Published on *The National Law Review* https://natlawreview.com

10 Issues to Consider When Drafting an International Arbitration Clause

Article By:

Jacob A. Manning

Often, one of the last clauses to be discussed by the parties to an international contract is the **dispute resolution clause.** While considerable attention is rightfully paid to the substantive clauses of a contract, parties often include a form **arbitration clause** instead of carefully drafting a clause that is tailored to the situation.

A contract is often drafted, of course, with the intent that it will help the parties avoid a dispute, so it is perhaps not surprising that the parties would spend the least time outlining the procedure they will follow if there is a dispute. At the same time, when disputes arise, the arbitration clause is heavily litigated and every item from the number of arbitrators to whether the parties may be appeal may become the subject of controversy. As such, companies would do well to consider certain issues and draft the clause carefully to save the time and money involved in litigating those issues later.

The parties, of course, may agree to any number of issues that can be resolved by their inclusion in the arbitration clause (some issues related to the procedure, the qualifications of arbitrators, discovery, and the like). However, the following are ten issues that the parties should consider when drafting any arbitration clause:

1. **Institutional or Informal.** The parties may rely on an institution to conduct the arbitration and incorporate its rules (for example, AAA, ICC, or the London Court of International Arbitration). Or the parties may establish their own procedure within the clause itself, choosing the number of arbitrators, the procedure, and the rules by which the arbitrators would decide claims. While an informal arbitration may be cost-effective, institutions provide known rules and processes, quality control, and ease; thus parties should carefully consider designing an informal process in the place of an institutional process.
2. **Rules**. Whether the parties choose an informal procedure or an institutional process, they must decide what rules will govern the proceedings. Where the parties have opted for an institutional proceeding, that institution's rules can simply be incorporated once the parties choose which institution's rules to follow (and in fact, a good starting point for an arbitration clause will be that institution's model clause). If an informal process is chosen, again, the parties must describe the rules in the clause itself—a cumbersome process that should not be undertaken without assistance.
3. **Scope and Exclusivity.** The parties must discuss what disputes will be submitted to

arbitration. There may be reasons to exclude some disputes from arbitration, but those are rare; in most situations, the parties will dictate that all disputes are to be arbitrated.

4. **Place of Arbitration.** The clause should define the place of the arbitration—a decision that does not rest only on convenience of the location. The parties must consider, among other things, whether the courts in the chosen country would enforce the decision, whether the country is a signatory to the **UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards,** and the arbitrators who may be available in the chosen country.
5. **Number of Arbitrators**. Usually, an arbitration will be conducted by one or three arbitrators. Obviously, an arbitration before three arbitrators will be more expensive, and possibly more time-consuming. However, in large dollar-value cases, choosing three arbitrators may be desirable to limit the risk of irrational or unfair results or aid in handling complex issues.
6. **Method of Choosing Arbitrators**. The parties should consider specifying in the clause the method by which the arbitrator(s) will be chosen or replaced. Though the rules each provide a mechanism for doing so, the parties should maintain some control particularly over the manner by which the chairperson is chosen.
7. **Language**. Even where the parties have chosen the language of the contract, they should also define the language of the arbitration in the clause. That choice should be governed by the language of the contract, the parties and documents involved, and the pool of arbitrators from which they will be choosing.
8. **Substantive Law**. The choice of substantive law can be covered elsewhere in the contract, if the clause is explicit that the chosen law governs the arbitration as well. Regardless, the contract should make clear what country's law will govern performance and any disputes.
9. **Provisional or Injunctive Relief**. Generally, the arbitrator(s) will have the authority to enter provisional or injunctive relief, but that ability may be limited. As a result, the parties may wish to allow themselves to seek provisional or injunctive relief in aid of arbitration in a court of their choosing.
10. **Finality and Waiver of Appeal.** It should not be necessary for the parties to state in their arbitration clauses that any award granted is final and not subject to appeal. However, it is certainly prudent for the parties to state in the contract itself that they have agreed to those limits.

National Law Review, Volume I, Number 218