Overview

- Rise in international arbitration
- Foundations of modern international arbitration
- Getting your arbitration clause right
- Selecting a place (seat) for arbitration
- Choosing institutional or ad hoc arbitration
- Choosing the right institution
### Rise in use of international arbitration

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Prevalence of Arbitration
Preferred Mechanisms for Resolving International Disputes
Source: Queen Mary University / White & Case Survey 2015

Chart 1: What is your preferred method of resolving cross-border disputes?

- International arbitration: 56%
- International arbitration together with (other) ADR: 34%
- Mediation: 5%
- Cross-border litigation together with ADR: 2%
- Cross-border litigation: 2%
Prevalence of Arbitration
Preferred Mechanisms for Resolving International Disputes
Source: Queen Mary University / White & Case Survey 2015

Chart 2: What are the three most valuable characteristics of international arbitration?

- Enforceability of awards: 65%
- Avoiding specific legal systems/national courts: 64%
- Flexibility: 38%
- Selection of arbitrators: 38%
- Confidentiality and privacy: 33%
- Neutrality: 25%
- Finality: 18%
- Speed: 10%
- Cost: 2%
- Other: 2%
Prevalence of Arbitration
Preferred Mechanisms for Resolving International Disputes
Source: Queen Mary University / White & Case Survey 2015

Chart 15: Why are certain institutions selected the most?

- Reputation and recognition of the institution: 62%
- Previous experience of the institution: 52%
- Seat chosen for the arbitration: 36%
- Particularities of the contract/type of dispute (likely to arise): 33%
- Corporate policy, standard terms and conditions: 30%
- Law governing the substance of the dispute: 23%
- Personal connection to the institution: 19%
- Imposed by the counterparty: 18%
- Recommendation of external counsel: 13%
- Other: 7%

Percentage of respondents (respondents were able to select multiple answers)
Why arbitrate international disputes?

- International neutrality
- International enforcement: New York Convention
- Flexibility / party autonomy
- Expert arbitrators
- Privacy / Confidentiality
- Finality of decisions
Foundations of Modern International Arbitration

New York Convention

UNCITRAL Model Law or compatible laws

Established Arbitration Rules / Institutions

National Laws
New York Convention

- Dates back to 1958
- Over 140 signatory countries
New York Convention

- New York Convention requires national courts
  - to recognize the validity of arbitration agreements subject to specified exceptions
  - to refer parties to arbitration when they have entered into a valid agreement to arbitrate
  - to recognize and enforce foreign arbitral awards subject to a limited number of specified exceptions
- Procedure for enforcing an award varies from state to state since a state enforces awards according to its own rules but must not be contrary to the New York Convention
Grounds for Non-Enforcement under the New York Convention

- Incapacity of party
- Invalidity of the arbitration agreement
- Lack of notice or lack of fairness in the process
- Arbitrator acting in excess of authority
- Constitution of the tribunal or the arbitral procedure was not consistent with the agreement of the parties
- Award not yet binding
- Award has been set aside
- Subject matter of the dispute is not arbitrable
- Public policy
UNCITRAL Model Law

- UNCITRAL Model Law on International Commercial Arbitration
- A model law for adoption as part of domestic legislation
- States have the flexibility to depart from the text
- Model Law designed to work in conjunction with the party autonomy and the arbitration rules – “unless the parties have agreed otherwise.”
- In case of conflict between the arbitration rules and the Model Law, generally the chosen arbitration rules will prevail
- Over 60 countries have arbitration legislation based on the UNCITRAL Model Law
Arbitration Rules

- One of the significant ways parties exercise their autonomy is through the inclusion, in their commercial contracts, of arbitration agreements incorporating institutional or *ad hoc* arbitration rules

- E.g. UNCITRAL Arbitration Rules, SIAC Rules, ICC Rules, HKIAC Rules

- Arbitration rules can usually be varied by party autonomy
Role of national laws in international arbitration

- Law governing the parties’ capacity to enter into an arbitration agreement
- Law governing the arbitration agreement and the validity of that agreement
- Law governing the procedure of the arbitration (i.e. *lex arbitri*, usually the law of the seat of the arbitration or the legal place of the arbitration)
- Law, or the relevant legal rules, governing the substantive issues in dispute (i.e. applicable law, governing law or substantive law)
- Law governing recognition and enforcement of the award
Getting Your Arbitration Clause Right

- Issues to consider when drafting arbitration clauses:
  - Scope
  - Choice of Law (governing the dispute / arbitration agreement)
  - Place of Arbitration or seat (law governing the arbitration)
  - Ad hoc or Institutional
  - Number and Choice of Arbitrator
  - Third parties
  - Prerequisites to commencement
Where do you arbitrate?

- Usually neutral country

Is it a contracting state to the New York Convention?

CIArb London Centenary “Safe Seat” Principles

- A clear effective, modern international arbitration law – law recognizes, assists but does not interfere e.g. – interim relief / setting aside

- Availability of court access and an independent competent judiciary with expertise in international arbitration and respectful of the parties’ choice of arbitration as their method of settlement of disputes

- Availability of legal expertise and good counsel and no restrictions on appointment of arbitrators or counsel
Place of Arbitration

- Accessibility and safety – easy access free from unreasonable constraints on entry, work and exit for parties, witnesses, counsel and arbitrators.

- Facilities – availability of infrastructure for arbitration – hearing rooms, hotels, transcription services

- Ease of communication

- Education – commitment to education of counsel, arbitrators, the judiciary, experts, users and students of the character and autonomy of international arbitration and to the further development of learning in the field of arbitration
Place of Arbitration

- Ethics – professional and other norms which embrace a diversity of legal and cultural traditions, and the developing norms of international ethical principles governing the behaviour of arbitrators and counsel e.g. – IBA guidelines on Conflicts of Interest / on Third Party Representation

- Enforceability – adherence to international treaties and agreements governing and impacting the ready recognition and enforcement of foreign arbitration agreements, orders and awards made at the Seat in other countries

- Immunity – a clear right of arbitrator immunity for civil liability or anything done or omitted to be done by the arbitrator in good faith in his or her capacity as arbitrator
Place of Arbitration

- Location of evidence and witness
- Costs – of travel, facilities, arbitrators and counsel
- If no seat chosen, usually arbitral tribunal (or in under some rules the institutions) will decide on seat
Ad Hoc or Institutional

- Ad Hoc Arbitration
  - No arbitral institution administers or supervises the arbitration
  - Usually parties select preexisting set of procedural rules designed to govern ad hoc arbitrations (e.g. UNCITRAL Arbitration Rules)
  - Sometimes an appointing authority is designated (e.g. arbitral institutions, courts, individuals)
Ad Hoc or Institutional

- Institutional Arbitration
  - Proceedings are administered by an organization (e.g. SIAC, HKIAC, ICC)
  - Usually in accordance with its own rules of arbitration
Ad Hoc or Institutional

Example of Ad Hoc – UNCITRAL

- Promulgated by UNCITRAL in 1976
- UNCITRAL does not act as an administrator or charge fees
- Designed for use in *ad hoc* international arbitrations
- Provides a tried and tested procedural framework
- Rules of many arbitral institutions are based on these rules
Ad hoc or Institutional

- If institutional, ensure institution is correctly named and rules are incorporated – use model clause where there is one

- No excuse for pathological clauses

- Consider the rules that go with choice of institution

- If *ad hoc*, consider if clause should include detailed provisions for conduct of arbitration e.g. appointment of arbitrators, default provisions, discovery, interim relief
Number and choice of arbitrators

- Usually one or three

- Rules usually have default provisions

- Provide for how arbitrators will be chosen
  - Appointing authority
  - Based on list

- Also consider appointment of presiding arbitrator (if there is one)
Advantages to institutional arbitration?

- Cost
- Speed
- Support and Guidance
- Arbitrator Selection
- Financial Management
- Enforceability
Advantages to institutional arbitration?

- Use of model clauses – avoidance of pathological clauses
- Incorporation of best practices through continual rules review and development
- Availability of emergency / expedited procedures
- Third parties and joinder procedures
- Challenges to arbitrators
- Availability of commentary on rules, procedure and practice
- Publication of awards
Choosing the Right Arbitral Institution

Which arbitration institution should you choose?

- Internationally recognised institution
- Well developed rules incorporating latest best practices
- Internationally experienced supervisory board or institutional court
- Experienced and sophisticated case management team
Thank You

If you have any questions, please do not hesitate to contact:

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