

ARBITRATION LAW UPDATE

International Arbitration DOs and DON'Ts: Notes from the Trenches

Introduction

It is no secret that Singapore has identified international arbitration as a growth area for the legal services sector. From joint ventures with the American Arbitration Association to the setting up of the International Centre for Dispute Resolution in Singapore, it is apparent that international arbitration is positioned for even more significant growth as the form of dispute resolution of choice, especially for complex commercial disputes.

In this context, we share with you a snapshot of the key “dos” and “don’ts” gleaned from years of experience in international arbitrations.

DON'T ...

- Be intimidated by international arbitration as a process. Any effective commercial litigator who also understands that this process is intended to be less formal, cheaper and more expeditious than court litigation will feel comfortable in this environment.
- Assume that the “hard ball” approach will go down well before an international arbitral tribunal – it is likely to backfire! Light touch!
- Forget that the culture of international arbitration is meant to be *international* - your lawyer will not do things the way he or she does it in the courts!

DO ...

Pre-contract

- Consider carefully whether international arbitration really does suit your needs when negotiating a dispute resolution clause in an agreement or entering into an *ad hoc* arbitration agreement.
- Ensure that the clause covers “disputes” as widely as possible, identifies the chosen law as well as the seat of the arbitration – the seat can be critical.
- Consider whether you need an institutional mechanism (eg., Singapore International Arbitration Centre, ICC International Court of Arbitration or London Court of International Arbitration (the “**LCIA**”)) or *ad hoc* (eg., the United Nations Commission on International Trade Law).
- Consider whether you want to exclude (where possible) rights of appeal to domestic courts.
- Consider whether you can agree sole arbitrator and perhaps even identify the arbitrator in advance.
- Consider whether you need a “multi-step” dispute clause and/or whether you can agree “time-lines” for expedited arbitration, or “documents only” process (see London Maritime Arbitrators Association rules in maritime matters, for example).

Dispute stage

- Consider whether there are any problems with the arbitration clause – ambiguity being the main one.
- Remember that domestic courts may be able to grant relief supportive of arbitration prior to its commencement or thereafter so as to preserve the status quo – see, for example, Section 12 of the Singapore International Arbitration Act and Section 44 of the UK Arbitration Act 1996 (the “**UK Arbitration Act**”).
- Try to assess the strengths and weaknesses of the claim / defence as early as possible – arbitration tends to start slowly but the pace soon accelerates.
- Identify sources of evidence (documentary/witness) as well as potential experts as soon as possible – don’t wait for the procedural order!
- Identify your potential arbitrator and make sure you ascertain availability/conflict issues (see the International Bar Associations Guidelines on Conflicts of Interest in International Arbitration as well as Section 24 of the UK Arbitration Act and the LCIA Guideline 16 on the Interviewing of Prospective Arbitrators).
- Where appropriate, evaluate very carefully the choice of potential chairperson for the arbitral tribunal. The experience, background and approach of the chairperson is key.
- Be pro-active (especially if you are the claimant) to have the tribunal constituted as soon as possible – delay is a risk here and throughout the process.
- Make sure the terms of reference (the “**TOR**”) of the tribunal are sufficiently broad. Institutional rules might create problems as regards the raising of “new issues” if these are not mentioned in the TOR.
- Try to ensure that the tribunal meets “face to face” with all parties at the TOR hearing.
- Try to use the TOR hearing for the setting of procedural directions – be realistic when suggesting or agreeing to the same – slippage is a real risk.
- Be alert to any possible grounds for challenge in connection with the tribunals’ conduct or approach (see Section 24 of the Singapore International Arbitration Act and Sections 24 and 68 of the UK Arbitration Act). Think VERY carefully before mounting any challenge but if you decide to do so, do it without delay otherwise you may waive your rights (see Section 73 of the UK Arbitration Act).

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