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Outside Counsel

Drafting an Arbitration Agreement in 2022: 2021 Considerations

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The events of the past couple years have forced us all to take a step back and rethink a broad array of matters that were previously on "auto pilot." Arbitration agreements are no exception. Obviously, the traditional features of a solid arbitration agreement remain unchanged for the most part. That being said, a number of new considerations are now de rigueur as practitioners embark on a drafting exercise that aims to not only secure clarity on the historically important matters but also take into account new realities and social priorities. Below I will briefly reiterate the key items that we've generally wanted to include in an arbitration agreement and then reflect on some of the newer matters to be considered.

The main objectives in drafting an arbitration clause are to reduce (if not eliminate) the risk that a dispute will be referred to a court at any point other than once enforcement of an arbitration award is sought, and to ensure that nothing in the agreement could lead a court to reject enforcement once an award is rendered. An arbitration agreement should therefore be clear in reflecting the parties' intent to resolve disputes in arbitration, specify its scope (i.e., the nature of disputes that must be resolved in arbitration) and include an agreement that judgment may be entered on the award. It should also indicate which procedural rules will govern the arbitration and ensure that the laws governing the arbitration agreement itself as well as the substance of the dispute are designated in the arbitration agreement if not otherwise included in the parties' contractual arrangement. Additionally, it will name the body that will oversee the administration of the arbitration and the actual seat of the arbitration. Finally, it should include the number of arbitrators to be appointed and the method for selecting them. In international arbitrations, parties should also specify the language in which proceedings will be held. These are the core items to include in an arbitration agreement. There are obviously other matters, such as whether arbitrators can award punitive damages and attorney fees, the scope and limits of discovery, consolidation and joinder, and similar items that a practitioner may want to consider including to tailor the arbitration agreement to the specific matter at hand.

In addition to the foregoing, today's drafters are more often than not called upon to reflect on matters related to the global events and social priorities of the past couple years.

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In Person or Virtual

The most notable consideration du jour is whether the arbitration agreement should provide for virtual hearings to be held, specify in-person hearings or remain silent on the matter as has been historically the case. The answer may not be clear cut and may even require a bifurcation. Indeed, the parties could agree that for smaller disputes, even in a post-COVID-19 world, virtual hearings will be conducted, while in-person hearings would be the default for disputes involving a larger quantum. Currently, when an arbitration agreement is silent on the matter, arbitrators will typically defer to the parties. However, where parties disagree, the arbitrators will generally have jurisdiction to determine whether to proceed virtually or in person. By considering the matter early on, practitioners give their clients the opportunity to have some visibility on the issue to the extent it's of importance. It may be particularly relevant to avoid unnecessary costs and delays when the amounts in dispute don't justify in-person hearings as the global community has successfully adopted virtual hearings. It can also give the parties the ability to agree, and thus secure, an in-person hearing in pre-determined circumstances without having to worry about it being questioned. Obviously, including such a requirement could lead to delays; the parties will have to weigh its benefits and risks considering the possibility that unforeseen events could dramatically upend their initial thinking and planning.

Cybersecurity

Although cybersecurity matters should not be new considerations per se, the increased use of virtual hearings and virtual rooms for document-sharing, coupled with what appears to be a growth in hacking incidents, should motivate all parties to consider what they can, and should, do to strengthen cybersecurity defenses. For example, in selecting the arbitration center and seat, parties should consider the scope and strength of a venue's cybersecurity procedures. Further, in their own agreement, parties may wish to agree specific document-sharing standards. In a best-case scenario, the parties will be able to rely on an arbitration center's security protocols for all of their dealings once an arbitration is initiated. That being said, given the heightened risks involved, this is definitely a matter where parties and their attorneys would be well served to take a step back and reassess the adequacy of the norms they had previously adopted. They will want to ensure that they consider and assess the magnitude of the cybersecurity threats and include in their arbitration agreement whatever measures they believe will limit the possibility of such threats occurring, as well as their potential impact should they materialize.

This article briefly reiterates the key items that generally have been included in an arbitration agreement and then reflects on some of the newer matters to be considered.

Including a Mediation Clause

The economic shock of the COVID-19 pandemic should motivate all parties to consider including a mediation provision in their dispute resolution agreements going forward. Indeed, almost overnight, the economic indicators that formed the basis of pre-COVID-19 agreements were replaced by metrics that reflected uncertainties and a dramatically different global landscape. Many pre-COVID-19 agreements could simply no longer be executed on the basis of the pre-COVID-19 terms. The most obvious examples are in real estate leases involving businesses that were forced to close or reduce their operations considerably during the pandemic. Similar issues have arisen in a broad array of arrangements and industries, leading many contracting parties to try to terminate agreements on the basis of force majeure, or any other outs they can find. This in itself has led to increased adjudication activity and delays, whether via courts or arbitration. The reality is that many parties would have benefited from a mediation clause that would have forced them to try to rethink the underlying terms of

their contractual arrangements instead of immediately turning to a court or arbitration where the decision maker is bound by the terms of an agreement that is no longer reflective of the current state of affairs. Parties are obviously always free to try to resolve their disputes even in the absence of a mediation clause. That being said, by including such a clause, they give themselves a much-needed incentive and roadmap to try to mediate and avoid an adjudicative process without impacting either party's negotiation posture or creating further delays.

Arbitration Center

COVID-19 has taught us that we shouldn't take anything for granted or assume that our realities are set in stone. With that in mind, I am now of the view that there is some benefit to parties either listing two arbitration bodies as options to administer the proceedings or otherwise ensuring that they account for the possibility that their choice may not exist in the future. Earlier this year, in a surprise to many industry players and experts, the Dubai government issued a decree that basically combined the three main arbitration centers in the Emirate. As a result, the Emirates Maritime Arbitration Center and the DIFC Arbitration Institution have been dissolved and the Dubai International Arbitration Center remains as the surviving entity. Parties who had selected one of the now defunct arbitration centers without an alternative, or without providing for a successor entity to take on the role in the event of a combination such as the one that occurred, are now left in somewhat of an unfortunate limbo. This is a good example that may also be a precursor to more consolidation on the global stage. It should encourage all drafters to rethink the rationale, benefits and risks of the sole arbitration venue choice that has been traditionally adopted.

Social Consideration: Equity, Diversity and Inclusion

As an increasing number of businesses focus on the need to proactively adopt policies that are in line with their EDI goals, drafters should contemplate reflecting such aspirations in their arbitration agreements. Indeed, parties may want to agree an arbitrator selection process that ensures that all groups are represented in the list of arbitrator candidates and that such list is adequately considered by the parties in its entirety, i.e., taking into account criteria that include EDI objectives. They may also opt for an arbitration panel with specific diversity requirements amongst the three arbitrators chosen as well as for chair selection. In addition, the parties should evaluate the EDI policies of the arbitration centers they're considering selecting. Key matters to examine should include not only a center's arbitrator list diversity requirements and arbitrator selection criteria but also the scope, metrics and effectiveness of its EDI promotion activities for all those involved in the arbitration process. Such scrutiny will help parties ensure that the policies of the arbitration seat they select are consistent with their own EDI priorities, both on paper and in practice.

It's imperative that any drafter consider all these matters and determine where a party's interests lie. That being said, it's equally important not to go overboard and try to cover every single contingency. This could lead to the parties either settling on an impracticable arbitration agreement or wasting an inordinate number of hours contemplating and negotiating items that ultimately are not of importance to them. I would be interested in hearing your thoughts on the above and any additional considerations that you believe should be taken into account going forward. Please email me mbarakat@mb-cap.com and I may, with your permission, include them in a follow-up article on this topic.