

Why Midsized Companies Should Consider International Arbitration to Enforce Their Cross-Border Contracts

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For midsized companies engaged in cross-border trade—whether selling overseas or purchasing from foreign suppliers—the ability to enforce contracts is critical. After all, if a contract cannot be enforced, it’s not worth the paper it’s written on. But the unfortunate truth is that relying on courts to enforce cross-border contracts can cost significant time and money. Large companies often can sustain those costs and are accustomed to dealing with foreign courts. That frequently is not the case for midsized companies, however. And under current global economic circumstances—including a weakening dollar—cross-border contract (and other commercial) disputes may increase as trade flows and foreign investment patterns shift. It is therefore all the more important for midsize companies to reduce the risks associated with their cross-border transactions where possible. One potential tool for doing so is international arbitration.

An international arbitration clause can provide a midsized company with a practical and enforceable mechanism to resolve disputes, thereby reducing legal uncertainty and minimizing risk. The benefits of an international arbitration are discussed below.

Avoiding the Risks of Foreign Litigation

One of the biggest risks in cross-border trade is being forced to defend a dispute in a foreign court. Litigating in a foreign jurisdiction can mean navigating an unfamiliar legal system, dealing with different laws and procedures, facing potential prejudice as an outsider, defending yourself at a distance from home, and overcoming language barriers—all of which increase uncertainty, cost, and risk. By choosing international arbitration, companies can ensure that disputes are resolved in a neutral and more predictable forum, avoiding the pitfalls of foreign litigation.

Expert Decision-Making

Unlike litigation, where a case is often decided by a judge or jury with no expertise in the subject matter, arbitration allows parties to select arbitrators with specialized knowledge in the relevant industry or legal field. This leads to well-informed decisions that take commercial realities into account, improving the quality and fairness of dispute resolution.

Confidentiality

Unlike court proceedings, which are typically public, arbitration is private. This helps to keep sensitive business information, trade secrets, and contractual disputes confidential, reducing reputational risks and protecting competitive advantages.

Flexibility and Control

Arbitration allows parties to shape the dispute resolution process to meet their needs. Companies can select arbitrators with the right expertise, agree on procedural rules, and choose the seat of arbitration—all of which provide greater control over how disputes are handled compared to litigation.

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Use Your Own Lawyer Regardless of Arbitration Location

A significant advantage of arbitration is that, if your lawyer has international arbitration expertise, they can represent you no matter where the arbitration is seated. Unlike litigation, where local court rules often require hiring local counsel, arbitration allows you to retain the legal team you trust, ensuring consistency in legal strategy and cost efficiency.

Possibility of Remote Arbitration

Many arbitration institutions now offer the option for hearings to be conducted remotely via video conferencing. This reduces the need for costly international travel and allows businesses to participate fully in dispute resolution with minimal disruption to operations. Remote arbitration can also streamline proceedings, making the process more efficient and cost-effective.

Limited Discovery

Discovery in international arbitration is far more limited, less invasive, and less expensive than in U.S. litigation. Depositions are rarely allowed, and document production is typically restricted to materials that are relevant and material to the outcome of the case. This contrasts sharply with U.S. litigation, where broad and costly discovery – and resolution of the disputes that inevitably arise over such discovery – can significantly extend the length and expense of proceedings.

Faster Resolution

International arbitration is often more time-efficient than litigation, helping businesses avoid prolonged court delays that can disrupt operations. With streamlined procedures and limited appeals, arbitration enables companies to resolve disputes more quickly and move forward with their business.

Cost-Effectiveness

While arbitration involves costs, it is generally more predictable and cost-effective than navigating lengthy court battles across different jurisdictions. The ability to choose efficient procedures, avoid excessive discovery, and limit unnecessary delays makes arbitration a more practical choice for mid-sized businesses.

Finality of the Award

Unlike court judgments, arbitration awards are final and binding, with very limited grounds for appeal. This means that once an award is issued, the losing party has little ability to delay or overturn the decision, providing businesses with greater certainty and closure.

Enforceability of Awards

International arbitration awards are widely recognized and enforceable in over 170 countries under the New York Convention. This makes arbitration a more reliable mechanism for cross-border contract enforcement than court judgments, which may not be easily recognized or enforced in foreign jurisdictions.

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The “Loser Pays” Rule

Unlike litigation in U.S. courts—where each party typically bears its own legal costs—international arbitration often follows the “loser pays” rule. This means that the losing party is generally required to cover the prevailing party’s arbitration costs and legal fees. This discourages frivolous claims and ensures that businesses can recover their costs when they prevail.

Implications for Midsized Companies

For midsized businesses engaged in international trade, arbitration offers a strategic advantage by ensuring contract enforceability, reducing legal uncertainty, and avoiding the complications of foreign litigation. By including arbitration clauses in cross-border contracts, companies can protect their interests and minimize risks while benefiting from a more predictable, cost-effective, and expert-driven dispute resolution process.

The authors are members of Miller Canfield’s International Disputes Group. If you’d like to learn more about how international arbitration can help you enforce your cross-border agreements, contact the authors or your Miller Canfield attorney.