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Outside Counsel

Drafting an Arbitration Agreement in 2022: The Litigator's Perspective

In the first article in this series titled "Drafting an Arbitration Agreement in 2022," I highlighted matters to consider including in dispute resolution agreements to reflect recent events and current social priorities. In the second article, I examined the issue from the perspective of transactional attorneys. In this third article of the series, I consider the views of four litigators, the professionals who are often consulted by their corporate partners to advise on drafting and who ultimately have to defend or critique the provisions: Lea Haber Kuck, a partner in Skadden's international litigation and arbitration group, where she concentrates her practice on the resolution of complex commercial disputes arising out of international business transactions; Cecil Key, head of the DGKeyIP Group of DiMuroGinsberg P.C., who focuses on the protection, enforcement and licensing of intellectual property rights; Taline Sahakian, a partner in Constantine Cannon's antitrust litigation & counseling and commercial litigation groups, where she has represented parties in international arbitrations and in the context of mediations of commercial disputes; and Dan Weiner, co-chair of Hughes Hubbard & Reed's litigation department and a regular arbitration counsel in high-stakes commercial disputes.

By **Myrna Barakat**

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 remotely 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

Selection of arbitration center(s) is often a matter on which litigation partners are asked to advise when their corporate colleagues are drafting an arbitration agreement. As Lea notes, whether or not it's advisable to include a second arbitration venue option depends on the circumstances: If the parties are choosing a well-established arbitration center, there shouldn't be a need for a fallback option. If, however, the parties opt for a less mature center, it should be given serious consideration. Generally, the litigators agree that, if parties determine that it's advisable to select more than one venue, drafters should ensure that the provision is clear about the order of preference. As Cecil puts it, "a precise structure is key to avoid a separate dispute or litigation over where the dispute is to be decided."

In-Person or Remote … or Hybrid

With the pandemic, the litigators have seen firsthand how arbitration centers have generally been much more effective than courts in establishing a reliable infrastructure for remote proceedings. This, in itself, has made arbitration more attractive. Cecil mentions having witnessed the challenges of the courts in handling

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remote hearings, often "forcing proceedings to be drawn out with longer periods between hearings or appearances. The net result is increased costs, delays in resolution and hardening of positions. There have also been instances when the court's technology, or facility with the available technology, does not allow for smooth operation, which inhibits presentation." Separately, Taline points out that: "virtual appearances could resolve many issues in producing witnesses for international arbitration regardless of the pandemic. Parties can sometimes have difficulty traveling to the seat of arbitration or may not want to travel for various reasons. Having the ability to testify remotely would allow them to still participate."

Notwithstanding the clear appeal of arbitration's remote capabilities, all litigators expressed some concerns about the inclusion, and drafting, of a provision that specifies which medium to use for hearings. As Taline put it, "if the parties want to consider remote hearings in certain circumstances, they should specify what triggers those circumstances and it should be clearly defined. Otherwise, every ambiguity *can* become a cause for dispute and delay once things go wrong." Both Lea and Dan suggest that the parties avoid the drafting perils and simply agree to defer to the arbitrator(s). Indeed, Dan would include language to the effect that "in the interest of convenience and avoidance of delay, the arbitrators can determine to hold any proceedings in the arbitration, including evidentiary hearings, either in-person or remotely." Lea would favor not addressing the issue at all in the arbitration agreement but rather that it be "addressed with the arbitrators at the outset of the case, usually at the preliminary hearing."

Cybersecurity

Cybersecurity clearly continues to be a concern and focus for all. Cecil reminds us that, with the current pandemic, all arbitration participants, including witnesses, can appear from their homes or other random locations. This raises additional concerns about security protocols that need to be addressed. Lea, a member of the Working Group that drafted the ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration, believes that it is not "prudent to simply rely on the institutions to address cybersecurity". Instead, she encourages "parties to take responsibility for this issue and make use of resources such as the Cybersecurity Protocol which lists the factors that parties, arbitrators and lawyers may consider in determining what cybersecurity measures may be appropriate and reasonable for a particular dispute."

Equity, Diversity and Inclusion

Here again, although all litigators favor diversity and a proactive approach to ensure EDI priorities are considered and effective, there were some reservations on whether it's wise to elaborate on the matter in the arbitration agreement. Lea points to enforceability: "while this is definitely an issue that needs to be addressed, the arbitration agreement is not the place to do it. Indeed, depending on how a clause was drafted, I would be concerned about whether a court would enforce such a provision or whether it could give rise to issues relating to the enforcement of the award. I do agree, however, that parties should consider the EDI policies of the arbitration center being selected. My view is that this issue is most effectively addressed by clients requiring that their lawyers provide them with lists of well-qualified potential arbitrators consistent with their EDI objectives."

On EDI generally, Dan makes an interesting side note that, "as female arbitrators determining high-stakes commercial arbitrations become more prevalent in what had historically been an "old boys' club," the importance of female representation among lead arbitration counsel becomes even more heightened." Taline echoes Dan's view, pointing to the trend within courts for "some judges (in their personal rules) requiring that a certain number of attorneys who appear and argue motions before them be junior attorneys or from diverse backgrounds." It remains to be seen whether arbitrators will adopt a similar practice for attorneys appearing before them.

Finally, as the reader may recall, in the prior article exploring the drafter's perspective, we discussed the fact that EDI may mean different things to participants from different nationalities. Lea reminds us that this could be the case even within our borders and a clearer approach would be to focus on "under-represented groups" rather than debating whether particular groups are "diverse."

Mediation Clauses

Generally, the litigators view mediation as a viable and potentially promising option to try to avoid an adjudicative process. Cecil recommends that mediation clauses parallel the matters that we're discussing for arbitration agreements. Lea, however, has some reservations given the potential for poor or incomplete drafting. She emphasizes: "If the parties are inclined to include a clause requiring mediation, the dispute resolution provision must be carefully

drafted to make clear whether mediation is a required pre-requisite to initiating arbitration or litigation or whether it is an independent obligation that may proceed in parallel with arbitration or litigation. If mediation is to be a required first step, then the drafters also need to be very specific about when the parties' obligation to mediate has been satisfied in order to avoid a jurisdictional dispute in the resulting arbitration and to avoid the possibility of mischief by one party trying to drag out the process."

Speed, Confidentiality and Drafting Pitfalls

As Dan points out, "the virtual world has effectively speeded up arbitrations, since it is easier to schedule hearings without having to build in travel time for parties, witnesses and arbitrators." However, the emphasis on efficiency remains an objective, as noted in the prior article by the drafters who favor expanding arbitration clauses to include procedural timeframes. Dan supports this view for certain matters, such as limiting scope of discovery, but points to the fact that, "as a practical matter, specifying time limits for completion of hearing stages or issuance of an award often proves ineffectual—busy arbitrators will ask the parties to agree to extend the deadlines, and no party in its right mind will refuse." Generally, as Lea points out, this is "another one of those areas where drafters need to be careful in trying to anticipate issues in advance as their clients' interests and objectives may not be clear until the particular dispute arises."

With respect to confidentiality, Lea reminds us that "parties often make incorrect assumptions regarding the nature of the confidentiality obligations as between the parties themselves. The arbitral institution rules often impose confidentiality obligations on the institution and the arbitrators, but not on the parties themselves." Dan echoes Lea's point, stating that "while arbitrations are meant to be non-public, their existence and content—including filings, hearing transcripts and awards—can be freely publicized by the parties unless specific provision is made to keep those aspects confidential. But there are ways to ensure they are … by providing clearly that the proceedings, documents, and any other private exchange be kept confidential."

Generally, it's worth noting that all four litigators had some concerns about a drafter's ability to memorialize specifics in an arbitration agreement in an effective manner when there are so many unforeseeable events that can arise. Lea highlights the tension that most arbitration participants face: "Of course, one of the advantages to arbitration is the ability to define a dispute resolution process tailored to the particular parties and nature of the transaction, and there will be instances that cry out for a very tailored clause, but a lot of the pathological clauses result from drafters, or parties, with a little bit of arbitration knowledge being too specific or trying to get too creative and ending up with a clause that, when the dispute actually arises, does not work.

One example is providing such specific criteria for the arbitrator that it is impossible to find an appropriate person who satisfies the requisite criteria." She further points to the practical realities of how the arbitration clauses are often drafted, negotiated and agreed: "At the drafting stage, parties (and also transactional lawyers) are looking for a clause that will work if a dispute arises, but are generally not willing to spend much negotiating capital on the provision; in other words, in choosing their negotiating battles, the dispute resolution clause is generally not at the top of the list. As a result, as a disputes lawyer, I am often instructed to simply review the clause proposed by the counterparty and to only make adjustments that will ensure it will be effective should a dispute arise."

I appreciate Lea, Cecil, Taline and Dan taking the time to reflect on these issues and sharing their thoughts. As they noted, and many of us have witnessed, the ability of arbitration platforms and participants to adapt swiftly and effectively to drastic, unforeseen changes has been proven in the past two years. It's yet another reason parties will want to consider including an arbitration provision in their agreements. That said, the key concern they raised throughout our discussions, namely the adverse consequences of poor drafting, should resonate with all of us.

To date, we generally haven't yet seen new elements reflected in arbitration agreements. Changes however are likely imminent as we take stock of the "new normal" and try to leverage it to the extent it can be used to accelerate processes, reduce costs and otherwise increase efficiency. As we consider these new matters for transactions going forward, drafters would be well served to reflect on the litigators' cautionary words and ensure that, whatever route is taken, it is one that is carefully worded and tailored to the specifics of the transaction and the needs of the parties.