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Outside Counsel

Drafting an Arbitration Agreement in 2022: the Drafter's Perspective

In an article published on Dec. 10, 2021, the first in a series titled "Drafting an Arbitration Agreement in 2022: 2021 Considerations," I highlighted matters to consider including in dispute resolution agreements to reflect recent events and current social priorities. In this second article of the series, I examine the issue from the perspective of practicing transactional attorneys. Indeed, it's those lawyers who draft the arbitration provisions that the litigators ultimately have to defend or critique and that we, as arbitrators, must consider and often decide on.

With that in mind, I asked three corporate lawyers for their thoughts: Jan Joosten, a corporate partner at FisherBroyles, specializing in cross-border transactions;

By **Myrna Barakat**

Cathy Rossouw, a partner in Chapman and Cutler's bankruptcy and restructuring group; and Melissa Sawyer, head of Sullivan & Cromwell's global M&A practice and co-head of its corporate governance and activism practice.

As the reader may recall, in my first article, I suggested exploring the following five items for inclusion in dispute resolution agreements: an alternative arbitration center the parties may turn to in case their initial choice is no longer an option due to unforeseen events; whether hearings should (or may) be held virtually or in-person; cybersecurity measures to follow during proceedings; a description of equity, diversity and inclusion considerations to take into account when selecting arbitrators and arbitration venues; and a mediation clause before parties can move to an adjudicative process.

Arbitration Center

Not surprisingly, the selection of the arbitration center(s) is a matter that corporate lawyers will typically discuss with their litigation partners and on which they are likely to defer to them. Melissa points out that, in M&A deals, the disputes that arise are generally related to post-closing disagreements over the calculation of earn-outs or purchase price adjustments. These are often handled by accountants acting as arbitrators. I would therefore note that, similar to arbitration venue selection, one may want to consider having more than one accounting firm as an option or a fallback choice in case the appointed firm can't act for an unforeseen reason.

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In-Person or Virtual … Or Hybrid

Generally, all three practitioners believe that specifying whether hearings will be held remotely or in- person will very likely be considered by drafters and their clients going forward. Ultimately, a hybrid approach may be the optimal one when a dispute could involve participants from different locales. For parties who prefer in-person hearings but don't want to delay proceedings significantly, Jan suggests drafters include a timeframe after which a hearing must be held virtually if it can't be held in person prior to the specified milestone or period due to unforeseen events.

Jan also highlights the need to consider the challenge of time zone differences for virtual hearings and agree on a fair schedule for all. He gives the example of an all-day session "with one party located in the Netherlands and the other on the West Coast, a nine-hour time difference. When the biological clock of the participants in the Netherlands tells them to go home and get some sleep, the people in California are wide awake and alert."

Cybersecurity

A common theme in all of our discussions was the appeal of, and absolute need for, confidentiality in any alternative dispute resolution proceeding. Including cybersecurity protocols and scrutinizing those of the arbitration venues considered were therefore on the top of everyone's list of key matters to consider going forward, in particular as virtual hearings become more common.

Cathy notes that these protocols should extend to privacy matters generally. She suggests that "arbitration centers that develop a 'best practices' set of rules that are clear, commercial and widely adopted, or that become leaders in setting benchmarks relating to privacy and cybersecurity in the context of online proceedings, are likely to put themselves ahead of their competition."

Social Consideration: Equity, Diversity and Inclusion

As I had previously noted, transaction parties may want to consider scrutinizing an arbitration venue's equity, diversity and inclusion (EDI) protocols when deciding which one(s) to select. For M&A deals, such examination should apply to accounting firms when they're asked to act as "arbitrators." For international matters, Cathy reminds us that EDI has a different meaning for different nationalities. Although it isn't uncommon to consider arbitrator nationalities for the makeup of an arbitration panel, parties will also have to account for specific and varying cultural and national perspectives when agreeing on EDI parameters in cross-border matters.

Mediation Clauses

Although to date one rarely sees traditional mediation clauses in M&A agreements, Melissa notes that parties do often agree on other forms of pre-adjudication negotiation processes, also referred to as "step clauses." For example, "disputes first go to business unit presidents, then to global presidents, and only then to arbitration, if the parties are unable to resolve their differences."

Cathy further notes that "clients may view an agreement to mediate as unnecessary" but she agrees that "a binding obligation to mediate, as a first step, gives the mediation a deeper sense of meaning: if the parties are obliged to commit resources to a mediation, it is more likely to be successful and—ultimately—save both parties time and money, especially in the context where a changed environment resulting from the pandemic means that performance under the original terms is impossible or unfeasible."

Jan is a true convert: "Having been involved in multiple

mediations, I have become a big fan of mediation, particularly in the cross-border context. I was very skeptical at first. My thinking was that parties could always agree to mediation later on. The reality is, however, that once there is a dispute, parties are often reluctant to propose mediation out of fear that it will make them look weak and eager to settle. I now strongly believe that you need a contractual obligation to force parties to take a serious stab at resolving the matter through mediation. Nobody has to fear losing face or looking weak. The overriding goal is to get parties to the negotiating table—and impress on them that the other side probably also has a good (or at least a decent) story to tell. A lot of the work required for a mediation would have to be done in any case for a full arbitration or litigation, so the incremental cost is relatively limited. I would never have thought that a virtual mediation would work—and yet both virtual mediations that I was involved with during COVID resulted in settlements."

Additional Considerations: Speed and Confidentiality

Speed and efficiency are key advantages of arbitration. To avoid unnecessary delays, Melissa suggests including additional procedural items in arbitration agreements, such as scope of discovery and timing of award. By agreeing to these matters at the onset, the parties avoid having to address them after the fact at a time when all issues can become unnecessarily acrimonious and take longer to resolve. After all, the parties' ability to define such parameters is unique to arbitration and allows them to secure a more efficient and economical process than litigation.

Confidentiality is another important attribute of arbitrations. Although arbitration proceedings themselves are, by their very nature, meant to be confidential, parties would be well served to consider including additional language to limit the parties' ability to disclose the existence of the dispute and proceedings beyond what they may be required to divulge under the applicable laws. As Melissa notes, any "ambiguity on this subject could conflict with the objective of confidential arbitration."

I'm grateful to Jan, Cathy and Melissa for their willingness to share their personal views on a matter for which many corporate lawyers shy away from or simply defer to their litigation colleagues. As a transactional lawyer myself, I understand the reflex for corporate lawyers to focus on deal terms and attribute less energy and negotiation time to a provision we all hope our clients will never have to use. That being said, as an arbitrator, when asked to decide on a matter related to the wording of an arbitration agreement, one can't help but wonder what those lawyers had in mind when they drafted, and ultimately signed off, on the provision.

Corporate lawyers memorializing an agreed deal are generally closest to both the specificities of the transaction at hand and their clients. Although it's typical to liaise with specialist colleagues for certain provisions, including dispute resolution provisions, I'm confident that the time and cost efficiency of all dispute resolution processes would be increased significantly if the relevant provisions were given greater attention by the drafters and tailored with more focus to the specifics of the contractual arrangement they cover.