



## **Choosing the Right Method for International B2B Disputes**

**Commercial and Contracts**

**Litigation and Dispute Resolution**



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## Cheat Sheet:

- **Remember to choose, and choose wisely.** In cross-border B2B disputes, the primary decision is between litigation and arbitration, with other ADR tools like mediation playing a supporting role.
- **Avoid procedural complexity.** To control cost and duration, in-house counsel should prioritize avoiding complex issues of jurisdiction, conflict of laws, and unfamiliar procedural rules.
- **Use arbitration efficiently.** Arbitration can reduce time and cost because awards are rarely reviewed on the merits and procedures can be tailored for speed.
- **Know when to use litigation.** Litigation may be preferable where disputes are non-arbitrable, require consolidation, involve related court actions, or allow for straightforward enforcement of judgments.

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In-house counsel who work on international transactions will eventually find themselves negotiating disputes clauses, but this negotiation can be difficult.

Inevitable questions may arise: What is a seat of arbitration, and is it the same as venue? What is the New York Convention? Can we just contract to apply best efforts to negotiate?

And guidance can vary widely: “Litigation is standard. Arbitration is too expensive.” “Arbitration is standard. Litigation is too expensive.” “Arbitral confidentiality is good.” “Arbitral confidentiality is bad.” “Arbitration takes too long.” “Litigation takes too long.”

These and many other questions are routine in negotiations over disputes clauses in cross-border agreements.

But in-house lawyers are expected above all to build things and help their business grow. Unless disputes are your business, they are antithetical to growth. Even in best-case scenarios, they are a resource drain.

First, this means that for most in-house lawyers, the directive is usually to make disputes go by faster, cheaper, and with as little internal impact as achievable.

Second, this means that though in-house lawyers excel at building out the substance of their contracts, the situation is different when it comes to preparing for the *procedure* of disputes. This is doubly so for international cross-border disputes.

I do not find readily available materials on choice of method and jurisdiction for cross-border contracts to be of much help. The bad materials are superficial marketing. The good materials (like [this drafting guide](#) from the AAA-ICDR) explain the “how” without much on the “why”: the focus is on how to draft disputes clauses as a technical matter and not on understanding what, in a given case, should and should not go there and why. The “whys” are left out as “issues to consider”.

This article is my first pass at helping with these “whys,” starting with the choice of method of dispute resolution.

## **Understand the toolbox**

At a high level, the dispute resolution toolbox is well-known. It includes litigation, arbitration, mediation and other forms of alternative dispute resolution (ADR). “Alternative” can mean “alternative to litigation” or “alternative to litigation and arbitration” depending on who you ask.

However, all disputes eventually end up in court. You can only affect what the court does and does not get to decide.

As far as ADR methods go, arbitration is unique in that, when it works as it should, it pulls the final legally binding determination of the merits away from the jurisdiction of courts. This is because arbitral awards are (or should be) near-immune to challenge on merits.

In other words, you go to court anyway, but you decide whether that court will be the entity deciding on the merits. This is the base variable that parties get to manipulate. It forces a choice between going to court or to an arbitral tribunal. If there is no choice to arbitrate, then the parties have chosen to litigate on the merits.

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International arbitration is decentralized but harmonized because the legal infrastructure is very similar in most of the world. It may not be homogenous, but it is close enough that arbitration can be competently practiced without years of training in each jurisdiction.

International litigation is centralized but heterogenous because judiciaries do not usually set up entirely new procedures for international disputes. International litigation is still domestic litigation and that can be difficult to manage for in-house counsel who is not familiar with its nuts and bolts.

The exception to this statement is free zone courts (e.g., specialized courts in the [Dubai](#), [Qatar](#), or [Astana](#) financial centers) and dedicated international commercial courts (e.g., [Singapore](#) or [Bahrain](#)). These courts are usually modeled after the English judiciary and will be unfamiliar to lawyers who are not comfortable with litigation in England or in common law jurisdictions. In that sense, the domestic nature of litigation is toned down but not eliminated.

Non-arbitration forms of ADR are supportive. This is because they do not result in a legally binding determination like litigation and arbitration. Mediation and informal negotiations result in a settlement that needs to be enforced from scratch, unless [the Singapore Convention on Mediation](#) applies or the settlement is a byproduct of litigation or arbitration. Adjudication and expert determination do not have statutory footing in most of the world and the outcomes are usually not internationally enforceable.

For most in-house lawyers, the directive is usually to make disputes go by faster, cheaper, and with as little internal impact as achievable.

## Define objectives

Step 0 in approaching the choice of method is to define what you and your business need from the disputes framework. The underlying refrain for most in-house counsel will be to minimize financial exposure for the business, so this article proceeds on this assumption. This assumption does not apply where disputes are the business but counsel at these types of firms (law firms, litigation funders, ADR providers) are not the target audience for these notes.

Consider what the disputes framework will do to the claims and to your own use of resources.

For effect *on claims*, you can chase resolution or you can chase deterrents.

If you are after resolution, then the objective will generally be to make disputes go by faster and with minimal internal impact. This can backfire when your business is on the receiving end of a good claim.

If you are after deterrents, then the objective will be to make claims unattractive. This backfires when you have an otherwise good claim of your own. This article is written from the perspective of in-house counsel who wants to make disputes go by faster with less pain. If the deterrent is the objective, one can take in the recommendations in this article and do the opposite. However, be mindful of professional ethics.

These two objectives are opposites and not compatible. Some businesses try to chase both by using asymmetrical disputes clauses but these add layers of procedural complexity. Increasing complexity creates more room for increased delays and spend, so it serves against resolution and as deterrent.

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For *resource management*, consider what you need to get a dispute to the end. This includes counsel costs, filing fees or arbitration costs, and the internal workload that it will take to go through the procedure from start to finish.

## Which is more expensive?

You may be familiar with conflicting messaging on whether international arbitration is more expensive or less expensive than court litigation.

This messaging is conflicting because both are true depending on how the arbitration is set up and run and on what kind of litigation we are comparing against.

For an English or American lawyer, arbitration is often cheaper because court litigation can itself get eye-wateringly expensive. The cost savings from not having appeals kick in.

For a continental European or a Latin American lawyer, courts can get expensive but not *that* expensive. The cost-effectiveness thesis for arbitration is not as true and could be flipped because international arbitration lawyers often come with legal holds and document production from the common law tradition.

In both cases, filing fees with arbitration providers and tribunal fees are higher in arbitration than court fees, but the bulk of the costs is legal fees. Cost savings come from managing legal fees. Managing legal fees comes from having outside counsel less to do.

Unlike litigation, arbitration can be manipulated to run by faster. This requires correct procedural choices at step zero, which is the building of the arbitration agreement.

As a result of not having appeals, arbitration does, or at least can do, a better job at cutting costs than litigation. This is more pronounced in comparison to jurisdictions where litigation is expensive.

Friction creates uncertainty. Uncertainty increases your legal spend.

## When to use litigation

Sometimes, litigation would be the better choice because arbitration, or more precisely the law governing arbitral procedure and outcomes, can introduce unknowns into predictions on how disputes will go. This creates issues of procedure and private international law, and those are proxy for delayed resolution and spiraling legal spend.

This means that these cases are *defined negatively*, they are less “use litigation because it is good” and more “think twice if arbitration is the right choice.”

Examples are:

- **Consolidation of claims.** Consolidation can be difficult outside of self-contained systems of contracts. This is because availability and conditions are somewhat all over the place between different seats, procedural rules and to an extent legal cultures. For example, it is uncontroversial that at a bare minimum arbitration agreements must be compatible. Except

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once you stop to think about it, what exactly is “compatible”?

- **Arbitrability.** This is straightforward. Think if your contract engages subject matter that is not arbitrable under the law of the seat or the law of the future place of enforcement. If it does, then you might not be able to do anything with an award. If an issue “might be” not arbitrable, you get to finance the development of foreign arbitration law in litigating over whether your dispute was arbitrable or not.
- **Criminal fraud.** This is (hopefully!) difficult to predict at contracting but findings of non-civil fraud are hard for arbitral tribunals to make. Private tribunals do not get to decide whether there was or was not a crime: they do not have jurisdiction and they do not deal with evidence in a way that is anything like a criminal court. The tribunal is working with their hands tied behind their back and can end up with a decision inconsistent with a future criminal court judgment.

In other cases, the productivity of litigation is just more predictable. These *positive* cases for litigation would be those where you understand the landscape of enforcement of your remedies and you know that this enforcement can be achieved in a reasonable time.

Examples:

- **Preliminary injunctions.** Domestically, these are often available in arbitration. In international situations, preliminary relief is the near-exclusive domain of courts. Yes, almost all jurisdictions give arbitral tribunals the power to order interim relief, but these orders are not directly enforceable except in a few jurisdictions that have recently updated their statutes. Most of the time, at least for now, all that the arbitrators can really do is shuffle costs.

If you know you will need a preliminary injunction that is not about money, you will usually be better served by the courts. Many disputes clauses have language to the effect of “this [clause] does not prevent parties from seeking injunctive relief from a court that is competent to give that relief.” This can work but depending on how court jurisdiction works in a place at a basic level, this language might not actually give jurisdiction to whatever court you eventually need.

- **Reliable enforcement of judgments.** Where the landscape and selection of jurisdictions for enforcement is straightforward and the procedure is fast-tracked, the New York Convention regime is much less of an advantage. If you expect enforcement in a place where judiciaries seek out unusual or unintuitive reasons to refuse enforcement of awards but not judgments, litigating may be safer.
- **Development of law.** In select niche situations, development of law might be in your business’ interests. This would be vanishingly rare for in-house counsel but when it does happen, a court judgment on merits is itself the desired outcome. Arbitration cannot produce that.

All those cases, both positively and negatively defined, flip the assumption of “arbitration is safer.” Now, litigation becomes the safer default and arbitration turns situational.

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## A few dos and don'ts

**Don't blindly rely on "standard" choices.** Even where a statement that "x is standard" is in itself true, it does not help explain why we use a specific method and jurisdiction in our specific contract with its specific possible disputes and how it helps interfere less with our business objectives.

**Do be transparent,** internally and externally, about what you want from the procedure you settle on. Encourage your counterpart to do the same.

**Don't layer complexity.** Procedural machinery malfunctions when it needs to digest too many moving parts. By adding complexity, you are introducing room for procedural skirmishes, admissibility problems, and questions of law that may be undecided in the jurisdictions that your dispute engages. Layering mechanisms like multi-tiered clauses are sometimes needed but use them sparingly because they create friction. Friction creates uncertainty. Uncertainty increases your legal spend.

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