

# Three truths and international arbitration

**T**he first truth is that most clients don't like litigators. It is not that they don't like the lawyer; rather they do not like litigation because it is usually unanticipated, almost always unwanted, expensive and generally a negative experience. Even if the lawyer wins the case, it is something they "do not want to go through again". This is why clients usually do not want to address and, unless lawyers coerce them, do not pay attention to, a mechanism to cost effectively resolve potential future disputes when they are entering a commercial agreement.

For that reason, it is incumbent on lawyers to take a client through dispute resolution options at the time the commercial deal is done and to include, if appropriate, a sound and cost effective dispute-resolution mechanism.

The second truth is that commercial clients like certainty and as much control as possible. It is possible to give them more control dispute resolution and to give a degree of certainty by including clauses in their commercial agreement providing for arbitration. There are several reasons for this.

First, because arbitration is flexible,

it can be tailored to the particular needs of the parties. They can pick where the proceedings are held, what law governs the proceedings and what rules will be used. They can use an Institution to administer the arbitration or arrange for an ad hoc arbitration (privately organised). They can agree to use, for example, Uncitral rules to protect themselves against a recalcitrant party and to ensure that the arbitration process will be fair and will be completed. The arbitrator can control the timing of the process to accommodate the needs of the parties but at the same time to render an award in as reasonable a short time as possible.

Second, by choosing the "seat" of the arbitration and specifying the rules, there is certainty compared to the uncertainty of attending going before the courts in an unfamiliar country.

Third, they can select an arbitrator or a panel that has expertise in the area of the dispute. This eliminates much time otherwise spent "educating" a judge who may have little or no familiarity with the particular industry, the trade practice, the terminology or the science involved, to give a few examples. There

is more certainty that such an arbitrator will understand the issues and likely in less time.

An arbitrator is not just a person that holds himself out as such. There are rosters of arbitrators who are members of arbitration institutions. There are "Chartered Arbitrators", which are recognised worldwide and are accredited by the Chartered Institute of Arbitrators in London, England. They are certified to conduct international arbitration anywhere in the world.

Arbitration is also confidential and for those who do not want to make public the dispute, arbitration is ideal when compared to public courts systems.

The third truth is that clients want to maximise their profits and, therefore, be cost-effective. Although not always the case, arbitration can be less costly. At least the parties can attempt to control this; for examples, by agreeing to use one arbitrator instead of a panel of three, by choosing a convenient location, by agreeing to streamline the process or to use electronic methods to file documentary evidence and/or to hold teleconference hearings instead of personal attendances.

The trick to all of this, of course, is to get the parties to turn their attention to the issue of dispute resolution at the beginning of their commercial relationship just like they think about tax planning and other commercial terms. And then it is the lawyers' responsibility to canvass these and other options and to draft proper and complete clauses that will provide a sound and cost-effective mechanism to help in the event of a dispute. To do this, commercial lawyers might consider consulting one of those "litigators" familiar with arbitration or consult a Chartered Arbitrator.

For all this, clients may not be grateful at the time but it is another truth that they likely will be in the event they are faced with a dispute.

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