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Good Arbitration Clauses Can Ease Overseas Biz, Attys Say

By **Jack Newsham**

Law360, New York (September 14, 2016, 3:45 PM EDT) -- As more U.S. firms turn to low-cost vendors in China, India and elsewhere, they should be careful to write contracts with clear and effective arbitration clauses that are tailored to the circumstances of their business relationships, lawyers withMayer Brown LLP said in a Wednesday webinar.

Transactional attorneys are often taught the perils of boilerplate language in contracts, and dispute settlement sections are no different. If an arbitration clause lacks broad, clear language requiring parties to submit their disputes to a neutral tribunal, that can leave the door open for an adversary to sue and avoid arbitration, or it could make it harder to convince a judge to issue an anti-suit injunction that bars the other party from suing, said Mark Stefanini, a London partner with Mayer Brown's international arbitration group.

Ted Howes, a New York partner who leads the firm's U.S. international arbitration practice, said companies seeking to contract for products or services with an overseas vendor should not neglect to use leverage when they've got it. Parties often send disputes to "neutral" countries, but a buyer with vendors lining up around the corner could insist that business partners agree to arbitrate on its home turf, in its preferred language, with clauses to limit the cost of proceedings or otherwise give it the upper hand, Howes said.

In one dispute where the language of arbitration was not laid out in the contract, Howes said, "my French adversary refused to speak in English for the first two days of the hearing."

Attorneys may also consider working language into their clients' contracts that govern depositions, interrogatories and document production when disputes arise, said Robert Kriss, a veteran tech litigator and partner at Mayer Brown. Arbitrators often do not allow much discovery, which is often a plus for businesses, he said, but how much takes place can be written into a contract.

"You should consider whether your company will be at an information disadvantage if a dispute arises," said Kriss, who noted that a supplier is often more likely to know the reason behind cost overruns or other ground-level details on a given project. "Discovery can be expensive, but it can be absolutely necessary in some circumstances."

He added that dispute clauses can be structured to encourage settlements. For example, requiring the parties submit to negotiations or mediation beforehand can avoid the costs of an adversarial process, especially if a contract calls for a negotiator to reach a nonbinding conclusion that could foreshadow

how arbitrators could rule.

A contract can also take the strain off of ongoing relationships where small disputes frequently come up, by creating some sort of abbreviated, low-cost process, Kriss added. For example, a single arbitrator could be empowered to rule on low-dollar-value disputes over a monthlong period after a single round of briefing by picking one side's settlement offer, he said.

Whatever country the parties agree on, the attorneys highlighted the importance of arbitrating in a state that's signed the New York Convention, a bedrock agreement to confirm arbitration awards won in foreign countries. Many countries have signed onto the agreement in a bid to spur foreign investment — with Angola recently positioning itself to become the 157th state to sign on — and have made it much easier to enforce foreign awards than foreign judgments.

"Unless the other side that you're arbitrating with has sufficient fixed assets in the U.S. to satisfy a future court judgment, that court judgment may not be worth the paper it's written on," Howes said.

--Editing by Edrienne Su.

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