

In-House with You Monthly Q&A

Dispute Resolution Clauses – Prevention and Cure

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Welcome



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Beware of the Midnight Clause: Rules of Engagement

Tailored solutions:

- Governing Law
- Jurisdiction (how and where)
- Exclusive or Non-Exclusive
- Judge or Arbitrator
- Timescale of dispute
- Escalation procedure
- Alternative Dispute Resolution
- Other party's assets
- Neutral forum
- All disputes to be covered by DRC or those relating to a particular obligation



Arbitration or Litigation

Litigation

- No confidentiality: potential for adverse publicity
- Precedent value (financial institutions)
- Certainty, coercion and speed: procedural certainty, costs penalties and sanctions
- Interim measures: remedies not available in arbitration (summary determination)
- Expertise: equivalent experience for arbitration panel is expensive
- Multiple agreements and parties: consolidation to avoid parallel proceedings
- Ability to appeal
- Costs: common misconception that arbitration is cheaper and faster

Arbitration

- Confidential
- Enforceability: New York Convention - currently 172 state parties
- Neutrality: avoid risk of local advantage
- No Precedent
- Flexibility: suitable procedure, neutral country and select arbitrators
- Industry Expertise: costs savings
- Finality of Decision: limited grounds to appeal
- Disclosure: reduced obligation

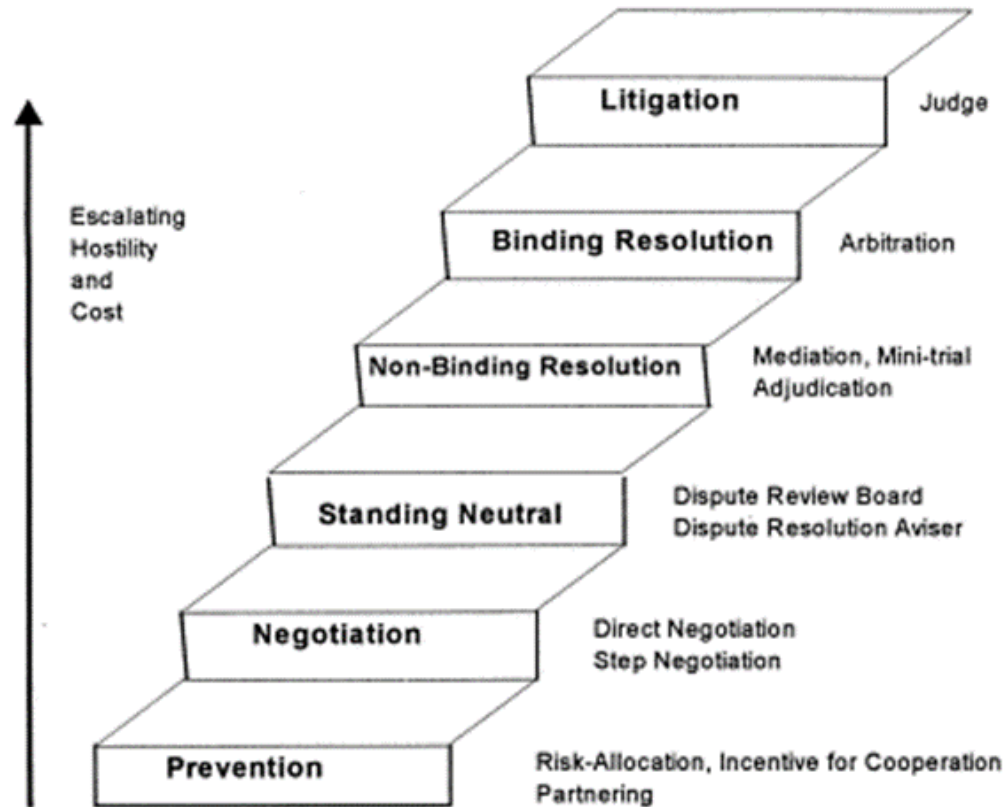


Dispute Escalation Procedure

Contractual obligation by specified methods increasing in formality before proceedings commenced

Key considerations:

- Clear process
- Trigger point
- Time frame
- Identity of decision makers
- ADR - binding or non-binding?
- Form of notice



ADR Mechanisms

Consider all options as part of the DRC (especially where there are related contracts)

Non-Binding without third-party intervention:

- Negotiation

Non-Binding process with third-party intervention:

- Mediation
- Conciliation
- Early Neutral Evaluation
- Executive Tribunals (mini-trial)

Binding ADR processes:

- Expert Determination
- Dispute Review Board
- Mediation- Arbitration
- Adjudication
- Early Neutral Evaluation



Drafting Considerations



DRC must:

- be in writing
- accord with accepted standards in the relevant area of international commerce

Several courts can have jurisdiction:

- nothing to prevent a clause which gives exclusive jurisdiction to two states concurrently for the purpose of negotiations (i.e. If A sues B they may sue in their preferred jurisdiction and vice versa)

Related Agreements in a transaction:

- avoid conflicting jurisdiction clauses as they lead to parallel proceedings

Avoid the battle of the forms: do not rely on invoices or simply exchanging standard terms

Do not refer to an earlier agreement unless that agreement specifies subsequent agreement

(Pressteck Europe Ltd v Multi-Digital De Impresion SL [2012] (QBD))



Arbitration Agreement



DRC should contain a clear agreement to refer the dispute to arbitration:

- Incorporate wording such as "disputes relating to" or "arising in connection with" the contract (to encompass both contractual and non-contractual claims)
- Specify the rules that are to govern the arbitration (such as the London Court of International Arbitration or International Commercial Court)
- Specify the seat of the arbitration, the preferred number and expertise of arbitrators
- Define the choice of language (for all written submissions and hearings) and number of arbitrators
- Consider multiple parties and/or related contracts. Is consolidation possible?
- Exclude right to appeal to the extent permitted by the laws of the relevant state
- Include confidentiality provision for all documents disclosed and Awards made



Exclusive, Non-Exclusive or Hybrid?

Exclusive:

- Another court is unlikely to accept jurisdiction. If proceedings commenced in a non-EU state in breach of an exclusive jurisdiction clause, English Courts may grant an injunction restraining those proceedings (an 'anti-suit' injunction) and can also award damages for breach of contract

Non-Exclusive:

- Flexibility but risk of parallel proceedings (especially outside the EU). Provides for disputes to be heard in one jurisdiction but one or other of the parties can take a dispute to the courts of another jurisdiction

Hybrid:

- Common in loan agreements where the borrower is restricted to one forum but the bank can sue wherever the assets are. Recognised under Brussels Regulation and Lugano Convention but may not be enforceable outside the EU





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Any Questions?



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