Kluwer Arbitration Blog

Corporate Counsel Considerations in Choosing Dispute Resolution Methods

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Introduction – the usual reasons

Assumptions are made about the reasons corporate counsel choose particular methods of dispute resolution in contracts. It is said that the usual factors of enforcement, confidentiality, flexibility, informality, time, cost and so on are determinative. For some corporate counsel they might be. For others, as I have written elsewhere, the method might be chosen because it is in the template, because it is a compromise, because of anecdotes drafters have heard from others, or merely because of counsel's instinct. Many in-house counsel come from a transactional background and may not be overly familiar with the nuances of each method.

Other considerations

For those with greater familiarity, other, more practical considerations come into play such as:

- whether default judgment might be a possibility, knowing the counterparty and the likely areas of dispute;
- what pace of proceedings might suit;
- which counsel you might want to instruct;
- whether you might want to conduct the proceedings yourself up to a point;
- whether you have security;
- whether the counterparty might be difficult to serve;
- the type of message to be sent to the counterparty;
- whether mediation is desired;
- whether the disputes are likely to be more factual or legal;
- whether the possibility of appeal might be desirable;
- which courts are the "natural" courts for the contract;
- ability to choose your arbitrator;
- possibility of natural justice paralysis;
- joinder of parties;
- joinder of proceedings.

Most of those considerations will depend on the nature of the contract, the "personality" of the counterparty and the types of disputes that might be expected to arise. Naturally this is something of an educated guess based on experience with similar contracts and counterparties. After some

time in a particular company or industry those factors can be fairly accurately predicted.

None of the questions here would be decisive in itself, I suggest. Instead, they are issues which are not commonly thought of by many as being considered by in-house counsel in choosing between arbitration and litigation and would be weighed in the balance along with the typical considerations mentioned above. I will touch on each for a little more detail, separating them into those which favour each method and those which could go either way. Of course, in some cases the degree of favour or particular considerations will be marginal.

Favouring arbitration

Choosing arbitrator

Some in-house counsel highly value the ability of being able to choose their arbitrator over having a judge imposed on them by the court. I do not have that preference and in fact, as a very general rule, lean towards common law judges who have been appointed after 20-30 years of commercial litigation experience and risen to the peak of the profession.

Default judgment

If there is a decent chance that the counterparty is the type who would be able to be served but would not respond to proceedings, litigation might be more suitable to enable default judgment to be entered. The SIAC rules have provision in r 29 for early dismissal of claims and defences but they presuppose the existence of a defence, that is, the respondent has responded to the proceedings and delivered some form of defence.

Counsel

Companies are accustomed to finding different lawyers in different countries but have their preference for certain specialties. For example, a party might have briefed a particular barrister on this form of construction contract a number of times with success and wishes to rely again on her expertise on the contract and familiarity with the party. Such considerations can be strong and can drive the party to arbitration rather than litigation in a jurisdiction where that barrister cannot appear.

Conducting proceedings

If the issues in potential disputes are likely to be relatively simple, the value not high and documents few, in-house counsel might prefer to conduct the proceedings themselves up to a point. This is easier with arbitration than with litigation. It is not often that this would be relevant but it remains a consideration.

Joinder of proceedings

If multiple proceedings in different countries are possible, arbitration might be preferred now that some rules have the equivalent of SIAC r 8 enabling consolidation of arbitrations. This may prove easier than consolidating court proceedings in different countries.

Favouring litigation

Pace of proceedings

It is not always necessary to race to trial and judgment, and there are occasions when a more leisurely pace can produce an outcome at lower cost than a trial while preserving the parties' relationship. These days, particularly in commercial lists, courts can grab plaintiffs by the scuff of the neck and drag them kicking and screaming to trial. Usually if one files in a commercial list one is prepared for the surrendering of control, but if greater autonomy and a more relaxed approach is better suited to the dispute, arbitration will be preferable.

Security

Not everyone will have the luxury of security from the counterparty, but its existence and location could well be decisive or a weighty factor in the choice between dispute resolution options. If the security is located in a jurisdiction where the courts are developed and trusted, litigation would be the natural choice. Of course, the opposite is also true, and arbitration will be chosen if the courts of the security's jurisdiction are not so developed and the country has acceded to the New York Convention.

Mediation

Many commercial courts now have almost a presumption of mediation in their rules or their practice at some stage of the interlocutory process. Even if not mandatory, this leaning towards mediation might be desirable if a settlement should be possible. Having the court order parties to mediation saves the face of both in that neither has to be the party to suggest mediation first and to fear being thought of perceiving it to have a weaker case. These days, however, this can be dealt with by using the SIAC-SIMC arb-med-arb clause if the counterparty will agree.

Appeal

No-one wants the right of appeal until they lose, and then it is their first question. Some institutes make provision for appeals but the general rule remains that there is no appeal in arbitration. If there is a decent chance that an appeal might be desirable, litigation might be preferred. This can be related to the question of whether the disputes are likely to be more legal or factual, with appeals being more useful for the former.

Natural justice paralysis

Some arbitrations become slow, expensive or even moribund due to natural justice paralysis, with the tribunal being overly fearful of being accused of denying a party procedural fairness. Judges are usually much more robust and are supported by appellate courts in holding parties to timetables and reasonably curtailing rights of amendment, adjournment, reply and so on. For example, in 2009 the High Court of Australia reversed its former position and held that courts may take into account case management principles when exercising discretion in procedural applications, even to the prejudice of a party: Aon Risk Services v Australian National University (2009) 239 CLR 175.

Joinder of parties

While some arbitral rules now allow for the joinder of parties to an arbitration, such as SIAC r 7, the conditions of those joinders may be more difficult to meet than the requirements of joining parties to litigation. This is particularly the case where there is a natural third party to the dispute, such an insurer, who is not party to the arbitration agreement. Such a joinder does not usually even require the permission of the court where it is within the time allowed by the rules.

Either way

Service

Arbitration would be indicated if the counterparty could prove difficult to serve since service can be effected less formally than in court proceedings. For example, SIAC r 2.1 provides for five different locations for service and five different methods (although by their nature, some of those methods are not appropriate to some of those locations). However if there is a real possibility that the counterparty will be able credibly to deny receipt of arbitration papers by those methods, the facility of substituted service in litigation might tip the scales in its favour.

Messaging

A Writ bearing the seal of a State's court commanding the defendant's appearance tends to send a sterner message to a counterparty than a notice of arbitration. Sometimes this sterner message is desired to indicate the plaintiff's concern and determination. Other times a softer message might be desired in an attempt to grab the respondent's attention but to preserve the relationship, in which case arbitration might be indicated.

Factual or legal disputes

I would not suggest that arbitrators cannot deal with legal issues but if the dispute is likely to be over the meaning of a clause or statute relatively free from factual contention, litigation might be preferred, having a single, experienced judge deal with the question quickly and definitively. The scales are more evenly balanced if the disputes are potentially more factual than legal.

Natural courts

If the courts most naturally and closely associated with the contract and any likely dispute are developed and trusted, it may be that the dispute is best left to them. However if they are not, it would be better to opt for arbitration than the courts of another jurisdiction since a party might still attempt to invoke the jurisdiction of the natural courts. It is something of a gamble when untrusted natural courts are a possibility as there is no guarantee they will decline jurisdiction in favour of the parties' choice of arbitration or other courts.

Summary

Different corporate counsel may well have other factors they consider in choosing between arbitration and litigation, and the considerations mentioned here will differ in weighting for almost every contract.

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