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Dispute Resolution Clauses EU/UK Litigation Webinar Series Session 6

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Agenda



- Governing law and Jurisdiction
- Key considerations when deciding Governing law and Jurisdiction
 - Enforceability
 - Technical Considerations
- Types of dispute resolution
 - Litigation
 - Arbitration
 - Alternative dispute resolution
- Common pitfalls
- Questions

Governing law and Jurisdiction

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Governing law and Jurisdiction

- Dispute resolution clauses are essentially trifurcated:
 - Governing law
 - Jurisdiction
 - Procedure
- Some high-level issues to consider from the outset:
 - Consistency between governing law and jurisdiction
 - Enforceability
 - Certainty and predictability
 - Third party nation (i.e., insulation of the parties)
 - Technical aspects or reputational issues



Key Considerations: Governing Law and Jurisdiction

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Key Considerations (1): Enforceability

- Dispute resolution clauses are not solely legal formula
- They have **practical** implications and need to achieve clients' aims
- We want clauses that provide for clear, efficient and certain dispute resolution
- So, consider a few key questions:
 - Where are the parties based?
 - Where will the contract be performed?
 - Where will the client be able to travel to participate in legal proceedings?
 - Where will you be seeking to enforce any financial (or other) award?
 - What are the costs shifting rules?
- Hague Judgments Convention / New York Convention

Key Considerations (2): Certainty and Predictability

- Dispute resolution clauses can help minimise risk
- Contracting parties **need** to be able to reasonably predict how a contract will be interpreted
- Factors that may be taken into account in assessing certainty and predictability of interpretation include:
 - The stability of the jurisdiction
 - The ability of the Courts to address complex concepts and corporate structures
 - The familiarity of the governing law with established commercial practices
 - The approach to interpretation - either objective or subjective (e.g., common law v civil code)

Key Considerations (3): Legal Frameworks

- Is the preferred governing law and jurisdiction possible as a matter of law?
- In many jurisdictions, consumers are protected by certain "mandatory rules of law" or "provisions that cannot be derogated from by agreement" and contracts cannot deprive consumers of the protections afforded to them
- UK Rome I, Article 6:
 - Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable.
- Consumer Rights Act 2015: forcing consumers elsewhere onerous and unfair

Key Considerations (4): Commercial Considerations

- Dispute resolution clauses form part of the overall bargain being struck
- Two key issues to consider that may arise as a consequence:
 1. Costs shifting
 - Will you be content with incurring irrecoverable legal fees?
 - Will you want to risk being responsible for the other side's legal fees?
 2. Third party nation (i.e., insulation of the parties)
 - Governing law is the law from 'time to time' in force
 - Is there a risk that the jurisdiction of the other side may impose unilateral (and unfair) changes? (e.g., reduction in interest rates; requirements to repay in local currency etc).
 - Will a third party nation insulate the parties from these risks?

Key Considerations (5): Exclusive / Non-Exclusive

- The essential balance is between:
 - Flexibility (non-exclusive)
 - Certainty (exclusive)
- Material risks with a non-exclusive jurisdiction clause:
 - Parallel proceedings
 - Inconsistent judgments
 - Potentially increased costs



Types of Dispute Resolution

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Litigation

- ‘Traditional’ means of deciding disputes – in public, subject to the procedural rules of the relevant national Court
- Parties need to agree: (1) which national Courts have jurisdiction (2) the choice of law
- *“Each party irrevocably agrees that the **courts of England and Wales shall have [exclusive OR non-exclusive] jurisdiction to settle any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with this agreement or its subject matter or formation. The governing law of the contract shall be the law of England.**”*

Arbitration

- A non-court alternative method of resolving disputes, where an arbitrator(s) is appointed by the parties to make a binding decision
- Parties need to agree: (1) arbitration rules (2) the legal place or 'seat' of the arbitration (3) the number of arbitrators (4) the language and (5) the choice of law
- *"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 three. The **seat, or legal place**, of arbitration shall be London, England. The **language** to be used in the arbitral proceedings shall be English. The **governing law of the contract shall be the substantive law of England.**"*

Alternative Dispute Resolution

- Means of resolving disputes via agreement
- Includes negotiation, mediation and neutral adjudication
- Parties need to agree: (1) the type of ADR and (2) the procedure
- *“If any dispute arises in connection with this agreement, the parties agree to **enter into mediation** in good faith to settle such a dispute and will do so in accordance with the **Centre for Effective Dispute Resolution (CEDR) Model Mediation Procedure**. Unless otherwise agreed between the parties **within 14 days of notice of the dispute**, the mediator will be nominated by CEDR.”*

Multi-Tiered Dispute Resolution Clause

1.1 If a dispute arises out of or in connection with this agreement or its performance, validity or enforceability (**Dispute**), then, **except as expressly provided in this agreement**, the parties shall follow the procedure set out in this clause:

(a) either party shall give to the other written notice of the Dispute, setting out its nature and full particulars (**Dispute notice**), together with relevant supporting documents. On service of the Dispute notice, the CEO of [Party 1] and CEO of [Party 2] shall have 30 working days to attempt in good faith to resolve the Dispute;

(b) if the CEO of [Party 1] and CEO of [Party 2] are for any reason unable to resolve the Dispute within 30 working days of the Dispute notice, the parties agree to enter into mediation in good faith to settle the Dispute and will do so in accordance with the CEDR Model Mediation Procedure. The mediator will be nominated by CEDR. To initiate the mediation, a party must give notice in writing (**ADR notice**) to the other party to the Dispute, referring the dispute to mediation. A copy of the ADR notice should be sent to CEDR;

(c) if there is any point on the logistical arrangements of the mediation, other than nomination of the mediator, on which the parties cannot agree within 15 working days from the date of the ADR notice, the mediator will be requested to decide that point for the parties having consulted with them; and

(d) unless otherwise agreed between the parties, the mediation will start not later than 30 working days after the date of the ADR notice.

Multi-Tiered Dispute Resolution Clause (cont.)

1.2 No party may commence any court proceedings in relation to the whole or part of the Dispute until it has attempted to settle the Dispute by mediation and either the mediation has terminated, or the other party has failed to participate in the mediation, provided that the right to issue proceedings is not prejudiced by a delay.

1.3 If for any reason the Dispute is not resolved within 15 working days of commencement of the mediation, the Dispute shall be referred to and finally resolved by the courts of England and Wales.

Common Pitfalls

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Let's get this over with...

*Each party irrevocably agrees that the **Supreme Court of England and Wales shall have [exclusive OR non-exclusive] jurisdiction** to settle any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with this agreement or its subject matter or formation. **The governing law of the contract shall be the law of Great Britain.***

What did you really want...

*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 three.** The **seat, or legal place**, of arbitration shall be London, England. The **language** to be used in the arbitral proceedings shall be English. The **governing law of the contract shall be the substantive law of England.***

[...]

*Each party irrevocably agrees that the **courts of Singapore shall have [exclusive OR non-exclusive] jurisdiction** to settle any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with this agreement or its subject matter or formation. **The governing law of the contract shall be the law of Singapore.***

Who did you mean...

*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 the London international arbitration court**, under the International Arbitration Rules. **The number of arbitrators shall be three. The seat, or legal place, of arbitration shall be London, England. The language to be used in the arbitral proceedings shall be English. The governing law of the contract shall be the substantive law of England.***

Road block ahead...

*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 two. **The seat, or legal place**, of arbitration shall be London, England. **The language** to be used in the arbitral proceedings shall be English. **The governing law of the contract shall be the substantive law of England.***

If you want to...

*Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, **may 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 three. The seat, or legal place, of arbitration shall be London, England. The language to be used in the arbitral proceedings shall be English. The governing law of the contract shall be the substantive law of England***

Questions?

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