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UK Contract? Today is the Day to Review Your Dispute Resolution Provisions

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> Whether you are a regular user of arbitration, a default user of your local courts or pick and choose a forum depending on the deal, it always pays to take a cold look at those choices. Do they still work for you? Will they work in the future when a dispute arises? Have you taken into account developments in law and current best practice?

Today is the day to review your dispute resolution (**DR**) provisions. Why? We give you **5 good reasons**.

1. Brexit (aka enforcement and service)

The UK left the EU on January 31, 2020, and the current transition period is due to expire on December 31, 2020. After this date, EU law ceases to apply within the UK unless expressly preserved (and the terms of any future deal are still under debate). The result is that UK judgments may no longer be automatically enforceable in EU Member States and vice versa. Enforcement will still be possible but local law procedures, such as an action on a debt, are typically more expensive and less certain.

The enforcement of arbitration awards, however, is largely unaffected by Brexit. All EU jurisdictions and the UK are parties to the New York Convention, which severely limits the grounds to challenge the enforcement of an arbitration award.

So, if you intend to do cross border deals or trade post Brexit within the EU and have previously relied on national courts, arbitration could be a good option.

If you do stick with national courts, ensure parties appoint a local process agent to accept service of proceedings as the EU Service Regulation with its simplified service options may no longer apply starting in 2021.

2. The post-pandemic dispute resolution landscape (aka speed and cost)

Despite the English Courts' valiant attempts to operate virtually and with social distancing, we predict that once business as usual resumes, there will be a significant backlog of cases leading to lengthier times to trial.

Arbitration may provide quicker resolution of disputes in these circumstances. Tribunals can be more flexible, being able to adopt paper only processes, virtual hearings and other procedural measures to streamline the process and reduce costs. The lockdown has shown this, with common arbitral rules providing suitable and sufficient powers to tribunals, and the market collaborative in creating and pooling resources (see, for example, the Virtual Arbitration forum).

Our experience of standard commercial claims is that costs are largely comparable between court proceedings and arbitration. It has long been a common fallacy that arbitration is cheaper than the English Courts. Post-pandemic, however, if arbitrators and parties fully embrace the new working practices and the technology available, the myth might become reality.

3. Your counterparty is (aka your negotiating position)

More and more parties are using arbitration.

The LCIA's 2019 statistics show a steady rise in the use of commercial arbitration, including significant growth in banking and finance sector cases (which sector has traditionally been reluctant to embrace arbitration). Common agreements giving rise to disputes were loan and facility documents, service agreements, sale of goods agreements, shareholder and JV agreements and SPAs.

If your counterparty proposes arbitration, will you be prepared to accept this?

Equally, if asked to agree to the national courts of another jurisdiction, do you understand what this means for you?

Having a house position on suitable forums or even a list of ordered preferences can help decisions be made promptly and confidently.

4. Best practice changes (aka avoiding satellite litigation)

The English Courts regularly consider DR clauses. Will yours stand up when you need them to, or will they risk satellite litigation about their applicability and scope?

Some recent cases have highlighted how important it is to:

- make an express choice of governing law applicable to an arbitration agreement or at least understand that the choice of arbitral seat will dictate the relevant applicable law (*Enka Inset ve Sanayi AS v. OOO Insurance Co Chubb*, which we wrote about here).
- consider carefully how different DR mechanisms in related contracts are intended to work together. Make it express and avoid contradictory or competing clauses *(see Albion Energy v Energy Investments, which we wrote above here; as well as Airbus SAS v Genberalia Italia SPA [2019] EWCA Civ 805 and BNP Paribas SA v Trattamento Rifiuti Metropolitani SPA [2019] EWCA Civ 768).*
- decide whether the Court is able grant emergency pre-action relief or whether such a procedure is only to be available under the applicable arbitral rules (*Gerald Metals SA v Timis & Or* [2016] EWHC 2327).

We recommend a periodic review of standard clauses and house choices to check they are still fit for purpose.

5. Your needs change (aka never assume)

In a post-Brexit post-pandemic world, you may be looking to new jurisdictions. While arbitration is a common choice for cross border deals due to the ease of enforcement, there can be traps for the unwary:

- Not all jurisdictions will uphold an asymmetric jurisdiction or arbitration clause (where one party is bound to sue in a designated jurisdiction and the other is not).
- Some jurisdictions (such as China) require an arbitration to be administered by an arbitral institution, so ad hoc clauses are unenforceable.

Similarly, you may be tempted in times of uncertainty to require some form of ADR in your DR clause. These are often drafted as multi-tier clauses. A failure to comply with such clauses in full may have significant consequences. While a national court has inherent jurisdiction, it may consider agreed pre-court steps to be directly enforceable – for example, the English Court has held parties to an agreement to mediate, staying a claim to allow a mediation to take place (*Ohpen Operations UK Limited v Invesco Fund Managers Limited* [2019] EWHC 2246 (TCC)). If your final stage is arbitration, earlier stages can act as pre-conditions to the Tribunal having any jurisdiction at all.

Our top tip – make any requirements clear, express and subject to a time limit.

As ever, we’re here to help. Please contact Dorothy Murray or your usual Proskauer lawyer.

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