

## Dispute Resolution clauses – a commercial approach

When negotiating a contract, the focus is typically on key clauses concerning the performance of the contract with only a cursory glance afforded to the so-called “Boiler Plate” clauses, including Dispute Resolution.

Not paying proper attention to the methods in which disputes will be resolved can ultimately result in drawn-out disputes, costing your client not only money, but key business relationships.

In commercial contracts, the parties are relatively free to agree exactly how disputes are to be resolved. This freedom of contract can help deescalate minor issues by using a multi-tiered Dispute Resolution clause.

Attempting to resolve disputes by alternative means is looked on favourably by the courts (and by arbitral tribunals), who have been willing to impose costs sanctions on parties who fail to properly engage in settlement discussions (see *Halsey v Milton Keynes General Trust [2004] EWCA Civ 576*). It is, therefore, wise to make provision for non-binding resolutions methods, such as mediation, within the Dispute Resolution clause.

### Mediation

Mediation allows parties to meet in semi-formal settlement negotiations overseen by an independent mediator. The mediator sits as an intermediary between the parties suggesting points of compromise but not ruling on facts or legal issues. It is this sense of neutrality and cooperation that allows tensions to be defused, and along with the confidential nature of discussions, accounts for the high success rate seen in mediations.

However, as negotiations are non-binding until formalised in a signed settlement agreement, the parties must be willing to compromise and reach a settlement, otherwise any mediation is sure to fail.

### Expert Determination

It is recommended to resolve technical issues by referring matters to a jointly appointed independent expert knowledgeable in the technical field of dispute. The investigation by the expert will be limited in scope and the findings of the report will be binding on the parties, unless there is evidence of fraud or manifest error.

When drafting the clause, it is recommended for the parties to be clear as to how the expert is to be appointed (including any fall-back mechanism if the parties are unable to reach an agreement), the procedure by which the determination is to take place, and any method by which a party can challenge the report.

## **Industry-specific Adjudications**

Like expert determination, certain industries, particularly in construction and projects, favour a manner of referring disputes to independent adjudicators appointed at the start of a project. This method allows issues to be referred during the course of the project whilst allowing work to continue.

## **Arbitration**

Where the issues in dispute are too complex or not appropriate for other dispute resolution methods, the parties will resolve matters using arbitration or litigation: which method is more appropriate for your contract will depend on several factors.

Arbitration is a contractually agreed method of resolving disputes, providing a degree of flexibility that allows proceedings to be conducted speedily and to the needs of the parties.

Trade bodies and institutions in certain industries have standardised the terms of conducting arbitrations, such as GAFTA and LMAA, which can be easily incorporated into contracts. The use of this standard language lends certainty and ease to contracting in certain industries, with such terms being under regular review and revision.

Within this commercial environment, arbitrations are conducted confidentially with a focus on reaching a commercially viable outcome, with the arbitrators selected for their commercial experience in the industry.

However, this flexibility and lack of oversight by the courts can, and does, result in proceedings being dragged out unnecessarily, resulting in high costs that could be avoided in litigation.

Finally, and most importantly, enforcing arbitral awards, particularly in foreign jurisdictions, is seen as far easier than the enforcement of court judgements, by virtue of a numerous international conventions. This mutual recognition and enforcement are key reasons that parties elect for arbitration, ensuring that a winning party can easily enforce an arbitral award against the losing party.

## **Litigation**

Unlike arbitration, litigation follows strict procedural rules (such as the Civil Procedure Rules) and does not afford the same flexibility as arbitration. Whilst this may seem unattractive in certain respects, in fact, it does lend a degree of certainty as to how proceedings will be conducted.

The biggest consideration in litigation is deciding on which country's court system to use, particularly as a party needs to be able to enforce a judicial award in the jurisdiction where the losing party holds assets.

Care should be taken to consider whether there are any mutual recognition and enforcement treaties between the two countries, and where there are none, if there is any evidence of the ease of enforcement. In such circumstances of uncertainty, choosing arbitration as the method of dispute resolution is likely to be the more prudent choice.

Aligning the chosen court system with the country of the governing law of the contract is often the preference in negotiations. This ensures certainty of how the court system will interpret the terms of the contract within the governing law. Further considerations should also be taken for minimising costs for your client. In general, obtaining advice on conducting proceedings in the resident country of your client is cheaper and far easier in both the short and long terms.

### **Conclusion**

Negotiations over the drafting of a Dispute Resolution clause should not be a sticking point to concluding a commercial contract, however care and attention should be taken in deciding which methods are elected to resolve disputes. In an ideal world, all disputes could be resolved quickly and amicably through non-binding negotiations, however the reality is that sometimes more formal proceedings are required.

Bargate Murray is on the forefront of advising on and conducting disputes on behalf of its clients, with experience in high-value arbitrations, litigations, and meditations. Please get in touch for more information and to speak to a member of our Dispute Resolution team.



### **Hannah Faulkner - Associate**

Hannah has been an Associate at Bargate Murray since May 2020, specialising in Disputes Resolution. Throughout her time at Bargate Murray, Hannah has gained significant experience in a number of complex dispute resolution matters having been closely involved in multiple high value arbitrations spanning the superyacht and aviation sectors. Hannah also has experience in mediation, negotiation and tax investigations, and continues to expand her work in High Court litigation.

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