Arbitration Clauses: 10 reasons why you should consider English Law and a London-seated Arbitration for Dispute Resolution

April 1, 2022 Fiona Cain

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Dispute resolution clauses in a contract provide the parties with an agreed approach to resolve any disputes that arise under the contract. We often find that during contract negotiation, parties adopt the laws and forum that they are familiar with and/or do not seek to negotiate this clause as they hope that they will not have to refer to it. Unfortunately, differences and disputes do arise and if relationships have broken down, it can be too late to seek to amend the clause. It is therefore important to consider the dispute resolution clause as a key element of the pre-contract negotiations. We often recommend a London seated arbitration under English law which provides various benefits to the parties as further detailed in this briefing note.

1. **Centre for Arbitration** - London is not only home to one of the oldest and leading arbitral institutions, the London Court of International Arbitration (LCIA), and the prominent London Maritime Arbitrators Association (LMAA), it was also found to be the preferred *seat* in the 2021 International Arbitration Survey[1] where 54% of respondents chose London as their preferred seat. Whilst this varied by region, London was the top choice for respondents from Africa (69%), Europe (76%), Middle East (78%) and North America (66%).
2. **Certainty** – English law is based on well-founded principles, respects the autonomy of a contractual agreement, is transparent and has a predictability of outcome, legal certainty and fairness which is not necessarily present in all jurisdictions.
3. **Language** – English language is and will remain the *lingua franca* of business and commerce, which heightens the appeal for English-speaking foreign parties to choose London as the *seat* for arbitrations. The International Chamber of Commerce (ICC) reported that in 2020 English was the predominate language chosen in their arbitrations, with 80% of all awards given in English, notwithstanding the ICC being based in Paris.[2]
4. **Arbitration Act 1996** – The Arbitration Act 1996 (the Act) applies to arbitrations seated in England and Wales. When the Act became law 25 years ago, it provided a radical change to English arbitration law, increasing party autonomy and limiting court intervention. While the Act is currently under review, the consensus is that the Act remains fit for purpose and is not in need of a major overhaul although it has been suggested that issues such as a process for summary dismissal for unmeritorious claims and defences, guidance on confidentiality and narrowing the ability to appeal on a point of law to increase the finality of arbitration may be addressed in future legislation to seek to enhance English arbitration law.
5. **Quality of Arbitrators and Judges** - English arbitrators and judges are independent, experienced in dealing with international disputes, and are world class legal minds.
6. **Established system** – Steeped in experience and history, the breadth and volume of disputes reviewed by English courts over many years has created a wealth of well-developed case law offering parties an understanding as to how their agreement might be interpreted, however nuanced the legal issue. English law has been widely used in international commerce for centuries in areas including finance, insurance, shipping and maritime, and

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more recently has become a popular choice for the developing fintech and artificial intelligence businesses.

7. **Flexibility** – The English common law legal system assigns an important role to the judiciary in interpreting legislation and continuously developing it through application to specific cases, and specific sets of circumstances. This means the courts can respond to changes in the business environment that may not have been even anticipated by the legislators.
8. **Limited Right of Appeal** – The Act allows appeals of an arbitral award in very limited circumstances. Awards can be challenged on the grounds of lack of substantive jurisdiction (section 67) and serious irregularity (section 68). Where the parties have not adopted the rules that expressly exclude the right to appeal or agreed otherwise, there is also a right to appeal on a point of law (section 69). Interestingly in 2020/21 67% of applications under section 69 were refused, showing the reluctance of the English courts to interfere in the independence of international arbitration.[3]
9. **Enforcement** - The United Kingdom is party to the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards allowing for mutual recognition and enforceability of arbitral awards in excess of 160 contracting states.
10. **International appeal** – London is experienced in dealing with international arbitrations. The LCIA has reported that 86% of parties to their arbitrations in 2020 came from 88 countries other than the UK and confirmed that England remained the most popular *seat* and English law the most frequently chosen law[4]. Similarly, the Commercial Court based in London has a long history of handling cases involving foreign parties and in 2020/21 74% of the cases dealt with by the Commercial Court were classed as "international[5]"[6].

Although it is not essential, we recommend that parties choose London as the arbitration *seat* and English law as the governing law of a contract. English arbitrators and judges are experienced in determining foreign law disputes but rely on foreign law experts in order to do so thereby increasing cost.

Consideration should also be given by the parties as to whether an institutional arbitration is appropriate, in which case the arbitral institution, such as the ICC or the LCIA, should be referred to in the dispute resolution clause and the arbitration will be conducted under that arbitral institution's rules. Alternatively, the parties may prefer to choose an ad-hoc arbitration where they adopt a set of stand-alone arbitral rules, such as the LMAA Rules or UNCITAL[7] Rules or agree their own procedure and otherwise rely on the law of the seat.

While this briefing note covers the topic briefly, for those interested in more information, we have produced a detailed comparison of the rules of 7 key arbitral institutions and 3 standalone rules. Please contact Fiona Cain or Charlotte Mullis if you would like us to share a copy of this with you.

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[1] 2021 International Arbitration Survey: Adapting Arbitration to a Changing World - https://arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/.

[2] ICC Dispute Resolution 2020 Statistics.

[3] The Commercial Court Report 2020-21, Business and Property Courts - https://www.judiciary.uk/wp-content/uploads/2022/02/14.50_Commercial_Court_Annual_Report_2020_21_WEB.pdf

[4] 2020 Annual Casework Report.

[5] A domestic case is one where: (a) the subject matter of the dispute between the parties is related to property or events situated within the United Kingdom, and (b) the parties (relative to the dispute)

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are based in the United Kingdom. All other cases are classified as “international”.

[6] The Commercial Court Report 2020-21

[7] United Nations Commission of International Trade Law.

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