



AFRIMARI

The merged firm of Clyde & Co and Barlow Lyde & Gilbert

CLYDE&Co



**DISPUTE RESOLUTION
CLAUSES IN AN
INTERNATIONAL CONTEXT**



OBJECTIVE

The objective of this presentation is to briefly consider some of the issues a contracting party may wish to consider when drafting a dispute resolution clause for a contract which will be performed in an international trading environment.

OUTLINE

- Identifying the problem!
- Solutions and relevant factors which will influence choice
- Sovereign or state immunity
- Clauses
- Conclusion
- Questions

IDENTIFYING THE PROBLEM!

Example:

A in Liverpool, UK agrees to sell Canadian made armaments to be shipped from Thunder Bay, Ontario, CIF West Africa for US\$15 million to B based in Lagos, Nigeria. B will pay for the goods by way of a letter of credit denominated in US Dollars which must be issued by a 1st class German bank in Germany. Under Canadian law an export licence is necessary for which A has not applied. The contract of sale was concluded by an exchange of emails. B fails to open the letter of credit and attempts to renegotiate the price.

The above example could give rise to the following issues:

- A. Can A sue B in England?
- B. If an English court has jurisdiction must it be exercised?
- C. If A obtains judgment against B in Nigeria, Canada or Germany, will an English court be prepared to recognise the judgment? And how will the judgment be enforced in England?

- D. By what law will A's rights be determined, English, Nigerian, Canadian/Ontario, and/or German? Does it necessarily follow that all aspects of the matter will be governed by the same law?
- E. What if the transaction is illegal under English law? Will the English court enforce a foreign judgment?
- F. How should obligations expressed in a foreign currency be dealt with?
- G. What if B is a Nigerian government department or a state controlled corporation?

- From a legal perspective all of the above questions fall to be determined in accordance with principles developed in that branch of law known as conflict of laws, or private international law.
- Each state has its own rules for resolving disputes possessing a foreign element and such conflict of laws rules form part of that state's law.

- A court trying a case will apply the conflict rules of its own legal system to answer such questions and in particular, to decide whether it accepts jurisdiction and which law should govern the dispute.
- Commercially this is not good for business as it brings uncertainty and thus additional risk to the transaction. To minimise the risk of such issues arising the solution is to negotiate and agree a dispute resolution clause which will attempt to address such issues in advance of a problem arising.

FACTORS WHICH MAY INFLUENCE CHOICE

WHAT LAW SHOULD I AGREE?

Relevant considerations, choice should aid:

- Measurement of performance of parties' respective contractual obligations
- Construction
- Certainty



OTHER FACTORS WHICH MAY INFLUENCE CHOICE

- Who you are dealing with?
- Role of home advantage
- Neutrality
- “Neutral” systems, e.g. English, Swiss or in accordance with commercial principles
- Availability of remedies in event of breach
- Maturity of legal system

WHICH FORM OF DISPUTE RESOLUTION?

- Court
- Arbitration
- Mediation
- Expert determination
- Combination of 2 or more of the above



COURT PROCEEDINGS (FROM AN ENGLISH PERSPECTIVE)

- Trial by a single judge
- Likened to a civilised war but ultimately a battle of attrition
- Public
- Detailed procedural rules – the CPR
- Adversarial system – court only adjudicates on the issues presented by the parties and upon the evidence which the parties choose to call
- Interim relief, e.g. freezing, search orders, anti-suit injunctions, security for costs

Cont'd – Enforcement in an international context:

- Judgments Regulation
- Lugano Convention
- Administration of Justice Act 1920
- Foreign Judgments (Reciprocal Enforcement) Act 1933
- Administration of Justice Act applies principally to UK colonies and members of the Commonwealth.
- Costs

ARBITRATION

- Consensual – parties must agree
- Private and confidential
- Arbitrators do not have to be lawyers
- Less formal
- Parties have more control, e.g. party autonomy
- Not bound by rules of evidence or court procedure
- Tribunal's interlocutory powers
- Costs
- Third parties
- Can I appeal?

TYPES OF COMMERCIAL ARBITRATION

Ad hoc and institutional arbitration e.g. LMAA, LCIA, ICC, GAFTA, FOSFA, RSA, CIETAC, HKIAC, SIAC, ICSID

Model arbitration clauses

ENFORCEMENT

- Ease of enforcement – Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the New York Convention”).
- Objective is to facilitate reciprocal recognition and enforcement of foreign arbitral awards.
- Exceptions, e.g. public policy or illegality.
- Need for local law advice.

NEW YORK CONVENTION – THE STATISTICS!

147 countries have signed, ratified and brought into force the Convention of which the following are African:

Algeria	Ghana	Niger
Benin	Guinea	Nigeria
Botswana	Kenya	Rwanda
Burkina Faso	Lesotho	Senegal
Cameroon	Madagascar	South Africa
Central African Republic	Mali	Tanzania
Ivory Coast	Mauritania	Tunisia
Djibouti	Mauritius	Uganda
Egypt	Morocco	Zambia
Gabon	Mozambique	Zimbabwe

NEW YORK CONVENTION – THE STATISTICS!

African countries which have signed but not ratified the New York Convention:

Angola	Eritrea	Sao Tome & Principe
Burundi	Ethiopia	Seychelles
Cape Verde	Gambia	Sierra Leone
Chad	Guinea-Bissau	Somalia
Comoros	Liberia	Sudan
Democratic Republic of Congo	Libya	South Sudan
Republic of Congo	Malawi	Swaziland
Equatorial Guinea	Namibia	Togo

MEDIATION

- A form of alternative dispute resolution or ADR
- Parties appoint a third party (usually a trained mediator) who attempts to broker a settlement
- Mediation agreement
- Everything done on a without prejudice basis
- Form of shuttle diplomacy
- Costs

EXPERT DETERMINATION

- Parties agree that certain issues which may arise during performance of the contract will be submitted to an expert who will adjudicate on the matter, e.g. accountant, architect, classification society, etc
- May be a condition precedent to litigation or arbitration
- Otherwise absent fraud determination final and cannot be challenged

THE ISSUE – STATE OR SOVEREIGN IMMUNITY

- Is the State acting in a commercial capacity?
- Implied waiver

BILATERAL INVESTMENT TREATY



- Increasingly topical
- Will provide for binding international arbitration where consultation or negotiation has failed
- Arbitration proceedings can be brought directly by the investor no need for their home government to participate in the process

BILATERAL INVESTMENT TREATY

For example, the USA has BITs with the following African countries:

Tunisia	Egypt	Morocco
Senegal	Rwanda	Mozambique
Cameroon	Democratic Republic of Congo	Republic of Congo

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES ("ICSID")

ICSID is an autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States

CLAUSES

The plain vanilla:

Parties agree governing law and jurisdiction (litigation or arbitration).



Mixing it up:

A number of combinations available which can be increasingly complex. For example,

Agree to court or arbitration but with compulsory mediation and/or expert determination.



CLAUSES cont'd

Parties agree in certain circumstances one of the parties can bring proceedings anywhere in their option but the other can only bring proceedings before a particular forum, e.g. arbitration.

Proceedings before an arbitral tribunal or court in one jurisdiction but the substantive law to be applied to be that of another legal system. The procedural law governing the proceedings to be that of the state in which the court or tribunal is sitting.

Parties may agree that different systems of law apply to different types of dispute arising out of the same contract.

CONCLUSION

- You should now be able to recognise the potential problem.
- Identify factors which may influence you and your counter-party's choice.
- Other forms of dispute resolution mechanisms.

QUESTIONS



Our Global Network



1,338

Lawyers and fee
earners worldwide

1st

Law Firm of the Year
Legal Business Awards
2011

281

Partners worldwide

27

Offices across Europe,
Americas, Middle East,
Africa and Asia.