Lexis®PSL ARBITRATION

Choosing the 'right' arbitration institution—guidance for businesses on costs

First published on Lexis®PSL Arbitration on 09/04/2018

Arbitration analysis: Pelin Baysal and Bilge Kağan Çevik of Turkish law firm Gün + Partners discuss the relevance of costs when concluding an arbitration agreement where the parties have settled on institutional rather than ad hoc arbitration.

Pre-nups and arbitration agreements

A metaphor used by Prof Dr. Loukas Mistelis suggested that arbitration agreements may be likened to pre-nuptial agreements made at the start of a relationship, with a possible exit strategy in case things go wrong. However, just like people in relationships, businesses—generally—only reluctantly consider the possibility of things not working out as planned. This is especially when they are in the process of getting to know each other, ie during contract negotiations.

When things do go wrong, businesses need to ensure that their arbitration agreements fulfil their expectations of an 'exit strategy'. This article seeks to provide guidance to businesses to help protect them from any rude awakening when things have not turned out in a way they expected. Even though the choices made by parties when concluding an arbitration agreement can result in important legal and tactical advantages, practice shows that the decision to include an arbitration clause is often based on habit or rather limited background information. While there are other important issues businesses need to consider, this article focuses on providing guidance on the 'right' arbitration institution when drafting an arbitration agreement.

When drafting agreements, businesses must make a simple but fundamental choice: ad hoc arbitration or institutional arbitration. With ad hoc arbitration clauses, a little more thought is required from the parties. In the absence of any agreed procedure, the arbitration will commence and be conducted outside any formal structure. Hence, it may be preferable for parties to create a detailed structure for the arbitration in the agreement, or else agree to the application of non-administered arbitration rules like those of UNCITRAL or the London Maritime Arbitrators Association (LMAA). In the absence of a clear statement on arbitration procedure, the law of the seat of arbitration will normally apply. On the other hand, in institutional arbitration, the task of agreeing the relevant procedure can be fairly easy as all institutions have their set of rules governing the conduct of the arbitration process if there is no contrary agreement between the parties.

When making this choice, it may be relevant that an arbitration clause in a wider agreement is often referred to as a 'midnight clause': introduced at a time when all other points are clear, and no one wants to elaborate on the detailed rules for possible disputes. At the eleventh hour, parties may have difficulty negotiating a detailed set of rules and agreeing on arbitral procedures which fit precisely with their particular needs. Therefore, for some businesses it is quite common to refer any future disputes to arbitral institutions. As such, this article focuses on choosing between different institutional rules.

For more information on the two forms of arbitration, see Practice Notes: What is ad hoc arbitration? and What is institutional arbitration?

We have selected five arbitration institutions that we believe represent a well-rounded mix with regards to their relevance, reputation, geographic location, and cultural preference, namely:

- the International Court of Arbitration of the International Chamber of Commerce (ICC)
- the London Court of International Arbitration (LCIA)
- the Arbitration Institute of the Stockholm Chamber of Commerce (SCC)
- the Singapore International Arbitration Centre (SIAC)
- the Istanbul Arbitration Centre (ISTAC)

As for selecting the 'right' arbitration institution, numbers often speak louder than words. In a survey carried out by the Queen Mary, University of London School of International Arbitration in 2010, when selecting an arbitration institute, 46% of the interviewees considered the arbitration rules as an important factor while 41% considered the overall cost of service as an important factor. It is no surprise that for businesses, it is the cost of arbitration that captures their interest. Although the cost of arbitration may not have an impact on the merits of the case, for businesses, cost may sometimes be the determinative factor on whether to pursue arbitration or not.

For this reason, this article (the first in a two-part series) compares the overall costs of the arbitration institutions mentioned above. The second part will provide a detailed comparison of the institutions' arbitration rules. Having compared different arbitration rules and their costs, the aim is to enable businesses to find the 'right' arbitration institution for the dispute in hand.

Comparison of costs

ICC arbitration

In an ICC proceeding, the arbitrator's fee and administrative charges depend on the amount in dispute (ad varolem system). The ICC offers a cost calculator on its website, which will provide an estimate of the cost of an ICC proceeding according to the current fee standards.

For the arbitrator's fee, the ICC Rules set a minimum and maximum amount. The ICC Court determines the exact cost by taking into consideration the specific circumstances of the proceeding, such as, for example, how complex the case is or how timely the tribunal rendered the award. Where there is a tribunal involving three members, the arbitrator's fee is multiplied by three.

The administrative charges are based on a fixed percentage of the amount in dispute.

The chart below demonstrates how the amount in dispute affects the costs. It should be noted that the costs increase slower the higher the amount in dispute is. When looking at the allocation of these costs only, to choose the ICC as an arbitration institution appears to be economically more viable when the amount in dispute is rather high.

	USD 1m dispute		**USD 10m dispute**		**USD 30m dispute**	
Administrative charges in USD	*23,335**		*57,515*		*77,515*	
	Min	*Max*	*Min*	*Max*	*Min*	*Max*
Arbitrator's fee in	*14,620*	*64,130*	*39,167*	*187,400*	*51,960*	*235,600*

USD						
Total in USD	***37,955***	***87,465***	***96,682***	***244,915***	***129,475***	***313,115***

**Figures indicated in this table are rounded to the nearest whole number.*

LCIA arbitration

In LCIA arbitration, the arbitrator's fee and administrative charges are largely fixed on an hourly rate basis.

After a party has nominated or the LCIA has selected an arbitrator, the LCIA's Secretariat asks the arbitrator to advise the hourly rate applied in the case. The LCIA's Schedule of Costs generally sets a cap to this hourly rate, which is currently GBP 450 (USD 608.93 as of 10 January 2018).

In practice, the LCIA Court will recommend a certain maximum rate based on the circumstances of the case before the arbitrator advises the Secretariat about their hourly rate. The recommended fee is often lower than the maximum rate. Normally, arbitrators follow the LCIA Court's recommendation. In cases with a modest amount in dispute, arbitrators have charged hourly rates of between GBP 150 and GBP 200.

Administrative charges consist of the time-based charges of the Secretariat, a non-refundable registration fee and an additional fee equal to 5% of the total arbitration fee. The hourly fees of the members of the Secretariat vary between GBP 150 and GBP 250, depending on the member's function in the Secretariat.

Due to the hourly rate system, a chart such as the above cannot be provided. However, the LCIA calculated the median costs (arbitrator's fee and administrative charges) of a LCIA proceeding while allocating these costs to an amount in dispute for a time-frame of four years. According to this calculation, the median costs for an amount in dispute between USD 1m and USD 10m, are USD 79,000. The median costs for an amount in dispute between USD 10m and USD 100m are USD 185,000.

When comparing these amounts to those of the ICC, in the USD 10m range, the LCIA costs may be substantially lower, even when considering the ICC's minimum amount only. A similar observation may be made in the USD 30m range, especially considering that this amount is placed on the lower range of the scale up to USD 100m.

SCC arbitration

As in the case of an ICC proceeding, the SCC's arbitrator's fee and administrative charges depend on the amount in dispute. The SCC also offers a cost calculator on its website.

As with the ICC Rules, for the arbitrator's fee, the SCC Rules set a minimum and a maximum amount. However, where there is a three-member tribunal, the arbitrator's fee is not multiplied by three. Instead, the SCC's cost schedule defines the fee for the chairman of the tribunal only. The co-arbitrators generally receive only 60% of such fee.

The administrative charges are based on a fixed percentage.

As typical for the *ad varolem* system, the costs increase slower the higher the amount in dispute is. Overall, arbitrators' fees and administrative charges are considerably lower when compared to the ICC. The higher the amount in dispute is, the bigger this gap is, which means that in proceedings with a high amount in dispute, the cost difference is substantial. This is even more valid when the case is decided by a tribunal due to the 60% cut with regards to the co-arbitrators' fee in a SCC proceeding.

	USD 1m dispute		**USD 10m dispute**		**USD 30m dispute**	
Administrative charges in USD	20,546		45,629		55,187	
	Min	Max	Min	Max	Min	Max
Arbitrator's fee in USD	23,888	58,535	59,739	166,068	71,655	213,677
Total in USD	**44,434**	**79,081**	**105,364**	**211,697**	**126,842**	**268,864**

SIAC arbitration

As in ICC and SCC arbitration, the SIAC's arbitrator's fee and administrative charges depend on the amount in dispute. The SIAC offers a cost calculator on its website also.

For the arbitrator's fee, the SIAC Schedule of Fees sets only a maximum amount payable to each arbitrator. As an alternative to the Schedule of Fees, the parties may agree on another method for determining the arbitrator's fees. For the administrative charges, the SIAC Schedule of Fees also sets a cap only.

The SIAC costs range somewhere in the middle between those of the SCC and the ICC. In comparison to the SCC, the gap between costs increases the higher the amount in dispute is.

	USD 1m dispute		**USD 10m dispute**		**USD 30m dispute**	
Administrative charges in USD	11,020		29,088		43,328	
	Min	Max	Min	Max	Min	Max
Arbitrator's fee in USD	N/A	47,537	N/A	121,401	N/A	166,364
Total in USD	**N/A**	**58,558**	**N/A**	**150,489**	**N/A**	**219,692**

ISTAC arbitration

As pointed out in the 2010 Survey of the School of International Arbitration, there is increasing demand for new arbitration institutions with regional knowledge and presence. ISTAC arbitration has played and will continue to play a significant role in fulfilling this increasing demand along with other institutions across the globe.

ISTAC, an independent, neutral and impartial institution, opened its doors in the third quarter of 2015 with the ambition of providing efficient dispute resolution services not only for domestic but also for international parties. The ISTAC Rules reflect modern arbitral practice and sit well alongside those issued by high profile arbitration centers around the world. For example, the existence of fast-track arbitration, the appointment of arbitrators, and the conduct of the proceedings. Further, the ISTAC Rules have almost identical arbitration rules with the ICC Arbitration Rules, including the existence of Terms of Reference. Therefore, ISTAC Rules constitute a set of rules that are already familiar to parties participating in international arbitration.

Besides its modern arbitration and mediation rules, ISTAC has already established a good reputation among legal and business circles and is receiving international cases. Indeed, ISTAC arbitration provides arbitration services highly similar to the services provided in ICC but for substantially low prices.

Pursuant to ISTAC arbitration rules, the ISTAC's arbitrator's fee and administrative charges are fixed and depend on the amount in dispute. The ISTAC offers a cost calculator on its website also.

The cost of ISTAC arbitration can easily be determined by relying on the chart in its rules. Considering that not only administrative expenses but also arbitrator's fees are fixed and do not depend on the circumstances of the case, the cost of ISTAC arbitration can be accurately determined even before the initiation of the arbitration.

	USD 1m dispute	**USD 10m dispute**	**USD 30m dispute**
Administrative charges in USD	13,324	22,284	34,337
Arbitrator's fee* in USD	41,343	106,224	128,271
Total in USD	**54,667**	**128,508**	**162,608**

**It is worth noting that the total fee of a three-member tribunal, relatively speaking, is even less expensive. There is no multiplication but rather a fixed fee for the whole tribunal as well. According to this fee, the total cost for a tribunal in a USD 1m dispute is USD 79,961; the total cost for a tribunal in a USD 10m dispute is USD 218,176; the total cost for a tribunal in a USD 30m dispute is USD 331,954*.

What should businesses bear in mind?

First of all, be ready to pay

For businesses referring a dispute to an arbitral institution, it is important to know that the institution will not only claim a first filing fee but will also require pre-payments to be made. Those pre-payments may be claimed before any meaningful step in the proceeding as well as at different stages during the proceeding.

A pre-payment may amount close to what is expected to be the total amount of the arbitration cost. Therefore, having monies set aside for this is desirable. The general rule is that pre-payments are shared by the parties. However, it is not uncommon, that a party—usually respondents—either refuses or fails to pay its share. In this case, to continue the proceeding, the other party may be compelled to make the pre-payment in full by itself.

Second, the numbers above are not everything

The total cost of an arbitral proceeding is more than the sum of the arbitrator's fee and administrative charges. There may be expenses of the arbitrators, costs for room hire, interpreters, transcription, etc. And, even more importantly, there will be legal fees.

Depending on the applicable law in the arbitration proceeding, these legal fees may become a major cost driver. For example, even if the LCIA appears to be an affordable option compared to the ICC and SIAC, assuming that the seat of arbitration was London and the applicable law was English law, costs might add up quickly when a Turkish party requires legal advice from an English law firm.

Third, a higher price usually implicates more service

The extent, to which an arbitration institution will get involved in the management of the proceeding, varies. For example, the ICC plays a very active role in the proceeding. This is particularly reflected by the ICC Court's mandatory scrutiny of the award. This scrutiny and approval process may prevent unwanted surprises when enforcing the award, and therefore, all in all, will reduce costs. The SIAC's role in a proceeding is similarly active than the one of the ICC—and, therefore, explains the rather high level in cost. Interestingly, the SIAC's administrative charges are substantially lower than the ICC's.

Fourth, more service is not always better or necessary

A strongly and actively managed proceeding generally indicates that the institution has means it uses to keep the process moving. This might be preferable when it is expected that the opponent may be uncooperative. However, there may be certain cases which make a hands-off approach more attractive. For example, if the case is so complicated that makes it impossible for the respective counsels to put forward each party's main arguments at the very beginning of the arbitration, ICC arbitration might not be the perfect choice, as it requires the parties to sign Terms of Reference in which counsels are expected to summarise their case.

So, when it comes to cost, it is not a matter of selecting 'the best' institution, but only the best institution for the dispute in hand?

Cost is important, but it is not everything. This is particularly reflected by the fact that although the ICC tends to be the most expensive institution, it is at the same time the most popular. Naturally, when drafting arbitration agreements, businesses should always bear in mind the cost of arbitration if things go wrong. However, the important question to be asked is—do the benefits of that particular arbitration institution outweigh its costs?

Having compared the costs of different arbitration institutions, the next volume will explore the differences in the rules of arbitration institutions, and how these may affect the choice of an arbitration clause.

Competition is fierce! There must be good opportunities for businesses.

The views expressed are not necessarily those of the proprietor.