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Good Deals Gone Bad—Drafting Dispute Resolution Provisions to Avoid International Disputes

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Today's Topics

I. Litigation v. International Arbitration

II. The Workable (Not Merely Enforceable) International Arbitration Clause

III. Optional Provisions to Decrease the Risk and Expense of International Arbitration

LITIGATION vs. INTERNATIONAL ARBITRATION?

Advantages of Arbitration Over Litigation in International Commercial Disputes

- Speed/Cost
- Privacy/Confidentiality
- Expertise/Quality of the Decision Makers
- 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

When is Litigation Safe (or Safe-*ish*) for International Commercial Disputes?

- Court Judgment Enforcement Treaties
- *Established* record of comity between nation courts (take this risk?)
- Fixed/sufficient assets available for attachment in the litigation forum
- Monies in escrow (*e.g.*, purchase price holdback provision)
- No chance you will be the plaintiff (but how to predict that?)
- Jurisdictions that do not enforce international arbitration awards
  - Non-signatories to the New York Convention
  - Renegade signatories to the New York Convention → arbitration may be the best of several bad choices

THE WORKABLE (NOT MERELY ENFORCEABLE) INTERNATIONAL ARBITRATION CLAUSE

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
- Jeopardizes chances of successfully enforcing an award
- May bind parties to expensive procedures

Essential Provisions ("the Bare Minimum")

- Scope of Dispute to be Arbitrated
  - Except in rare circumstances, clause should cover "any and all disputes arising under or in connection with" the contract
  - Piecemeal Clause: recipe for chaos
- Exclusivity of Arbitration as Dispute-Resolution Mechanism
  - Beware the distinction between "may" and "shall"
- Reference to Applicable Arbitration Rules
  - Procedural Rules distinguishable from substantive law
  - Institutional rules recommended over "ad hoc" arbitration

Model Arbitration Clauses *Are* the Bare Minimum

- 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."
- NOT ENOUGH!

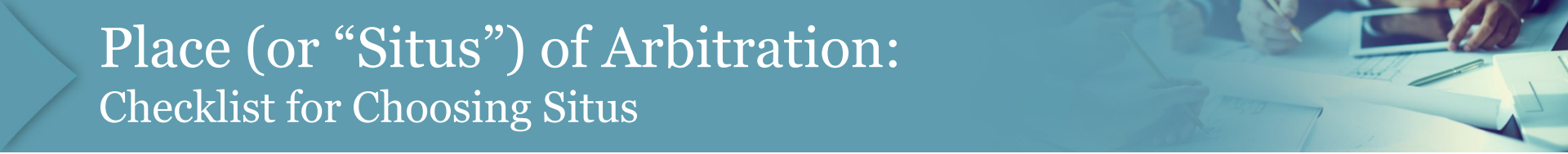
Turning a Merely Enforceable International Arbitration Provision into a Workable One

- Place (or “Situs”) of Arbitration
- Number of Arbitrators and Selection Procedures
- Language of the Arbitration
- Entry of Judgment Stipulation
- Provisional/Injunctive Relief
- Waiver of Appeal

Place (or "Situs") of Arbitration

- Simple one-sentence provision: "*The place of arbitration shall be* _____ *[insert city, country].*"
- The consequences of not including this sentence
- You may choose a location anywhere in the world, regardless of the particular rules you adopt.
  - *e.g.*, ICC arbitrations do *not* have to take place in Paris
- 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, New York, London, Geneva, Zurich, Stockholm, Singapore, Hong Kong, Toronto and Miami
  - Really, anywhere in Europe or most of the Americas
  - Avoid developing countries, Asian countries (other than Hong Kong and 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 Procedures for Selecting Them

- Selection procedures governed by arbitration rules unless the arbitration clause specifies otherwise
- Generally recommended to give the parties control over choosing the sole arbitrator or arbitral Chairman
  - **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

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
- Alternative: Emergency arbitrator provisions under institutional rules (pros and cons)

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

- Simple provision: *"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 recommended

OPTIONAL PROVISIONS TO DECREASE THE RISK, AND EXPENSE, OF INTERNATIONAL ARBITRATION

Deadlines and Time Limits

- While it may seem like a good idea to impose inflexible time deadlines on an arbitration, this is not recommended
  - Any deadline not met could lead to court challenges
- Deadlines should be subject to extension in the reasonable discretion of arbitrator
- **Example:**

  "The parties agree that, except in extraordinary circumstances, the arbitration award shall be issued within six months of the date of the Request for Arbitration. However, the parties may jointly agree in writing to extend this deadline, or the arbitration Tribunal may unilaterally extend this deadline in its sole discretion if it determines that this is required in the interests of justice."

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
- The unavailability of summary disposition procedures can be addressed by a provision in the arbitration clause — consider adding such a provision if the contract is strongly worded in your client's favor
- **Example:**

> *"The arbitration Tribunal shall have the authority to hear and determine, in a preliminary phase of the arbitration, any issue of law asserted by any party to be dispositive, in whole or in part, of any claim, including any assertion that any claim is not timely by reason of the applicable statute of limitation or otherwise, pursuant to the filing of motions to dismiss or other such procedures as the arbitration Tribunal may deem appropriate in its discretion. 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, conciliation 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

Mandating Legal Fees to the Prevailing Party

- Under most international arbitration rules, arbitrators have the discretion—but not the obligation—to order the losing party to pay the attorneys' fees and costs of the prevailing party
- Frivolous arbitrations can be deterred by mandating the award of fees to the prevailing party
  - **Example:**

    "The arbitrator(s) shall award all costs and expenses incurred by the prevailing party in the arbitration, including all administrative fees, reasonable attorneys' fees and expert witness fees, to the prevailing party."

Consolidation & Joinder Provisions

- Arbitration is consensual – problems arise when there are more than two parties who are not party to same arbitration agreement
- Situations where consolidation or joinder appropriate:
  - Multi-contract: one transaction with more than one contract, possibly binding different parties.
  - Multi-party: one contract with more than two parties.
- Aim of joinder and consolidation mechanisms – avoid multiple proceedings and inconsistent awards.

Consolidation Provisions

- Most sophisticated corporate transactions involve multiple related contracts – *e.g.*, Master Agreement and Ancillary Agreements
- Without express agreement of parties, disputes under related contracts will be heard by different arbitration tribunals
- Dangers of competing arbitration tribunals
  - Expensive
  - Threat of inconsistent awards on the same issues → CHAOS
- Solution: Consolidation provisions
  - Include in each agreement or umbrella agreement
  - Parallel and follow the same rules
- Institutional consolidation rules (ICC Rules, Article 9; LCIA Rules, Article 22) often insufficient (e.g., require each contract has identical parties)

Joinder Provisions – Multi-Party

- Equal treatment issue: appointment of tribunal where more than two parties – how to ensure party autonomy and all parties contribute to tribunal appointment process (*Siemens v Dutco*)
- Possibility for a defendant to join a third party in order to claim contribution or an indemnity
- Institutional arbitration rules contain joinder provisions (ICC Rules, Article 7; LCIA Rules, Article 22.1)

Limiting Discovery

- Discovery in international arbitration is traditionally quite limited (no depositions, targeted document requests, etc.)
- Times are changing
- Lower the cost of arbitration by narrowing discovery
  - Capping the number of document requests
  - No privilege logs
  - Eliminate expensive e-discovery requirements like production of metadata
- Consider IBA Rules on Taking Evidence – drafted to accommodate common and civil law approaches

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
- This includes lowering risk and expense

QUESTIONS?

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