McNAIR
CHAMBERS
INTERNATIONAL COMMERCIAL LAWYERS

INTERNATIONAL ARBITRATION – DO'S AND DON'T'S

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DON'T

- **Be intimidated by International Arbitration as a process. Any effective commercial litigator who also understands that this process is intended to be less formal, cheaper and more expeditious than Court litigation will soon feel comfortable in this environment**

- **Assume that the "hard ball" approach will go down well before an international arbitral tribunal – it is likely to backfire! – Light touch!**

- **Forget that the culture of international arbitration is meant to be <u>international</u> (don't do things the way you do in the Courts!).**

DO'S

<u>(I). PRE-CONTRACT.</u>

- **Consider carefully whether International Arbitration really does suit the needs of the client when negotiating a dispute resolution clause in an agreement or entering into an ad hoc arbitration agreement**

- **Ensure that the clause covers "disputes" as widely as possible, identifies the chosen law as well as the seat of the arbitration – the seat can be critical**

- **Consider whether you need an institutional mechanism (ICC/LCIA) or ad hoc (such as UNCITRAL)**

- **Consider whether you want to exclude (where possible) rights of appeal to domestic courts**

- **Consider whether you can agree sole arbitrator and perhaps even identify the arbitrator in advance**

- **Consider whether you need a "multi-step" dispute clause and/or whether you can agree "time-lines" for expedited arbitration, or "documents only" process (see LMAA rules for example in maritime matters).**

(II). DISPUTE STAGE.

- **Consider whether there are any problems with the arbitration clause – ambiguity being the main one**

- **Remember that domestic Courts may be able to grant relief supportive of arbitration prior to its commencement or thereafter (so as to preserve the status quo – see for example Section 44 Arbitration Act 1996 ("AA 96") in the UK)**

- **Try to assess the strengths/weaknesses of the claim/defence as early as possible – arbitration tends to start slowly but the pace soon accelerates**

- **Identify sources of evidence (documentary/witness) as well as potential experts as soon as possible – don't wait for the procedural order!**

- **Identify your potential arbitrator and make sure you ascertain availability/conflict issues (see IBA Guidelines on conflict of interest as well as Section 24 AA 1996, and the LCIA Guideline 16 on the Interviewing of Prospective Arbitrators)**

- **Be pro-active (if you are the Claimant!) to have the tribunal constituted as soon as possible – delay is a risk here and throughout the process**

- **Make sure the terms of reference ("TOR") of the tribunal are sufficiently broad (Institutional rules might create problems vis the raising of "new issues" if not mentioned in the TOR)**

- **Try to ensure that the Tribunal meets "face to face" with all parties at the TOR hearing. Use that as an opportunity to make sure the client comes along and becomes acquainted with the process**

- **Try to use the TOR hearing for the setting of Procedural Directions – be realistic when suggesting/agreeing to the same – slippage is a real risk**

- **Be alert to any possible grounds for challenge vis the Tribunals conduct/approach (in the UK see Sections 24/68 AA 1996). Think VERY carefully before mounting any challenge but if you decide to do so, do it without delay otherwise you may waive rights (Section 73 AA 1996).**