

Client Playbook

Choosing Arbitration

A practical guide to the procedural choices that actually shape outcomes

Mercer & Stone LLP — International Arbitration — Client Playbook

Litigation vs Arbitration: The Real Differences

Arbitration is not simply private litigation. Treating it that way is the most common source of dissatisfaction we see.

Confidentiality and party autonomy are genuine advantages of arbitration, but the more consequential differences are procedural: parties choose the tribunal, the seat, and the rules, and those choices shape the outcome as much as the merits of the dispute. Litigation offers less choice, but more predictability in exchange.

The Clause Decisions That Matter Most

Most arbitration clauses are agreed once, at contract signing, and never revisited until a dispute arises — by which point the seat and rules are fixed, whether or not they still suit the parties' actual circumstances.

SEAT VS VENUE

The seat of arbitration determines the procedural law governing the arbitration and the courts with supervisory jurisdiction — it is a legal choice, not simply a matter of where hearings physically take place, and deserves the same attention as choice of governing law.

Seat, Rules and Tribunal: A Primer

Institutional rules (ICC, LCIA, UNCITRAL) differ meaningfully in cost structure, timeline, and the degree of institutional oversight of the tribunal. A three-arbitrator tribunal costs more and takes longer than a sole arbitrator, but may be worth it for higher-value or more technically complex disputes. These are commercial trade-offs, not just legal ones, and worth deciding deliberately rather than by default.

Enforcement: Planning Backwards

An award is only as valuable as your ability to enforce it. Before finalising an arbitration clause — and certainly before a dispute begins — it is worth understanding where the counterparty's assets are likely to be, and whether the relevant jurisdictions are signatories to the New York Convention.

- Confirm the seat and any likely enforcement jurisdictions are New York Convention signatories.
- Consider whether interim relief (freezing orders, injunctions) may be needed before an award is issued, and whether the chosen seat's courts can provide it.
- For treaty-eligible investments, consider investment treaty protections as a supplement to contractual arbitration clauses.

A Final Word

The right choice between litigation and arbitration — and the right procedural choices within an arbitration clause — depend on the specific relationship and the realistic dispute scenarios it could produce. We would rather have that conversation with you before a contract is signed than help you live with a clause that no longer fits once a dispute has actually arisen.