Skadden

Drafting International Dispute Resolution Clauses

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On December 5, 2018, Skadden hosted the webinar "Drafting International Dispute Resolution Clauses." Topics included the importance of dispute resolution clauses, choosing between litigation and arbitration, drafting arbitration clauses, multiple-party and multiple-agreement transactions, and the intersection between arbitration and courts. The panelists were Skadden International Litigation and Arbitration partners **Julie Bédard**, **Lea Haber Kuck**, **Gregory A. Litt** and **Timothy G. Nelson**.

Importance of Dispute Resolution Clauses

After introductions by Ms. Bédard, Mr. Litt kicked off the webinar with observations about the importance of properly drafted dispute resolution clauses. He observed that if parties overlook dispute resolution clauses when drafting complex commercial agreements, they may lack the tools to effectively protect their rights and interests in the transaction when the need arises, particularly if they need to enforce their rights across borders in one or more foreign countries.

Mr. Litt noted that taking the time to negotiate effective dispute resolution provisions in the transaction documents at the outset can ultimately save significant time and costs. Once a dispute arises, the parties may be unable to negotiate a dispute process or forum, and may find themselves facing protracted litigation over issues of jurisdiction, venue and *forum non conveniens*.

Choosing Between Litigation and Arbitration

Ms. Kuck next gave an overview of considerations in international business transactions for choosing to resolve disputes in litigation or arbitration. Ms. Kuck explained that international arbitration strives to be transnational in nature and has incorporated aspects of both the civil and common law systems, which can be tailored to suit the needs of the parties and the dispute. Ms. Kuck noted that even where a party might convince its opponent to litigate in the party's home forum, this may not be the best course. More than 150 countries have implemented treaties providing for the enforcement of international arbitration awards, most notably the Convention on Recognition and Enforcement of Foreign Arbitral Awards, known as the "New York Convention." The United States is not party to any treaty providing for the enforcement of court judgments.

Ms. Kuck then discussed differences between international arbitration practice and U.S. litigation, including: (1) pleading standards, as international arbitration generally requires greater detail than what is commonly expected under notice pleading standards in U.S. litigation; (2) the relative unavailability of dispositive motions in arbitration, as compared to U.S. litigation; (3) the much more limited scope of "disclosure" (*i.e.*, discovery); (4) the confidentiality of proceedings in arbitration, (5) the narrowly limited availability of appeal, and (6) cost-shifting in arbitration, a remedy rarely granted in U.S. litigation. She also discussed some of the differences in arbitration hearing practice, including the presentation of witnesses in international arbitration, with direct testimony being offered through written witness statements in advance of the hearing, and the practice of "hot-tubbing" experts in arbitration, which requires opposing party-appointed experts to appear jointly for questioning at the hearing.

Ms. Kuck also touched upon the Hague Choice of Court Convention, a treaty that seeks to put court judgments on similar footing to arbitration awards. The Choice of Court Convention currently is in force in only a few countries, but it is slowly gaining traction. The U.S. has signed but not ratified it, and the Department of State has been working on implementing language. Although more limited in scope than the New York Convention, one of the primary features of the Choice of Court Convention will be that courts enforcing a foreign judgment will not review the underlying merits of that judgment, which also is a key advantage in the enforcement of arbitration awards.

Ms. Kuck concluded by addressing governing law and forum selection clauses. Governing law clauses provide the substantive law that will inform the interpretation and enforcement of a contract, but selection of the forum, which in arbitration entails a designation of the "seat" of arbitration, informs the procedural law that will govern the dispute. Ms. Kuck observed that sometimes these two topics are related — for instance, New York has a statute permitting parties to choose New York courts as their forum for disputes, but, for that choice to be effective, they also must choose New York law as the governing law of the contract.

Drafting Arbitration Clauses

Next, Mr. Litt discussed specific considerations impacting the drafting of arbitration clauses. He noted that while party autonomy is a hallmark of arbitration — *i.e.*, parties may negotiate the dispute process that best accounts for the nature of their transaction and other needs — there are background legal principles that inform the interpretation and enforcement of any arbitration clause, making informed drafting critical.

Mr. Litt then outlined a series of key considerations for successful arbitration clause drafting. First, parties should consider the identity and nature of their counterparties — for example, what are their nationalities, and are any of them sovereigns? This issue may directly bear on a number of other important ones, from the service of process at the start of the case to the enforcement of an arbitration award at the end. Mr. Litt also noted that special considerations may apply when there are more than two parties, a topic addressed in detail later in the presentation.

Second, parties should consider the nature of the transaction and what they need/want out of the arbitral process. Parties should ask themselves: (1) What should be the scope of the arbitration, *i.e.*, what disputes should be subject to arbitration, and what disputes, if any, should be subject to a different dispute process? (2) How many arbitrators should there be? (3) What should be the seat of arbitration? (4) What institution and rules should govern? (5) What will be the language of the arbitration? (6) Should preliminary and interim relief be addressed? (7) Should the clause provide for the consolidation of disputes? And, finally, (8) What should the terms of confidentiality be?

Given the number of factors to be considered, and the need for knowledge of the background principles and law, Mr. Litt cautioned that, in a sophisticated transaction, the parties should consider involving experts in the drafting of any arbitration clause. Mr. Litt noted that even if a party has negotiated an arbitration clause before, or has been through an arbitration, the background principles and law can change. The U.S. Supreme Court heard argument in three different cases involving arbitration this term, and the outcome of those cases will influence the way arbitration is conducted in the U.S. Experts in international arbitration can help parties stay abreast of these changes in the law and aware of the various factors to be considered when drafting.

Multiple-Party, Multiple-Agreement Transactions

Mr. Nelson addressed the potentially thorny issue of arbitration clause drafting where transactions involve multiple parties and multiple agreements.

Mr. Nelson explained that "multiple-party transactions" (deals with more than two signatories) are rarely complicated when each of the signatories belongs to one "side." In such situations (*e.g.*, where affiliates from each side sign the agreement), it is not hard to draft a dispute clause where both sides will appoint an arbitrator and the third arbitrator (the chair) will be neutral. More complicated issues arise, however, when there are more than two "sides." This situation can arise in numerous ways. To cite just one example, when there is a sale of a minority parcel of shares,

the deal can involve the entering party (the buyer), an exiting party (the seller) and a third party (the majority shareholder) — there are many other kinds of "three-cornered" or "four-cornered" transactions.

In these situations — truly multiparty disputes — the normal model of arbitration needs adjustment. Normally, arbitration is binary: There are two sides, and each side appoints an arbitrator, which is followed by the selection of a neutral chair, who is jointly nominated (or appointed by the arbitral institution). In a multiparty dispute, unless the parties can be corralled into two "sides," this binary model will not work. The normal drafting solution (and the one favored by several arbitral institutions) is for each of the three arbitrators to be appointed by an institution.

Mr. Nelson also noted that when drafting an arbitration clause involving multiple parties, drafters should try to anticipate how a multiparty dispute would unfold. This can have an impact upon, for example, (1) the manner in which predispute procedures (*e.g.*, predispute negotiation periods, if they appear in the contract) are observed; (2) the disclosure/discovery of documents; and (3) the manner and place in which a future award will be enforced (and against whom).

Mr. Nelson then turned to "multi-agreement transactions." He observed that large deals typically involve more than one contract — even in a simple share-purchase transaction, there often will be a share purchase agreement (covering the transfer) plus a shareholder agreement (going forward). There also will be separate buyer/seller contracts along a supply chain, *e.g.*, an upstream oil production license, followed by a production sharing contract, as well as midstream or downstream arrangements (pipeline, offtake, etc.) In these scenarios, a dispute involving one contract relationship can lead to disputes in others.

In some cases, parties may want to have the same arbitral procedure governing related contract disputes. If so, this can be addressed at the drafting stage. Parties can agree, for example, to a mechanism for the consolidation of disputes arising under related agreements. Doing this may, in some situations, save costs and create other efficiencies.

Moreover, it can be important to keep disputes separate (*e.g.*, in a supply chain situation, parties often will not want to have disputes combined, particularly when it would lead to disclosure of sensitive pricing information). In such scenarios, drafters should be diligent in fencing off disputes as they arise under multiple agreements.

Intersection Between Arbitration and the Courts

Ms. Bédard concluded the presentation by addressing the intersection between arbitration and courts. Ms. Bédard noted that while the panel had focused on drafting arbitration clauses, it also was important to consider the role of the courts in the enforcement of arbitration agreements, granting relief in aid of arbitration and the enforcement of awards.

On the enforcement of arbitration agreements, Ms. Bédard explained that courts will first consider whether there was a valid arbitration agreement. In the U.S., courts have broad discretion for deciding such "gateway" issues in arbitration, and while U.S. courts will compel arbitration, and even in certain instances compel nonsignatories to arbitrate, they do assess whether it was proper for the parties to be forced to arbitrate. The courts also are empowered to enjoin arbitration, if they think it is improper or, conversely, enjoin litigation, if they believe arbitration is the dispute resolution mechanism agreed upon by the parties.

Ms. Bédard went on to summarize the kinds of relief that courts may grant when an arbitral panel has not yet been constituted for a dispute or even before an arbitration is formally filed. First, a court may issue negative injunctive relief to have a party cease action that harms the moving party. A court also may issue mandatory injunctive relief, to require a party to continue performing some contractual obligation in maintenance of the status quo during the pendency of the arbitration. Parties also may pursue pre-award asset attachment in order to prospectively ensure enforcement of an eventual award, although the standard for such relief generally is stringent, as it requires a showing that absent attachment, the award will be meaningless due to a dissipation of the counterparty's assets. Ms. Bédard also noted that non-U.S. litigants should be aware of a U.S. federal statute, 28 U.S.C. § 1782, that may permit them to obtain discovery from U.S. persons and entities in aid of arbitration, litigation and regulatory proceedings outside of the U.S.

Finally, Ms. Bédard discussed the New York Convention, which is applicable to international arbitration awards. Ms. Bédard summarized the grounds under Article V of the convention on which an arbitration award may not be recognized. With respect to due process challenges under Art. V(1)(b), Ms. Bédard noted that the Arbitration Committee of the International Bar Association, of which Ms. Bédard serves as co-chair, had recently concluded a worldwide study assessing how often a failure of due process was accepted as a ground for nonrecognition, and the results strongly suggested that courts do not entertain such challenges lightly.