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What US GCs Should Know About Drafting International Arbitration Clauses

Preliminary Considerations

Consider likely nature of the dispute. Thinking about what may go wrong with a contract, can be as important as the planning to make it go right. Key issues such as where an arbitration should take place, the level of confidentiality required and what levels of evidential discovery are you likely to require, can all put you in a much better position to deal with a dispute if one should arise in the future. These clauses should never be thought of as simply “boiler-plate”.

Should the clause cover all disputes that could arise? The standard arbitration clause will usually look to have all disputes as being covered by the arbitration clause. If this is what is required then careful wording will be required to ensure this happens, so for example to be sure that it will include tortious claims as well as contractual issues. However it is possible to have a valid and binding arbitration agreement but nevertheless carve out specific issues/areas that would be resolved through a court process. The most obvious being to provide for the parties to be able to go to court where some sort of injunctive relief is required, or to do with Intellectual Property Rights generally, or more specifically Patent issues.

Should you include a dispute escalation clause? The purpose of such a clause is to build in a process to allow the parties to have further discussions, or other less formal processes to go through, before putting a dispute in to formal arbitration proceedings. They can be as simple or as complex as the parties or the contract requires. The purpose of such clauses will also depend upon whether it is anticipated that they will be used to resolve issues that arise during the lifetime of the contract, where those issues need to be resolved to enable the contract to proceed, as against where the contract is at an end and it’s purpose is more to allow the parties a more formalised set of discussions to see whether a settlement can be achieved, before commencing a formal dispute resolution process. Again it is important at the drafting stage to think about how such clauses may be used and to answer some key questions, which will inform the drafting: how many levels of escalation is required; should the process be concurrent with the commencement of an arbitration, or do you have a right to go to arbitration only at the conclusion of the escalation process; should some form of expert determination be included?

Could any dispute include more than two parties? In general terms an arbitration agreement will only be binding on the parties to the contract in which it is included. There are some very limited exceptions to this. If there is a suite of related contracts with different parties and it seems likely that any dispute in the future may involve parties who are not a party to your contract, serious consideration should be given as to whether arbitration is appropriate as joinder of 3rd parties to a dispute is much easier if litigating in the court. It is achievable in arbitration but will require very careful drafting in all of the contracts involved.

Will there be any enforcement issues? This is likely very much to depend on who is the counter party to the contract and where they are based. If enforcement of any Award/Judgment is thought likely to be an issue then having the dispute heard in arbitration proceedings rather than through the courts is likely to be more beneficial.

With the exception of Europe there are few bilateral or multilateral treaties to assist in the recognition and enforcement of court judgments. However, in arbitration that gap is filled by the New York Convention which makes the recognition and enforcement around the world of an arbitration award a much simpler and more effective process.

Specific Drafting Issues

Choice of law issues (the contract and the arbitration). Everyone understands the need to identify the law that will be applicable to the contract. Care is also required to decide and specify what will be the law applicable to the arbitration. That is the procedural law that will be applied to the arbitration, which most commonly will that of the "seat" of the arbitration ie where the arbitration takes place. It is this law that will decide issues such as whether an exclusion of rights of appeal is valid; how far a local court can assist/intervene in an arbitration; whether there are certain mandatory rules that the parties cannot exclude.

Institutional or ad hoc arbitration. Although it is possible to start from scratch and set up an "ad hoc" arbitration the overwhelming majority of arbitration agreements select one of the well known bodies, such as the ICC or LCIA to help in the administration of the arbitration. Some thought should be given to which is the most appropriate.

Confidentiality. Although the hearings in an arbitration will be held in private, as against court hearings which will usually be open to the public, it is not the case that all others aspects of an arbitration must remain confidential. It is not automatic. Most of the sets of international arbitration "Rules" make provision for the parties to be able to apply to the Tribunal seeking an order for confidentiality. However to achieve certainty on this issue it may be better make specific provision for it in the contract.

The Rules to be used. Ordinarily the Rules to be used in an arbitration will be those of the arbitration institution that has been selected to administer the arbitration i.e the ICC. There are considerable differences between the different sets of Rules and care should always be taken in their selection. In terms of the actual procedure to be adopted during the arbitration they can be very general in their nature. Thought should be given to key issues at the contract drafting stage so elements not covered bu the Rules can be included in the contract. An obvious issue to consider is the likely levels of discovery that may be required. The starting point for most international arbitrators is to look to minimise document discovery and certainly to have nothing like clients would be used to who litigate in the US courts. If broader discovery is likely to be required, consideration should be given to including appropriate language in the contract.

The number of arbitrators. Usually this will be a choice of one or three arbitrators. Having only one can certainly limit costs and may well be appropriate in some cases. For more substantial disputes three is the more usual number, which ordinarily will give each party the right to choose one of the three.

The seat/place of arbitration. As explained above choosing the right Seat of the arbitration is important as without language to the contrary it will determine the law of the arbitration.

The language of the arbitration. A simple but often overlooked point. Especially where the contracting parties come from different countries with different languages, specifying what language any arbitration will be conducted in, is important.

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