

International Arbitration Versus Litigation

May 8, 2023

While companies – particularly emerging companies – may have limited capacity to address dispute resolution, such terms can be essential in their agreements should a dispute later emerge. As no one size fits all, either arbitration or litigation may be appropriate based on several factors, including the type of commercial agreement (and potential disputes), confidentiality concerns or desire for more (or less) discovery.

When the agreement is cross-border, arbitration is likely to be superior to litigation, because enforcing US court judgments abroad can take longer and be more difficult – and also because litigating in a foreign court may involve unfamiliar law and procedures, a foreign language and an unknown judiciary. On the other hand, litigation may be preferable in the cross-border context for simple disputes (like a nonpayment or collection action), especially if there are assets in the forum jurisdiction or the jurisdiction is in a state that is a party to a multilateral treaty for the enforcement of foreign court judgments (as is the case in the European Union). Agreeing to litigation also may be a leverage point to agree to a familiar, favorable and trusted foreign court for resolution.

For either cross-border or domestic agreements, one key benefit of arbitration is that while the various arbitral institutions' rules provide default procedures, the parties have flexibility to tailor the dispute resolution process to suit their needs and preferences, as well as the context and needs of the most likely disputes. For example, if speed is a critical component, the parties can agree to expedited procedures, limited discovery and a sole arbitrator, along with providing a specific timeline to the award. If confidentiality is important, the parties can agree to keep the existence and contents of the arbitration confidential. If the dispute is complicated or technical, the parties can include a requirement that the arbitrators have particular technical qualifications or experience.

Taking the time to consider dispute resolution and draft appropriate dispute resolution clauses in agreements can allow parties to optimize the dispute resolution process and avoid time-consuming and costly procedures down the road if there is a breakdown in the parties' relationship that cannot be amicably resolved.

The primary pros and cons of arbitration and litigation are summarized below.

Arbitration

■ Enforcement

- More than 160 countries are parties to the New York Convention, a treaty for the mutual recognition and enforcement of foreign arbitral awards.

■ Reduces risks of national courts

- Local bias (real or perceived).
- Unfamiliar and possibly more limited local court procedures.
- Different bodies of law.
- Language.
- Speed of process (too fast or slow).

- Possible due process concerns.
- Questions regarding the reliability and sophistication of the system and judges, including lack of familiarity with deal structure and terms.
- **Privacy and confidentiality**
 - Keeps disputes out of the press and public eye.
 - Can protect brand and reputation.
 - May help minimize copycat suits.
 - May help preserve long-term relationships.
 - More strict confidentiality depending on arbitral rules, where the arbitration is seated and how the clause is drafted.
- **Finality**
 - No error correction or appeal.
 - Usually limited judicial review, with set aside (or vacatur) of the arbitral award on narrow (i.e., non-merits-based) grounds.
 - Eliminates risk of protracted appellate process (also a potential downside for the losing party).
 - May be a leverage point for settlement.
- **Selection of decision-makers**
 - Ability of the parties to choose arbitrators through party nomination or a rank and strike process.
 - Require specific arbitrator qualifications or background best-suited for the dispute.
 - May be particularly important in complicated technical disputes where industry or technical experience would be an asset.
- **Limited document disclosure**
 - Generally less discovery, which can impact costs and speed, especially in international arbitration.
 - However, less discovery can make it more difficult to obtain evidence to substantiate a claim.
 - If there is a desire for more expanded discovery (can be a leverage point), the parties can provide for it in the dispute resolution clause.
- **Speed**
 - Can be faster.
 - Possibility of expedited rules and agreed-upon time limits in clause.
 - Consider sole arbitrator.
 - Less protracted appellate process.

Litigation

- **Enforcement**
 - There is no analog to the New York Convention for the enforcement of US court judgments.
 - While some countries are parties to treaties for the recognition and enforcement of court judgments on a more limited scale, the US is not, which means enforcement of a US court judgment abroad depends on local process (which can be onerous and highly discretionary).
- **National courts may be preferable (or required) for certain disputes**
 - May be beneficial (and faster) for simple disputes (e.g., nonpayment).
 - May be preferable to have formal rules, procedures and protections – including procedures for summary disposition or early

resolution of disputes (e.g., motion to dismiss, dispositive motions) – as litigation has more procedural discipline. o
However, stricter rules come with less flexibility.

- o Agreeing to national courts may be a negotiation point that allows for a preferred forum (a national forum you trust) where the judgment will be enforceable (e.g., assets readily available in forum).
- o Not all disputes are arbitrable in all jurisdictions.

■ **Confidentiality**

- o Resolution of disputes and decisions may be more public and carry higher possibility of press coverage.
- o More public nature can be a lever to settle of disputes. • Appellate protections o Ability to appeal/error correction.
- o May be preferable for large “bet-the-company” type disputes or disputes concerning intellectual property or trademark where the right of an appeal may be important.

■ **Decision-maker assigned**

- o Beholden to random selection by court system.

■ **More extensive discovery possible**

- o Broad discovery is often a key component of litigation in many (mainly common law) legal systems.
- o Due to the enforcement power of judges, easier to obtain discovery from third parties and add third parties to case.

■ **Speed**

- o May be faster for simple disputes.
- o Greater ability to resolve disputes earlier in the case – particularly frivolous disputes or disputes with strong defenses on the merits – through summary disposition (e.g., motion to dismiss, summary judgment).

Key Contacts

Caroline Pignatelli New York	cpignatelli@cooley.com +1 212 479 6679
Marc Suskin New York	msuskin@cooley.com +1 212 479 6466
Rachel Thorn New York	rthorn@cooley.com +1 212 479 6465

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.

