getting a diverse counsel team**. Arbitrations usually involve an international element, meaning different perspectives, mindsets and cultural awareness are assets in developing a strong and creative arbitration strategy. It ensures that your team of counsel has a global vision of the dispute and arbitral proceedings often involving different legal systems and languages, as well as the subject matter of the dispute.

  Jus Connect by Jus Mundi offers a range of filters to help you find what you are looking for in an external counsel. We add new filters regularly.

- **Taking a look at firm profiles** with caseload information and analytics for a broader vision of a law firm's arbitration practice:

  Jus Mundi's Firms Profiles can help you identify law firms with arbitration experience and get specific analytics about their expertise. New features are coming soon.

Save on legal costs and gain autonomy over your case management by collaborating with your external counsel in selecting arbitrators that are right for your dispute.

WORD TO THE WISE

Mark Baker

Global Head of International Arbitration
Norton Rose Fulbright

Choosing an external counsel for your arbitration and collaborating effectively with them:

In-house counsel should recognize at the very beginning of any arbitral process that international arbitration is not litigation. You are not doing yourself, or your company, the best service by going to your usual litigation counsel. They may have experience in international arbitration, but they would never have the same experience as a specialized arbitration team that exclusively work in the field.

The client's case can be substantially hurt if the in-house counsel only go to a specialized arbitration counsel after their regular external counsel started the process for them.

- **Why a specialized arbitration counsel:**
  - International arbitration is more expensive, more complicated, and has a lot more room for clients to get hurt because the rules are much simpler, but much fewer.
  - It is also an area where there are a lot of repeat players: the knowledge about how they think is invaluable, whether they are sitting as an arbitrator or they are your opponent on the other side. The lead counsel for your organization has a tremendous advantage if they have experience with them in either of those capacities and can bring their insight into your strategy.
  - Having a firm that is familiar, not only with the enforcement procedures, but also have an office on the ground where you may need to enforce the award will save you huge amounts of money and time. At the beginning of every case, while preparing their request for arbitration, in-house counsel need to be thinking about how they will eventually collect. The arbitral process can otherwise end up being a complete and utter waste.
- **Why should in-house counsel be invested in collaborating with their external counsel:**

  In house counsel need to be the point person for anything within the business for their external counsel. The internal organization may have changed since the contentious contract was signed: divisions reshuffled, IT system updated, document retention policies evolved. The external counsel cannot effectively represent a client without somebody on the inside that is in the know. That is where the in-house counsel or legal department can add massive value and why they should be an integral part of the team and case strategy.

  The in-house counsel cannot just check-in with their external counsel every few months. They need to educate their management as to why their active participation in the case is essential.

The Importance of Selecting the Right Arbitrator

Arguably, one of the most crucial decisions of the arbitration process is selecting an arbitrator.

The selected arbitrator can influence the findings of the Arbitral Tribunal and therefore, the outcome of the case. A poorly selected arbitrator, for instance, appearing partial or with conflict of interest, may be challenged by the adverse party and your choice may eventually end up costing you.

As the parties are responsible for selecting their own arbitrators, the selection process can be considered a key strategic element of your wider strategy. However, as an arbitrator is to be neutral and impartial, the selection can be tricky. It is important therefore to select someone that MIGHT be on your side, whilst still ensuring neutrality, *i.e.*, someone that may have ruled in favour of parties which used similar legal arguments as yours.

Failing to select the right arbitrator can prolong your dispute and increase legal fees, rendering the arbitral process less efficient:

- Primarily, an arbitrator that is not available enough may lack focus for being on too many cases at one time, and delay the process as they may have scheduling issues (to plan for conference calls, hearings, etc).
- A challenged arbitrator can also result in time wasted and increased legal fees. So making a choice that is above any appearance of partiality is primordial: a potentially conflicted arbitration would surely lead to challenges, delays, and further conflicts.
- An unqualified arbitrator, meaning without expertise in the subject matter of the dispute or, at the very least, its industry, may prove inefficient in understanding the ins and outs of your case.

However, note that an arbitrator with little experience as an arbitrator is not an unqualified arbitrator. **Giving a chance to a lesser-known arbitrator with less extensive arbitrator experience may have advantages:**

- They tend to be more available,
- They tend to show eagerness to work efficiently and prove oneself, and
- You are fairly assured that this kind of arbitrators will work on your case themselves (as opposed to famous arbitrators with packed schedules and caseloads who may rely more on associates' work).

How to Research Suitable Arbitrators for Your Dispute?

To put it simply, the only guidance given by most institutional rules and domestic laws on the selection of arbitrators is that they must be independent and impartial.

Given that the parties can often select their own arbitrator, it is important to make an informed decision, meaning you should be involved in the research from the outset to find a candidate that will have the relevant expertise and conduct thorough due diligence of any potential candidates.

OUR INSIGHT:

- **Strictly follow the selection process set in the arbitration clause, the arbitral institution's rules, and the laws of the seat of arbitration**

→ First, the dispute resolution clause may contain some specific criteria arbitrators of the dispute must observe. Therefore, be mindful of the content of your arbitration clause.

→ Second, the arbitral institution selected in your arbitration clause likely has rules on the selection of arbitrators. Follow the steps and requirements indicated.

→ Be aware that some arbitral institutions can assist in proposing a pool of suitable candidates tailored for the disputes. Do not hesitate to talk to the case manager, who usually can also provide neutral advice.

If you decide to appoint an arbitrator in this manner, it is important to note that all institutions are not equal in the diversity of candidates they may propose. Doing some independent research is therefore paramount.

→ Finally, ensure you comply with requirements stated in the laws of the seat of the arbitration. Not all jurisdictions are equal (*e.g.*, some restrict the nationality of arbitrators), which is why the selection of a suitable seat is critical.

- **Typically, the steps for researching arbitrators follow this process:**

1. **Broad research:** The process starts with parties looking for arbitrators by using fundamental case criteria such as applicable law, industry, excluded nationalities, etc.

   This information can be found on public databases, institutional lists, individual arbitrator CVs, awards but usually require extensive research on numerous different resources.

   Jus Connect by Jus Mundi is your one-stop to all this information and more. Due diligence made easy!

2. **Specialized research:** Parties then narrow down their long list of potential arbitrators by conducting further research using publicly available information such as published cases and articles. At this point, parties also draw on other information such as previous work experience, connections or potential conflicts with other parties, arbitrators or counsel, general caseload or depth of knowledge of a specific industry.

   To avoid having to comb through multiple obscure resources, Jus Connect also gathers and analyzes this data on individual arbitrator's profiles.

3. **Your selected arbitrator:** The final step is the most important decision – narrowing down your specialized research to one arbitrator. Parties draw on any additional information that can be publicly sourced, such as procedural priorities, interpretive preferences, timing etc. At this point, parties also enquire within their personal and professional networks to corroborate their selection.

Interviewing the candidate is a must and your external counsel should involve you in such an important step. Your external counsel can inform you of the limits as to the kind of questions that you can ask, as the arbitrator must remain independent and impartial from the outset.

OUR TIPS:

Your one-stop solution to arbitrator due diligence

By following the above steps, it is likely you will find an appropriate arbitrator. However, the final point shows that not only is there a need for deeper insights into topics that are not in publicly available sources, but deeper insights into new and less well-known international arbitrators that are outside local networks and traditional hubs.

This is where Jus Connect by Jus Mundi comes in. Jus Connect is a professional network tailor-made for arbitration. Profiles are automatically created for anyone who has been mentioned in at least one document publicly available on the Jus Mundi search engine.

To date, Jus Mundi's search engine contains 58,633 documents that are sourced by advanced algorithms and institutional partnerships. Our network currently has 42,709 profiles including arbitrators, lawyers, and experts.

The search filters on Jus Connect make it easy to see a diverse set of practitioners, so everyone has an equal opportunity to be considered for an arbitration appointment. Since profiles come with data-backed insights, the results are even more reliable.

Every profile on Jus Connect is publicly available for easy access.

Jus Connect is the only platform where arbitrators and arbitration practitioners can share their entire case experience and track record to their public profile, without sacrificing confidentiality. This includes commercial arbitration cases since only non-confidential case information is collected. When a user uploads their own cases, the information is validated prior to publishing to assure the quality of the network. This means in-house counsel know they can rely on the information contained in arbitrators' profiles.

Additionally, with Jus Connect by Jus Mundi, you can have an idea of how an arbitrator has previously ruled on specific legal issues and how they tend to conduct arbitrations, by taking a look at the procedural orders, awards and other documents from arbitrators on Jus Mundi.

What to Look for in an Arbitrator?

The best arbitrators have a combination of skills that make them excellent at running arbitration hearings, including strong analytical abilities and great reasoning. While researching suitable arbitrators, it's important to be able to distinguish their characteristics and expertise.

OUR TIPS:

- **Research your arbitrator's professional expertise**

  Ensure that you've thoroughly researched who will be the most suitable practitioner related to the economic sector or industry setting in which your dispute takes place.

  Not only do you want to make sure they have the relevant legal and professional expertise, but you will want to know their history in that industry and even more crucially, their vision of what the arbitral process should be. Do they fully understand the development of your industry? And will they be able to evaluate that effectively?

- **Ensure your arbitrator has a practical approach to proceedings**

  It is crucial for an arbitrator to have the ability not only to observe but to actively guide proceedings.

The selected arbitrator is expected to rule in a thorough and clear manner, including on damages. So it is important to make sure that the decision they will render will be legible, precise, and argumented. No guesswork should be required. Taking a look at arbitrators' previous awards on Jus Mundi and Jus Connect allow you to do just that.

→ **Choose from a diverse pool of potential arbitrators**

It is important to promote gender, generational and cultural diversity among candidates. This will result in a more balanced pool of potential arbitrators. Diverse arbitrators allow for a more global perspective on the proceedings and wider social, or cultural understanding.

Logistically speaking, selecting an arbitrator that speaks a particular language could influence the outcome of the case: the communication and delibeartions is impacted by the ability of arbitrators to communicate with the parties and with each other.

Take an Active Role in Selecting Your Arbitrator

It is no secret that arbitration can be costly. An easy way to reduce external counsel's billable hours is to handle the selection of potential arbitrators mainly in-house. With the right tool, you can even deal with arbitrator due diligence and check candidates for potential conflict of interest yourself, saving on legal costs.

ACTIVELY PROPOSE ARBITRATORS TO YOUR EXTERNAL COUNSEL

To choose the right arbitrator for the dispute, take the lead, and propose arbitrators to your external counsel. At the very least, be actively involved in the selection process, as this is a key choice in your arbitration, which has a direct effect on your final award.

Some of the elements discussed above may not be as essential to your external counsel in appointing your arbitrator. In addition, you are privy to your business' strategic positions and bottom line. You are therefore better equipped to take all-rounded legal decisions in the best interest of your company than external counsel.

Also consider that some external counsel may propose very similar lists of arbitrators to their various clients, for instance, because they know the arbitrator. This may mean that the list they propose is not as tailored for your dispute as you may make it.

WORD TO THE WISE

Mark Baker

Global Head of International Arbitration

Norton Rose Fulbright

How can in-house counsel be more involved in the selection of their arbitrator:

There is an old joke about the three most important things in an arbitration: the arbitrator, the arbitrator & the arbitrator!

This is therefore the one essential step of the arbitral process in which in-house counsel must be involved. How?:

- At a minimum, they need to have a spirited discussion with their outside counsel about the type of person and the skillset they should look for, so that counsel can comb their network and put together a list of possible candidates.
- Then, they need to be involved in whether or not the people on that list have appeared or are appearing before them or, to their knowledge, their counterparty, *i.e.,* in checking there does not exist any **conflict of interest** with any of the candidates.
- Once they have a short list of potential arbitrators, they absolutely need to participate in the **single most crucial step in the selection process, the arbitral interview.** This is your opportunity to have a general chat with candidates in order to evaluate if this potential arbitrator can be trusted. You cannot discuss the case. This is more to discover the general mindset of the arbitrator, if they would be able to manage the process and the case efficiently, to manage the different personalities of arbitrators, and other stakeholders.
- Your external counsel should make sure that you know what the rules of this interview are: what you can talk about and what you can't.

OUR TIPS:

→ **A diverse counsel team will be better equipped to help you make more all-rounded choices in your arbitrator selection**.

In addition, different perspectives and mindsets are assets in developing a strong and creative arbitration strategy. It ensures that your team of counsel has a global vision of the dispute. Arbitral proceedings often involve different legal systems and languages.

Jus Connect by Jus Mundi offers a range of filters to help you find what you are looking for in an external counsel. Some of these filters include nationality of the practitioner, languages spoken, and gender. You can also take a look at pleadings on Jus Mundi.

→ **Do your own due diligence.**

Searching for information on some arbitrators can be difficult given the nature of the proceedings. Because of this, due diligence can be a lengthy process and therefore costly when outsourcing to external counsel.

Minimize the time and resources spent on due diligence by using tools like Jus Connect by Jus Mundi, as previously mentioned. No other tool in the marketplace gives you access to a practitioner's full case history. On a single platform, you can determine recent activity, current caseload, and previous roles held in arbitral proceedings.

WORD TO THE WISE

[Avinash Pradhan]

Deputy Head of International Arbitration
[Rajah & Tann]

Conduct your own due diligence:

- If you have a good relationship with the firm that provides the recommendation, then you have more trust. Therefore, choosing carefully your external counsel is important.
- It is important for in-house counsel to do appropriate due diligence of arbitrators. It can be difficult because lawyers rely a lot on word-of-mouth to select arbitrators. So, it is important for in-house counsel unsure of how to make these decisions autonomously to go with a law firm that has a sense of how arbitrators should handle things, cultural differences, working across different regions, etc. Word-of-mouth intelligence is very important but other forms of intelligence can be better: published awards, arbitrators track records, etc.

→ **Check for conflicts of interest.**

A conflict of interest is a clash between the private interests and the official responsibilities of a person in a position of trust. To mitigate conflicts of interest and simplify the due diligence process, it is essential to identify any past connections between arbitrators, counsels, or parties instantly.

[Jus Mundi's Conflict Checker] enables users to identify the past connections between arbitrators, counsels or parties instantly. This makes the due diligence process much simpler and more effective to avoid conflicts of interest and subsequent challenges to the arbitrator or the final award.

Conclusion

As we have seen, [in-house counsel] should not rely solely on external counsel when making decisions about arbitration proceedings including selecting an arbitrator. The interests of the company are better served by the in-house legal department which is more familiar with the company and its operations. Ultimately, the in-house lawyer will be held accountable by the company for the entire management, coordination, and end result of arbitration proceedings. It is therefore important for your team to be as autonomous as possible from the external counsel in order to oversee the arbitration strategy effectively, as well as reduce legal cost where possible.

Thanks to innovative tools, in-house counsel can be more involved in their arbitration strategy, even if they do not have extensive experience in arbitration. Jus Mundi offers a series of tools to empower in-house legal team to protect their company's business, financial and legal interests.

At [Jus Connect] by Jus Mundi, our aim is to make arbitration more transparent and diverse, by making legal professionals globally accessible, irrespective of age or seniority. With data-backed insights, we want to make sure that your selection for an arbitrator, is not only an informed one but one that effectively benefits your role as the guardian of your company's interests.

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Prompting Compliance with Arbitral Awards without Resorting to Enforcement

Introduction

Zeyad Abouellail

Legal Content Officer
Jus Mundi

Parties are often caught off guard when, after winning an arbitration, they come to the realisation that there is still a big chunk of work to do: getting the money.

In case of non-compliance, because the losing party is unwilling or unable to honour the terms of the arbitral award, the winning party could pursue recognition and enforcement proceedings. Multilateral treaties such as the *Convention on Recognition and Enforcement of Foreign Arbitral Award of 1958 (New York Convention)* and the *Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965 (ICSID Convention)* provide expedited procedures for recognition and enforcement of awards that fall into its scope of application and tend to limit the motives available for a national court to refuse enforcement of an arbitral award.

However, after spending time and capital arbitrating a dispute, a winning party will often be unenthusiastic about the idea of deploying more of the same trying to execute the award. From this standpoint, quick recovery of damages may be the most important issue for your legal department and company, as the award simply has no value if it is not complied with or enforced.

Zeyad Abouellail is a Legal Content Officer at Jus Mundi and a PhD candidate at Paris-Saclay University. His research focuses on the post-award phase in investment arbitration. He holds two Master's Degrees in International Business Law from Paris-Saclay University and Paris 1 Panthéon-Sorbonne University. Prior to joining Jus Mundi, Zeyad has interned at several law firms in international arbitration and corporate law in Cairo, Egypt.

It is not all bleak though: losing parties tend to voluntarily comply with the arbitral award[1]. However, one may wonder if this reality is changing[2]. In any case, even if the expectation should normally be that the award debtor will comply, in-house counsel should reasonably anticipate non-compliance by the opposing party.

OUR INSIGHT:

Before resorting to enforcement, the winning party must contemplate how it can prompt compliance with the award. From pre-dispute considerations to an effective post-award strategy, there's an array of routes available to ensure compliance by the award debtor.

- → Beware! An effective arbitration strategy should not end at the rendering of the arbitral award. It is too late to start thinking about compliance and enforcement when the award has already been rendered.
- → The post-award phase is at the intersection of legal, economical, and geopolitical considerations, and it is the role of your legal department to anticipate how it can prompt compliance with a favourable award without spending time and money enforcing it.

Mutually Beneficial Advantages of Compliance with an Arbitral Award

Compliance with the award nurtures trust in the arbitral process and is mutually beneficial for both parties:

- For the award creditor, it safeguards swift collection of the debt and ensures that no extra costs or time is spent on enforcement proceedings. It also avoids having to resort to local courts, potentially in a foreign jurisdiction, when the purpose of arbitration is to avoid litigation.
- For the award debtor, it guarantees the respect of its legal obligation to comply with the award and eliminates reputational risks that may arise if the opposing party decides to publicise the dispute. By voluntarily complying with the award, the losing party is also saving costs and time it will spend resisting enforcement.

  Most importantly, timely compliance will go a long way in saving the commercial relationship between the parties as it will avoid potentially years of litigation[3].

1 International Arbitration: Corporate attitudes and practices 2008, Queen Mary University of London and PriceWaterhouseCoopers ("84% of the participating corporate counsel indicated that, in more than 76% of their arbitration proceedings, the non-prevailing party voluntarily complies with the arbitral award; in most cases, according to the interviews, compliance reaches 90%"); Crystal Robles, The 2014 Survey: How Well Are Arbitral Awards Enforced in Practice?, 20 News & Notes from the Institute for Transnational Arbitration 5, 5 (Qtrs. 2 & 3 2014) (survey respondents were '[p]ractitioners with experience in over 2,000 arbitrations resulting in awards in over 35 jurisdictions') ('Forty-four percent of participants answered that "very few" (10 percent or less) of their commercial arbitration awards were subject to judicial enforcement, while 27 percent answered that "some" (10 to 40 percent) were.'), referenced in Drahozal, Christopher R., Empirical Findings on International Arbitration: An Overview (December 21, 2016). Oxford Handbook on International Arbitration (Forthcoming)

2 J William Rowley QC, Editors Preface, in The Guide to Challenging and Enforcing Arbitration Awards – Second Edition, Global Arbitration Review, 8 June 2021.

3 Loukas Mistelis & Crina Baltag, Recognition And Enforcement Of Arbitral Awards And Settlement In International Arbitration: Corporate Attitudes And Practices, The American Review of International Arbitration, Vol. 19, (2008) ("The interviewed corporations revealed that the main reason for compliance with the arbitral awards was to preserve a business relationship. In sensitive industries, such as insurance and re-insurance, pharmaceuticals, shipping, aeronautics and oil and gas, the percentage is significantly higher, as the number of major players in these sophisticated markets is much lower than in other industries (86% in the construction industry, 73% in the energy, oil and gas and 100% in the insurance and re-insurance).")

Quick Recap of the Legal Framework Governing Compliance With Arbitral Awards

Arbitral awards are final and binding upon both parties.

This principle can be found in the majority of arbitration rules[4], but can also be included by the parties directly in their arbitration agreement[5].

In the context of ICSID arbitration, the State has an international obligation to comply with the arbitral award[6].

Your Step-by-Step Strategy to Prompt Compliance with an Award

PRE-DISPUTE: REASONABLY ANTICIPATING NON-COMPLIANCE

An important aspect of an arbitration strategy is reasonably anticipating non-compliance with the award once the dispute has ended. Even the strongest of commercial relations can be ruined by disputes and it is necessary to take into consideration the possible situation of your counterparty in the future.

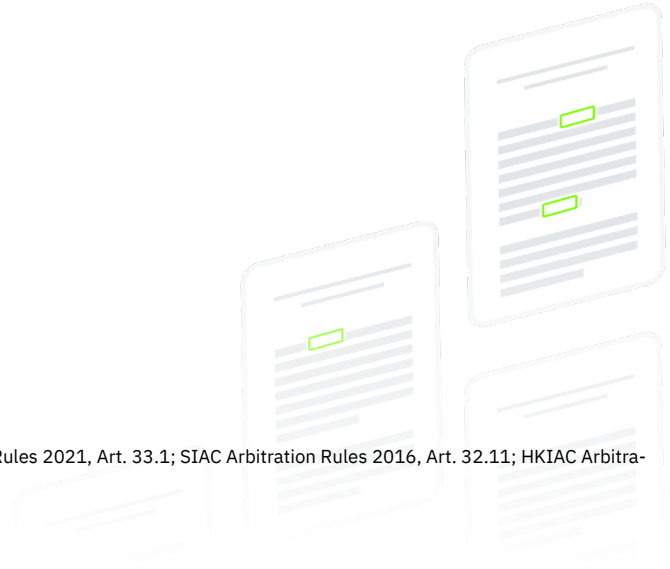
Contractual tools to prompt automatic enforcement of the award should be taken into consideration. Payment guarantees, for instance, could be seen as a strong assurance for both parties, which can provide important leverage when needed.

When your counterparty is a State or State entity, sovereign immunity issues should be addressed. Idyllically, the contract should include a broad waiver of immunity from execution clause, or a clause earmarking assets that may be potentially attached in satisfaction of the award. However, in practice, such clauses are extremely rare.

If the losing party thinks that the award was made in error, it will most probably try to set aside the award at the seat of arbitration. Therefore, it's important to carefully draft your arbitration clause, so that it doesn't create hurdles to compliance or potential enforcement proceedings.

POST-AWARD: PROMPTING COMPLIANCE

After the rendering of the award, the winning party shouldn't hesitate to address a letter to the losing party reminding them of their legal obligation to honour the terms of the award. This is also an opportunity where the winning party could propose talks for a potential settlement if this solution is deemed the fittest to the dispute.



4 See ICC Arbitration Rules 2021, Art. 35.6; UNCITRAL Arbitration Rules 2013, Art.34.2; LCIA Arbitration Rules 2020, Art. 26.8; ICDR Arbitration Rules 2021, Art. 33.1; SIAC Arbitration Rules 2016, Art. 32.11; HKIAC Arbitration Rules, Art. 35.2; CRCICA Arbitration Rules 2011, Art. 34.2.

5 See for example, Sales & Purchase Contract, Art. 13.3 (available on Jus Mundi); Distributorship Agreement, Art. 14.8 (available on Jus Mundi).

6 Art. 53 of the ICSID Convention.

OUR TIPS:

- **Consider settling**

  It may sound counterintuitive to settle with the opposing side once the arbitral award has been rendered, especially in your favour. Unfortunately, award creditors should sometimes accept that it will be difficult to recoup the full value of the award when the award debtor refuses to comply voluntarily, especially if the latter's assets are in multiple jurisdictions, making enforcement proceedings more difficult and costly.

  In this case, the winning party should assess potential settlement, including a reduction of the value of the award in return for timely payment. This reduction also reflects the costs saved by not pursuing forced execution.

  Other than securing compliance with the award, a settlement will save the commercial relationship, even potentially reincarnate it after a dispute. Sometimes, it may be more important for your company to continue doing business with a partner while expeditiously recovering a part of the value of the award, rather than pursuing more litigation and destroying a commercial relationship[7].

  When analysing settlement possibilities and the discount to the award, the costs of enforcement proceedings should be balanced with the value of the award and most importantly, with the value of what you think can be effectively recouped after enforcement proceedings.

- **Applying commercial pressure**

  If settlement discussions fail or if you deem a settlement not fit for your dispute, the award creditor may still be able to make the award debtor comply with the award without forced execution.

  By leveraging the reputational risk and publicising the dispute, the winning party can prompt the losing party to comply with the award or accept settlement terms.

  Useful tools:

  - This could be done by notifying trade organisations of instances of non-compliance. Trade bodies such as GAFTA and FOSFA (both provide for ADR services) publish a list of defaulters on arbitral awards. This information is only available to members of the organisation and is not publicly accessible.
  - More recently, this practice has expanded to arbitral institutions, with Delos Dispute Resolution introducing a Compliance Reinforcement Mechanism in the DELOS 2021 Arbitration Rules. This allows "*an award creditor to obtain the publication on Delos's website of a Compliance Failure Notice once the time-limits for all forms of recourse against the award have expired at the seat of arbitration*".

  Potential partners would think twice before contracting with a business known for its lack of compliance with unfavourable awards.

- **Considerations when your opponent is a State or a State entity**

  Generally, negotiation with States or their entities may be more difficult as there are usually more stakeholders involved when dealing with sovereigns. Moreover, sovereigns' legal and internal budgetary constraints can be restrictive and pose challenges to prompt compliance with the terms of an award.

  It is important to utilise diplomatic channels when needed.

7 The 2008 Queen Mary Survey found that "40% of the participating corporations have negotiated a settlement after the arbitral award was rendered; this usually entailed a discount in return for prompt payment". 56% of them indicated that the motive was to save time and costs, while for " 19% of the participating corporations, maintaining a relationship with the nonprevailing party was an important driver of a settlement".

Examples:

This has proved to be a successful strategy by Azurix and Blue Ridge (assignee to CMS) who requested the withdrawal of Argentina from the US Generalized System of Preferences (GSP) after non-compliance with two arbitral awards rendered in their favour. The request was granted but the parties eventually settled. A similar request was submitted by Chevron against Ecuador for which the country review is still ongoing.

Publicising the dispute could provide important leverage. One commentator has noted that when dealing with States, "*some investors apparently believe this may be their best leverage in collecting an award*"[8]. Non-compliance can negatively impact a sovereign's credit rating if it is seeking credit from an international organisation. More generally, it may harm a State's investment climate[9].

MONETIZING THE AWARD

Another viable option will be to "monetise" the award in the secondary market. This could be very attractive for the winning party as it obtains financial relief relatively quickly. The latter could avoid the hurdles of enforcement proceedings by selling its rights to the award to a third party at a discounted price, in exchange for the third party assuming the enforcement risk and costs. If the award debtor is consistently refusing to comply, this could be a commercially sensible outcome for the winning party.

OUR INSIGHT:

This option will depend on numerous factors, notably the size of the award: the award needs to be sizeable to accommodate for the discount on the value of the award and the enforcement costs. Monetisation structure can also differ, parties could negotiate a lump sum payment or a multitude of payments based on future trigger events.

When All Fails: Considerations Before Commencing Enforcement Proceedings

If compliance by the award debtor is no longer a viable reality, you will be forced to recognize and enforce the award. An effective strategy should be planned as enforcement proceedings could be costly and time-consuming.

8 R. Doak Bishop, Introduction: The Enforcement of Arbitral Awards Against Sovereigns, at 7, in R. D. Bishop (ed.), Enforcement of arbitral awards against sovereigns, Juris Publishing (2009).

9 See Vinuales, Jorge E. and Bentolila, Dolores, The Use of Alternative (Non-Judicial Means) to Enforce Investment Awards Against States. In Boisson de Chazournes, L., M. Kohen and J. E. Viñuales (eds.), Diplomatic and Judicial Means of Dispute Settlement: Assessing their Interactions (The Hague: Brill) (2012)

WORD TO THE WISE

Sebastiano Nessi

Partner | International Arbitration & Disputes

Curtis, Mallet-Prevost, Colt & Mosle

Tips for successful enforcement of an international arbitral award

The condition to successful enforcement of arbitral awards is being cognizant of the specificities and risks that arise in each particular country where enforcement is being sought.

Key questions to answer in order to maximise the chances to enforce successfully an arbitral award:

- What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of an arbitral award?
- Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement?
- What documentation is required to obtain the recognition of an arbitral award?
- If the required documentation is drafted in a language other than the official language of the jurisdiction where enforcement is sought, is it necessary to submit a translation of such documentation?
- What are the grounds on which an award may be refused recognition?
- Are the grounds applied by the court before which enforcement is sought different from those provided under Article V of the New York Convention (the provisions of the New York Convention are expressed as broad, general propositions and do not contain definitions of key terms. Therefore, in interpreting obligations under the New York Convention, national courts in different countries have sometimes reached differing conclusions about what the same terms mean)?
- What challenges are available against a decision recognising or refusing recognition of an arbitral award?
- Will the court adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration?
- Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration?
- Are there any databases or publicly available registers allowing the identification of an award debtor's assets within the jurisdiction were enforcement is being sought?
- Are interim measures against assets available? What is the procedure to attach assets?
- Are there any rules which specifically govern recognition and enforcement of arbitral awards against foreign states?
- Are assets belonging to a foreign state immune from enforcement? If so, are there exceptions to such immunity?

Last advice: If the defendant has assets in more than one country, always identify which country has the most favourable enforcement regime.

OUR INSIGHT:

- Registration of the award in court or further forced execution may prompt the debtor to reassess its options and settle. If needed, keep settlement possibilities open throughout all steps of these proceedings.

OUR TIPS :

To plan an effective enforcement strategy:

- **Locate the debtor's assets**

  A lack of assets or an inability to locate them will make enforcement of the award very difficult. Locating recoverable assets is considered the main hurdle in the enforcement stage. Depending on the complexity of the case, specialised firms in asset tracing may bring a strong added value.

- **Inform yourself about the laws applying in the jurisdictions where the debtor's assets are located**

  It is important to be aware of the procedural rules and laws governing recognition and enforcement proceedings, such as knowing if the New York Convention applies. When dealing with States, awareness of sovereign immunity laws is recommended.

  Take a look at our Wiki Note to learn more about the concept of Sovereign Immunity from Execution (in Enforcement).

- **Analyse the need for funding**

  Depending on the localisation of the debtor's assets and your strategy to recoup the value of the award, you may need to fund enforcement proceedings in multiple jurisdictions. This is different from full monetisation of the award and is closer to risk sharing, where the funder will fully or partially fund the costs of enforcement proceedings in return for a share of the recovered sum.

EXTERNAL CONTRIBUTION

Avinash Pradhan

Deputy Head of International Arbitration
Rajah & Tann

Considerations before enforcing an award in APAC:

- If the adverse party has assets in Singapore and you have a final arbitration award, you are basically fine! But it's not the same for all regions in South-East Asia or Asia generally. Having on-the-ground counsel certainly helps.
- At the beginning of their dispute, in-house counsel should already consider their enforcement strategy. A conversation about tactics and steps to get to the best position to enforce should occur early on with the external counsel. Asset investigation & tracing may be necessary, as may be freezing injunctions of certain assets to ensure future enforcement of the award.
- While a lot of jurisdictions in South East Asia are now pro-arbitration, some take much longer than other to enforce awards. If in-house counsel are trying to enforce in a specific region, it helps to have lawyers with local knowledge, who have been to court in the juridisdiction, understand the rules and how they can be played by the other side to prepare for the fight. Local knowledge is extremely important. That's imperative or any enforcement strategy is shaky at best!

Conclusion

International arbitration is corporations' preferred dispute resolution mechanism for cross-border disputes. Its efficiency, procedural flexibility, confidentiality, and level of expertise of arbitration practitioners make it a prime choice for corporations. However, there are still concerns over the cost associated with arbitration.

To have more control over costs and their business's bottom line, many legal departments and in-house counsel have increased their involvement in case management. Collaboration with external counsel has become a must.

There is no one-size-fits-all solution to striking a balance between delegating to external counsel and saving on costs by internalizing some tasks. But we hope this guide gave you the tools to determine how you and your legal department can both manage legal costs better and be more involved in crafting a winning arbitration strategy.

Your job is to mitigate arbitration risks and maximize potential rewards while keeping costs and budgets in line.

At Jus Mundi, our job is to make you more efficient and autonomous to be the strategic business partner you were meant to be.

We can help at every stage!

Jus Mundi gives you the best chances

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