The Art of Arbitration

Exploring efficiency in international dispute resolution

Virtual Round Table Series
Disputes Working Group 2017

The Art of Arbitration

Exploring efficiency in international dispute resolution

Commercial disputes are common in business, with many organisations handling multiple disputes on a domestic or international level in the course of their activities. The efficient resolution of those disagreements is crucial to ensuring costs and time are kept to a minimum, allowing the companies involved to focus on their primary operations without the distraction of a complex dispute.

Litigation is acknowledged as a difficult, time-consuming and expensive process, often requiring multiple hearings and appeals that can alter resolution timescales significantly. As a result, arbitration has become established as a viable alternative, often preferred because of its efficiency and transparency.

There are a number of high profile arbitration institutions, such as The UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), that have an established set of rules and procedures accepted and implemented by all signatory countries. This level playing field has given organisations greater confidence to engage in international trade and commerce, without the spectre of costly litigation proceedings in a foreign legal system they have minimal understanding of.

With this in mind, IR Global brought eight members of its Disputes Group together to discuss arbitration procedures and their application to international commercial disputes. The aim of this feature is to give members and their clients practical insight into the specifics of arbitration in major jurisdictions across Europe, the Americas and Asia. We also highlight major arbitration institutions including The New York Convention, The Panama Convention, FIAA, AAA, ICC and CIETAC.

The following discussion involves IR Global members from the United States – New York and Florida, England, Austria, The Netherlands, China, The Cayman Islands and Spain.

The View from IR

Ross Nicholls

BUSINESS DEVELOPMENT DIRECTOR

Our Virtual Series publications bring together a number of the network's members to discuss a different practice area-related topic. The participants share their expertise and offer a unique perspective from the jurisdiction they operate in.

This initiative highlights the emphasis we place on collaboration within the IR Global community and the need for effective knowledge sharing.

Each discussion features just one representative per jurisdiction, with the subject matter chosen by the steering committee of the relevant working group. The goal is to provide insight into challenges and opportunities identified by specialist practitioners from the specific working group featured.

We firmly believe the power of a global network comes from sharing ideas and expertise, enabling our members to better serve their clients' international needs.

ENGLAND

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Howard Colman is Founding Partner and Head of Commercial Litigation and Dispute Resolution at Colman Coyle.

He advises on a wide variety of commercial disputes and acts for a range of clients from private individuals to major Plcs, specialising in commercial litigation including construction and property disputes and professional negligence.

In addition, he is a Fellow of the Chartered Institute of Arbitrators FCIArb, an ADR Group trained mediator and a member of the TeSCA Specialist Construction Mediators Panel.

Howard's experience as a litigator has involved acting for clients in a number of landmark and test cases and encompasses litigation at all levels of Court from County Court to the Supreme Court. Howard also heads the International Desk at Colman Coyle.

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Gary Davidson is a high-stakes international litigator and arbitrator with noted successes in state and federal courts and before the American Arbitration Association, the ICDR, ICC and other institutional arbitral bodies. He is a frequent speaker and author on international law.

Gary currently sits on the Executive Council of the Florida Bar's International Law Section and is a former adjunct professor of law at Nova Southeastern University School of Law. He was also a visiting Lecturer in International and Comparative Law at the University of Tartu, Estonia, and Comenius University, Slovakia.

He is a former liaison to Slovakia for the American Bar Association Central and Eastern European Law Initiative, providing advice and assistance to various Slovak governmental and judicial organs at independence.

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Klaus Oblin specialises in commercial and civil law-related disputes. He also acts as counsel and arbitrator in arbitrations under the rules of bodies such as the International Chamber of Commerce (ICC), the International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC), Swiss Rules and UNCITRAL.

He regularly provides advice with regard to various matters of commercial, contract and construction law and the establishment of businesses.

Klaus established Oblin Melichar in 2004 and before that he worked for Freshfields Bruckhaus Deringer and Vienna McDougal Love Eckis Smith & Boehmer.

He is a member of the ICC, International Centre for Dispute Resolution (ICDR) Austrian Arbitration Association (ArbAut), German Institution of Arbitration (DIS) and the International Bar Association (IBA).

CAYMAN ISLANDS

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Cherry Bridges is the partner in charge of the Litigation and Disputes Resolution Department at Ritch & Conolly. She is a Barrister at-Law called in England & Wales (1982), Hong Kong (1983) and an Attorney-at-Law admitted in the Cayman Islands (1987).

Cherry has 34 years' experience acting in a wide range of complex international litigation and arbitration relating to insolvency, liquidations and restructuring of banks, hedge funds and private companies, corporate shareholder disputes, trusts, insurance, contract, asset-tracing and enforcement of foreign and domestic judgments.

Her 49 cases reported in the Cayman Islands and Hong Kong Law Reports are listed on Ritch & Conolly's website at www.rc.com.ky.

The Legal 500 directory reports client feedback as:

"Team head Cherry Bridges has 'great knowledge of Cayman law and is a problem solver'." (2017)

"Cherry Bridges has considerable experience of civil commercial litigation, is 'a strong advocate for her clients and their interests'." (2016)

"Cherry Bridges is 'a truly exceptional attorney'." (2015)

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Dr Xu Guojian has led of a number of projects that have had significant impact in international legal circles.

He successfully completed a RMB4 billion RMB-USD joint bank loan project for SMIC and led the team that completed the acquisition of Shandong Airlines by Air China Group.

Dr. Xu acts as a legislative and consultative expert to the Standing Committee of the People's Congress of Shanghai. He is also the Vice Chairman of the China International Private Law Association, and an initiating member of the WTO Sub-committee of the National Bar Association. In addition, he is a member of the China Law Association and the Sino-German Jurists Association.

Dr. Xu is a member of the Shanghai Interpreters' Association and is a qualified translator of both English and German.

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Daniel Jimenez specialises in complex litigation matters, both nationally and internationally, and has taken part in several of Spain's most important litigation and arbitration cases of recent years.

He has extensive experience in disputes in the field of mergers and acquisitions, commercial disputes, intellectual property rights, partnerships, financial products and foreign judgments and awards. He is also a specialist in white collar criminal litigation.

His main sectors of activity are banking, hotels and tourism, IT, construction and energy. He has acted for multinational companies such as HP, IBM, Barclays, Santander, Goldman Sachs, Accor, Meliá Hotels International, Acciona and Globalia.

He is member of Spanish Arbitration Club and Madrid Bar Association.

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Leonard ('Len') Rodes represents companies and executives in sophisticated business dispute resolution. Len has over 30 years of experience litigating and arbitrating cases arising in a wide variety of business contexts and involving myriads areas of law.

Len's recent clients have included commercial real estate developers and investors, hedge fund managers, private equity firms, foreign securities dealers, Chinese manufacturers, a Hong Kong trading company, a New York-based public relations firm and several Norwegian municipalities.

Len and his partners have extensive experience with various alternative dispute resolution processes, including arbitration administered under AAA, UNCITRAL, and FINRA rules, and mediation, both court-annexed and private.

On a pro bono basis, Len is a mediator in the New York Supreme Court (commercial division) ADR program. He is also an officer and general counsel of a charity devoted to assisting victims of human trafficking.

THE NETHERLANDS

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John Wolfs, is a thoroughbred entrepreneur and founder of Wolfs Advocaten. He worked as an attorney for almost 25 years for leading firms in Washington DC and Rotterdam, before founding Wolfs Advocaten in Maastricht 14 years ago.

The strategic geographical situation of the city of Maastricht as well as his Maastricht roots, brought him back to the city.

John is well known for his creativity, specialist (sector) knowledge and the top quality service he provides. He is direct, proactive, constructive and able to analyse situations quickly. He is also pragmatic. John Wolfs often lectures in the field of (international) transport and customs law, (international) commercial law and insurance law.

In his private time, John enjoys playing squash and running. He has completed marathons in New York, San Francisco and Amsterdam.

Round Table Q&A

QUESTION 1

What requirements exist for recognition and enforcement of domestic and foreign awards in your jurisdiction? What grounds exist for refusal of enforcement?

Cayman Islands –Cherry Bridges (CB) In the Cayman Islands we have a specific enforcement law (the Foreign Arbitral Awards Enforcement Law (1997 Revision) which gives effect to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (The New York Convention). This law provides a mechanism for enforcement of Convention awards in the Cayman Islands. In addition, The Arbitration Law (2012 Revision) provides a regime for the enforcement of domestic awards and interim measures.

Enforcement of international awards depends on whether the award is provided by a jurisdiction that is a signatory to the New York Convention.

The court can refuse to enforce the convention for a number of reasons, including if:

- A party to the arbitration agreement was under incapacity
- The agreement is not valid under the law of the forum
- A party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings
- The award deals with a dispute not contemplated by the terms or scope of the submission to arbitration
- The tribunal was not properly or validly composed
- The award was not binding or has been set aside by a relevant and competent authority

England –Howard Colman (HC) That is very similar to the position in England. The grounds for refusing to enforce an award are set out in section 103 of The Arbitration Act 1996, and are almost identical to those already mentioned.

There is also a right to refuse an award on public policy grounds, but the reality is that we are signatories to the New York Convention and the English Courts are always in favour of upholding arbitration awards, unless there has been some serious irregularity or, for example, corruption. Virtually every case that has attempted to oppose arbitration awards being recognised and enforced has been unsuccessful.

Austria –Klaus Oblin (KO) Yes, it's similar in Austria. One can bring a legal action to set aside an arbitral award (both awards on jurisdictions and awards on merits) on very specific, narrow grounds.

- the arbitral tribunal accepted or denied jurisdiction although no valid arbitration agreement exists
- a party was incapable of concluding an arbitration agreement under the law applicable to that party
- a party was unable to present its case (e.g. it was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings)
- the award concerns a matter not contemplated by, or not falling within the terms of the arbitration agreement, or matters beyond the relief sought in the arbitration
- the composition of the arbitral tribunal was not in accordance with articles 577 to 618 CCP or the parties' agreement
- the arbitral procedure did not, or the award does not, comply with the fundamental principles of the Austrian legal system (ordre public)
- if the requirements to reopen a case of a domestic court in accordance with article 530(1), Nos. 1 to 5 of the CCP are fulfilled

For example:

- the judgment is based on a document that was initially, or subsequently, forged
- the judgment is based on false testimony (of a witness, an expert or a party under oath)

John Wolfs pictured during the 2017 Dealmakers' conference in Barcelona

Spain –Daniel Jimenez (DJ) Here in Spain as well. It's very difficult to oppose a foreign or domestic award.

Netherlands –John Wolfs (JW) This is true in The Netherlands also. There was a new arbitral law enacted on Jan 1st 2015, giving grounds to annul arbitration awards, but these grounds relate to specific positions. They mainly relate to a situation where someone has not been party to the arbitration agreement, or the wrong party has been given the award. As a result, it is not a significant change from the way most European jurisdictions implement grounds for enforcement.

USA –Gary Davidson (GD) In US law we of course recognize awards granted under the New York Convention, but our Federal Courts also recognise any awards under the Inter-American Convention on International Commercial Arbitration 1975, also known as the Panama Convention.

A dispute must be considered commercial to fall under the New York Convention, and there are situations where enforcement might be denied. One thing unique to the US though, is that several states have created codified separate statues governing both domestic and international arbitration.

Florida has codified the Florida Foundation for International Arbitration Act (FIAA) which is based on the UNCITRAL rules.

We have also gone as far as to appoint several state trial court judges here in Miami who are designated to handle international arbitration issues as they come up. They have developed expertise equivalent in some cases to that found in the Federal Courts.

Cayman Islands –CB What are the criteria for determining whether you apply to the State or Federal Courts?

USA –GD A claim dealt with under the FIAA has to be an international dispute. There is a strategy advantage in this particular statute, giving flexibility to parties attempting to structure their dispute resolution. It is designed to ensure that Florida is a welcoming venue for any type of international dispute that might arise, and is particularly focused on attracting arbitrations involving Latin America parties.

USA –Leonard Rodes (LR) Recognition and enforcement in New York State and Federal Courts of arbitration awards is governed by state and federal statutes.

Both statutes permit arbitral parties to ask a State or Federal Court to 'confirm' an arbitration award, transforming it into a judgment, which in turn will provide the arbitral winner with all of the judgment enforcement mechanisms available to court judgment creditors generally.

The same statutes permit the arbitral loser to 'vacate' the arbitral award, meaning to invalidate it and require re-submission to the arbitrators, but the grounds for invalidation are severely limited. To invalidate an arbitration award, the loser would have to demonstrate that it was prejudiced by corruption or fraud in the arbitral process, or that the award is irrational, violates a strong public policy, or clearly exceeds an express limitation on the arbitrators' authority.

An additional ground for vacating an award is the 'manifest disregard doctrine.' Under that doctrine a court can vacate an arbitration if the arbitrator knew of a governing legal principle yet refused to apply it and the principle was well defined, explicit and clearly applicable to the case.

With respect to international arbitrations, we must, of course, consider the relevant treaties; specifically, the New York and Panama Conventions.

Spain –DJ Recognition and enforcement in Spain of international arbitration awards is governed by the New York Convention.

China –Xu Guojian (XG) I am currently at a convention in The Hague concerning the negotiation, representation and enforcement of foreign judgments. We have had many intensive discussions on this.

With respect to domestic awards, as long as it is a valid award, it is enforceable. The applicant is required to submit some proof and documents such as the arbitration agreement.

If a domestic arbitration award involves foreign elements, the court can refuse the award on a number of grounds, including lack of an arbitration clause in the contract in question, failure to inform the respondent of the arbitration process or if the arbitration procedure does not comply with the arbitration institution in question.

With respect to foreign awards, the court will enforce it according to the New York Convention. The applicant is required to submit relevant materials and documents to the court according to the convention.

Netherlands –JW It's interesting for Europeans to hear a Chinese viewpoint, because I get different views on whether or not an arbitral award based on an arbitration clause will be executed in China. You say it is very likely.

China –XG Yes, that's not a problem, there are only a few circumstances under which foreign arbitral awards are refused.

Cayman Islands –CB Do you regard an arbitral award made in Hong Kong as a domestic award, in the light of the 1997 handover?

China –XG No, Hong Kong or Macao-related awards are classed as international.

Austria –KO In my personal practice, I have come across many different situations in China, and I find it depends on which province you are in. To enforce an international award in Beijing is not the same as trying to do it somewhere else. This is of major interest, because when a client asks whether or not to include an arbitration clause in a contract involving China, you can't be sure. At the end of the day, we all know that China has signed the New York Convention, but it's another thing trying to enforce a claim.

China –XG Have you had personal experience of this?

Austria –KO Yes, on more than 10 occasions. In Shanghai or Beijing things run perfectly, but once you get into the provinces it can be a different story. You might end up having no explanation for the client about why the claim wasn't being enforced even though you had told them China is a signatory to the New York Convention.

China –XG Next time, perhaps i can help.

QUESTION 2

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

England –HC In England, the Tribunal Court would be expected to exercise discretion on the basis that the winner would generally recover their costs. A recent court decision in England on this point was interesting, where a party to a major arbitration case had increased costs due to third party funding. That was held to be recoverable from the losing party, which is completely opposite to what we would expect from the litigation process in England.

USA –GD In the absence of express contractual language in an arbitration agreement, the likelihood of recovering attorneys' fees in a US-based arbitration, whether international or domestic, is quite low. Allocation of costs and fees depends on three principal factors.

- The pertinent provisions of the contract
- Which jurisdiction's law is being applied
- The provisions of relevant State statutes

There are states that decline to give arbitrators the power to award attorney fees in an arbitration. That is changing, but, in the absence of contractual agreements on fees, claimants may have a serious problem recovering them. Some State statutes specifically provide for fees, but you really should address it in the parties' contract. Be mindful of including attorney fees and cost provisions in the first instance.

Austria –KO The arbitral tribunal is granted discretion in the allocation of costs, but must take into account the circumstances of the case, in particular the outcome of the proceedings. As a rule of thumb, costs follow the event and are borne by the unsuccessful party, but the tribunal can also arrive at different conclusions if this is appropriate to the circumstances of the case. If one party is launching the arbitration request and the other party wants to resolve the issue, it shows there is a major intent to settle the dispute. In that case costs could be shared.

England –HC That would be completely contrary to the English way of thinking. We have the facility of making sealed offers, so that if a defendant is being sued for, say, GBP100 million and knows they are going to lose, they can make a sealed offer. If they do better than the offer, they will recover the cost from the other side, even though they lost the arbitration.

USA –GD Interesting, we have that procedure in litigation but not in arbitration.

England –HC Sealed offers are used regularly in English arbitration.

USA –LR In New York, the issue of whether and how costs are awarded and allocated depends on a variety of factors, including the terms of the parties' arbitration agreement, or the rules of the administrator they have chosen to govern their arbitration. Arbitrators have discretion to allocate attorney fees, but the usual rule is that each party bears its own attorney fees, in the absence of contract or statutes.

There is an interesting wrinkle in New York which states that, even if the underlying agreement is silent on fee shifting, if both a claimant and a respondent expressly ask for attorneys' fees to be awarded, the arbitrators will regard the mutual requests as a binding agreement authorising such an award.

China –XG In China, an arbitration tribunal has the power to determine the allocation of arbitration costs.

Dr. Xu Guojian pictured during the 2015 'On the Road' event in Shanghai

Normally, the parties will negotiate the provision stipulating the fees and/or costs related to the arbitration in the arbitration agreement or arbitration clause. Where there is no such stipulation and the case is resolved through the mediation of the arbitration tribunal, the relevant arbitration fee will be negotiated between both parties. In a case where a tribunal ruling is required, the losing party will bear the arbitration fee.

Spain –DJ Normally the winning party has the right to be compensated for costs in Spain, particularly if a large portion of the claim prevails. This is not a mandatory rule but a common practice in internal arbitration cases.

Austria –KO What kind of law is that?

Spain –DJ It's a system rather than a law that is ruled in our civil procedural law. Lawyers in national arbitration cases usually rule that the winning party gets compensated on cost. It's practice, not obligation, but Spanish arbitrators tend to apply this rule.

Cayman Islands –CB Our position in the Cayman Islands is very similar to England, in that the tribunal has complete discretion with respect to costs, unless expressed in an agreement. Generally speaking, the arbitrator will order the losing party to pay the costs of the winning party.

Austria –KO Would you tell your client that you are relying on the arbitrator to stick to that rule and behave as they normally do? It is difficult to know what they are going to do, in terms of cost of allocation, if they are not bound to anything.

England –HC If the arbitrator just said they would order each party to pay their own costs, without reasoned grounds, then that would be challengeable as an irregularity.

Spain –DJ I agree.

Austria –KO Would you be able to challenge the award?

Cayman Islands –CB Even though they have discretion, they have to exercise it fairly and reasonably, otherwise they can be challenged.

Netherlands –JW In The Netherlands, arbitrators decide on the costs. They are mostly awarded in favour of the winning party, and paid by the losing party. Arbitrators sometimes award costs in full, for example based on the time spent, but sometimes mitigated, in line with regular non-arbitration court's awards.

The cost of arbitration proceedings depends on what arbitration institution we are discussing. In The Netherlands the best known is the International Chamber of Commerce (ICC), which requires payment of a non-refundable filing fee of $5,000 (US), credited to the claimant's portion of the costs.

ICC administrative expenses are based on the amount in dispute and shall normally not exceed the maximum amount foreseen in the scale of Article 2(1) in the appendix of the ICC Mediation Rules as follows:

AMNT (USD)	FOR AMOUNTS IN DISPUTE
$5,000	up to and including $200,000
$10,000	between $200,001 and $2,000,000
$15,000	between $2,000,001 and $10,000,000
$20,000	between $10,000,001 and $50,000,000
$25,000	between $50,000,001 and $100,000,000
$30,000	over $100,000,000

Where the amount in dispute is not stated, the administrative expenses may be fixed by the Centre at its discretion. The Centre takes into account all circumstances of the case, including indications regarding the value of the dispute. However, normally, costs don't exceed $20,000 (US).

QUESTION 3

Speed of decision is often talked about as an advantage of arbitration in comparison to litigation, partially because of the limited ability to appeal decisions. Is this the case in your jurisdiction?

Spain –DJ It is much quicker to go to arbitration in Spain, where awards usually take a maximum of one year. Litigation follows a different system, with the process of appeals and Supreme Court rulings meaning it can take up to six or seven years in some cases to get a result. It is always much faster to go through the arbitration process.

England –HC It's much less clear cut in England. If I were to litigate a construction dispute in the technology and construction courts, I could have a trial within four to six months, with any appeal adding a maximum of another 12 months.

Arbitration timescales depend on the size of the tribunal and the availability of arbitrators. Often, if there are three or more arbitrators, the date has to be re-fixed causing lengthy delays in finding a convenient date – as a result there isn't always a great deal of difference in the timelines.

Netherlands –JW Is it possible for the parties themselves to delay the procedure, for example because of settlement negotiations, or are they bound to comply strictly with the terms set by arbitrators?

England –HC I don't know of any arbitrators who would refuse parties time for negotiation and mediation. Arbitrators usually want to follow the wishes of the parties involved.

Netherlands –JW In Holland, it is possible to extend or delay a procedure because of settlement negotiations. In general construction disputes, the arbitrators are usually very fast and skilful, whereas international trade disputes take longer.

As a general rule though, arbitration is much faster than regular court proceedings. A District Court will take a minimum of one to two years in a complex litigation case, including hearing witnesses. If it goes to the Court of Appeal and the Supreme Court, a claim can take four to six years.

England –HC Appeals to the Supreme Court are extremely rare, no one has the right to appeal to the Supreme Court in England and they will normally only be given permission if it's a matter of public interest.

USA –GD My sense in the US is that it is difficult to compare and contrast arbitral award speeds with litigation. In some ways it greatly depends on whether, and to what extent, discovery is permitted in the arbitration. I have been in arbitrations where the only discovery permitted was the exchange of documents. Contrast this with a situation where the parties are permitted to take unlimited depositions or sworn statements under oath, which can add a year or more of time to a complex case.

It also depends on how many arbitrators are involved. Generally speaking, a relatively simple arbitration with up to three arbitrators and limited discovery should take somewhere between 14 months and two years to complete. There would be a need to obtain confirmation of the award with the court and that takes additional time, and if it's contested that can take almost as long as the underlying arbitration.

Gary Davidson pictured during the 2016 Annual Conference in Amsterdam

USA –LR I think the speed advantage is still valid in the US, at least as between arbitration and litigation in New York, for three reasons.

- Arbitration proceedings can usually commence quickly if no parties challenge the arbitrability of the dispute, whereas in litigation it is often the case that pre-answer motions delay things for months.
- The limited nature of judicial review means that most arbitrations, even complex ones, can be completed in a year or less, whereas a business litigation in New York takes between one and four years.
- Discovery opportunities in arbitration are far more limited and more tightly overseen than is the case in litigation.

The speed advantage of arbitration is particularly clear compared to litigation in New York state court, because of the judicial review issue. While Federal Courts and many other State Courts (including Florida) observe a "final judgment rule," meaning that you can only appeal following the final judgment, New York state courts allow almost any interim order to be appealed. That can, and often does, slow the entire case.

As a result of these factors, I would say that arbitration is generally much speedier than litigation in New York.

Austria –KO In Austria we do not allow appeals or reviews in the arbitration process. Awards can be challenged, but there is no Appellate Court to review the merits of a case. That would be my main argument in terms of the speed of arbitration versus litigation.

In European litigation, you may have one hearing lasting for two or three days, but you may need to postpone and reschedule until all witnesses are heard, which could take years. In arbitration you don't reschedule, you do it all at once in the time period set. As a result, arbitration is faster in Europe than regular litigation. The positions are never an issue in commercial arbitration, and we don't do pre-trial investigation.

The major risk is that if a party doesn't agree with the arbitrator's judgment, it is almost impossible to challenge the award.

Cayman Islands –CB The question of speed depends on the subject matter and complexity of the dispute, the availability of arbitrators and the availability of the parties involved. Defendants can try to employ delaying tactics by, for example, not complying with discovery or failing to comply with an agreed timetable.

My experience in the Cayman Islands is that we do not really have arbitrators available on the island, so we often fly people in from England or New York to deal with cases. If it's a local arbitration, a construction matter, for example, then it could be dealt with in a matter of months, but with an international arbitration there is scope for matters to be delayed.

Under our Arbitration Law, the tribunal is obliged to conduct proceedings without unnecessary delay or expense, but the practicality of finding three arbitrators who are all free at the same time can be challenging.

Spain –DJ I would say arbitration is much faster than regular court proceedings in Spain. Even if it is a complex case, you can expect to have an award rendered within 10-16 months. In court, a first instance judgment would take longer and you then have two potential appeals, one to the Supreme Court. This could extend the length of a civil case for five years or more.

China –XG In China arbitration is generally much faster than normal litigation because of the limited ability to appeal decisions. It depends on the different institutions, but an arbitration hearing should be completed within six months to one year. Litigation proceedings can take much longer – up to two years.

USA –GD If the arbitration provision of the contract itself does not provide for the arbitral panel to decide suitability for arbitration, it can cause delays in US arbitration hearings. If there is nothing in the contract to stipulate that the arbitrators can decide that suitability, then, in case of a dispute, the court has to be petitioned to do it by default.

England –HC What if you adopt a specific institution's rules?

USA –GD That's sufficient, but I would still put it in the contract.

QUESTION 4

How is an arbitration hearing held under the most popular institutions in your country?

USA –GD Most arbitration rules commonly used in the United States allow for discovery and the presentation of one's case and defence. If this isn't specified, then the arbitration rules will provide power for the arbitral tribunal to guide that process to protect each party's ability to present its case, but at the same time minimise unnecessary expenditure of time and money.

For example, The American Arbitration Association (AAA) provides for a preliminary hearing where the parties basically map out the schedule for the arbitration process.

The scheduling order that comes from this meeting will outline points such as length of the proceeding, length and timing of the presentation of briefs and the timing and duration of final hearings. It will also detail how evidence will be collected and presented.

The order allows both parties, as well as the arbitral tribunal, to obtain a clear picture of the entire process.

USA –LR In a commercial arbitration administered by the AAA or JAMS, the evidentiary hearing proceeds similarly to a court trial. The claimant presents their case, offering evidence through witness testimony and documentary exhibits, then the respondents follow.

Interestingly, in international arbitrations administered by the AAA, arbitrators are increasingly permitting or requiring parties to present direct evidence in the form a sworn written statement, delivered to the adversary and the panel in advance of the hearing. This means that the live testimony at the hearing begins directly with cross-examination. This procedure is generally not followed in American courts, and represents an example of the efficiencies that are available in arbitration.

England –HC We have that procedure in litigation in the UK and it is often adopted in arbitration. Witness statements stand as evidence in chief, and you don't ask your own witness any questions at the beginning. This does promote speed, but also can increase expense in making sure you have crafted the witness statements beforehand to cover everything you want to say in the words of the witness.

Spain –DJ In Spain, witness cross-examination is done orally, so in national arbitration hearings witnesses are just called up to speak at the hearing. There are no written statements. In international arbitration cases, it is usually acceptable to have written witness statements.

China –XG In my jurisdiction, the most popular arbitration institution is the China International Economic and Trade Arbitration Commission (CIETAC). A typical hearing in CIETAC, and other arbitration institutions used in China, consists of four parts. An opening statement is followed by presentation and examination of evidence. The evidence is then debated before a closing statement is issued.

For evidence presentation, one party chooses evidence and the other party examines it item-by-item and states opinions with respect to legitimacy and relevance. In the case of witnesses, the hearing parties directly examine them, then the other party cross-examines and the tribunal can also ask questions.

Cayman Islands –CB The first stage is choosing the arbitrator, before we can begin with the preliminary arbitration proceedings. The beauty of arbitration is that you are not tied by the usual procedures of court rules and, depending on the subject matter, you can design the most efficient way of getting the end result by, for example, agreeing to restrict expert evidence or the amount of discovery.

Netherlands –JW The most popular institutions in The Netherlands are the Dutch Arbitration Institute (NAI) and the ICC. Furthermore, we have TAMARA for transport law issues and the Council for Arbitration (Raad van Arbitrage Voor de Bouw) for construction or real estate disputes.

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