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Together: International Dispute Resolution Clauses and the Entire Transaction

By Howard B. Miller

An international arbitration dispute resolution agreement is part of virtually all private international agreements. Ordinarily, no party to an international agreement is willing to trust the judicial process in the home jurisdiction of another party. The solution is an agreement for an international arbitration.

Unfortunately, the dispute resolution clause in international negotiations often is added at the end of a negotiation and is sometimes viewed as a postscript to the deal.

For strategic purposes, however, an international arbitration dispute resolution clause *is integral to an entire negotiating position and is not just an add-on to the transactional terms already agreed upon*. If it is not thought of that way, there will be strategic disadvantages either in the dispute resolution process or in the negotiation position. The team that negotiates an international transaction should include both transactional counsel and at least one counsel experienced in international arbitration.

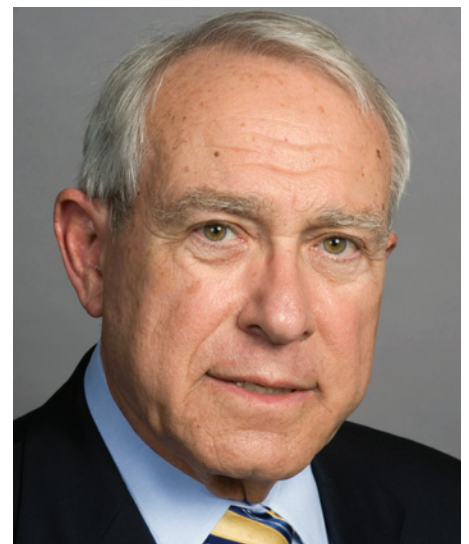
Reviewing the terms of an international arbitration clause will demonstrate the importance of that dual perspective.

First is the location of the arbitration, its venue, which is often most important

to senior executives, who would rather not travel internationally for an arbitration hearing. Because of its importance, the venue issue can lose its value if negotiated just within the context of the dispute resolution clause. Sometimes the venue may be more important to the other party; therefore, if it is negotiated in the context of the entire deal, it may be used as leverage for your side to gain an even more important transactional point.

This idea was reinforced just last year in California. For the past 20 years, California has been a disfavored location for international arbitration, to the detriment of California businesses. In 1998, the Supreme Court of California effectively ruled the appearance of counsel in international arbitration was the practice of law; therefore, having a non-U.S. lawyer appear at an arbitration represented the unauthorized practice of law, with severe potential sanctions.

Foreign lawyers were loath to advise their clients to agree to a California-based arbitration. If requested by California counsel, the foreign lawyer's response was a decisive no because the foreign lawyer was prohibited from appearing at an arbitration in California.



That changed in 2018 when the California legislature passed and Governor Jerry Brown signed Senate Bill 766, which provides that a non-U.S. lawyer who is a member in good standing of an established bar of a foreign country can appear in an international arbitration in California.

The new law went into effect January 1, 2019, and now counsel for California businesses can credibly ask for venue in California and either get it or obtain something else of value.

The same principle holds true for other arbitration clauses: Measure their importance against other non-arbitration items as well as the arbitration issue.

The issues to be drafted in the arbitration clause in an international agreement, in addition to the venue, include the following:

How will the arbitration be administered? It is possible to have an international arbitration without designating an arbitral institution to administer it. To avoid unnecessary complexity and delay, most parties designate an institution to administer the arbitration. For international arbitrations, there are several dozen, from the widely used International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), Hong Kong International Arbitration Centre (HKIAC), Singapore International Arbitration Centre (SIAC), and, in the United States, the International Centre for Dispute Resolution (ICDR) and JAMS. Each has its own fee structure and its own panel of arbitrators, though some will administer arbitrations with arbitrators not on their panels.

Each arbitral institution also has its own procedural rules for the process of the arbitration. Each may have different timing and efficiency rules. There are different rules in each on critical issues such as the availability of emergency or other preliminary relief and certain types of damages. Each arbitral institution has its own rules on pre-hearing disclosures of documents, a critical matter in the resolution of disputes, and one on which even at the time of negotiating the arbitration agreement the parties may have different interests.

The international arbitration clause may also describe the agreement on selection of arbitrators. Will there be one or three? Will there be any special qualifications; for

example, judicial experience, knowledge of an area of business or law, language abilities or country origins? Each arbitral institution has its own rules on the appointment and challenges to arbitrators.

The arbitration clauses also will deal with choices of law. What substantive law will govern the institution (the substantive law does not need to be the law of the place of arbitration)? For example, the place of arbitration could be California, but the agreed-upon substantive law could be English law. What is the law of the designated seat of the arbitration that governs procedural law in court?

Will the agreement limit available damages that can be awarded by an arbitrator? In the rules of some arbitral institutions, there is a default rule of no punitive damages. In others, there is no limit on punitive damages absent agreement of the parties, but there may be in the agreement limitations on other types of damages.

Is the arbitration confidential under applicable law or the rules of the institution? If not, should there be agreement on confidentiality?

Do the parties want to have a step ADR process, involving agreeing to a mediation before the arbitration can be commenced? There are land mines in step ADR agreements about the timing of when the mediation must be completed, what constitutes good faith if it is not, and whether an arbitrator or court will decide those issues.

Will there be an allocation of fees and costs to the prevailing party? Some arbitral institutions have a default rule on fees and costs, and some do not.

All these clauses are subject to the fundamental rule of international arbitration,

which is party autonomy. The parties may negotiate these issues individually, but with a designated institution in the arbitration agreement, the parties can modify the rules only by joint agreement. If one party objects to any change, the rules of the institution will govern, which is why it is critically important the negotiators of the arbitration clause are completely familiar with the rules of the arbitral institution to which they agree and understand the value and importance of each dispute resolution issue. They are too important to be negotiated at the last minute in discussion limited solely to the arbitration issues. They need to be considered by counsel knowledgeable in both the transactional and arbitration issues in the interests of the client in the overall agreement.

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