Guide to international arbitration in Europe


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Not every international dispute can – or should – be resolved by international arbitration. There are, however, significant advantages in the vast majority of international business disputes to choosing arbitration over litigation. Consequently, during the past several decades, businesses and states around the world have embraced international arbitration as the preferred means of resolving their disputes.

Despite its broad acceptance, critics sometimes complain that arbitration does not deliver the savings in time and costs its proponents speak of. They also sometimes complain about inattentive or sloppy tribunals, blatantly partisan conduct by co-arbitrators and arbitrary, unintelligible, or simply wrong awards.

These concerns are serious. There are instances where arbitral awards are not delivered for months, or years, after final submissions have been made; where the tribunal is unconscionably careless or incompetent in drafting relief or addressing the parties' arguments; or where an arbitrator is manifestly unable or uninterested in devoting serious attention to the proceedings. These results are unacceptable and diminish the credibility of international arbitration as an effective means of dispute resolution.

Fortunately, these results are anomalies. In the vast majority of cases, tribunals are diligent, attentive and competent. In other cases, parties fail to take advantage of available mechanisms for correcting an arbitral process that appears headed in the wrong direction, whether by adopting a different pleading style, objecting to the pace of proceedings, or the like. Moreover, in at least some instances, criticisms of the arbitral process reflect the loss of a hard-fought dispute, rather than flaws in the arbitral process.

Nevertheless, it is also important to be clear about what international arbitration promises and should not promise. A considerable amount of the criticism of the process rests on exaggerated or misconceived expectations, which are sometimes the result of simplistic or overly-optimistic claims about the arbitral process by its proponents.

Thus, arbitration is sometimes promoted as being faster and less expensive than litigation. In truth, arbitration does not necessarily deliver cost savings or faster results than a first instance litigation in a good national court. It is true that arbitration can be faster and less expensive than litigation (particularly when compared to litigation in a common-law system that allows broad pre-trial discovery or to litigation in some developing states). Arbitration also is less frequently subject to de novo appeals and retrials, which are generally available in national court proceedings in any legal system.

Nonetheless, arbitration can be just as complex, time-consuming and expensive as litigation in a first-instance national court. The simple reality is that a complicated, difficult dispute will, absent unusual circumstances, take a considerable amount of time to resolve in a fair and reliable way. Indeed, in complex and high-value disputes, the users of international arbitration may in fact desire a dispute resolution process that spends significant time and resources evaluating the evidence and arguments to reach the most reliable and informed result possible. In these cases, the problem is not that arbitration fails to deliver savings in costs and time, but rather that these are too often oversold by advocates of the procedure.

International arbitration does offer numerous real advantages to its users, including a neutral forum, the ability to participate in the choice of decision-maker, a measure of control over the procedural conduct of the proceedings, the certainty of having a single, centralised forum for the resolution of disputes, and relative finality and enforceability of the award. The importance of these factors will vary from dispute to dispute, but they generally make arbitration a better forum for the resolution of international disputes than litigation in any one country's courts.

Perhaps the most significant advantage of international arbitration is that it provides a neutral forum for the resolution of international disputes. When parties to a contract are from different countries, they will often be unable to agree on a forum selection clause selecting a particular national court. Parties often resist agreeing to litigate in their counterparty's domestic courts, which may be perceived as biased, or at least as providing the counterparty with an advantage. International arbitration offers the parties a neutral forum, where neither has the benefit of appearing in front of a familiar or sympathetic decision-maker. This is a significant advantage, particularly in transactions involving parties from less-developed jurisdictions or from those whose courts have a reputation for bias or arbitrary decision-making.

Another significant advantage of international arbitration is that it allows the parties to influence the selection of the decision-maker. In most international arbitrations, the parties either choose the arbitrators (or at least some of them) directly or the method by which they should be selected. This allows the parties to ensure that their disputes are decided by men or women with appropriate expertise, experience and judgment. While parties may not always be happy with their choice of arbitrators or with the quality of their decision, their role in the selection of the arbitrators generally results in decisions in which they have more confidence than if the decision had been made by a random judge in a foreign court.

Similarly, arbitration offers its users a measure of control over the decision-making process. The consensual, contractual nature of arbitration gives the parties great autonomy to agree upon the procedures by which their dispute is decided. Again, the parties could not always be satisfied with the results of the procedures they have chosen, but arbitration clearly offers significantly more procedural flexibility and scope to control the process than national court litigation.

Finally, arbitration also helps to prevent lengthy disputes about the proper forum for resolving the dispute and the enforcement of any resulting judgment. Although there can be multiple parallel proceedings even in the face of an arbitration clause, the parties' agreement to arbitrate is a powerful tool that can be used to defeat those actions. Under the New York Convention, as well as the European Convention and Inter-American Convention, international arbitration agreements enjoy a significant 'enforceability premium', as compared with forum selection clauses, making arbitration a more reliable means of selecting a dispute resolution forum. Likewise, while there can be – and often are – disputes concern-

ing the enforcement of arbitral awards, the New York Convention and its counterparts generally make those awards significantly more enforceable than comparable judgments from national courts.

In sum, any significant international business dispute has the potential to be slow, expensive, and distracting, and there is always a risk that the dispute will be decided wrongly. International arbitration cannot eliminate these risks. What international arbitration does, however, is to reduce these risks by offering its users a neutral forum, decision-makers of their own choosing, procedures tailored to fit their dispute, and tools for enforcing both their agreed upon choice of forum and the resulting judgment. These advantages make arbitration much like democracy: the least bad of the available alternatives.

At the same time, counsel and arbitrators owe it to their profession to take increasingly seriously the criticisms levelled against the arbitral process. Changing political climates have increased scrutiny and criticisms of international arbitration, particularly in the investor–state context. It is essential that these criticisms be addressed. At least as important, it is in the interests of the international arbitration community and those it serves that the arbitral process be continually improved, both systemically and through the diligence and care of lawyers and arbitrators in individual cases. That, as much as anything, will ensure that international arbitration continues to attract and retain the confidence of companies and states around the world.