Inside Counsel

Be careful what you ask for in international arbitration

International arbitration has unique features that make it a materially different process than U.S. litigation

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Over the past 20 years, as the pace of economic globalization has accelerated, U.S. corporate counsel increasingly have been required to ponder the optimal dispute resolution mechanism to insert into their cross-border contracts, including whether to choose court litigation or international arbitration.

The attitudes of corporate counsel toward international arbitration run the gamut. Energy companies, long accustomed to large investments in developing countries, are well familiar with international arbitration. Old line manufacturers who source materials from abroad or who sell products abroad, are also accustomed to international arbitration. By contrast, many technology companies, protective of their IP assets, prefer the U.S. courts to adjudicate intellectual property and complex commercial disputes and are wary of a process from which there is no right of appeal from a private arbitrator.

As with all debates, the litigation versus arbitration decision is not black or white. There is no universally correct answer. And there is no perfect system.

The case for arbitration can be summarized in brief. *First*, the parties are able to choose a neutral forum instead of going to litigation in the home courts of one or the other party where the "foreign" party may worry that the judge will favor the local party. *Second*, since there is a multilateral treaty for the enforcement of arbitration awards (known as the New York Convention), but no corresponding multilateral treaty for the enforcement of court judgments, arbitration is viewed as the best way to ensure that a party's litigation victory can be converted into an enforceable money judgment. *Third*, the parties have the ability to specify the arbitrator's skill set, including industry expertise, cultural familiarity and other qualifications that may be important in a specific dispute. *Fourth*, factors such as confidentiality, quicker pace and lower cost are often cited by arbitration fans as advantages.

Yet international arbitration has unique features that make it a materially different process than U.S. litigation. Many corporate counsel who regularly insert arbitration provisions into their contracts, upon becoming involved in their first international arbitration, are taken aback at how "alien" the process can be.

First, the procedures, or the "shape of the table" to use the vernacular, are fluid, since the procedural rules provided by arbitration providers are typically very sparse by the standards of the Federal Rules of

Civil Procedure. The sparseness is considered by arbitration aficionados as an advantage, since it provides the arbitrator great latitude in designing a process tailored for the particular parties and dispute. At the outset of a federal court lawsuit, an experienced litigator can advise his or her client of the basic procedures the court will follow because this is laid out in detail in the Federal Rules of Civil Procedure, in the supplemental local rules of the particular U.S. district in which the case is filed, and in the extensive case law that interprets the meaning of each of the federal rules. Not so with international arbitration. Corporate counsel must be prepared to litigate at the preliminary conference what features the arbitration will have.

As just one example, will dispositive motions be heard and decided prior to the trial ("merits hearing" in arbitration lingo) or will dispositive motions be deferred to and wrapped into the trial? Arbitration aficionados will argue that this uncertainty is a positive feature because the arbitrator and the parties can collaboratively design the ideal procedure for their unique circumstances. However, arbitrations, like lawsuits, are often not collaborative. Procedures can impact outcome. Thus, while deciding dispositive motions at an early juncture to avoid the expense of litigating issues at trial that could have been dismissed by dispositive motions is a no-brainer for the respondent, the claimant may argue that dispositive motions are a waste of money and amount to a delaying tactic. Lurking behind these competing arguments are the parties' respective tactical considerations.

Second, there is no right of appeal for the arbitrator's errors of law or of fact finding. Under the New York Convention, the grounds for denying the prevailing party's petition to confirm the award or for granting the losing party's petition to vacate are narrow. Unlike U.S. litigation, an error of law, no matter how egregious, is not a ground for relief. Just as in Las Vegas, the parties get one shot. The winner walks away a fan of arbitration, and the loser walks away vowing to avoid arbitration in the future. Classic arbitration thinking is that the "no appeal" rule leads to a shorter and cheaper dispute resolution process since there is only one round. U.S. corporate counsel, however, may hesitate to subject the fortunes of their company to a process before an unknown arbitrator from whom there is no relief from erroneous legal rulings.

One method to ameliorate this issue is to specify three arbitrators, instead of one; the deliberations among three arbitrators will decrease the chance of an "outlier" decision. A second method is to provide for an internal "appeal" procedure, whereby the losing party can seek review of the arbitration decision (known as the "award") by an independent arbitrator. This is a novel and controversial procedure available under the rules of only a few arbitration providers, but it can also be written into a dispute resolution provision.

Third, arbitration — whose roots lie in civil law — is characterized by very limited discovery (called "disclosures"). This means that absent mutual agreement, the parties get no depositions or interrogatories and only limited document requests. The limited discovery tradition is touted by arbitration boosters as a plus since it cuts down on cost. But the sharp limits on discovery can be a shock for first time users accustomed to the transparency of U.S. litigation. One partial solution is to adopt the IBA Model Rules on Taking Evidence, which is a compromise between common law and civil law practitioners and which establishes a baseline of basic document discovery to which parties will be entitled upon a showing of materiality. Beyond that, corporate counsel who anticipate the need for more extensive discovery in the event of a dispute, should negotiate for a discovery procedure in the dispute resolution provision itself.

Conclusion

In commercially significant cross-border contracts, international arbitration is the preferred mode of dispute resolution. It is a hybrid of civil law and common law concepts with a "language" and a set of rules all its own. Corporate counsel who educate themselves about the unique features and the advantages and disadvantages of international arbitration, and who think through how their clients' commercial relationship will play out in the future, will be able to negotiate and draft a dispute resolution procedure that best positions their client should a dispute arise.

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Cedric Chao is a trial partner and co-head of the international arbitration practice of DLA Piper LLP, a 4200 lawyer global law firm, resident in San Francisco. Mr. Chao is listed in *Best Lawyers in America* (for business litigation, arbitration, and mediation), Global Arbitration Review's *International Who's Who of Commercial Arbitration*, Euromoney's *Guide to the World's Leading Litigation Lawyers*, and Euromoney's *Guide to the World's Leading Experts in Commercial Arbitration*. He is recommended for international arbitration by *Chambers USA* as a "rigorous, creative, problem-solving thinker." He is a U.S. member of the ICC Arbitration Commission, and a director of the American Arbitration Association. Mr. Chao is a graduate of Stanford University and Harvard Law School.