Dispute Resolution/Forum Selection Clauses—What Corporate Counsel Should Keep in Mind

By Clifford J. Hendel and Elena Sevila

Dispute resolution clauses, though often deceptively short, merit great care in their drafting. Taking the time and making the effort to negotiate a dispute resolution clause may avoid engaging in costly and time-consuming proceedings. However, parties often fail to dedicate sufficient attention to these clauses until disputes actually arise, which is often "too late" to establish a fair and balanced clause, and which invites costly and unnecessary delay in bringing the matter to conclusion.

This article will investigate the main considerations corporate counsel should consider when negotiating the dispute resolution clause of an agreement when their client or project is overseas.

Pre-Judicial or Pre-Arbitral Resolution Mechanisms

When referring to a "dispute resolution clause" one may be tempted to automatically assume that reference is made to a national court, or to an arbitral forum, to which the parties will submit any potential controversy. However, we often forget that several alternative dispute resolution mechanisms are available and that the number of contracts including such mechanisms is increasing.

Direct negotiation and mediation are perhaps the most popular alternative dispute resolution mechanisms included in dispute resolution clauses. Negotiation, of course, is a process by which parties to a dispute communicate and exchange proposals in an attempt to resolve the same on a consensual basis. Mediation in many ways is an extension of negotiation where the parties to a dispute seek the assistance of a party not directly involved in the conflict to resolve their differences without having recourse to a binding third-party decision having the force of law and issued by a judge or arbitrator.

Alternative dispute resolution mechanisms, when they work, are obviously more effective and efficient than costly, time-consuming and debilitating court or arbitral proceedings. Such alternative mechanisms are especially suitable where a dispute occurs between parties valuing the preservation of their commercial relationship. However, there are a few things to keep in mind when drafting negotiation or mediation clauses, especially when these alternative mechanisms are considered as a prior step or condition to the initiation of judicial or arbitral proceedings.

First of all, the clause should clearly state whether the recourse to negotiation (i.e., meeting of senior executives to negotiate a settlement) and/or mediation is considered as a binding condition to initiating the proceedings. Otherwise, ordinary courts will be obliged to decide whether the parties were bound to negotiate in good faith or to mediate should a conflict arise. This may result in delay and extra expenses.

Secondly, parties have to determine when the condition is fulfilled, that is to say, when the negotiation or mediation requirement has been satisfied (freeing the parties to bring a judicial or arbitral claim). It is generally helpful to establish a limited time period after which, absent agreement to extend the period, these alternative proceedings would be deemed to be concluded and formal actions could be commenced.

Finally, there are cases where seeking a court (or arbitral) order providing interim relief may be crucial for one of the parties, and the existence of a negotiation/mediation clause may become a problem for the competent body that has to award it. Therefore, when drafting a dispute resolution clause, exceptions permitting the parties to seek these extraordinary measures (in spite of the binding mediation or negotiation) have to be included, or the time limitations for the consensual process have to be very brief.

"Home Court Advantages"

Obviously negotiation and mediation mechanisms do not always bear fruit. And clients and their counsel often are dubious of such procedures, and reluctant to commit to use them. (It should be remembered that in many jurisdictions worldwide, there is very little in the way of mediation or negotiation "culture," and players from such jurisdictions often will have little faith and no experience in the process.) Thus, parties are often obliged to resort to the national courts. When litigation becomes necessary, one of the first questions to be asked is where suit should be filed.

On a preliminary basis at least, the most favourable situation for a party to a dispute involving an international commercial transaction is to litigate in one's own courts. Even if the courts of the counterparty's country are viewed as unbiased, that party is litigating at home, using its regular lawyers following a familiar procedure and its own language.

Litigating in a foreign country always entails inconveniencies (unknown procedural rules, in some cases a different language, ignorance of other factors that could

have an important impact on the outcome of the case) and extra expense.

Recourse to "home court" litigation renders the foreign party subject, of course, to all procedures common in the home country: if your client is foreign, you will generally want to avoid exposing him to U.S.-style discovery and deposition practice, which will be entirely alien to him.

Thus, in international transactions, typically the counterparty does not agree to litigate before your courts, just as you may not agree to litigate before his.

In this regard, it should be remembered that certain contractual matters may not be adjudicated by courts notwithstanding the choice made in the dispute resolution clause, since in respect of such matters a particular court has exclusive power of decision. This exclusive jurisdiction of a particular court derives from the substantive law of the contract. Thus, together with the forum selection clause, it is important to establish the law that ensures the adjudication of the matter case by the preferred court.

Importantly, it should also be remembered that in any event recourse to "home court" may not in the end be particularly useful in terms of enforceability of the judgment. When no agreement exists between the country where the judgment has been issued and the country where it has to be executed (for instance, the place where the assets of the defendant are located) this judgment could be useless; and even where such an agreement exists, actual enforcement could be time-consuming and expensive, at a minimum. It is thus highly recommended to take the time and make the effort to analyze whether the judgment of our own court will be easily enforced in the country or countries where the other party's sizable assets are located.

Arbitration: The Most Suitable Option

Thus, there are many cases (surely the majority of international transactions) where the designation of one's own court is impossible or imprudent. Arbitration becomes the preferred option in these circumstances, as it is perceived to level the playing field between the parties, leaving it to them to establish the procedure that will govern the proceeding, to choose the arbitrator or arbitrators who will decide it, and otherwise leave decision control to the fullest extent possible in the hands of the parties; certain additional benefits or perceived benefits of arbitration include increased confidentiality, faster and better adjudication, etc.

Furthermore, in terms of enforceability, arbitration is the preferred efficient dispute resolution mechanism since the Convention on Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention (the "Guardianship" of which has been declared by the NYSBA International Section as one of its three missions) ensures on a nearly worldwide basis the enforcement (without substantive review of the merits) of arbitral awards issued in a jurisdiction which is party.

Unfortunately, an arbitration clause does not automatically guarantee all the benefits of arbitration (speed of proceedings, confidentiality, and certainty of forum...) and an ill-drafted clause may have results more detrimental than advantageous.

By appointing an arbitral institution and by including the model arbitration clauses proposed by such institution in their contract, parties are off to a good start insofar as the configuration of their arbitral process is concerned.

When parties decide to complete or fine-tune these model arbitration clauses), special care should be taken. Otherwise, the risk exists of drafting clauses in such a way that they may lead to disputes over their interpretation that may result, at best, in unnecessary delay and expense and, at worst, in the nullity of the arbitration clause (the so called pathological clauses).

In this regard, parties should avoid appointing a specific person who may refuse or be unavailable to act when the time comes. Also, parties should avoid too much specificity with respect to the qualifications of the arbitrator or impossible deadlines to render the award. Special attention should be paid not to misname or invent the institution appointed.

The more complete an arbitration clause is the more chances the parties have to obtain a satisfactory resolution to their dispute. Counsel may want to consult in this regard the International Bar Association's *Guidelines for Drafting International Arbitration Clauses*, with recommended clauses for optional elements such as provisional and conservatory measures (the authority of the arbitral tribunal and of the courts), document production, confidentiality, allocation of costs and fees, qualifications required of arbitrators, time limits, finality. Also multi-tier, multi-party and multi-contract dispute resolution clauses models were suggested. Another classic in the area is Paul Friedman's text *Drafting Arbitration Clauses*.

In conclusion, while the dispute resolution/forum clause of an agreement may be the least of your concerns when negotiating the document, it may turn out to be of critical concern if and when a dispute arises. At that point, you (and your client) will be very thankful for the care and attention that you may have devoted to it before the ink was dry on the agreement.

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