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Outside Counsel

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

In this series of articles titled "Drafting an Arbitration Agreement in 2022," I have explore the current events and social trends that practitioners should consider when drafting dispute resolution agreements. I covered the issue initially from my perspective, and then from the perspective of the drafters and the litigators.

By **Myrna Barakat**

In this fourth and final article of the series, I have sought contributions from four independent arbitrators, the professionals who ultimately are called upon to decide on disputes relating to arbitration agreements: Elisabeth Eljuri, an arbitrator focusing on cross-border energy, infrastructure and M&A disputes, and a former arbitration and transactional partner; Mike Lampert, a commercial arbitrator and mediator, and a former deputy general counsel of a financial institution; Jack Levin, a commercial arbitrator and mediator, and a former litigation partner; and Rebekah Ratliff, a JAMS arbitrator, mediator and neutral analyst focusing on commercial complex insurance and employment matters, and a former insurance professional.

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

The consensus from the litigator and drafter contributors seemed to be that naming an alternative arbitration center may be wise, especially if the center is a less established one. However, they also all stressed that, in doing so, the drafters must be clear in how parties are to select the fallback option to avoid any confusion and unnecessary disputes at the onset.

Elisabeth however believes that "it is better to select a single arbitral institution, albeit one of the well-established ones to avoid any risk of the center shutting down." She notes that, typically, "for mergers of arbitral centers, there will be guidance in the applicable rules of both centers on how the cases will be handled moving forward."

Mike, on the other hand, notes that "even when well-known institutions are named, things can go awry. Consider the recent Dubai shakeup or the famous case where a drafter used a mistaken name for a well-known provider and the courts concluded no arbitration at all was the result, since the named provider didn't exist. In drafting the agreement, the parties may want to unequivocally state their goal of resolution by arbitration as primary, and specifically empower a court to remedy an inadvertent pathology to preserve that goal."

In-Person or Remote…Or Hybrid

As with their litigation colleagues, the arbitrators seem to have differing views on whether drafters should specify if hearings should be remote or in person in arbitration agreements. All acknowledge the benefits of holding virtual hearings: Rebekah notes that parties are now beginning to understand the considerable time and cost savings of remote mediation sessions and arbitration hearings. Elisabeth expects that, "most carefully worded arbitration clauses going forward will include language addressing this topic in some form. Some form of virtual is here to stay. For example, jurisdictional hearings as well as case management

conferences, preliminary conferences, and first sessions will now likely all be virtual regardless of where the parties and counsel are located."

Jack highlights another key advantage of remote hearings, namely that "it permits clients to have a view into the process at any stage, which is always a benefit. One of the constant problems with litigation is that the client must rely on reports of what opposing counsel, a witness, a judge or an arbitrator said. Remote technology can take the mystery out of that and may improve lawyer-client accountability. The lawyer's performance is witnessed directly, and the client must step up to deal directly with events it has seen and heard directly."

Notwithstanding the appeal of remote proceedings, Jack has some reservations on whether it should be covered in the arbitration agreement: "Although parties now know that the possibility of remote proceedings is not an abstraction, it can be difficult for parties to anticipate their needs and wants in this regard before a dispute has arisen. For example, it may turn out that the dispute will involve a lot of money or that credibility will be important and so one or both sides will want one or more witnesses to testify in person. The best proceeding may turn out to be a hybrid. A cautious draftsperson will want to be careful not to trade away such rights in advance." He concludes that this issue "is a balance that lawyers and clients may want to negotiate closer to the hearing."

Cybersecurity

Generally, cybersecurity is an area that everyone recognizes is important but the consensus seems to be that drafters shouldn't necessarily cover the issue in the arbitration agreement. Jack's approach is a practical one: "don't try to accomplish too much in the clause." As industry group protocols, such as the ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration, and best practices are developed, this could be an issue that need not be controversial. Parties may therefore be best served if it is not discussed at the drafting stage in depth but rather left to counsel to agree should a dispute arise.

Equity, Diversity and Inclusion

Rebekah notes that a number of "national ADR providers' practices and processes have evolved to include pledges that encourage the promotion and selection of diverse neutrals. There are also efforts underway, such as the Ray Corollary Initiative (housed at the National Academy of Arbitrators), aimed at increasing awareness around diversity in alternative dispute resolution." She further points to the fact that, with the option of hearing cases remotely, neutrals can appear from anywhere, thus giving parties a greater pool of arbitrators to choose from and giving diverse arbitrators greater visibility and opportunities.

Although there is a general consensus on the need to continue to promote equity, diversity and inclusion (EDI) efforts, this is yet another area where the arbitrators question the wisdom of covering the matter in the arbitration agreement. Indeed, Elisabeth advises against including EDI considerations in the arbitration agreement itself. Instead, she encourages parties to ensure that the arbitration venue they select adopts protocols for diversity consistent with the parties' own EDI objectives. She points to "highly specialized cases where it is already quite difficult to find arbitrators who meet the qualifications (industry expertise, languages skills, conflict clearance)" and questions whether adding a diversity criteria would then make selection quasi-impossible.

Jack also believes that it may be wise to table the EDI discussion, "not because the issue isn't worthy of attention, but because cultural and other differences make it hard to work out in advance. It might be unwise to try to align parties thoughtfully and effectively in advance on such a complex issue. And as the issue relates primarily to arbitrator selection, how to treat it may depend on the number of arbitrators to be selected and the selection process to be undertaken. For example, if each party appoints one and the two select the chair, that might be the best juncture at which to consider EDI."

Mediation Clauses

Generally, all the arbitrators consulted support attempting to resolve a dispute through mediation before engaging in arbitration. Jack notes that "the fact that sophisticated people still view mediation with suspicion, or see it as creating misperceptions of negotiating strength, demonstrates how much education parties and even their counsel still need. A good step clause should always be considered. The timing of mediation should meet the needs of the parties and can be well drafted so that it will be a benefit and not an obstacle."

Similarly, Mike supports the use of step clauses but notes that, "to the extent mediation is a condition precedent to arbitration or court, in cases of urgency it may empower obstruction by an evil doer." He therefore suggests including "a safety valve that would allow either party to seek urgent relief without mediation if it can persuade the arbitrator or a court that the matter could not wait for a mediation."

Separately, Rebekah makes an interesting point regarding the benefits of co-mediation in multifaceted cases involving technical matters: "Leveraging subject matter experts adds valuable perspectives to manage the different personalities and challenges that can come with complex matters. They can be assigned various roles and work together throughout the mediation process to facilitate resolution. This can be done by separating issues by mediator or by a team approach in private caucuses." She notes that "attorneys work

in teams (as arbitrators do in tribunals), why not mediators?"

Additional Considerations

Finality of Awards. Jack raises an additional topic that isn't often explored in depth, namely the finality of arbitration awards. He notes that "some in-house lawyers and their clients are leery of arbitration because they had a bad experience—the arbitrator made an obvious mistake—with no right of appeal. It is incredibly simple to draft a clause that permits a motion to reconsider. It might add modest expense, but it's a precious safety valve. No arbitrator, when confronted with an obvious error, would not want to correct it. For those who think this just adds a layer of proceedings, consider that it can be done quickly, while providing protection similar to appellate review at a fraction of the cost in time and money. This is yet another example of how parties can take control of the arbitration process. Some arbitration providers are considering offering this on an opt-in basis."

Elisabeth has a different view, she believes that "arbitration awards are not meant to be appealed. That is precisely one of the advantages of arbitration. It is not an endless process. Therefore, the grounds for motions to set aside, which are filed in the courts, are narrowly defined. If a party wants a process with appeals, it should not select arbitration to begin with."

Tension Between Specificity and Foreseeability. A common theme that has arisen throughout our discussions revolves around the clear tension, and ideal balance, between specificity and foreseeability. In that respect, Jack notes that "all these matters merit consideration; as part of their examination, drafters and their clients should reflect on the appropriate balance between trying to foresee needs and interests, while not trying to out-negotiate the other side in an arbitration clause." He thus favors "focusing only on matters that can make it more efficient for all parties involved." He would also "encourage drafters to be well acquainted with the procedural rules of the arbitration venues they are considering selecting. Those rules might already anticipate important issues."

Mike further fleshes out the tension that has been pointed to: "On the one hand, specificity at drafting time means parties may not know where their interests lie and so can be more objective. On the other hand, two factors come into play: first, the people who write the clause may not have real experience—or knowledge—of the consequences of their choices, and second, unforeseen events, such as the pandemic, may cause unintended consequences from choices (such as demanding in person which turns out to cause a delay of two years)."

Mike therefore encourages drafters to "avoid writing a pathological clause, but, being more practical, draft a fall back in case you do." He parallels such fallback option with the severability clauses that are typically included in commercial agreements to protect the spirit of the arrangement in case a clause of the agreement is found to be invalid. Mike further points to instances where he's seen parties include "an explicit statement that the principal goal of the parties is arbitration; that, if a detail fails, the court may adjust to preserve the goal of arbitration."

All that being said, Jack reminds us that "a good discussion and negotiation about the clause is not necessarily a zero-sum game. Addressing issues one knows will come up if there is a dispute can aid both sides later on. And although it's obvious, even after a dispute has arisen, the parties should remember that they have the power to modify their agreement to serve the process. Retaining power over the process is a huge advantage of arbitration over litigation."

I appreciate Elisabeth, Mike, Jack, and Rebekah sharing their views based on their firsthand experience reviewing and opining on arbitration agreements. As one may note, although the various contributors have different views and approaches on these matters, there is a general consensus that all these issues merit consideration. The key question is not if they should be explored but rather at what stage should they be discussed and agreed. The other key finding is that drafters and their clients should familiarize themselves with the rules and procedures of the arbitration venue(s) they select since their scope will likely impact their decision-making, whether it relates to EDI protocols, cybersecurity, procedural time frames or confidentiality.

It's helpful to think of the arbitration provision as a complement to those procedures. With respect to strategy, it's important to focus on ensuring a smooth process and not simply attempting to gain a strategic advantage, which can quickly shift as unforeseen events occur. And if drafters opt to cover additional matters, they should ensure that the language is clear and any alternative options or triggers are clearly defined, with an overarching principle included to guide the adjudicator if appropriate.

Finally, everyone is best served when counsel collaborate in the interests of speed, efficiency and effectiveness to devise a plan of action that achieves those goals. While the subject matter of the dispute may be contentious, the process need not be.

Myrna Barakat *is a commercial arbitrator and mediator; she divides her time acting as a neutral and advising a broad range of domestic and international companies and investor groups on mergers, acquisitions, and other strategic initiatives.*