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Arbitration Clauses in International Sourcing Transactions

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Speakers

Brad Peterson (Moderator) is a partner in the Business & Technology Sourcing Practice in Mayer Brown's Chicago office. He has represented clients in dozens of large outsourcing transactions and hundreds of software license and services agreements. With both an MBA from the University of Chicago and a JD from Harvard Law School, he provides practical, business-focused advice and completes transactions efficiently and effectively.

B. Ted Howes is a partner in Mayer Brown's New York office and is both the Leader of the firm's US International Arbitration practice and a member of the firm's global leadership team for international arbitration. He advises US and foreign companies in a wide variety of international commercial arbitrations, including arbitrations governed by the Rules of the International Centre for Dispute Resolution, the International Chamber of Commerce, the Hong Kong International Arbitration Centre and the Singapore International Arbitration Centre.

Robert Kriss is a litigation partner in Mayer Brown's Chicago office. He has handled many technology and Internet-related disputes and has substantial experience with mediation and arbitration and other forms of alternative dispute resolution. He has tried cases before judges, juries and arbitrators and has served as an Adjunct Professor of Trial Advocacy at Northwestern Law School.

Mark Stefanini is a partner in Mayer Brown's London office and a member of the International Arbitration group. Mark handles major disputes for clients in a variety of sectors including energy, financial services and technology. He regularly acts in disputes involving complex issues of contractual interpretation, misrepresentation and the existence or scope of tortious duties. He advised international clients in arbitration matters before a wide range of arbitral institutions.

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- More than 50 lawyers around the world focused on helping clients improve their business operations by sourcing services and technology
- Advised on more than 300 significant outsourcing transactions valued at an aggregate of more than $100 billion

Recognized Market Leader

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in IT/Outsourcing for
13 consecutive years (*Chambers* 2004-2016)

Named "MTT Outsourcing Team of the Year"
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Ranked as one of the top law firms in 2009 through 2016 on The World's Best Outsourcing Advisors list for The Global Outsourcing 100™

"They are very good at being able to communicate and synthesize information in a useful and easily understandable way."
~ *Chambers USA 2016*

"They're very practical in terms of trying to identify solutions and giving very good advice on areas where it's reasonable for us to compromise or, alternatively, where to hold our ground."
~ *Chambers USA 2015*

"An excellent team of people for outsourcing agreements globally - pragmatic in their approach, with a wealth of experts they can call on."
~ *Chambers Global 2014*

"Their knowledge in this area is tremendous. They know us so well they blend into our deal teams and become a natural extension to our in-house team."
~ *Chambers USA 2014*

Today's Topics:

I. Why Choose International Arbitration?

II. Essential Provisions

III. Highly-Recommended Provisions

IV. Optional Provisions

V. Enforcement of Arbitration Awards in India and China

Why Choose
International Arbitration?

Advantages of Arbitration Over Litigation In International Commercial Contracts

- Speed/Cost
- Neutrality
  - Neutral Playing Field
  - Neutral Decision Maker
- Enforceability
  - 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
  - No comparable treaty for the enforcement of court judgments abroad
- Privacy/Confidentiality
- Expertise/Quality of the Decision Makers

Dangers of a Poorly-Drafted International Arbitration Clause

- May preclude arbitral jurisdiction altogether
- At very least, will lead to court challenges and added legal fees
- Reduces predictability of the time, expense and outcome of the arbitration

Strategic Consideration in Drafting An International Arbitration Clause

- More than the rote recitation of boilerplate language
- Arbitration is “creature of contract”
  - Arbitrator’s authority derives entirely from the contract
  - Thus, there are endless possibilities to craft/shape a future arbitration in the arbitration clause itself
- **Forward-looking** strategy: Need to envision the most likely future dispute under the contract, and draft the arbitration clause to best protect your client

Essential Provisions

(Provisions That ***Must*** Be Included In Every International Arbitration Clause)

Scope of Dispute to Be Arbitrated

- Clause must specify what disputes will be subject to arbitration
- Except in the rarest of circumstances, clause should cover “any and all disputes arising under or in connection with” the contract
- Piecemeal dispute clause is a recipe for conflict down the road

Exclusivity

- For arbitration clause to be enforceable, it must provide that arbitration is the *exclusive* dispute resolution mechanism
- Beware the distinction between “may” and “shall”
  - “any disputes arising under or in connection with this contract ***may*** be settled by arbitration” → **un**enforceable
  - “any disputes arising under or in connection with this contract ***shall*** be settled by arbitration” → **en**forceable

Reference to Applicable Arbitration Rules

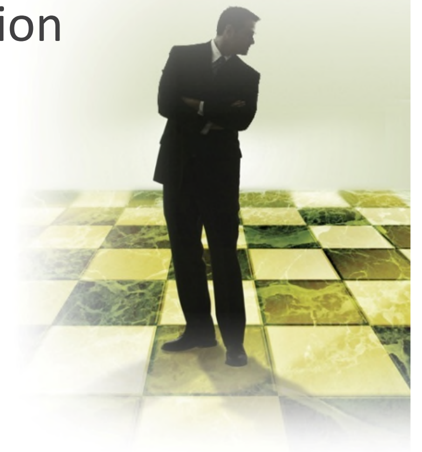
- Every arbitration clause must refer to and incorporate procedural rules to govern the arbitration
- Procedural rules are distinguishable from the substantive law governing the contract
- Two options:
  - Incorporate the procedural rules of a specific international arbitration organization (recommended approach)
  - "Ad hoc" arbitration (generally not recommended)

Reference to Applicable Arbitration Rules (cont'd)

- Most popular international arbitration organizations:
  - International Chamber of Commerce ("ICC")
  - London Court of International Arbitration ("LCIA")
  - International Centre for Dispute Resolution (branch of the AAA)
  - Singapore International Arbitration Centre ("SIAC")
  - Hong Kong International Arbitration Centre ("HKIAC")

Reference to Applicable Arbitration Rules (cont'd)

- General comments on arbitration rules
  - They are uniformly sparse (particularly when compared to court procedures)
  - More similarities than differences among the various rules
  - Do not contain rules of evidence (admissibility of evidence is left to the arbitrator's discretion)
  - Provide for very limited discovery (AAA domestic arbitration rules provide for more discovery)



Reference to Applicable Arbitration Rules (cont'd)

- Model arbitration clauses, examples:
  - International Chamber of Commerce ("ICC")

    "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration for the International Chamber of Commerce."

  - International Centre for Dispute Resolution ("ICDR")

    "Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be determined by arbitration administered by the International Centre Dispute Resolution under its International Arbitration Rules."

Highly-Recommended Provisions

(Provisions That ***Should*** Be Included In Every International Arbitration Clause)

Place (or "Situs") of Arbitration

- Simple one-sentence provision:
  "The place of arbitration shall be ____________ [insert city, country]."
- You may choose a location anywhere in the world, regardless of the particular rules you adopt
  - *e.g.*, AAA arbitrations do *not* have to take place in the United States
- Simple provision to draft, but complex strategic considerations behind choice of situs

Place (or “Situs”) of Arbitration: Checklist for Choosing Situs

- ✓ Neutral, third-party country (unless your client has special bargaining power and you can negotiate a home country arbitration)
- ✓ Signatory to the New York Convention
  - Country with a modern arbitration statute and reliable judicial system
  - Popular and reliable locations: Paris, London, Geneva, Zurich, Stockholm, the Hague, Amsterdam, New York, Los Angeles, Toronto, Rome, Brussels, Singapore and Bermuda
- ✓ Avoid developing countries, Asian countries (other than Singapore) and countries of the former Soviet bloc
- ✓ Country from which you would want the arbitral Chairman to be selected
- ✓ Country with infrastructure necessary for arbitration (modern travel facilities, internet access, etc.)

Number of Arbitrators and Procedures for Selecting Them

- The decision here: one arbitrator or three arbitrators?
- Panel of three arbitrators generally recommended:
  - Reduces chance of arbitrary decisions
  - Reduces chance of corruption
- But some advantages of choosing one arbitrator:
  - Cheaper
  - Less likely to “split the baby”

Number of Arbitrators and Procedure for Selecting Them

- **Example**

“The arbitration shall be conducted before a panel of three arbitrators. Each party shall select one arbitrator in accordance with the Rules of _________ [insert name of arbitration organization]. The parties shall then attempt to agree on the third arbitrator (the “Chairman”) within 20 days of the confirmation of the second arbitrator. If the parties fail to agree on the Chairman within such period, then such Chairman shall be appointed by the ________ [insert name of arbitration organization].”

Language of the Arbitration

- Dangers of not specifying the language of the arbitration: heated bilingual disputes and added expense
- Simple one-sentence provision: “*The arbitration shall be conducted exclusively in the English language.*”
- ***Avoid*** dual-language arbitrations
- Do not assume language of contract will be the language of the arbitration
  - The ICC Rules, for example, provide that where the arbitration clause does not specify the language of the arbitration, the arbitrators can decide the language of the contract with “due regard given to all relevant circumstances, *including* the language of the contract.”

Entry of Judgment Stipulation

- Simple provision: “Judgment upon any award(s) rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof, including any court having jurisdiction over any of the parties or their assets.”
- Not essential due to the New York Convention, but recommended for every international arbitration clause
- Preserves right of enforcement against both the parties **and** their assets
- Consider giving home court exclusive jurisdiction over motions to confirm or vacate arbitration awards, while stating it does **not** have exclusive jurisdiction over applications to enforce awards.

Provisional/Injunctive Relief

- Contrary to conventional wisdom, arbitrators are generally empowered to issue preliminary and permanent injunctive relief
- But there are two significant limitations on arbitral injunctions:
  - Timing: Parties cannot obtain arbitral injunctions at the beginning of a dispute, before the arbitral Tribunal is selected
  - Enforcement: Arbitrators lack “power of the state” to enforce preliminary injunctions
- Solution: Arbitration clause should preserve the parties’ right to seek court injunction in aid of arbitration

Provisional/Injunctive Relief (cont'd)

- **Example**

  "The arbitrator(s) shall have the power to grant any remedy or relief that they deem just and equitable, including but not limited to injunctive relief, whether interim and/or final, and any provisional measures ordered by the arbitrators may be enforced by any court of competent jurisdiction. Notwithstanding the foregoing, nothing in this Agreement shall prevent either party from seeking any provisional/ preliminary relief (including, but not limited to, injunctions, attachments or other such orders in aid arbitration) from any court of competent jurisdiction, and any such application to a court for provisional/preliminary relief shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate."

- Also consider adding **non**-exclusive court forum-selection clause to seek injunctive relief in aid of arbitration
  - Exclusive court jurisdiction may prevent your client from seeking a preliminary injunction where the property in question is located

Waiver of Appeal

- **Example**

  "Any award rendered by the arbitrator(s) shall be final and binding on the parties, and each party hereto waives to the fullest extent permitted by law any right it may otherwise have under the laws of any jurisdiction to any form of appeal of, or collateral attack against, such award."

- Not essential, but prudent and highly-recommended

Optional Provisions

(Examples of Provisions That ***May*** Be Included in an International Arbitration Clause)

Discovery Provision

- Consider whether your company will be at an informational disadvantage compared to your counter-party if a dispute arises and your company cannot take discovery
- Customers generally know less than suppliers with respect to most of the matters at issue
- Discovery can be expensive but necessary is some cases

Discovery Provisions (cont'd)

- If the arbitration agreement is silent on discovery, discovery will be governed by the rules of the organization selected to administer the arbitration
- Different organizations' rules provide different levels of discovery; many organizations provide for very little discovery
- Alternatively, the parties can specify in the arbitration agreement the types of discovery available (e.g., document requests, interrogatories, depositions) and limits on the amount of discovery

Discovery Provisions (cont'd)

- **Example**

  "Prior to the final arbitration hearing, each party shall be entitled to (i) request production of relevant documents; (ii) depose under oath the witnesses that the counter-party intends to present at the hearing; (iii) depose no more than five additional witnesses, (iv) serve no more than 30 interrogatories on the other party (including sub-parts) and (v) serve no more than 25 requests for admission on the other party. All such discovery shall be conducted in accordance with the U.S. Federal Rules of Civil Procedure. Any witness that has been requested for deposition by one party, but not produced by the other party, shall not be entitled to submit any testimony in the arbitration."

Summary Disposition Procedures

- International arbitrators are generally not permitted to issue summary judgment rulings, even where one party is plainly entitled to judgment as a matter of law
- Summary disposition procedures can be created by a provision in the arbitration

Summary Disposition Procedures

- **Example**

"The arbitration Tribunal shall have the authority to hear and determine, in a preliminary phase of the arbitration, whether any claim should be dismissed based upon the applicable law and/or a determination that there are no material issues of relevant fact to be resolved at an evidentiary hearing, including but not limited to any assertion that any claim is not timely by reason of the applicable statute of limitation. The parties agree that any award rendered by the arbitration Tribunal in such a preliminary phase of the arbitration will be final and binding on the parties, and not subject to appeal, even if the award disposes of all of the claims in the arbitration."

Negotiation or Mediation as Precondition to Arbitration

- Arbitration clause can be drafted to require the parties to engage in mandatory negotiation and/or mediation of their dispute prior to the commencement of arbitration
- Advice:
  - To avoid one party abusing the negotiation/mediation process as a means to delay arbitration, set strict and short deadlines
  - Make sure that arbitration is *mandatory*—not optional—following the conclusion of any unsuccessful negotiation or mediation ("shall," not "may")
  - Require executives with decision-making authority to engage in any negotiations or mediation

Negotiation or Mediation as Precondition to Arbitration (cont'd)

- Options to apply additional pressure to settle
  - Consider authorizing mediator to make a non-binding recommendation on the merits at the end of the mediation if a settlement has not been achieved
  - Consider providing for shifting attorneys' fees to the losing party as determined by comparing the outcome of the arbitration to the mediator's recommendation — adds pressure to settle

Expedited Arbitration Provision

- Particularly suited to address lower stakes disputes
- Accumulation of unresolved smaller disputes can adversely affect business relationships, particularly long-term outsourcing relationships
- Provide for a separate procedure for disputes involving claims under a specified damages amount
- Single arbitrator
- Short briefing schedule and page limits
- Each side submits a settlement offer to resolve the dispute at the time it submits its brief

Expedited Arbitration Provision (cont'd)

- No discovery is compelled, but participants can request information from each other and comment to the arbitrator if the counter-party refuses the request
- Dispute can be settled by accepting counter-party's settlement offer submitted with the counter-party's brief
- Short hearing (e.g., two hour maximum)
- For the award, arbitrator can select only one of the settlement offers submitted by the parties with their briefs
- Losing party pays arbitration costs and prevailing party's attorneys' fees
- Process encourages reasonable settlement offers and settlement without the need for a hearing

Enforcement of Arbitration
Awards in India and China

India: Legal requirements for enforcement

- Part II of the Arbitration and Conciliation Act 1996 ("**AC96**") (Part I applies to domestic arbitrations)
- Arbitral award must be issued in a jurisdiction that is both a signatory to the New York Convention and notified as such in the Official Gazette
- Enforceable as a decree of the Indian court (subject to points below)
- In theory, the Indian court should confine itself to the enforceability of the award, and not permit any further substantial argument on the merits
- Evidence required by the Indian court
  - Includes the original award and arbitration agreement (or authenticated copies)

India: Grounds to refuse enforcement

- Procedural irregularities
  - Including the parties were under some incapacity; a party had been unable to present his case in the arbitration; the arbitral award falls outside the arbitration agreement
- Subject matter of the dispute "not capable of settlement by arbitration under the law of India"
  - Must be "considered as commercial under the law in force in India"
- Enforcement of the award "contrary to the public policy of India"
  - Historically broadly interpreted: *Phulchand Exports Ltd v OOO Patriot; Civil Appeal No. 3343 of 2005* (Supreme Court decision on 12 October 2011)
  - Broad interpretation narrowed in *Shri Lal Mahal Ltd v Progetto Grano Spa; Civil Appeal No. 5085 of 2013* – but still wide interpretation

India: Changes brought in by the 2015 Act

- Arbitration and Conciliation (Amendment) Act 2015 (“**2015 Act**”)
- Restricts situations where enforcement of arbitral award would be “contrary to the public policy of India”
  - “Fundamental policy of Indian law”
  - “Most basic notions of morality or justice”
  - “Shall not entail a review on the merits”
- How will these be interpreted by the courts?
- Application that award not be enforced can now only be made to High Court

India: MCIA, and practical tips

- Mumbai Centre for International Arbitration
  - Due to open September 2016
  - With the 2015 Act, demonstrates desire to promote India as place to pursue arbitration
- Practical tips
  - Ensure that seat of arbitration is in a jurisdiction that is (a) signatory to the New York Convention and (b) officially recognised as such by India
  - Ensure the contracting party has assets outside India in countries where enforcement more straightforward
  - Monitor how the Indian courts interpret the AC96 as amended by the 2015 Act

China: Types of Arbitral Awards

- Foreign arbitral awards
  - An award made outside China
  - Enforceable Under the New York Convention
- Foreign-related arbitral awards
  - Made inside China administered by a Chinese arbitration institution
  - Has one of the following foreign elements:
    1. one party to the arbitration is a foreign party;
    2. legal facts as to the establishment or termination of the legal relationship between the parties happened outside China; or
    3. subject matter of the arbitration is located outside China.

China: Enforcement of Arbitral Awards

- China signatory to New York Convention since 1987
  - Foreign awards, in theory, subject to narrow exceptions under Convention
  - Foreign-related arbitral awards subject to enforcement under Article 258 of the Civil Procedure Law
  - Advice: *Arbitrate outside mainland China*
  - Arbitral awards made in Hong Kong, Macau or Taiwan treated like foreign awards under arrangements between Beijing and the Territories

China: Risks and Realities

- Risks
  - Lack of reliable statistics
  - Corruption/protectionism in local level courts
  - Extra-arbitration tactics common
- Realities
  - Absent attachable assets outside China, international arbitration is the best game in town
  - 1995, Supreme People's Court established a reporting regime to monitor the process and improve enforcement
    - Lower court refusal to enforce reported to regional Higher People's Court
    - If the Higher People's Court agrees not to enforce, automatic review by the Supreme People's Court

QUESTIONS

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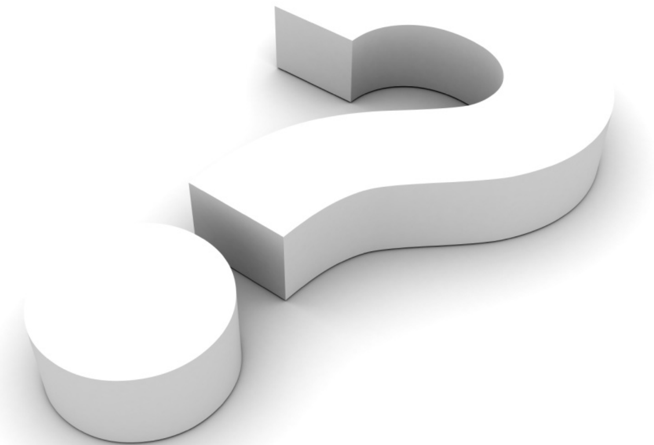

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