JUS MUNDI

FOR COMPANIES

The Ultimate Arbitration Checklist:

A Practical Guide for In-House Counsel

Contract Negotiation Phase: Prevent Risks and Implement Dispute Avoidance Techniques

☐ Build internal relationships and make yourself known as a valuable resource by the contract management team and other operators.

You need to be on top of the kind of contracts that your company enters into to ensure you are a valuable part of the contract conclusion process. You should also be in charge of drafting or, at the very least, reviewing the legal clauses, *e.g.,* dispute resolution/arbitration clause, choice of law clause.

Conduct internal trainings, create templates and other valuable resources for your product line, business colleagues, operatives, and other "on the ground" executives of the contract. The goal is for them to be prepared to address issues and reach out to you for directions early on. This will allow you to step in preemptively to perform a risk assessment and act or react fast.

☐ Monitor your company's partners, competitors, and industry to anticipate threats and mitigate risks.

Staying updated on arbitration developments should be an integral part of your legal strategy regardless of your level of involvement in managing your arbitration cases. Whether you delegate your dispute resolution strategy to an external counsel or work alongside them, you can prevent disputes altogether by knowing what to be mindful of in your contracts:

- Pay special attention to notoriously claim-generating clauses, *i.e.,* that you know can become problematic later on (*e.g.,* liability clauses and caps, liquidated damages, extension of time claues). This is much easier if you keep yourself abreast of legal and industry news and developments.
- Be aware of issues faced by or involving your partners so you can mitigate potential future contractual risks.

Stay tuned! We will publish a dedicated article about the importance of legal intelligence and how to mitigate your company's legal and financial risk.

Draft an effective arbitration clause and/or actively review it.

A clear arbitration clause is a vital preemptive step. Dispute resolution clauses are famously called "midnight clauses" because they are often reviewed last minute before signing a contract. They may seem unimportant compared to other substantive clauses of a contract. However, it is your role to educate internally about the tremendous importance of such a legal clause.

Unfortunately, once a dispute arises, the damage is done. The financial consequences of an ineffective or unclear dispute resolution clause can be catastrophic. On top of the contractual dispute, which can already be costly, you could be entangled in a dispute resolution/arbitration clause-related dispute. This is counterproductive in terms of time-efficiency and cost-management, thereby diminishing the benefits of using arbitration.

Models of effective arbitration clauses can be found on most arbitral institutions' websites. Jus Mundi's Arbitral Institution Profiles provides comprehensive analytics and insights into institutions' caseload to choose the relevant institution and rules for the arbitration clause.

However, there is no "one-size fits all" dispute resolution clause, as there are different circumstances in your commercial relationships, specific to your contract or your industry, that may factor into the key elements the clause must address.

Read the specifics and tips on how to draft an effective arbitration clause in a dedicated article soon.

Consider an internal tiered dispute resolution clause policy, if suitable for your industry or specific contracts.

This encourages using non-adversarial dispute resolution methods in your dispute resolution clauses (such as mediation) as a first recourse. If this first step fails, consider whether arbitration is suitable as your next course of action. If so, some elements are "must-haves" while some are "best to haves".

Decide whether to use institutional or *ad hoc* arbitration.

Both have their advantages but beware: do not think that avoiding the administrative fees of an arbitral institution will necessarily make your arbitration less costly. Ad hoc arbitration requires some level of experience with the arbitral process, as the arbitral tribunal and the parties manage the proceedings themselves. Poorly led, such an arbitration may end up entangled in litigation and, therefore, more costly than an efficiently led institutional arbitration.

Choose the arbitral institution, if you decide to avoid *ad hoc* arbitration.

Discover the arbitral institutions most chosen in your sector and the trends in arbitration in your industry through our Industry Insights Reports. For instance, the International Chamber of Commerce (ICC) is a popular choice in Construction, Oil & Gas, and Mining arbitrations. But *ad hoc* arbitration is favored in Shipping disputes.

Asians and Middle-Eastern parties tend to prefer submitting their disputes to local arbitral centers, such as the Singapore International Arbitration Centre (SIAC) and the Dubai International Arbitration Centre (DIAC). Their arbitrations are therefore managed with a more specific cultural understanding of regional business dealings.

The degree of administration a given arbitral institution's rules entail, and their fee structure

may vary widely. In addition, they may have diverse focuses: some are specialized in particular subject matters, while some center around disputes in a specific region. Some also offer expedited procedures.

For instance, some institutions only administer proceedings under their own rules. At the same time, others can also assist in administering ad hoc proceedings by intervening as an appointing authority (*i.e.*, to help the parties select and appoint the members of their arbitral tribunal), while some can administer *ad hoc* proceedings under the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL).

You have plenty of options, depending on the criteria that matter most to your business. To make the most appropriate choice for your bottom line, you can estimate the overall cost of resolving a dispute via international arbitration through some institutions' cost calculators or Reed Smith's Arbitration Pricing Calculator.

☐ Choose the arbitral rules applicable to your arbitration.

There are 501 arbitral rules currently available on Jus Mundi.

These rules guide your entire arbitral process as they provide for the specifics of an arbitral procedure. However, the way an arbitration is conducted depends on the selected arbitrators who act within these rules. You may want to specify the number of arbitrators you wish to sit in the arbitral tribunal to ensure this is agreed upon beforehand.

It is common to choose a three-arbitrator panel, each party appointing one arbitrator and the president either selected by these party-appointed arbitrators, the parties orthe arbitral institution. Ben Juratowitch QC shared his advice on how parties can agree on a presiding arbitrator in a time and cost-effective manner in a Protocol for Agreeing on a Presiding Arbitrator. Also, look at Jus Mundi's Masterclass on Arbitrators' Appointment Mechanisms for tips from leading arbitration practitioners.

The choice of your arbitral institution is important, but the choice of the seat of arbitration has more legal consequences.

☐ Identify the seat of arbitration.

The seat of arbitration determines the legal framework within which an arbitration takes place, *i.e.*, the procedural law applicable to the arbitration, the courts responsible for applying procedural law, and the "nationality" of the award for enforcement or setting-aside purposes. The seat may also determine the level of privacy and confidentiality of arbitration seated in that jurisdiction. It may also deal with the fate of multi-party disputes, as can the arbitral rules.

While the seat and place of arbitration tend to coincide in practice, it is important to make the distinction if you would like to ensure a specific physical location is used for the hearings and other procedural steps.

For instance, you may choose to seat your arbitration in London (United Kingdom), which entails the application of the English Arbitration Act 1996 to your arbitral procedure but to hold physical hearings in Kuala Lumpur for convenience.

Note that there may be significant differences in arbitration laws around the world. While some have more restrictive approaches, others, in contrast, are more liberal and arbitration-friendly, so the choice of the seat is imperative. Read our Industry Insights Reports to find out the most selected seats of arbitration in your industry.

Choose the language in which the arbitration is to be conducted.

Decide on the language in which all your written submissions and hearings are to be conducted. A different language other than the one in which your contract negotiations, documentation, or exchanges with your co-contractors are drafted will require translation, likely increasing legal costs.

Provide for the confidentiality of the arbitration.

Depending on the sensitivity of the matter, provide specifically for the confidentiality of the arbitration, rather than rely on general confidentiality provisions applicable to the underlying contract. Some arbitration rules already contain express confidentiality provisions.

Draft a choice of law clause.

While the dispute resolution clause sets out the mechanisms by which the dispute is to be resolved, the choice of law clause sets out the law governing the contract itself and its execution as well as the rights and obligations of the parties. This is the law applicable to substantive issues, such as the breach of contractual obligations, disagreement on the interpretation of a contractual clause, etc.

This specific choice can be based on several elements: the subject matter of the contract and how a jurisdiction deals or does not deal with it (*e.g.*, trusts only exist in some jurisdictions); the law of the jurisdiction of the legal department of a company is mainly based and therefore familiar with; and such.

It is important to clearly determine the legal system you refer to in your clause, *e.g.*, prefer New York law to United States law. You may also refer to customs and practices established in your trade, such as *Lex Mercatoria*, for instance. Be aware that choosing the law of a European Union Member State may make European Union law, directives, and precedents applicable to your dispute.

Pre-Arbitration Phase: Evaluate Settlement Opportunities and Your Chances of Victory in Arbitration

Perform a case assessment to evaluate your position in the dispute as well as the opposing side's and decide if your case is worth pursuing.

Read up on legal concepts specific to arbitration and search for similar disputes to see what outcomes can reasonably be expected. Jus Mundi's multilingual search engine with more than 29 filters helps you find exactly what you need in a few clicks. For instance, you can search specific paragraphs of an award, such as "Reasoning of the Tribunal", to eliminate the noise from other sections that may not be relevant at this stage of your case analysis.

Knowing the strengths and weaknesses of your position at any given time will also be an asset when negotiating with your partner to resolve issues as they come during the execution of contracts. Again, keeping abreast of the legal developments in your industry will also help you be efficient at this stage

so you can mitigate risk early on and save on legal costs.

Follow the pre-adversarial steps and timeline established in your dispute resolution clause.

For instance, if you agreed, in your clause, on trying out negotiation, mediation, or a cooling-off period before lodging a Request for Arbitration, you must go through these steps before launching an arbitration. An arbitral tribunal would likely refuse to hear the case before such steps were followed.

Be aware that you must act in good faith in any of these steps to avoid potential liability for not suitably submitting to the pre-adversarial steps of your dispute resolution clause.

Determine your chances of victory by researching and/or seeking advice from an external legal counsel.

To save on legal costs, you may choose to only involve external counsel once your in-house team has independently managed the settlement discussions or mediation. You should be able to confidently lead such discussions, since, by then, you will have assessed the strengths and weaknesses of the case and know your company's legal position well.

Here are a few tips for selecting your external counsel:

- **Use a uniform process to request bids from external counsel:** It is essential to carry out a comparative analysis of the different bids. Be mindful of the fact that your usual corporate lawyers may not be qualified to handle a specific technical dispute or familiar with international arbitration as a dispute resolution mechanism. Choosing arbitration practitioners and experts in the substantive issue at stake will ultimately save you on legal costs as the proceedings are more likely to be handled efficiently and give you better chances of prevailing. Jus Connect by Jus Mundi helps you comb through arbitration practitioners' profiles to identify the lawyers and experts you need.
- **Consider alternative fee arrangements:** This includes a breakdown of fees by stages of arbitration.
- **Ensure that your external counsel proposes cost incentives aligned with your business's goal for the dispute:** If the goal is to settle and negotiate an amicable resolution of the dispute, even during arbitration proceedings, your external counsel can propose a regressive incentive depending on the state at which the arbitration is settled.
- **Secure third-party funding, if necessary:** Third-party funding is a mechanism by which a third-party to your dispute pays some or all of the legal costs associated with a dispute in exchange for a share of the damages you may be awarded, should you win. This can include the arbitral institution, arbitrators' and external counsel fees, for instance. External counsel can assist in building a strong case to secure third-party funding so as to remove the costs of arbitration from your balance sheet.

Select the type of counsel that understand your company's interests.

The right external counsel should be a strategic partner, not completely take over your dispute resolution strategy. After all, you are the guardian of your company's business, legal, and financial interests.

They should, therefore, understand that you oversee the dispute, meaning you should be

regularly updated on your case's progress and make the strategic decisions that best suit your company's interests. They should also issue clear invoices as you need to justify the expense internally.

Here are a few tips for selecting the right fit for your business:

- **Check past pleadings**: You can find exclusive pleadings submitted to arbitral tribunals in Jus Mundi's search engine, which may assist you in determining if an external counsel is right for you.
- **Get a diverse counsel team:** Different perspectives and mindsets are assets in developing a strong and creative arbitration strategy. It ensures that your team of counsel has a global vision of the dispute and arbitral proceedings often involving different legal systems and languages, as well as the subject matter of the dispute. Jus Connect by Jus Mundi offers a range of filters to help you find what you are looking for in an external counsel. We add new filters regularly.
- **Check firm profiles with caseload information**: Jus Mundi's Firms Profiles can help you identify law firms with arbitration experience and get specific analytics about their expertise.

Arbitration Phase: Develop A Winning Strategy

☐ Establish a document management protocol.

Locate and gather all relevant documents, pre-contractual, contractual, and execution exchanges with the opposite side. Your role is to obtain all information from the business and create access for your external counsel. This will also enable you to identify potential witnesses that may need to draft affidavits or witness statements to support your claims.

☐ Lodge a Request for Arbitration or Answer to the Request for Arbitration.

The Request for Arbitration includes at least a summary of the claims. If you are Respondent in the case, you will need to answer the Request for Arbitration to defend yourself and present your counterclaims. This may be sent to the opposite side as a preliminary step to launch negotiations, with or without the involvement of external counsel.

- **Be mindful of a potential time limit** to lodge these with the selected arbitral institution. Your chosen arbitral institution rules may prescribe what should be in your notice to arbitrate. The Notice usually includes, at the very least, a description of the issue in dispute, a summary of the claims, and clearly identifies the parties involved. Depending on your arbitral rules, you may also need to nominate an arbitrator at this stage.
- **Pay the provision fees to the arbitral institution:** You will usually need to pay a provisional advance on costs to the arbitral institution at this stage.
- **Check examples to be independent at this stage of the arbitration and avoid the cost of involving external counsel if possible.** See the examples of Notices of/Requests for Arbitration specific to your contractual issues, for instance, on Jus Mundi.

☐ Select your arbitrator and appoint the arbitral tribunal.

- **Follow the arbitral rules:** The nomination of your arbitrator may need to occur in your Notice or Answer to the Notice or once the arbitral institution has been referred the case. The arbitral tribunal runs the proceedings and decides on their own jurisdiction if needed (which should not be the case if you drafted an efficient arbitration clause), as well as on the merits of the dispute.

- **Actively propose arbitrators to your external counsel:** To choose the right arbitrator for the dispute, take the lead and propose arbitrators to your external counsel. At the very least, be actively involved in the selection process, as this is a key choice in your arbitration, which has a direct effect on your final award.

Availability, expertise, languages, fees, and diversity are examples of key elements to consider for your business's bottom line, which may not be as essential to your external counsel in appointing your arbitrator.

Typically, either a sole arbitrator is to be agreed upon by the parties or appointed by the arbitral institution, or a three-arbitrator panel is to be constituted of one appointment per party, and a chair agreed upon by the two party-appointed arbitrators or appointed by the arbitral institution.

Once all arbitrators are appointed, the tribunal is constituted and takes over the conduct of the arbitration. Usually, the arbitral rules provide for the payment of an advance on costs in an amount likely to cover the fees and expenses of the arbitrators and institution administrative expenses.

Read our tips to become more autonomous in selecting your arbitrator, thereby saving on legal costs, in our upcoming article.

☐ Set the arbitration steps and timetable with the constituted arbitral tribunal

The arbitral tribunal may draw up its Terms of Reference, *i.e.,* a document identifying all the parties and arbitrators, the seat of arbitration, a summary of the parties' claims/counterclaims and relief sought, and other relevant information.

A case management conference may be scheduled to establish a provisional procedural timetable for the conduct of the arbitration.

The appeal of arbitration is particularly striking at this stage as you can decide whether any particular procedural step is necessary, such as discovery/disclosure of documents, some hearings or whether they are to be conducted in person or virtual, the number of pleadings exchanges, etc.

☐ Typical steps of arbitration are primarily handled by your external counsel under your oversight, and usually include but are not limited to:

- ☐ Document production requests
- ☐ Submission by Claimants of their full Statement of Claim, along with evidence, witness statements and experts reports
- ☐ Submission by Respondents of their full Statement of Defense and Counterclaim, along with evidence, witness statements and experts reports
- ☐ Submission by Claimants of their Reply and Defense to Counterclaim
- ☐ Submission by Respondents of their Rejoinder
- ☐ Physical, virtual or hybrid hearings
- ☐ Post-hearings submissions

- [ ] Deliberation of the arbitral tribunal and rendering of their award.
- [ ] Enforce the award, if the opposite side does not voluntarily comply with it.

If parties do not voluntarily comply with an arbitral award rendered against them, enforcement proceedings in jurisdictions where these parties hold assets will be necessary, as can be subsequent execution proceedings.

This ensures an award is recognized and executed similarly to a domestic judgment in a specific jurisdiction. As this is a jurisdiction-specific step, procedures vary from one country to another.

Learn how you can prompt compliance with awards without having to enforce them, if possible, in an upcoming article.

We hope you found this checklist helpful. It is meant to be a valuable resource you can use repeatedly.

Don't miss our "Arbitration Know-How" series to learn more about the specific stages where you can be more independent, save on legal costs, and truly be known internally as a risk-mitigating and cost-saving department.

We see you, in-house counsel!

You're the unsung heroes of every company. You protect your business's legal and financial interests while working with limited resources. We understand the challenges you face, and we want to help.

Register for Jus Mundi's upcoming newsletter dedicated to in-house counsel to receive practical tips, insights, and much more!