

Supply chain disputes: avoidance, mitigation and resolution

Introduction

Supply chains are increasingly complex. Globalisation of markets has led to supply chains that extend across multiple borders and consist of an ever-growing number of links. As the pandemic has highlighted, businesses of all types need to take a cold, hard look at the risks to their supply chain to ensure that mechanisms are in place to initially assess and mitigate disputes risk, and then to later manage disputes that do arise. Careful management of supply chain disputes risk is critical given that disruption can reverberate throughout the supply chain with significant time, cost, operational and liability implications for all involved.

Alternative dispute resolution and arbitration

International arbitration is a tried-and-tested method for resolving supply chain disputes efficiently and effectively. It offers a neutral forum that can be adapted to the needs of the parties and results in a binding award enforceable in most jurisdictions.

Arbitration also works well as part of a tailored mechanism that incorporates other alternative dispute resolution (ADR) procedures. Such bespoke options can be especially important where time is of the essence or the supply chains are essential. It can be very important that the supply chain continues to operate during the dispute to minimise loss.

Many parties initially seek to resolve disputes through negotiation, mediation or conciliation. These each provide an early opportunity to resolve the dispute, before it escalates and the parties become entrenched in their positions. Although ADR is sometimes seen as less hostile than traditional litigation, any dispute creates

tension. Parties need to be realistic: disputes will arise and must be resolved practically. If the parties have sufficient personnel, it can be helpful to have staff dealing with the dispute that are separate to those responsible for the day-to-day management of the supply chain.

Parties should also consider steps to preserve the supply chain if the other party refuses to cooperate. This could range from seeking provisional measures to compel performance of the contract to securing alternative supply to mitigate losses.

Dispute boards are another increasingly popular choice for supply chain disputes. A dispute board is a pre-established committee set up at the outset to help parties resolve disputes. The board may consider issues and provide guidance to the parties to prevent disputes from arising or be limited to resolving formal disputes that are referred to it. The board can be directed to make binding decisions or to simply provide recommendations for the parties to consider and act upon. This can assist parties in avoiding disputes or resolve them quickly in circumstances where a speedy resolution may be the most important outcome.

If the dispute cannot be resolved by ADR, then parties generally turn to either litigation or arbitration. The popularity of international arbitration in supply chain disputes is driven by several key factors, including the following.

- **Enforceability.** Unlike the enforcement of foreign court judgments, there is a near global and well-established regime for enforcing arbitral awards. Most countries have signed up to the New York

Convention, which provides straightforward rules for the enforcement of awards that, importantly, limit the scope for challenge. The ease and clarity of enforcement is a critical consideration in cross-border disputes, where disputing parties and assets may be spread across multiple jurisdictions.

- **Neutrality.** By choosing international arbitration, parties are choosing a neutral forum that is convenient for both parties to resolve the dispute, before independent, impartial arbitrators under transparent rules. In contrast, parties can be reluctant to have disputes heard before local courts as it can be seen as giving one party a home-court advantage (whether actual or perceived). In some jurisdictions, there may also be concerns over the neutrality, corruption or skill set of domestic judiciaries.
- **Expertise.** Related to the neutrality point, parties to arbitration choose their arbitrators. They are able to agree – in advance or after a dispute arises – the particular skill set and expertise of their tribunal. There are no jury trials in arbitration. This can be extremely important when dealing with complex, technical disputes.
- **Confidentiality.** Arbitration is a private process that is generally also subject to confidentiality obligations. This can be particularly important for disputes that involve sensitive information or trade secrets, such as those seen in the pharmaceutical industry. Confidentiality of process and outcome is easier to secure in arbitration than in proceedings before domestic courts where, in general, the starting principle is that proceedings and decisions are open to the public.
- **Flexibility of process.** Another great advantage of arbitration is that it offers significant flexibility. Unlike in litigation, parties have a large degree of control

over the applicable rules, procedure and scope of the arbitration, including the rules over costs allocation.

Preparing for dispute resolution

Time and time again, where dispute resolution is an afterthought left for eleventh-hour negotiation (or, worse, until after a dispute has arisen), the outcome is invariably a costly, unnecessarily complex and protracted dispute. To be most effective, the groundwork for the dispute resolution procedure should be laid when drafting the contract. In addition, companies that have undertaken a proper assessment of supply chain risks and implemented appropriate mechanisms are better placed to prevent disputes from arising (by, for example, identifying key triggers), negotiate a resolution or ultimately succeed in dispute resolution proceedings.

It is not possible to predict all the disputes that might arise during a complex long-term contract. Parties should, therefore, focus on developing a robust and flexible procedure. In particular, parties to the contracts underpinning a supply chain should consider the following.

- **Consistency.** It is unlikely that the entire supply chain will be governed by a single contract. There are usually several contracts involving different parties and regions. The most appropriate option will need to be chosen, taking into account all the circumstances. To minimise the risk of parallel proceedings and inconsistent decisions, parties will often benefit from a dispute resolution procedure that is consistent across the supply chain. Consideration should also be given to whether parties wish to be able to consolidate disputes and join key third parties to an arbitration.
- **Expedited relief.** Parties often need to obtain emergency relief quickly, such as an injunction or declaration. Many arbitral rules provide for emergency relief or expedited arbitration that allow parties to seek rapid relief on an interim or final basis. Parties should consider the

potential need for – and availability of – this type of relief when drafting their dispute resolution clause.

- Pre-arbitral steps. Given the long-term relationships and cooperation needed for an effective supply chain, it may benefit parties to attempt amicable settlement before resorting to arbitration. This can be provided for in a multi-tiered dispute resolution clause, but it should be carefully developed to avoid imposing additional disruption or delay, or grounds for jurisdictional challenges.
 - Method of dispute resolution. There are many ADR options and some will suit better than others. Parties should seek legal advice on the best options for their particular supply chain.
 - Disputes-risk legal audits. Another key element of disputes-risk mitigation is a disputes-risk legal audit. This audit involves both proactive and retrospective elements.
 - The proactive element is an audit to profile the range of disputes and then develop, adapt and adopt internal protocols to support the dispute resolution policies put in place. It may also involve training for in-house personnel in dealing with each stage of the supply chain dispute under the internal protocols.
 - The retrospective element is an audit of where, how and why disputes are arising. It involves a strategic analysis of factual circumstances and contractual arrangements in which disputes have arisen. It can be holistic or focused on a particular suite of transactions, time period or region. Commonly, patterns can be observed that allow for the identification of underlying issues and early commercial or strategic intervention that may avoid similar disputes in the future. This retrospective analysis provides an important data point for the proactive aspect of the audit.
 - Such audits are critical because too often in the heat of battle or in the relief of the aftermath, the underlying issues that caused a major dispute are forgotten. Similarly, a spate of lower value or less commercially important disputes can slip beneath the radar individually despite amounting collectively to a significant drain on financial and management resources. The opportunity to identify a common cause underlying those disputes can be missed. In the case of smaller skirmishes, it can also mean missing a red flag that the conditions for a major dispute are forming.
 - Disputes protocols. Related to this is the importance of having appropriate dispute resolution systems and protocols in place to record disputes and preserve evidence from the earliest stages of a dispute. Such systems lead to more efficient and effective dispute resolution proceedings. Importantly, they also allow earlier and more informed decisions on the appropriate strategy for resolving the dispute and avoiding future disputes.
- Investing in the assessment of disputes-risk and implementing both bespoke dispute resolution contractual mechanisms and company protocols for managing disputes can prove invaluable. In the long run it can save significant management time and money and, crucially, preserve important counterparty relationships. With operations and finance under pressure and disputes-risk on the rise in the face of global volatility, this is an important component of any risk management protocol.

Comment

Supply chain disputes are complex and often require fast cross-border solutions. International arbitration provides a flexible, efficient and effective framework to resolve these disputes, especially if combined with other ADR options. It is critical, however, that parties consider dispute resolution at the outset of a transaction to develop an appropriate bespoke dispute resolution process that effectively manages their disputes. Conducting disputes risk audits of supply chains, particularly for companies operating in essential sectors or across multiple borders, and setting in place bespoke protocols for dealing with disputes are other important tools in a company's risk management toolkit. If done well, these can save significant time and costs, as well as commercial relationships.

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