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Arbitration clauses in international contracts

Commercial contracts often specify that the courts of a particular country (and only those courts) are nominated to determine any and all disputes which may arise in relation to that contract. Where that is the case, disputes which cannot be resolved amicably must normally be referred to those courts for a decision. This is known as an 'exclusive jurisdiction' clause.

To give an example, a contract between two English companies will commonly include something similar to the following:

"Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with this agreement".

Exclusive jurisdiction clauses are often sensible to include and provide useful certainty, particularly where the contracting parties and their commercial activities are all based in the same jurisdiction. But what about contracts where the parties are based in different countries? Clearly, there should still be a clear and effective mechanism for resolving disputes, but will a judgment given by the courts of one party's country be effective if the other party (based elsewhere) ignores it?

The answer is: it will sometimes not be.

Whilst the English courts, for example, have a well-deserved international reputation for rigour, impartiality, and expertise, it doesn't necessarily follow that other countries will recognise and enforce English court judgments. Issues of sovereignty and reciprocity come into play, and the level of cooperation that other countries will provide varies. Depending on the countries involved, and what arrangements are in place between them to

recognise and enforce foreign judgments (typically found in international treaties), the degree of cooperation can range from a relatively simple, broadly administrative requirement to register the foreign judgment with the receiving country's courts (at which point it will be recognised and enforceable as if it were the receiving court's own judgment) to there being a requirement to effectively re-litigate the case with the receiving court.

This can sometimes lead to a situation in which a party to a contract succeeds in its hard fought claim in the English courts, but is ultimately unable to force the defendant to comply because it is based in a country which does not readily recognise or support the enforcement of English judgments. In this situation, the claimant's success in court might amount to little more than a win on paper.

So how can this situation be addressed?

In short, it is best considered early, when the contract is being negotiated, to ensure that a suitable and effective jurisdiction clause is specified from the outset.

One option is to agree a "non-exclusive" jurisdiction clause, which means that there is more than one choice of courts to determine disputes. This can potentially enable an aggrieved party to bring court proceedings in the country where the offending party is based, thereby avoiding the risk of difficulties with enforcement, noted above. However, this is not without potential difficulties. For example, it can reduce certainty for the parties, as to where any future disputes will be decided. The willingness of a court to accept jurisdiction over a dispute will also be subject to its local laws, which can result in additional disputes. It can also lead to the courts of one country having to apply the laws of another country (e.g. the governing law of the contract) in order to reach its judgment, which is often not an ideal scenario.

A further option is that instead of the contract nominating a particular country's courts, it contains an arbitration clause, specifying that any and all disputes must be referred to arbitration.

We recently wrote about the nature of arbitration, and how it differs from court litigation. Briefly, it is a process by which an appropriately qualified and independent arbitrator (or a panel of three arbitrators) is appointed to determine a dispute by issuing a legally binding final judgment (referred to as an 'award').

There are a number of arbitral institutions (such as the International Chamber of Commerce and London Court of International Arbitration) which publish model arbitration clauses and rules governing arbitrations proceeding under their supervision. By way of illustration, a model form of an arbitration clause, suggested by the London Court of International Arbitration for inclusion in contracts which intend to refer any disputes to arbitration under its rules, is below:

"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one/three].
The seat, or legal place, of arbitration shall be [City and/or Country].
The language to be used in the arbitral proceedings shall be [ ].
The governing law of the contract shall be the substantive law of [ ]."

One of arbitration's key benefits, from an international enforcement perspective, is the extent to which it is internationally recognised and supported through different countries' domestic laws, such as (in the case of England and Wales) the Arbitration Act 1996.

At the time of writing, around 170 states are signatories to the Convention on the Recognition and Enforcement

of Foreign Arbitral Awards (New York, 1958) (often referred to as the "New York Convention"), which provides that arbitral awards issued in one signatory state following due process will be recognised and enforced in another signatory state in a manner which is no more onerous than would otherwise apply to domestic arbitration awards made in the enforcing state. This means that many countries, in which recognition and enforcement of an English court judgment (for example) could be problematic, will be more accommodating to arbitration awards made in other signatory states, including the UK.

Further information on the international enforcement of arbitral awards can be found in our recent article. For these and other reasons, arbitration can sometimes be an effective dispute resolution mechanism for contracts to specify, particularly those with an international element.

How we can help

If you would like guidance as to whether an arbitration clause might be a suitable form of dispute resolution for your bespoke contracts or standard T&Cs, please do get in touch with your normal Cripps contact or our commercial dispute resolution team, who will be very happy to assist.

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