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3 Secrets Of Int'l Arbitration Every Atty Should Know

By **Caroline Simson**

Law360, New York (July 1, 2016, 1:22 PM ET) -- International arbitration may not be something that's top-of-mind for lawyers in other practice areas, but harboring a misunderstanding of the field may come back to haunt attorneys whose clients suddenly find themselves in the midst of an international dispute.

As the world becomes more globalized, the likelihood that companies in any number of sectors will be signing contracts with an international component only continues to grow. What, then, if a dispute arises? What body would ultimately resolve such a dispute?

More and more, the answer is an international arbitral institute like the London Court of International Arbitration or the Singapore International Arbitration Centre — a neutral body that's typically not in the home country of either company, but that can render an award that's enforceable in many countries throughout the world.

"There's a reason why international arbitration is growing," said Ed Schorr, an international arbitration and energy partner in Baker Botts' New York office. "When done right, it's an excellent way to resolve disputes. It's something that year upon year upon year we see growth in, and the more people learn about it, the faster that growth is going to continue."

Here, international arbitration attorneys dish to Law360 the things they wish their nonspecialist colleagues knew about this increasingly specialized practice area.

It's All About the Arbitration Clause

Lawyers negotiating an international commercial contract will be stressing to ensure that their client is getting the best possible deal, and, often, an airtight dispute resolution clause isn't among their top priorities. As a result, drafting an arbitration clause may be a task that gets left until the very end of negotiations.

Enter the dreaded copy and paste. While it's generally viewed as acceptable to take one of the model clauses offered by many international arbitral institutions, problems can arise if attorneys rely too heavily on clauses contained in other contracts, or if they stick different components from two separate clauses together.

"It's a recipe for disaster," said Paul Hastings partner Joe Profaizer, the head of the firm's international arbitration practice. "Copying and pasting the same defective clause into every contract is like

replicating a virus."

Examples of a defective clause could include one that names an institution that doesn't exist, or an internally conflicting clause that doesn't make sense when taken as a whole because no one read the contract from a disputes perspective.

Another example is a clause that provides for arbitration under the federal rules of civil procedure, which isn't really possible, according to Grant Hanessian, the global co-chair of Baker & McKenzie's international arbitration group. In a situation like that, the parties will ultimately end up in court anyway, he said.

"If the arbitration agreement doesn't clearly state that the parties have agreed to arbitrate a particular dispute, there is a good chance that one of the parties will ask a court to sort it out, leading to increased expense and inconvenience even if the court ultimately refers the parties to arbitration," he said.

Perhaps the most important part of the arbitration clause is choosing a seat of arbitration, a fact that escapes many noninternational arbitration practitioners, who may not even pick a seat of arbitration in the contract. But that component is a critical part of any arbitration clause, since courts in some areas of the world may be more likely to interfere in the arbitral process or to consider the merits of an award once it's issued.

"I think some in-house counsel don't fully understand the importance of the place of the arbitration," Hanessian said. "National courts can interfere with arbitrations in many ways, and of course have the power to set aside awards rendered in their jurisdiction. It's like real estate: the three most important things are location, location, location."

Both Clients and Counsel May See Upsides

In some cases, attorneys or general counsel may be opposed to international arbitration from the start, thinking of it as some sort of informal process that may or may not actually protect their client's interests. But there are many reasons why international arbitration is preferable to the alternatives and why leaving such a proceeding off the table may be doing a disservice to your clients, Profaizer says.

It's incorrect to think of international arbitration as "alternative dispute resolution" in a way that suggests that it's not a mainstream dispute resolution mechanism, he says.

"Nonexperts often think that international arbitration is a more simplistic notion of dispute resolution than it actually is ... that the mechanism is less sophisticated or developed than it has actually become," he said.

In fact, when done right, international arbitration may be a faster and less expensive option than cross-border litigation, according to Schorr. Parties can elect to have control over many aspects of the dispute resolution process, including how long the proceedings will last and the types of arbitrators that will be brought on to resolve the dispute.

In terms of the length of the dispute, it's important to note that international arbitration cases are more likely to run their full course than court proceedings, Schorr says. That's due in part to the fact that there are fewer dispositive motions in international arbitration than in court proceedings, so the percentage of cases going to evidentiary hearings is higher.

As a result, practitioners of other specialties or general counsel need to seek counsel for international arbitration proceedings with that in mind, he says.

"Arbitration calls for very good hands-on ability, as well as, of course, the ability to work effectively with people from a number of different cultures," he said.

Even if the proceedings go on longer than court litigation, though, it's quite possible that the result will be favorable to the one a client would have gotten through a court. Thanks to the New York Convention, which allows for reciprocal recognition and enforcement of international arbitration awards, an award can be relatively easily enforced in any of the 156 contracting states by that country's courts.

Sometimes, U.S. lawyers may lobby hard for a clause providing that any dispute will be resolved exclusively in a New York court. But if the foreign party lacks sufficient assets in the U.S. to collect that resulting court judgment, it won't be worth the paper it's written on.

"It's much easier to enforce an international arbitration award abroad than it is to enforce a U.S. court judgment abroad, and a lot of U.S. lawyers don't understand that," said Mayer Brown partner B. Ted Howes, who is both the leader of the firm's U.S. international arbitration practice and a member of its global leadership team for international arbitration. "They'll negotiate an international contract and insist upon home New York court advantage ... not realizing that they may be undermining their client's chances of recovery."

An Arbitrator's Reputation is Everything

Many, if not all, of the world's international arbitration rules provide for party-appointed arbitrators in disputes where the parties opt against using a single arbitrator. That means that within the tribunal of judges overseeing the claim, one will typically be appointed by each side and then a third member will be chosen by the institution or the other two arbitrators.

There are myriad concerns that should be considered when choosing an arbitrator, but some noninternational arbitration practitioners have misconceptions that the arbitrator should be an expert of the law where the arbitration is taking place. In fact, it's far more useful to factor in the reputation of any potential arbitrator, according to Daniel Schimmel, who leads the international arbitration and litigation practice of Foley Hoag's New York office.

"Often, some parties believe that it's useful to have a party-nominated arbitrator who comes from the jurisdiction and will understand the local law, and to me that's often not the right approach," he said. "It's important when you nominate somebody to nominate someone who's going to have clout and credibility with the chair."

While that may be difficult in cases where the tribunal president is chosen by the other two arbitrators, it's still important to keep in mind, he says. It's not unusual for lawyers working on international arbitration claims to be unable to find previous cases that could help the arbitrators decide in their case, leaving them to resort to cases in other jurisdictions.

In that circumstance, having an arbitrator who's an expert in one particular country's laws isn't going to be helpful, he says.

"It becomes counter-productive if that person becomes the odd man or odd woman out on the tribunal, because the other two are prominent actors in the international arbitration community and the third one is just a good specialist of the local law," he said.

Equally important is ensuring that your party-appointed arbitrator has a reputation for integrity, Howes says.

Picking an arbitrator who will be on your side no matter what may seem like a good strategy, but it's one that can often backfire, he says.

"If you pick an arbitrator who clearly is not judging, but advocating openly for your client, it'll turn off the other two arbitrators," he said. "They'll see through that, so you need to pick someone with integrity and intellectual heft."

--Editing by Philip Shea and Rebecca Flanagan.
