

Good to know

Arbitration: five tips for CLOs

To avoid excessive litigation, legal departments can turn to alternative dispute resolution. Often linked to business law, arbitration also has a role to play in the SME world, says the Chamber of Commerce.

Journalist **GUILLAUME MEYER**

1. Understand mediation vs. arbitration

"Mediation allows businesses to preserve commercial ties through dialogue," says Anne-Sophie Theissen of the Chamber of Commerce. She urges CLOs to develop a strong grasp of alternative dispute resolution (ADR) methods, such as mediation and arbitration, in order to determine which approach is best suited to each dispute and to resolve it efficiently. While mediation relies on a neutral facilitator to help the parties reach a mutual agreement, arbitration resembles private litigation, resulting in a binding decision made by an arbitrator--often with a clear winner and loser.

2. Include MEDARB clauses in contracts

"CLOs should promote a culture of amicable dispute resolution," says Theissen, advocating for the early inclusion of ADR clauses in contracts to ensure flexibility through tailor-made solutions (e.g. MED-ARB, ARB-MED-ARB). She stresses that these mechanisms require mutual consent, making it vital to anticipate potential disputes from the outset. Waiting until tensions arise, she warns, often makes it far more difficult to secure agreement on alternative procedures.

3. Choose arbitrators with expertise

"The key advantage of arbitration is that you choose who decides your case," says Carl Baudenbacher, former president of the EFTA Court. He notes that this flexibility allows parties to appoint experts in complex fields, such as derivatives in finance--something not possible in state courts. However, he warns CLOs to remain alert to potential bias: professional arbitrators may have past ties with the same parties, and unlike state judges their impartiality is not always ensured by institutional safeguards.

4. Assess arbitration costs carefully

"Unless the case is significant, arbitration may not be cost-effective," warns Baudenbacher. He cites a €60m dispute in Germany in which arbitrators' fees alone reached €1.5m. CLOs must consider the value and complexity of the dispute, as well as the number of arbitrators required. He adds that upfront payments are often necessary, making arbitration less accessible for some businesses compared to state courts.

5. Don't assume arbitration is faster

Arbitration is often seen as quicker than state court proceedings, with fast-track procedures lasting just over six months, or even as little as 15 days in urgent cases. However, Baudenbacher cautions against overestimating this benefit. He notes that, in complex cases, scheduling hearings remains a challenge, as arbitrators and parties must coordinate their availability. "I wouldn't say speed is always an advantage," he adds, pointing out that delays can still occur despite the private setting.