A DIFFERENT TYPE OF INTERNATIONAL ARBITRATION CLAUSE

By Eric S. Sherby

Forum selection clauses and arbitration clauses are intended to achieve certainty in international transactions. Because of the very nature of international commerce, it is frequently the case that, when a dispute arises, courts in more than one country may legitimately exercise jurisdiction over all parties to adjudicate the dispute. Such situations often lead to parallel legal proceedings, jurisdiction-related motions, and doubts throughout the litigation as to the enforceability of any ensuing judgment.

Because multi-jurisdictional battles are expensive and entail uncertainty, experienced international businesspeople often agree at the outset—through the contract that defines their legal relationship—that all disputes are to be resolved before the courts of a specified state or through arbitration. Although the United States is not a party to any multilateral treaty that governs the enforceability of forum selection clauses, the United States (along with more than 100 other nations) is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the "New York Convention"), which governs the enforceability of arbitration clauses and the recognition of arbitral awards.

By choosing arbitration as the dispute resolution mechanism in international transactions, American companies that do business with companies based in New York Convention countries know with a high degree of certainty that the specified arbitrator (or arbitral institution) will be *the* adjudicating entity for any ensuing dispute *and* that such adjudication is likely to be recognized wherever enforcement may be sought.

Yet, not all transnational agreements include arbitration clauses, in part because parties to international transactions are frequently unable to agree on the situs for arbitration or on the institution to administer it. Although the party with the greater bargaining power can usually "veto" the possibility of arbitrating in the country of the other party, that superior bargaining power is not always sufficient to result in an agreed arbitration situs. Similarly, although the International Chamber of Commerce (ICC) is often considered the "default" institution to administer international arbitration, receptivity to the ICC is not universal.

This article addresses one category of situations in which it is difficult to reach agreement—both on the issue of situs and on the issue of arbitral institution—and proposes an arbitration clause that has proven itself capable of resolving both problems.

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The American Perspective:
Arbitrating on the Other Party's Home Turf

In recent years, institutions such as the American Arbitration Association (AAA) and (to a lesser extent) the ICC have become part of the regular lexicon of American businesspeople involved in international transactions. International lawyers in the United States routinely recommend that their clients arbitrate through the AAA or the ICC.

Yet, when American businesspeople (or their counsel) are asked to consider an arbitration clause that would commit them to arbitrate in the country of a foreign party, before an institution or tribunal with which they are *not* familiar, hesitations naturally arise. Those hesitations can be summarized as follows:

1. *How neutral is the arbitrator?*
2. *Even if the foreign arbitrator is completely neutral, the arbitrator's culture is not our culture.*
3. *We are not familiar with the foreign law, but the other side is.*

These "foreign" factors interject a level of uncertainty into the arbitration process, such that the decision for an American company to agree to arbitrate before a relatively unknown foreign institution is much less routine than the decision to agree to arbitrate before the AAA or the ICC.

Second Problem: For a Non-American Company,
Arbitration Is Not As Routine As It Seems

The hesitation as to conducting an international arbitration before an "unfamiliar" institution can also exist when a non-U.S. businessperson who is experienced in international commerce has to consider arbitrating. For instance, many non-American businesspeople are appre-

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hensive about arbitrating before an institution such as the AAA—even though it maintains a set of rules designed specifically for international cases. To many non-Americans, the fact that the AAA has special international rules is secondary to the makeup of the institution. For example, the British or Brazilian businessperson who is asked to arbitrate before the AAA takes careful note of the word "American" in its name. Apprehension is even encountered when the proposed institution is the ICC—especially in transactions involving companies from small countries, where ICC arbitration is viewed as expensive.

An additional concern of many non-U.S. parties stems from the perception that American businesspeople are litigious—even in international arbitration. Regardless of the merits of this perception, it is a widely held one outside the United States, and it affects the readiness of many non-American parties to consider arbitrating before international arbitration institutions. These hesitations are further complicated by the well-known reality that decision makers frequently relegate the issue of dispute resolution to the eleventh hour. As a result, much of the decision as to the selection of arbitral entity falls upon the lawyers.

In light of the conflicting concerns and the interests outlined above, what should an American lawyer do when his or her American client has less bargaining power than the foreign party *and* the foreign party insists that arbitration take place in *its* country, under the auspices of an institution that is virtually unknown outside that country?

The Proposed Solution:
Two Institutions in the Same City

The author's experience in negotiating contracts involving Israeli parties that have the bargaining power to insist on Israel as the situs for any arbitration is that it is possible to overcome the other (usually American) party's resistance to institutional arbitration in Israel by empowering *two* arbitral institutions—one the ICC and the other an Israeli entity—to adjudicate the dispute in Tel Aviv. The two-institution clause also overcomes the Israeli party's concern about a potentially expensive ICC arbitration to "chase down" a relatively small debt.

The use of a two-institution clause can resolve the conflicting interests outlined above in transactions between U.S. companies and their counterparts in *many* countries.

How Does It Work?

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. In each transaction in which the author has used the two-institution clause, the American party and its U.S. counsel came into the subject transaction completely unfamiliar with the author's preferred local arbitration institution (the Israeli Institute of Commercial Arbitration, or IICA). In each such case, U.S. counsel to the American party reviewed the IICA's arbitration rules, but that was the extent of their due diligence regarding the IICA. Reviewing those rules obviously did not satisfy every concern of the American parties (or their counsel). In particular, it did not satisfy the concern as to the relationship between the proposed Israeli institution and the Israeli party nor the resulting ability of a "visiting" party to get a fair hearing.

The value of the two-institution clause is that it addresses these concerns and provides a reasonable compromise. The two-institution clause greatly reduces the concern of the American party that it will be at the "mercy" of a virtually unknown foreign institution, and it reduces the concern of the non-U.S. party that it will be forced to incur significant legal fees to pursue a relatively simple claim.

In the author's experience, when the American party proposed the ICC as the second institution empowered in the arbitration clause, the Israeli party could hardly object; so long as the arbitration would take place in its country, it was difficult for the Israeli company to question the fairness of the ICC. As for the cost issue, the Israeli party knew that *it* would not be the one instituting an ICC arbitration. The Israeli party assumed that the American party would not recklessly rush to commence an arbitration—thousands of miles from home—before an "expensive" arbitral institution.

At the same time, the two-institution clause gave the U.S. company the comfort of knowing that, if the need to sue were to arise, resort to the most renowned international arbitral institution would be possible. That level of comfort was enough to overcome the American party's concerns about arbitrating in the turf of the opposing party.

Criticisms of the Two-Institution Clause

One criticism of an arbitration clause that empowers two institutions is that it could lead to an impasse if the parties were to submit *simultaneous* applications to the two arbitral institutions empowered in the arbitration clause. However, this impasse concern can be resolved by drafting a clause that provides one or more mechanisms in the event of a "tie" in commencing arbitrations before the two institutions.

Another criticism of the two-institution clause is that it forces parties to become "trigger-happy." In other words, it forces a party to a dispute to initiate an arbitration proceeding sooner than it otherwise would, in an effort to ensure that it, and not its adversary, will be the one to select the

arbitral institution. This concern can largely be alleviated through carefully drafting a pre-arbitration "demand" letter that would demand a short "cooling-off" period before the potential plaintiff commences an arbitration. Thus, the concern that the two-institution clause forces parties to be trigger-happy can also be overcome through drafting.

The Two-Institution International Arbitration Clause

The issues of situs and arbitral institution often go hand-in-hand when deciding upon an arbitration clause. Because the two-institution clause addresses both issues, it should be considered in those international contracts in which it is difficult to arrive at a workable dispute resolution clause. ■

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