

International Commercial Arbitration

In international trade and business, arbitration has become widely recognized and favored by parties. Arbitration clauses in agreements, when constructed correctly, are often held enforceable under contract law principles. When it comes to arbitration agreements, the United States Arbitration Act, also known as the Federal Arbitration Act, specifies the rules governing enforceability. In this article, we will explore the advantages of international arbitration that make many participants of international trade favor arbitration over litigation.

Neutrality and Impartiality

Neutrality is considered one of the most fundamental features of arbitration. In comparison, under the traditional judicial framework, the court of the breaching party's home country might exhibit favoritism to that party. Whereas, in arbitration, the parties can jointly select the substantive choice of law, the procedural rules, the seat of arbitration, the nationality of the arbitrators, and even the language of the arbitration.

Furthermore, the arbitration process does not involve a jury, which normally consists of randomly selected laypeople. Many people believe that the jurors tend to show bias and prejudice on the basis of nationality and geopolitics.

Thus, neither party will have the advantage of litigating the case in their domestic court. This gives the parties an enhanced sense of fairness and increases the parties' confidence in the process. Hence, international commercial arbitration is able to create a neutral mechanism that helps develop trading relationships agreed upon by all parties involved in the process.

Arbitrator Selection and Expertise

Many judges are specialized in particular type of cases, such as commercial disputes. However, considering the limited resources of the court system, they are trained to handle a variety of cases, instead of focusing on a specific subject. In addition, due to their significant caseload, many judges may not have the luxury to spend a considerable amount of time simply to acquire sufficient background knowledge for a case. Hence, they may not be best positioned to hear cases that involve a novel and complex subject matter.

Indeed, a judge can sometime be assigned without regard to her or his insights and understanding



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on the relevant topics. For example, a judge who does not truly understand the relationship between a decentralized autonomous organization (“DAO”) and its participants may find assigning liability in a case involving a DAO to be very challenging. The judge’s lack of knowledge and expertise on the subject of matter can negatively affect the final decision.

However, in arbitration, the parties can select arbitrators who possess specialist skills and professional experience in a particular field. In fact, the parties can even specify the arbitrator’s qualification in the arbitration clause or arbitration agreement. The parties can set rules regarding the arbitrator’s expertise, educational experience, and time spent in the specific field that is arbitrated. Equipped with professional competence and knowledge, the arbitrator will require less resources to understand the essence of the dispute or render a fair award.

Enforceability of Arbitration Award

An arbitrator’s final decision, which is the equivalent of a judge or jury decision on a case, is called the “award.” A remarkable advantage of international arbitration is the enforceability of international arbitration awards. The enforcement of arbitration awards can be achieved in over 150 countries thanks to the New York Convention.

When an arbitrator makes his or her decision, such a decision is final and binding. Many parties choose to voluntarily comply with the decision. However, if one party does not comply with the decision, neither the arbitrator nor the party has authority to make a noncompliant party follow the decision. Instead, the winning party can go to the court to file a motion or petition and “confirm” the arbitration award.

In the United States, the Federal Arbitration Act and the Uniform Arbitration Act are the primary governing legislations on the enforcement procedures for arbitration awards. Once an arbitration award is confirmed as court judgment, it can be used to collect payments from or enforced against the losing party.

Generally, the procedures for enforcing court decisions overseas are often unclear, complex and time-consuming. In comparison, the enforcement of arbitration awards under the New York Convention generally presents less difficulties.

Privacy, Confidentiality and Expedited Process

One major concern that parties to international commercial dispute may have is how to keep their names out of the spotlight. Parameters of confidentiality and privacy can be better specified and safeguarded in arbitration than in litigation. Normally, arbitration decisions are not made available to the public, and parties can even keep their names private. Additional confidentiality measures can be requested by the parties in the arbitration, including limiting the scope of discovery.



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As we have explained earlier, the flexibility of arbitration allows the parties to decide the procedural rules and the scope of discovery to achieve an expedited process and a timetable that suits the parties' needs better. Overall, it is fair to say that arbitration procedures can be tailored to suit the parties' need for privacy and a speedy process.

Expenses and Cost

In spite of the popular myth that arbitration is more cost-efficient, it may not always be true. In arbitration, there are mainly three types of costs: i) the administrative cost paid to the arbitral forum; ii) the fees paid to the arbitrator(s) who hear(s) the case and; iii) the fees paid to the attorneys and their staff who prepare the materials and documents for the clients. Generally speaking, the overall cost of an arbitration case depends on the following elements:

- The arbitrator's hourly rate, which is often determined by the arbitrator's expertise and experience
- The amount disputed in the arbitration case
- The length of the arbitration process
- The administrative fees required by the arbitral forum

In addition to the various fees paid to the arbitrators, attorneys and the forum, many businesses also take into consideration the potential business opportunities that lengthy international litigation procedures may cost them. Indeed, the sooner the parties can resolve their disputes, the more time, energy and resources they can invest into their commercial activities and expand their business.

Finality of Arbitration Decisions

Although international arbitrations have many advantages, there are still some features that make it unappealing to some parties. For example, the arbitration awards are final and very hard to challenge. Different arbitration institutes, such as CPR, JAMS and the AAA, have different rules on how and when a party may challenge an arbitration award. In some situations, the parties may also challenge the arbitration award in a federal court. Provided that the award is governed by the Federal Arbitration Act and that all other procedural requirements, such as jurisdiction and venue, are satisfied, the Federal Arbitration Act provides that a district court may grant a motion to vacate an award if:

- 1- "the award was procured by corruption, fraud or undue means"
- 2- "there was evident partiality or corruption in the arbitrators, or either of them"



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3- “the arbitrators were guilty of misconduct in refusing to postpone the hearing,” or in “refusing to hear evidence pertinent and material to the controversy;” or of any other misbehavior “by which the rights of any party have been prejudiced;” or

4- “the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”

In addition, parties can also set the rules for appealing an award in the arbitration clause or the arbitration agreement. Generally speaking, the court normally gives great deference to the arbitration award and it is harder to challenge an arbitration award than to appeal a court decision.

Conclusion

There are many reasons why international arbitrations are preferred over international litigations. Thanks to the New York Convention, the procedures for enforcement of arbitration awards are well established. Civil litigation is an adversarial process with little opportunity for the parties to compromise. Each procedure has its pros and cons. However, businesspeople should carefully consider and analyze whether to arbitrate and how to arbitrate future disputes when entering into contracts. Thevoz & Partners specialize in cross-border disputes and international business litigation. Our founding and managing partner, Olivier Thevoz, Esq., is a member of the Swiss Arbitration Association. If you are considering signing an arbitration agreement or facing an arbitration action, contact Thevoz & Partners to consult your particular situation.