How to draft an International Arbitration Clause

: ROBERT E. CROTTY AND JACLYN M. METZINGER

Failing to carefully consider the arbitration clause may result in lengthy negotiations (and perhaps litigation) about the arbitrability of a dispute and can eliminate the efficiency benefits that parties expect to realize from arbitration.

Introduction

When entering into an international business agreement, one or both parties may want to consider arbitration as a potential method of dispute resolution. The parties will usually view arbitration in a neutral country as more fair than litigation in the other party's country. In addition, arbitration is generally considered to be faster, less expensive and more confidential than litigation. In order to realize these benefits, however, it is important to draft an arbitration clause that adequately sets out what arbitral organization, if any, the parties will use, what disputes the parties agree to arbitrate, how the parties will choose the arbitrators, what law will be applied to the arbitration, what rules of procedure will be applied and other matters that, if properly considered when drafting the arbitration clause, will allow the arbitration to proceed smoothly.

Failing to carefully consider the arbitration clause may result in lengthy negotiations (and perhaps litigation) about the arbitrability of a dispute and can eliminate the efficiency benefits that parties expect to realize from arbitration. A thoughtful and comprehensive arbitration clause can insure that the arbitration proceeds smoothly without attempts to litigate arbitrability or to initiate proceedings to affect the venue, arbitration procedures, enforceability of the award and the like. Parties, therefore, should consult with their litigators to draft a clear and binding arbitration clause that will best serve their interests in the event of a future dispute. The discussion below deals with some of the important issues to consider when drafting an international arbitration clause.

International Arbitral Associations

Contracting parties from different countries should agree that arbitration be governed by an international arbitral association, such as the International Chamber of Commerce (ICC) Court of Arbitration, the London Court of International Arbitration (LCIA) or the American Arbitration Association's International Centre for Dispute Resolution. Each association has a standard arbitration clause and well-established procedures that the parties can adopt - or adapt - to increase the predictability of their dispute resolution. Furthermore, the arbitral associations administer the arbitration so that disputes are resolved in an orderly and prompt manner.

The Scope of the Arbitration Clause

One of the first things to consider is the scope of the arbitration clause. What kinds of disputes are you willing to arbitrate? Do you want to arbitrate any and all disputes arising under the business agreement or do you want to limit arbitration to particular types of disputes? Standard arbitration clauses are very broad and are intended to cover all disputes that arise out of the business agreement and the arbitration clause. Less broad clauses may lead to litigation over what disputes the parties agreed to arbitrate.

The best way to achieve clarity is to adopt an existing arbitration clause from the governing arbitral association. These standard clauses have well-understood language whose meaning has been established through - or in response to - litigation. These clauses can be incorporated into a business agreement "as is" or can be used as a starting point to draft a clause that is tailored to the needs of the parties and to the specific business agreement.

Venue

The venue of the arbitration is another fundamental consideration in drafting an international arbitration clause. Often, each party is wary of arbitrating where the other party is located due to unfamiliarity with foreign law and procedures and fear of bias.[1] Therefore, the parties should agree on a neutral venue where both can expect to achieve a fair and just result. Before choosing a venue, you should familiarize yourself with the law of that venue and how it might interact with your arbitration clause, procedural rules and any arbitration award. Other concerns may be travel restrictions, cost of travel, language, and the like.

Requiring pre-arbitration attempts to resolve disputes may allow the parties to avoid the time and expense of arbitration, especially where the parties are willing to settle but need the help of a neutral mediator to bring them to a final settlement.

Language

The arbitration clause should state the language to be used in conducting the arbitration.

Choice of Law

An international arbitration clause should also include a choice of law provision. Absent such an agreement, different bodies of law could apply to different stages of the arbitration proceeding. For example, Argentine law could apply to the validity of the arbitration clause, Italian law to the business agreement itself, and English law to the enforceability of the award. To avoid such convoluted results, you should consider the various bodies of law (and ethical rules) that could apply to the arbitration and agree upon one that will apply to the entire proceeding.

Pre-Arbitration Dispute Resolution

An arbitration clause may also require pre-arbitration dispute resolution efforts before commencing arbitration. This can include a meeting at the business level in an attempt to informally resolve the dispute or a more structured mediation program. Most arbitration associations have rules and procedures for mediation. Requiring pre-arbitration attempts to resolve disputes may allow the parties to avoid the time and expense of arbitration, especially where the parties are willing to settle but need the help of a neutral mediator to bring them to a final settlement.

Choosing the Arbitrators

Contracting parties can also control the number and appointment of their arbitrators. The arbitration clause can designate a specific person or persons to serve as arbitrators, can select a method of appointment, or incorporate an arbitration association's rules of appointment. The ability to choose your arbitrator is an advantage over litigation, where you have no control over the judge assigned to your case. The parties can also decide if they want to have one or three arbitrators resolve their dispute. Although a single arbitrator is less expensive, a panel of three arbitrators reduces the risk that a single arbitrator may not reach a sound result. In short, three heads may be better than one.

Procedural Rules

It is also important to decide on the procedural rules that will govern the arbitration. It is almost always preferable to adopt the procedural rules of an arbitral association, at least as a starting point. These rules usually have well-understood meanings, and in some cases (e.g., the ICC), have very substantial published commentaries.[2] The United Nations Commission on International Trade Law (UNCITRAL) has published procedural rules for arbitration which parties may adopt. The UNCITRAL rules are not specific, however, to any arbitral association.

Contracting parties should consider whether the arbitral association's rules adequately consider the extent of motion practice that will be allowed, the availability of

(Footnotes)

[1] W. Laurence Craig, William W. Park, & Jan Paulson, International Chamber of Commerce Arbitration, 16 (Oceana Publications, Inc., 2nd ed. 1990) (1984).

[2] See, e.g., W. Laurence Craig, William W. Park, & Jan Paulson, International Chamber of Commerce Arbitration, 16 (Oceana Publications, Inc., 2nd ed. 1990) (1984).

preliminary relief and dispositive motions, the arbitrator's power to impose sanctions on the parties, including awards of costs and attorneys' fees, and whether a written award will be issued at the end of the hearing.

Preliminary Relief

Parties should consider the availability of preliminary relief, such as temporary restraining orders, preliminary injunctions, attachments, or receiverships, and at what point in the proceedings the arbitrator may issue such relief. If given this authority, the arbitrator can protect the parties' ability to recover upon the ultimate resolution of the dispute, for example, by depositing funds in an escrow account or through the appointment of a receiver.

Dispositive Motions

A provision for dispositive motions might also be included in your arbitration clause. Motions to dismiss and motions for summary judgment may help to limit frivolous claims or prevent claims that are not factually driven from proceeding through discovery to a full hearing. If a party is concerned that submitting a dispute to arbitration will foster frivolous claims by the other party, the availability of dispositive motions (along with the arbitrator's ability to sanction the parties and make an award of attorneys' fees) is likely to discourage such claims.

Discovery

Contracting parties can also control the extent of discovery in their arbitration. This is extremely important in the international context, as different countries have different views on the proper scope of discovery. Once again, the parties can adopt the discovery rules of the governing arbitral association or they can draft their own procedures. Although the trend seems to be in favor of broad discovery, resulting in arbitrations that look more and more like litigation, this is not necessarily the most effective way to conduct an arbitration. Electronic discovery can make discovery much more expensive and time consuming. The efficiency benefits of arbitration support a shorter, less extensive, and less expensive discovery period than is typical in litigation. On the other hand, discovery should not be so limited that it prevents you from obtaining the facts necessary to prove your case or disprove your adversary's case. It is also important to be aware of artificial limits on discovery, as this may encourage frivolous claims without giving you the ability to adequately defend against those claims.

Sanctions

The parties should consider whether they want to give the arbitrators the express authority to impose sanctions for frivolous claims or procedural maneuvers. The arbitration clause may also provide for sanctions to be awarded by a court where a party frivolously attempts to vacate the award. A threat of sanctions should discourage frivolous claims and frivolous challenges to the scope of the arbitration clause, procedural rules or other matters. Sanctions can include an award of attorneys' fees, costs of the arbitration, and additional monetary sanctions.

Enforcement of International Arbitral Awards

The ability to enforce the arbitral award is a key element of the arbitration clause. International arbitral awards are enforceable through various international treaties and conventions such as the United Nations' Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention) and the Inter-American Convention on International Commercial Arbitration, both of which have been codified in the United States Code.[3] These conventions provide for the recognition of arbitration agreements (and the enforcement of arbitral awards) among citizens whose countries have adopted the conventions. You should consider whether to make enforceability a specific part of your arbitration clause.

A Caution

International arbitration has become a well-accepted method of dispute resolution, and arbitral associations are generally responsive to making sure that arbitration is conducted efficiently and fairly. While parties should carefully consider all the issues outlined above, parties should not assume that they should write new rules and new procedures unless the need to do so is clear.

Conclusion

A well-considered and well-drafted arbitration clause can add a great deal of control and predictability to the resolution of your dispute and will enhance your ability to achieve the benefits of arbitration.

(Footnotes)

[3] See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, codified at 9 U.S.C. §§ 201-298. See also Inter-American Convention on International Commercial Arbitration, codified at 9 U.S.C. §§ 301-307.

(Author: Robert E. Crotty is a Partner in the New York office of Kelley Drye & Warren and Jaclyn M. Metzinger is an Associate in the firm's New York office. This article was originally published in The Metropolitan Corporate Counsel, Vol. 17, No. 8 (August 2009))