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## FROM THE SECTION CHAIR-



We hope you are enjoying our new electronic [Business Law Today](#). I want to thank all of our members who wrote me with comments (both positive and negative) about our new format. As a result of the feedback, we are looking at additional options and features. We have also created a listing of featured Section content in this monthly *BLT* email for your convenience. Review the list below and click on the links to find the newest additions to [Business Law Today](#). Or just visit [the site](#) now. We hope you like what you see.

By the way, a regular feature of [Business Law Today](#) is the "Training for Tomorrow" department, which provides practical guidance for the emerging business lawyer. The current "Training for Tomorrow" article highlights the second edition of the [Model Stock Purchase Agreement with Commentary](#). This new and expanded guide is an ABA bestseller from our [Mergers & Acquisitions Committee](#). The Model Agreement is an essential tool for anyone who is involved in transactional deals. This "Training for Tomorrow" article includes sample letters of intent and a correlating fact pattern. If you are interested in learning more about the Section's premier publications, visit the [ABA Webstore](#) to see a full listing.

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Lynne Barr  
Chair, ABA Business Law Section

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## A Checklist for Drafting an International Arbitration Clause

By Eric S. Sherby

*Tried-and-true “plays” for the lawyer who is called upon to craft an arbitration clause late in the negotiating process.*

Books have been written advising how to draft international arbitration clauses, and the websites of several large law firms provide “how-to” advice on drafting such clauses. Recently the International Bar Association got into the act by issuing its own guideline.

Undoubtedly the authors of those books and how-to sites are *preeminently qualified* to draft the most comprehensive and detailed international arbitration clauses known to the legal profession.

Yet none of those “how-to” works includes a chapter on the hardest part of the drafting process—convincing the transactional lawyers to involve the international arbitration specialist in the deal early enough for the specialist to get up to speed and be able to craft the most appropriate clause for the deal.

Rather, in many cases, the litigator or arbitration specialist receives an 11th-hour e-mail or phone call from a transactional lawyer, along the lines of “please send me your standard arbitration clause for an international transaction.” At that late stage, there is no time for any lawyer involved to hit the “how-to” books.

Any lawyer (even an international arbitration specialist) who receives such an 11th-hour request is like the football coach who has a playbook full of different plays to be executed at various stages of the game—but who knows that, when there are only two minutes left to put points on the board, he has no choice but to go with a limited number of tried-and-true plays.

Put slightly differently, sometimes a lawyer has no choice but to conclude that there is not enough time left on the clock to ask all the questions that might have been asked had the international arbitration specialist been consulted earlier in the process.

This article outlines the tried-and-true plays for the lawyer who, late in the drafting process, is called upon to craft an arbitration clause for an international transaction.

But before addressing each of the elements of a good international arbitration clause, a few words about the overriding issue in drafting any dispute resolution (not just arbitration) clause: Who is likely to sue whom? and Why arbitrate?

### To Sue or to Be Sued—That Is the Question

At the time of contracting, there is never certainty on that issue. Nonetheless, probabilities help answer this question. For example, in the typical international distribution arrangement (or licensing arrangement), a terminated distributor (or licensee) is more likely to sue the manufacturer/licensor than vice versa. (Yes, there are manufacturers/licensors who sue former distributors for nonpayment of invoices or for wrongful disclosure of trade secrets, but those are the exception.)

Similarly, there are certain types of service providers that regularly work on a commission-only basis. (Examples include sales agents, finders, and brokers.) Those service providers generally get paid only after they have provided their services. As a result, it is more likely that they will have to sue for their commissions than it is

that they would be sued. (Again, claims for breach of fiduciary duty are the exception.)

Under what circumstances is it very difficult, at the contracting stage, to anticipate which party is more likely to sue? One example is a joint venture agreement because the two sides usually bring something of comparable value to the deal. Also, in contrast to the typical manufacturer/distributor (or licensor/licensee) situation, both parties in a joint venture usually have similar expectations as to the relationship (if any) after the conclusion of the joint venture, and they draft accordingly.

The conventional wisdom is that the lawyer who represents the party that is more likely to sue wants any arbitration to be easy and quick.

In contrast, the lawyer who represents the party more likely to be sued down the road does not want an arbitration to be commenced at the drop of a hat. More often than not, the lawyer who represents the likely defendant wants the potential plaintiff to be forced to think twice about commencing an arbitration.

These competing interests arise in deciding almost all of the subissues, discussed below, in drafting an international arbitration clause.

### Do We Really Want Arbitration?

Not everyone likes arbitration. The general lack of appellate review, coupled with the cost of paying arbitrators, leaves no shortage of experienced lawyers who question whether arbitration is better than litigating in court.

Nonetheless, in the international context, most experienced practitioners agree that arbitration has one great advantage

over litigation in court—there is a multinational treaty, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention, see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html)), which (as its name suggests) governs the recognition and enforcement of foreign arbitral awards. Approximately 140 nations are signatories to the New York Convention.

In contrast, the United States is not (yet) a party to any multilateral treaty that governs the enforceability of court judgments. (The Hague Convention on Choice of Court Agreements, which was signed by the United States in January 2009, deals only in part with the recognition of foreign judgments, and there are only a few signatories to that convention.)

Therefore, as a practical matter, there is often greater doubt as to the enforceability of a court judgment than there is as to the enforceability of an arbitral award; ergo, the attraction of arbitration in the international field. (The extent to which some signatory countries, in particular in Europe, recognize exceptions to the New York Convention's stay requirement is beyond the scope of this article.)

#### BLINC LLC

No, it's not a company that makes eye care products. It's a mnemonic device designed to enable you to remember a checklist for quickly drafting an international arbitration clause: **B**road, **L**aw, **I**nstitutional, **N**umber, **C**osts, **L**ocation **L**anguage, and **C**arve-out.

**Broad:** Your arbitration clause should be broad, clear, and unambiguous. Although unclear arbitration clauses are a litigator's delight (because they generate legal fees), clients, understandably, hate them.

Unclear arbitration clauses plant the seeds for multiple legal proceedings, as one party tries to have the dispute adjudicated in an arbitration, while the other party goes to court, perhaps seeking to enjoin (or partially enjoin) the arbitration.

The lawyer who drafts an unclear arbitration clause is justifiably asked by his clients to explain how he got them into such a mess. After all, one of the reasons the client agreed to arbitration in the first place was to get an efficient resolution, and multiple proceedings—especially when one party is litigating abroad—are never

efficient.

The best way to avoid an unclear arbitration clause is to start with the traditional phrase:

... any and all disputes or claims arising under, concerning, or relating to this agreement, its interpretation, its validity (including, but not limited to, any claim that all or any part of this agreement is void or voidable), its termination, or the subject matter hereof will be resolved by confidential and binding arbitration . . .

Despite the clarity of the broad clause quoted above (and even though it has a long history of use), for many international transactions, that clause is not good enough. Take, for example, the typical agreement between a manufacturer in Country A and its distributor in Country B. Not only should counsel for the manufacturer be concerned with possible claims brought *by* the distributor against the manufacturer in Country B, but she also should be concerned with possible claims brought by customers in Country B against the distributor. Why? Because it is not uncommon for a distributor to be sued in connection with the products that it markets, and when that happens, the distributor often asserts a third-party claim against the foreign manufacturer, in court.

Counsel for the manufacturer (in Country A) does only half a job if she ignores the possible assertion of a third-party claim in Country B arising from a dispute between the distributor and its customer.

Therefore, when representing a manufacturer (or licensor) in a contract with a foreign distributor (or licensee), our law firm regularly adds a definition of "claim" that expressly includes third-party claims. As a result, the broad clause (from above) would be modified to read:

... any and all disputes or claims (*including, but not limited to, third-party claims*) arising under, concerning, or relating to this agreement, its interpretation, its validity (including, but not limited to, any claim that all or any part of this agreement is void or voidable), its termination, or the subject matter hereof will be resolved by confidential and binding arbitration . . .

Federal courts have held that, where a third-party claim is clearly covered by

an arbitration clause, the clause will be enforced notwithstanding any argument that it would be "inefficient" to have the third-party claim proceed independent of the main litigation. See, e.g., *Acevedo Maldonado v. PPG Industries, Inc.*, 514 F.2d 614 (1st Cir. 1975); *Schulman Investment Co. v. Olin Corp.*, 458 F. Supp. 186 (D.C.N.Y. 1978).

It is possible that, notwithstanding such language in an arbitration clause, a non-U.S. distributor or licensee will assert a third-party claim against the manufacturer (licensor) in a non-U.S. court. If that happens, and if a judgment were to be rendered against the American company, the language quoted above should be sufficient, under section 4(b)(5) of the Uniform Foreign Money Judgments Recognition Act, to enable the American company to oppose enforcement of such a judgment (at least in those states that have adopted the uniform act).

**Law:** It is surprising how many international agreements—including those that contain an arbitration clause—do not contain a choice-of-law clause. One can only assume that such omission stems from the assumption by the draftsmen that the arbitrator/institution would have no difficulty in deciding what law should apply.

Make the arbitrator's life easier, save his/her time, and save your client money. Include a choice-of-law clause.

**Institutional:** When parties agree to a specific arbitrator whose appointment is not connected to any arbitral institution, such arbitration is referred to as "ad hoc" arbitration. Very few international arbitration specialists recommend ad hoc arbitration; they almost always recommend institutional arbitration. The main reasons for that preference are accountability and enforceability.

Arbitral institutions (at least the major ones) oversee the work of the arbitrator—to some extent. Also, the conventional wisdom is that it is easier to enforce an award given by an arbitral institution than one given by an ad hoc arbitrator.

But there is a price for that increased accountability and superior chance of enforcement. Arbitral institutions have administrative staff and almost always some professional legal staff.

Nevertheless (as noted above), few international arbitration specialists recommend *ad hoc* arbitration.

But with so many arbitration institu-

## Two Institutions Can Be Better Than One

In an article titled "A Different Type of International Arbitration Clause" (published by the ABA's *International Law News* (Vol. 34, Issue 1, Winter 2005 edition), [http://www.abanet.org/abanet/common/login/securedarea.cfm?areaType=premium&role=ic&url=/intlaw/mo/premium-ic/ILN\\_34-1.pdf](http://www.abanet.org/abanet/common/login/securedarea.cfm?areaType=premium&role=ic&url=/intlaw/mo/premium-ic/ILN_34-1.pdf) available at <http://www.sherby.co.il/ILNpublished.pdf>), I outlined the use of an arbitration clause that empowers two arbitral institutions in the same city. Essentially the two-institution clause mandates the city in which the arbitration will take place, but it allows the initiating party to choose one of two designated arbitral institutions.

Such a clause is useful when it is likely that the parties could agree on the arbitral situs but not on the institution.

The two-institution clause is rarely needed when the parties are able to agree on a third-party country as the situs for the arbitration.

tions throughout the world, how is a lawyer to decide?

First, get familiar with at least some of the major institutions.

The leading international institution is the International Chamber of Commerce (the ICC). Not far behind (at least from an American perspective) is the American Arbitration Association (the AAA), which maintains multiple sets of domestic rules and a set of international rules. In the same tier as the ICC and the AAA is the World Intellectual Property Organization (obviously not for a dispute in, for example, the construction industry).

In connection with sole-arbitrator cases, the rules of each of the ICC, the AAA (international rules), and WIPO include a general preference to appoint an arbitrator from a third-party (neutral) country.

Most international practitioners consider the London Court of International Arbitration to be in a league not far behind the ICC, the AAA, and WIPO. In the United

States, in recent years, Judicial Arbitration and Mediation Services (JAMS) has made significant headway in the international field.

Beyond those institutions mentioned above, there are numerous national and regional arbitration institutions.

If your clients never have dealings in the Far East, then you likely will not need to be familiar with institutions such as the Chinese European Arbitration Centre or the Hong Kong International Arbitration Centre. However, if your clients do have dealings in the Far East, you should be familiar with those institutions.

There are also many industry-specific institutions.

When representing an American company in an international transaction, most American lawyers believe that it is safe to propose the AAA (through its International Rules), with the ICC being a fallback if the non-U.S. company objects to the AAA. It is difficult to argue with that conventional wisdom.

**Number:** Multi-arbitrator cases are costly—very costly. They take longer than cases heard by a sole arbitrator because arbitrators are busy people, and getting three of them in the same room, at the same time, takes time and effort. And, of course, having three meters running for almost every substantive action in the case greatly increases the expense.

The conventional wisdom is that the party likely to be sued is more inclined to insist on three arbitrators.

In the international context, the issue of the number of arbitrators can be tricky. Under the rules of the ICC and the International Rules of the AAA, the general default rule (albeit a flexible one) is that a *sole* arbitrator will be appointed. Yet under the rules of the United Nations Commission on International Trade Law (UNCITRAL), the default number of arbitrators is three. Many arbitral institutions incorporate the UNCITRAL rules as their default rules for international cases. Therefore, there is a risk in "leaving to the arbitral institution" to decide the number of arbitrators.

If you do not want a three-arbitrator arbitration, make sure that your arbitration clause expressly calls for the appointment of a sole arbitrator.

**Costs:** To an American litigant, cost-shifting in arbitration (or litigation) is not necessarily expected. Yet to most of the

rest of the world, cost-shifting is expected. Not surprisingly, the rules of the ICC, the LCIA, the AAA, and WIPO provide generally that the arbitrator has significant discretion in awarding costs, including attorney fees.

Almost universally, the parties are free to address the cost issue in the arbitration agreement.

In my experience, the in-house lawyer of a corporate client can offer valuable insight on the issue of cost-shifting (in both the international context and the domestic context). The in-house attorney is likely to have a sense as to how litigation-averse his company is. The in-house lawyer might tell outside counsel that, if a (reasonably) valid claim is asserted against his company, it will look seriously at settling. In-house counsel also might tell outside counsel that his company will not commence an arbitration unless its case is strong. The lawyer at a company that considers itself litigation-averse will be more likely to recommend to his company to agree to a clause that provides for the prevailing party to be entitled to its costs.

The opposite also might be true. There are in-house lawyers who will tell outside counsel that their CEOs (and CFOs) can be unreasonable in assessing the settlement value of a dispute. Those in-house lawyers are less likely to request (or consent to) a cost-shifting clause.

The bottom line as to cost-shifting is that, even when there are only two minutes left to sign the agreement, outside counsel should generally consult with in-house counsel.

**Location** (sometimes called "situs"): Location is usually the most contentious issue in negotiating an international arbitration clause. The location is usually a function of bargaining power: the party with the greater bargaining power will insist that the situs of the arbitration be its home country. When the bargaining power is more or less equal, the parties often select a third-party country.

But before agreeing upon any situs for an arbitration, you should be sure that the country chosen is a signatory to the New York Convention. Otherwise, enforcement of an arbitral award will be in doubt.

Many lawyers assume that an arbitral institution will treat a choice-of-law clause as an implied agreement as to situs (in other words, that a clause calling for application of California law (for example) will

be construed as the parties' consent that California be the situs of any arbitration). That is an erroneous assumption. Arbitral institutions (such as the ICC and WIPO) may take various factors into account—not all of which can be identified at the time of contracting.

The issue of location/situs is too important to leave to doubt. Address it specifically in your arbitration clause.

**Language:** The major arbitral institutions will defer to the parties' pre-dispute agreement, in the arbitration clause, that the language for the conduct of the arbitration be English. However, if the parties are from countries where the official languages differ, absent the parties' agreement, all bets are off as to the language for conducting the arbitration.

Do not assume that the arbitral institution will naturally choose the language that your client prefers. Include in the arbitration clause the language that your client wants for the conduct of the arbitration.

**Carve-out:** A carve-out is a clause that excludes certain types of proceedings from the scope of the arbitration clause. The primary purpose of a carve-out is to ensure that applications for equitable relief—such as for an injunction or an order to attach assets—can be heard by a court wherever it might be necessary to take legal action against the defendant.

A carve-out is usually placed at the beginning of the arbitration clause:

Except with respect to motions or applications for equitable relief, any and all disputes or claims . . .

In the United States, the existence of an arbitration clause is generally not an obstacle to having a court grant equitable

relief—even when the arbitration agreement is silent as to the issue of equitable relief. *See, e.g., Faiveley Transport Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 116 (2d Cir. 2009); *Roso-Lino Beverage Distributors, Inc. v. Coca-Cola Bottling Co.*, 749 F.2d 124 (2d Cir.1984) (per curiam). Therefore, carve-outs are usually unnecessary in arbitration agreements in the domestic context.

However, you never know in what country your client will need to file a motion for an injunction to prevent a contracting party from misusing confidential information or infringing intellectual property.

The last thing you want to hear is that the courts of the foreign country refuse to consider your client's application for equitable relief because of the arbitration clause that you drafted. Therefore, a carve-out is a must in almost any arbitration clause in an international agreement.

What about using the suggested or model arbitration clause of an arbitral institution? I have never seen a suggested clause of an institution that (1) contains a carve-out for equitable relief or (2) sets forth a definition of "claim" to include third-party claims. Also, the suggested clause rarely deals (expressly) with cost-shifting—perhaps because it is in the interest of the arbitral institutions for the contracting parties not to focus on the cost of an arbitration when they are drafting contracts.

For these reasons, I almost never find the model clause to be sufficient.

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## Additional Resources

For other materials related to this topic, please refer to the following.

### ABA Web Store

The ABA Web Store offers the following publication on this topic:

#### [Commercial Arbitration at Its Best: Successful Strategies for Business Users](#)

Edited by Thomas Stipanowich and Peter H. Kaskell

This book is arranged in a convenient question and answer format, and is logically organized according to the chronology of the dispute resolution process. Each chapter covers a key area of the arbitration process and addresses the most important issues that parties using or contemplating arbitration must address. A final chapter is devoted to the special concerns of international arbitration.

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