



Dispute resolution clauses in international agreements: how to decide on the appropriate forum?

Disclaimer: this flyer is not to be construed as legal advice. You should consult a lawyer before relying on this flyer.

Dispute resolution clauses are not top of mind when companies conclude an agreement. Usually, the lawyer of the party drafting the agreement adds the law firm's standard choice-of-court clause to the agreement, and this rarely prompts discussions between the parties. However, the choice for a certain dispute resolution forum is not without consequences and merits particular attention, especially where the agreement is international in nature, e.g. where one of the parties is located in another country. This flyer outlines the elements to consider when selecting the appropriate dispute resolution forum for an international agreement.

1. Party control over the outcome

Basically, there are three types of dispute resolution:

- mediation: the parties resolve their dispute amicably under the guidance of an independent person (the mediator);
- arbitration: an independent non-judicial person (the arbitrator) solves the dispute by making a decision;
- litigation: an independent judge solves the dispute by making a decision.

The main difference between mediation and the other types of dispute resolution, is that the outcome of any mediation must have the consent of both parties, whereas in arbitration and litigation the dispute is resolved by a decision. If the mediation does not lead to a resolution of the dispute, parties may need to turn to arbitration or litigation nonetheless.

2. Costs

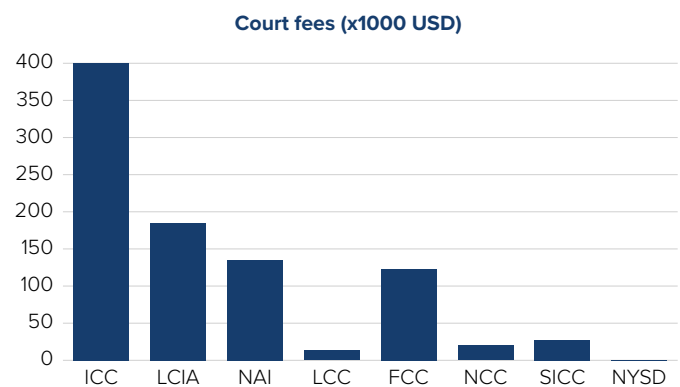
Costs will typically include such items as the fee charged by the arbitral institution or state court, the fees for the arbitrators, and lawyers' fees.

Court fees

The fees charged by the arbitral institution generally are substantially higher than the fees of state courts. This is the result of the parties having to bear the costs not only of the arbitral institution, but also the hourly rate of the arbitrator or arbitrators. The parties have limited control over these costs, as the arbitrator determines the duration of the proceedings and the amount of work necessary to reach a decision.

The costs of state court proceedings are limited to a fee which is generally a fixed amount to be paid in advance. The rates are published and therefore known beforehand. At some courts the court fee may be substantive, such as the courts in Germany, where the court fee depends on the claimed amount. Other courts charge a flat rate, such as the Netherlands Commercial Court.

Here is an example on how the fees may differ when a party brings a **USD 10 million claim**¹ which is dealt with by a tribunal consisting of three arbitrators/judges (using cost calculators, where available).



See Annex I for the underlying data

Lawyers' fees

The second cost item is the lawyers' fees. These fees are determined by the law firms themselves and are generally not subject to regulation. Basically, lawyers' fees are borne by the parties themselves. Usually, the court attributes certain legal costs and fee to the losing party. It varies from country to country and from tribunal to tribunal what the (maximum) exposure is for the losing party to the lawyers' fees (and court fees) incurred by the winning party. If the arbitral tribunal or state court adheres to the loser-pays principle, contractual arrangements regarding costs will - as a starting point - generally be accepted. Absent such an agreement, it depends on the arbitral tribunal or court how the exposure is calculated, in many instances based on applicable legislation.²

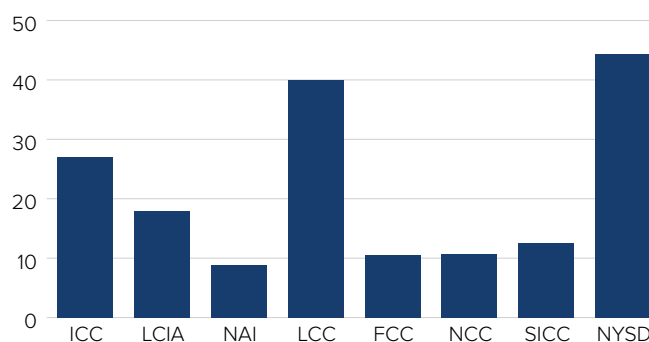
ICC International Court of Arbitration	The final award shall fix the costs of the arbitration including the reasonable legal and other costs incurred by the parties for the arbitration ³
London Court of International Arbitration	The arbitral tribunal shall decide the amount on such reasonable basis as it thinks appropriate ⁴ which generally will be 60-70% of the incurred costs ⁵
Netherlands Arbitration Institute	The arbitral tribunal may order to pay reasonable compensation, if and insofar as these costs were necessarily incurred ⁶
London Commercial Court	Actual legal costs are assessed to establish whether they are proportionate and reasonably incurred ⁷
Frankfurt Commercial Court	Maximum of EUR 98,000 (claim USD 10,000,000) ⁸
Netherlands Commercial Court	The court applies rates depending on the complexity (maximum in first instance is EUR 8,000 per act of process) ⁹
Singapore International Commercial Court	A reasonable amount in respect of all costs reasonably incurred ¹⁰
New York (US Southern District)	No loser-pays principle; parties pay their own costs, also when one party prevails, with exceptions ¹¹

3. Efficiency

"Justice delayed is justice denied" as they say. The longer legal proceedings take, the less relevant the outcome may be for the companies concerned, and the costs associated with the proceedings will increase. This is why the efficiency of an arbitral tribunal or state court is relevant for the selection of the proper forum.

Below is a chart representing the average length of proceedings where it concerns regular proceedings on the merits and by claim (excluding summary or other expedited forms of proceedings), except where separate data on these types of proceedings is unavailable.

Average length of proceedings (in months)



See Annex II for the underlying data

4. Confidentiality

In mediation and arbitration proceedings the dispute is dealt with behind closed doors. However, depending on the arbitral institution, the arbitral award may be published. Or it may become public record because of enforcement or annulment proceedings.

State court hearings and judgments are public, with only limited exceptions. Depending on the jurisdiction the case file may be confidential (e.g. the Netherlands). Generally, the identity of the parties will be withheld to the extent allowed by law.

5. Enforceability

The last factor to consider when choosing the appropriate forum for your dispute is enforceability of the decision given in arbitration or court proceedings. Here, there is a notable difference between arbitration and state courts:

- arbitral awards are enforceable in 172 countries worldwide (pursuant to the New York Convention). This is an advantage, but enforcement proceedings are required for every individual country where enforcement is needed. The award debtor may dispute enforcement or seek annulment of the award on grounds listed in the New York Convention. This may take considerable time and costs.
- state court judgments may be enforceable under a convention, EU regulation or by general private international law rules in the jurisdiction where enforcement is sought. A distinction needs to be made between judgments from EU countries and judgment from non-EU countries:
 - judgments from EU countries are enforceable in all other EU countries without the need for separate enforcement proceedings;
 - judgments from state courts in signatory states of the 2005 Choice of Court Convention (entered into force for the EU countries as well as Albania, Mexico, Montenegro, Republic of Moldova, Singapore, Ukraine and United Kingdom¹²) are enforceable in other parties to the convention after enforcement proceedings have been conducted;
 - judgments from state courts in countries that are parties to the 2019 Judgments Convention (entered into force for EU countries as well as Ukraine and will enter into force for Uruguay and the United Kingdom) are enforceable in other parties to the convention after enforcement proceedings have been conducted;
 - many countries allow enforcement under principles of comity. See the country-by-country information in the Memorandum on Enforcement¹³ prepared by the Standing International Forum of Commercial Courts (SIFoCC).

Exclusive or alternative jurisdiction?

Where a choice for certain arbitral institution or state court has been made, this may not necessarily be an exclusive one. There is the option to combine arbitration with litigation,¹⁴ for example when it comes to designating the state court that will deal with litigation before, during or after the arbitral proceedings. This includes:

- interim and protective measures: not all arbitral institutions provide for these types of measures, or do not have the jurisdiction to take certain measures (for example: granting a pre-judgment attachment on the debtor's assets);
- the appointment or challenge of an arbitrator: when parties are in disagreement on who will be the arbitrator(s), the court can decide on this issue. Challenges generally are dealt with by the arbitral institution, but litigation may be needed where the arbitral tribunal dealing with the challenge, is challenged as well.
- a claim for setting aside an arbitral award: all arbitral awards are subject to annulment by a state court.

Parties who choose court litigation to deal with any disputes arising from their agreement, may opt for one court or more courts for separate issues (a non-exclusive jurisdiction clause). In some instances, the parties agree that one party may bring proceedings exclusively in the designated court, whereas the other party may sue in other courts as well (an asymmetric jurisdiction clause).

However, alternative jurisdiction clauses have drawbacks:

- the enforcement of the judgment resulting from the court proceedings cannot be sought on the basis of the 2005 Choice of Court Convention, as this applies to exclusive jurisdiction clauses only; according to the explanatory report to the Convention¹⁵ an asymmetric choice of court agreement is not regarded as exclusive for the purposes of the Convention (unless the countries concerned have declared that the Convention applies to non-exclusive jurisdiction clauses as well). The 2019 Judgments Convention does apply to non-exclusive jurisdiction clauses, but there are limited ratifications to date.
- allowing one of the parties to choose the appropriate court when the dispute arises, may raise questions of validity. Currently, there is a case pending before the Court of Justice of the European Union on this issue.¹⁶

Model clauses

Various model jurisdiction clauses are available on the internet. However, as the final goal of a jurisdiction clause is to get an arbitral award or court judgment that is enforceable against the debtor, it may be wise to consider the requirements on jurisdiction clauses following from the main international sources allowing for enforcement of these decisions:

- the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards¹⁷
- the 2005 Choice of Court Convention¹⁸
- EU Regulation No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).¹⁹

What these sources have in common is that there must be:

- an agreement
- to submit to arbitration or to confer jurisdiction to a court
- disputes which have arisen or may arise from a defined legal relationship.

The Netherlands Commercial Court provides a model clause that contains these elements:²⁰

All disputes arising out of or in connection with this agreement will be resolved by the Amsterdam District Court following proceedings in English before the Chamber for International Commercial Matters (“Netherlands Commercial Court” or “NCC District Court”), to the exclusion of the jurisdiction of any other courts. An action for interim measures, including protective measures, available under Dutch law may be brought in the NCC’s Court in Summary Proceedings (CSP) in proceedings in English. Any appeals against NCC or CSP judgments will be submitted to the Amsterdam Court of Appeal’s Chamber for International Commercial Matters (“Netherlands Commercial Court of Appeal” or “NCCA”). The NCC Rules of Procedure apply.

A few elements have been added:

- the specific chamber(s) of the court that will deal with the dispute in English: the chamber for international commercial matters (NCC District Court), the NCC Court in Summary proceedings (in case of interim measures) and the NCC Court of Appeal (for any appeals raised against decisions of these chambers). This element follows from Dutch domestic law, which requires that parties agree on this chamber dealing with the case, if they choose to litigate in English.
- “to the exclusion of the jurisdiction of any other courts”: this element has been added in light of the 2005 Choice of Court Convention only applying to exclusive choice of courts agreements.²¹
- the applicable rules of procedure: while this is not required by Dutch law in order for the NCC rules to apply, it clarifies for the parties which set of rules will govern any proceedings.

Annex I: Court fees

ICC International Court of Arbitration	London Court of International Arbitration ²²	Netherlands Arbitration Institute	London Commercial Court	Frankfurt Commercial Court	Netherlands Commercial Court	Singapore International Commercial Court ²³	New York (US Southern District) ²⁴
USD 400,000 (advance payment) ²⁵	<p>Registration fee: GBP 1,950</p> <p>LCIA Secretariat: GBP 190-300 per hour</p> <p>Arbitrators: GBP 250-650 per arbitrator per hour</p> <p>Tribunal Secretary: GBP 100-250 per hour</p> <p>Median costs for cases 10-100 million dollar (2013-2016 Report²⁶): USD 185,000</p>	EUR 123,000 ²⁷	GBP 10,000 ²⁸	EUR 118,000 ²⁹	EUR 18,000 per party ³⁰	<p>Pay as you go: fees are due for certain milestones and hearings. This may include (for claimant):</p> <ul style="list-style-type: none"> • filing: SGD 5,390 • notification of CMC: SGD 7,865 • witness statements ordered: SGD 22,500 • setting down of the cause or matter: SGD 8,305 • hearing (no more than 4 days): SGD 13,500 	Filing fee: USD 405

Annex II: Length of proceedings

	ICC International Court of Arbitration	London Court of International Arbitration	Netherlands Arbitration Institute	London Commercial Court	Frankfurt Commercial Court	Netherlands Commercial Court	Singapore International Commercial Court	New York (US Southern District)
Length of proceedings	27 months on average ³¹	18 months on average for claims between 10-110 million USD (Report 2013-2016) ³²	8.8 months on average ³³	No specific data available; published judgments indicate a minimum duration of 21 months and a maximum of 61 months ³⁴	No specific data available; 10.5 months on average for regional courts ³⁵	10.7 months on average ³⁶	Slightly over one year ³⁷	44.4 months ³⁸
Time needed to render a judgment	2 to 5 months after the last substantive hearing ³⁹	3 months ⁴⁰	No data available	No specific data available; published judgments indicate a minimum of 1 week and maximum of 24 weeks after the last hearing ⁴¹	No data available	6 weeks on average ⁴²	No data available	No data available

References

Please note that it may take some time to load the webpages mentioned below, as permission may be needed to open links to other websites. You may wish to copy/paste the links instead.

- 1 Rates applicable on 1 August 2024
- 2 See <https://www.dlapiperintelligence.com/litigation/insight/index.html?t=09-costs>
- 3 Article 38, <https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/arbitration-rules-and-mediation-rules/>
- 4 Article 28 LCIA Arbitration Rules 2020, www.lcia.org
- 5 Man and Rühl, New International Commercial Courts - a comparative perspective, p. 508
- 6 Article 59 of the 2024 NAI Arbitration Rules, <https://nai.nl/nai-arbitration-rules/>
- 7 Rule 44.3 Rules & Practice Directions, <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-44-general-rules-about-costs/part-44-general-rules-about-costs>
- 8 <https://www.foris.com/en/litigation-costs-calculator>
- 9 <https://www.rechtspraak.nl/SiteCollectionDocuments/NCC-Rules3-Annex3.pdf>
- 10 https://sso.agc.gov.sg/SL-Supp/S914-2021/Published/20211201?DocDate=20211201&ProvIds=P11-PO21-#P11-PO21-P43_22-pr22- (Order 21, Rule 22)
- 11 <https://www.dlapiperintelligence.com/litigation/insight/index.html?t=09-costs>
- 12 Status table accessed on 10 September 2024 (<https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>)
- 13 https://sifocc.org/sifocc_documents/sifocc-memorandum-on-enforcement-2nd-with-international-working-group-commentary/
- 14 <https://www.rechtspraak.nl/SiteCollectionDocuments/NCC-litigation-pending-arbitration.pdf>
- 15 <https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf>
- 16 Societa Italiana Lastre, Case C-537/23
- 17 Article II of the Convention
- 18 Article 3 of this convention
- 19 Article 25 of that regulation
- 20 A similar model clause has been provided in case the parties choose to arbitrate their dispute. See <https://www.rechtspraak.nl/English/NCC/Pages/Model-clause-arbitration.aspx>
- 21 Article 3(a) of the Convention
- 22 https://www.lcia.org/Dispute_Resolution_Services/schedule-of-arbitration-costs-2023.aspx
- 23 See Singapore International Commercial Court Rules 2021, www.judiciary.gov.sg
- 24 <https://www.nysd.uscourts.gov/programs/fees>
- 25 <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/costs-and-payment/costs-calculator/>
- 26 LCIA Costs and Duration Data 2013-2016, <https://lcia.org/LCIA/reports.aspx>
- 27 <https://nai.nl/arbitration/>
- 28 <https://www.gov.uk/government/publications/fees-in-the-civil-and-family-courts-full-list-ex50a>
- 29 <https://www.foris.com/en/litigation-costs-calculator/>
- 30 <https://www.rechtspraak.nl/English/NCC/Pages/costs.aspx>
- 31 https://iccwbo.org/wp-content/uploads/sites/3/2024/06/2023-Statistics_ICC_Dispute-Resolution_991.pdf p. 15
- 32 <https://www.lcia.org/News/lcia-releases-updated-costs-and-duration-analysis.aspx>
- 33 <https://nai.nl/arbitration/#9.-Overview-of-the-proceedings>
- 34 This is based on an analysis of the final judgments published on the LCC's website (<https://www.judiciary.uk/courts-and-tribunals/business-and-property-courts/commercial-court/about-the-commercial-court/judgment-summaries-for-the-commercial-court/>) rendered in the period of 1 August 2023 to 31 July 2024 (excluding summary proceedings, interim judgments, default judgments, Part 8 claims, applications, proceedings on costs and appeals); where no start of the proceedings could be derived from the judgments, 31 December of the year of the initiation of the proceedings (as evidenced from the case number) was used as a starting point
- 35 Man and Rühl, New International Commercial Courts - a comparative perspective, p. 321

- 36 This is the average duration of proceedings of NCC District Court judgments published by the NCC (excluding summary proceedings, interim judgments, applications and appeals). See <https://www.rechtspraak.nl/English/NCC/Pages/judgments.aspx>
- 37 Man and Rühl, New International Commercial Courts - a comparative perspective, p. 433
- 38 Man and Rühl, New International Commercial Courts - a comparative perspective, p. 542
- 39 https://iccwbo.org/wp-content/uploads/sites/3/2024/06/2023-Statistics_ICC_Dispute-Resolution_991.pdf p. 16
- 40 <https://www.lcia.org/News/lcia-releases-updated-costs-and-duration-analysis.aspx>
- 41 Based on the same published judgments as the length of proceedings (footnote 34)
- 42 See NCC News Update April 2024: <https://www.nieuwsbriefrechtspraak.nl/ncc/>

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