

Top 10 Strategic Considerations When Drafting Dispute Resolution Clauses in Cross-Border Contracts

Parties to the growing number of cross-border transactions should anticipate the inevitable cross-border disputes and specify the methods for dispute resolution in advance.

International arbitration offers two key advantages compared to litigation for resolving cross-border disputes — enforcement and neutrality. First, international arbitration awards are more readily enforced. 148 countries are signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention, which provides for the recognition and enforcement of arbitral awards, with limited grounds for challenge. In contrast, court judgments are not easily recognized beyond their jurisdictions and thus may result in a pyrrhic victory if they cannot be enforced. The United States is not a party to any treaty providing for the enforcement of US court judgments abroad.

The second advantage to international arbitration is neutrality. Most companies do not want to submit their disputes to foreign courts. International arbitration allows the parties to resolve their disputes in a neutral forum — one acceptable to parties from different countries or with different legal and cultural backgrounds.

While no one wants to think about a dispute when entering into a deal, well-crafted dispute resolution clauses give corporations a tactical advantage in the event that a dispute arises. Conversely, the lack of attention to the negotiation of a suitable dispute resolution clause can leave a corporation adversely exposed should a dispute develop.

Below are the top 10 issues to consider when drafting a dispute resolution clause in a cross-border contract.

1. **Governing Law:** Every cross-border contract should contain a governing law clause. Otherwise, the parties will waste significant time and costs fighting the issue once a dispute arises. Choice of law clauses should specify the substantive law of the contract, and parties should consider whether a separate law governing the arbitration agreement needs to be specified. Parties should also consider whether to authorize the tribunal to act as *amiables compositeurs*, giving the tribunal the right to base a decision on fairness or equity rather than law. However, given the inherent uncertainties in application, parties should be extremely cautious to grant such broad and uncertain powers.
2. **Rules:** Typically parties prefer to adopt an arbitration institution's rules and recommended clause because this saves the time and expense of developing an *ad hoc* procedure. Institutional arbitration — sometimes described as “administered” arbitration — can offer better case management and more

effective procedures because the rules of well-established arbitral institutions have evolved from years of practical application and revisions. Although numerous arbitral institutions have particular geographic or industry focuses, the most frequently used arbitral institutions are:

- American Arbitration Association's International Centre for Dispute Resolution (ICDR)
- International Court of Arbitration of the International Chamber of Commerce (ICC)
- London Court of Arbitration (LCIA)
- Hong Kong International Arbitration Centre (HKIAC)
- Singapore International Arbitration Centre (SIAC)
- Chinese International Economic Trade Arbitration Commission (CIETAC)

If parties prefer a non-administered arbitration, the UNCITRAL Arbitration Rules are a good option.

Using an institution's standard clause avoids any ambiguity regarding the scope of disputes which are to be decided by arbitration, the name of the arbitral institution whose rules have been adopted and who is to administer the arbitration.

3. **Arbitrators:** One or three arbitrators are appropriate, depending on the amount in dispute and the complexity of the case. One arbitrator is usually cost effective if the amount in dispute is less than US\$10-15 million, but if the amount in dispute is impossible to predict with any certainty, the number of arbitrators can be decided by the arbitral institution once the dispute arises. When drafting multi-party contracts, parties should carefully draft an arbitration clause to avoid a situation in which each party appoints one arbitrator, resulting an even number of arbitrators.

If the parties wish to choose a method for selecting the arbitrators that differs from the method provided in the selected arbitral rules, the clause may set forth how the arbitrators should be selected. The parties also may wish to require that the arbitrators have specific qualifications, such as at least 10 years of experience with technology-related disputes. Requiring too many qualifications, however, can significantly reduce the available pool of qualified arbitrators.

4. **Venue:** The legal place, or "seat", of the arbitration determines the *lex arbitri*, or arbitration law, and the courts of that jurisdiction will have a supervisory function over the arbitration. Therefore, parties should select a venue in a country which is a signatory to the New York Convention and is known to respect the arbitration process. The parties should also consider the logistical issues, such as the availability of support services (e.g., appropriate hearing facilities, hotel accommodation, transcribers and interpreters), visa requirements, restrictions on the choice of counsel, and the location of the witnesses and parties. The most common venues include New York, London, Paris, Zurich, Geneva, Hong Kong and Singapore.
5. **Language:** Contracts between parties who use different languages should specify the arbitration language — most commonly English. In the absence of a provision designating the language of the arbitration, the arbitrators will decide, frequently selecting the language of the contract. Selecting more than one language will add significant time and costs and is thus discouraged, although witnesses can always testify in their native language, with the aid of a translator.
6. **Negotiation/Mediation Before Arbitration:** A tiered clause will provide for negotiation or mediation before a party can file for arbitration. Explicitly requiring negotiation or mediation may be helpful for a party concerned that broaching the subject of settlement could be viewed as a sign of weakness, or for parties in a long-term contract. But a tiered clause can also delay the start — and resolution — of a dispute. Even if negotiation or mediation is not expressly required, the parties are always free to try

to resolve their dispute through these methods. Thus, parties should consider whether a tiered dispute resolution process is necessary or helpful for this type of contract.

Although a tiered clause frequently requires senior executives to meet to try to resolve a dispute, this scenario typically benefits the smaller company, putting that party on equal footing at the negotiating table. Requiring executives to try to resolve a dispute, however, may not be the best use of time for a large company executive, who would much prefer to delegate this responsibility.

7. **Discovery/Disclosure:** The method for obtaining and submitting evidence in an international arbitration falls within the tribunal's discretion, unless the parties agree otherwise. National rules of civil procedure and evidence do not apply. To address the divergent approaches to disclosure between the common law and civil law systems, parties frequently adopt, in addition to the selected arbitral rules, the International Bar Association (IBA) Rules on the Taking of Evidence in International Commercial Arbitration, which uses a hybrid approach. Even when the IBA Rules are not formally adopted, however, they have become a point of reference. US practitioners will find the scope of disclosure in an international arbitration is far narrower than in US discovery, and depositions are rarely used in international arbitration. Thus, to the extent any party wants to utilize a particular method for obtaining and submitting evidence, the method should be specified in the clause.
8. **Interim Measures:** Notwithstanding the agreement to arbitrate, most arbitral rules provide that the parties have the right to obtain preliminary relief — such as a temporary restraining order or a preliminary injunction — from a national court before the tribunal is constituted. Certain arbitral rules also provide a method to obtain relief from an emergency arbitrator before the tribunal is constituted. If the parties want the ability to go to a court at any time to obtain preliminary relief, even after the tribunal has been constituted, they will need to so specify in the dispute resolution clause.
9. **Reducing Time and Costs:** Arbitration is no longer described as faster or less expensive than litigation. And when a dispute arises, the parties' objectives regarding the speed of the proceedings are likely to be divergent. Therefore, if time is of the essence, parties should address this issue in the dispute resolution clause. Reducing the time and costs of an international arbitration can be accomplished through various steps, including specifying the time permitted for each stage of the arbitration, or the time when the hearings should take place, or the time when the award should be issued after the tribunal has been constituted. The dispute resolution clause can also limit the number of written submissions or provide that the dispute be decided on the papers, rather than hold an evidentiary hearing. If the dispute resolution clause imposes time limits, parties are cautioned to select arbitrators who expressly agree to those time limits and to give the arbitrators the option to modify the time limits if justice so requires, in order to avoid a situation in which the time limits are not met and ambiguity remains regarding whether the arbitration clause remains valid.
10. **Confidentiality:** Although frequently cited as a benefit of arbitration, confidentiality is not guaranteed unless the parties expressly provide for it. Most arbitral rules only require that the institutions and tribunal maintain the confidentiality of the proceedings, and do not impose the same obligation on the parties. Thus, if parties desire confidentiality, they should specify so in the dispute resolution clause, except where disclosure may be required by law.

In the absence of a "one size fits all" arbitration clause, parties should carefully draft a dispute resolution clause and tailor the dispute resolution procedure to strategically meet their objectives.

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