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Negotiating Arbitration Clauses in International Agreements

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Do you rely on "cookie-cutter" dispute provisions when drafting international commercial agreements? This article outlines important considerations in the negotiation of an arbitration provision in an international agreement.

Dispute resolution clauses are often treated as an afterthought in the negotiation of an agreement. When a Canadian company is entering into an agreement with a foreign company, the dispute resolution provision may become essential to the effective and efficient resolution of any dispute. Costly pitfalls can be avoided by focussing on the following key considerations at the negotiation phase of an international agreement:

Arbitration clauses are important for enforcing obligations under international contracts.

There are conventions and treaties in place that facilitate the enforcement and recognition of arbitral awards. Most countries are signatories to the New York Convention, which provides for recognition and enforcement of international arbitral awards. The provisions and processes contemplated in these conventions significantly improve the ability of parties to enforce contractual obligations beyond what might be possible with court judgments.

The parties' choice of law to govern the interpretation of the contract does not dictate the law that will govern the arbitration process.

In the context of international commercial agreements, the choice of law that governs the interpretation of the contract must be considered separately from the law that governs the arbitral process and the law that will govern enforcement. Jurisdictions have their own laws that address matters such as what happens when a dispute arises over the appointment of arbitrators, interim relief, and judicial review and appeal of arbitral awards. The law that governs the arbitral process will be the law of the "seat" of the arbitration.

The "place of arbitration" (also known as the "seat" of the arbitration) is not necessarily synonymous with the hearing locale. An arbitration "seated" in Hong Kong, for instance, can often be physically heard anywhere. The dispute resolution clause should specify both a "seat" of the arbitration and the hearing locale, ideally naming a city and country in both instances to avoid confusion.

The factors that go into selection of the "arbitral seat" should include:

- whether the seat is a signatory to potentially relevant international treaties and conventions governing enforcement;
- whether a neutral seat is desired to avoid either side having a "home court" advantage;

- local arbitration laws, and how they are applied by local courts - consider whether local courts are unduly interventionist in arbitration processes; and
- whether the courts of the jurisdiction tend to uphold arbitration awards rather than setting them aside.

Wherever possible, include all of the relevant parties.

Arbitration proceedings are almost always limited to disputes between the parties to an agreement, with very limited ability to involve non-parties. This is a critical consideration when dealing with foreign subsidiaries that may or may not have assets to satisfy an arbitral award. If the parent company is a guarantor, then the dispute resolution provisions should potentially contemplate the ability to involve the parent in arbitrations so as to obtain an enforceable award against the parent as well. It may otherwise be very difficult to join the parent and any arbitral award may end up being useless.

Consider the significance of adopting particular arbitration rules and institutions.

In international arbitration agreements, it is common and desirable in most circumstances to specify a set of procedural rules to govern arbitrations arising under the agreement as opposed to the parties drafting their own procedural rules. Common procedural rule choices for international commercial arbitration include: the International Chamber of Commerce (ICC) rules; International Centre for Dispute Resolution (ICDR) rules; and, the Hong Kong International Arbitration Centre (HKIAC) rules.

The choice of rules matters because, despite significant similarities among institutional rules, there can be important differences. For instance, some rules specify different and more onerous document disclosure obligations (a party may care whether it is obligated to produce only documents that it wishes to rely on, as opposed to all relevant documents including some that might be unhelpful to its case). Others have special procedures for expedited arbitrations, interim measures, and the appointment of emergency arbitrators.

Although there are a few arbitral institutions that provide rules for unadministered or ad hoc arbitrations (e.g. UNCITRAL), the rules of most institutions (such as those identified above) assume that the organization will administer any arbitration under those rules. Though there is a cost associated with administration services, administration of an arbitration can bring significant benefits in the efficient conduct of proceedings and avoid costly trips to court, for instance, when parties cannot agree on who to appoint as arbitrator(s). The fee structure and the level of administrative involvement also varies from one arbitral institution to another.

Contemplate who will determine any dispute.

Parties have the ability to select their own arbitrator(s), or to agree on a procedure for appointing the arbitrator(s).

It is common for parties to default to a panel of three arbitrators (typically, each party picking one, and those nominees agreeing on the tribunal chair). This can work well in many cases. However, having a panel of three can create issues in terms of cost, timing and scheduling. Agreeing to use a single arbitrator and a method of appointment may be desirable for smaller cases, or even large cases where speed and cost are important considerations. Some contracts will identify three arbitrators to decide disputes over a specific monetary threshold, with disputes under that threshold to be decided by a single arbitrator.

When selecting the arbitrator(s), it is not generally advisable to identify a particular individual because it makes the parties captive to the health and availability of that person. However, it may be important in some cases to specify a certain field of expertise or professional qualifications (e.g., lawyer, accountant, engineer, quantity surveyor), or language fluency. This can help to mitigate the potential for avoidable delays and costs. Beware of being too specific about qualifications, as it creates difficulty finding a candidate who meets the requirements, is available on short notice, and has no conflicts of interest.

As one would expect, the choices made on the above matters (and other considerations as well) will differ depending on corporate priorities and the dynamics of contractual negotiations. The critical point is that the trade-offs should be understood and considered in the context of the overall commercial agreement. The deal negotiated by the parties will only have teeth if sensible dispute resolution provisions are in place when things go wrong.

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