Contracting for International Arbitration in the Global Supply Chain

By John R. Trentacosta and Leah R. Imbrogno

In today's global supply chain, it is almost inevitable that companies will find themselves in an international dispute. Strategic supply chain practices must take into account this circumstance and plan for the event in advance. In this article, we discuss the key considerations and benefits of using international arbitration to resolve international commercial disputes and best practices at the contract formation stage for establishing an international arbitration mechanism.

What is international arbitration?

International arbitration is a binding method of dispute resolution, conducted by either one or three arbitrators (commonly known as the "Tribunal"). The power of the Tribunal stems from the parties' agreement to enter into a contract for the private resolution of their disputes rather than litigating in a court system. Both parties to a contract must agree to submit their disputes

to arbitration. Absent extenuating circumstances or issues of contract interpretation concerning whether a particular dispute is actually subject to the parties' arbitration provision, courts routinely enforce contractual arbitration agreements.[1]

Generally speaking, arbitration is preferable to litigating in foreign courts due primarily to the enforceability of an award. Arbitration awards are more readily enforceable than foreign court judgments because most countries around the world are signatories to the 1958 New York Convention.[2] At the time of this writing, 159 countries are signatories to the New York Convention, meaning those countries will support and enforce an arbitration award made in an international arbitration proceeding.[3] The U.S. Court of Appeals for the Sixth Circuit has acknowledged that review of an international arbitration award is extremely limited and extends only to procedural aspects of the determination.[4]

Considerations for selecting international arbitration

Below is a nonexclusive list of key items that parties should take into consideration when deciding whether arbitration is appropriate for their contractual relationship.

Flexibility

International arbitration rules tend to be extremely flexible. Subject to venue rules and applicable law, the parties often steer the procedure and timetable. This can make disputes between parties from different legal traditions (e.g., common law versus civil law) much easier to navigate. Increased flexibility in arbitration, however, can lead to squabbling among the parties regarding the best path forward. In that event, the parties should agree to give the arbitrator(s) more discretion in determining the procedures by which the arbitration will be conducted.

Confidentiality

Another benefit of international arbitration is confidentiality. Documents, submissions, proceedings, and decisions are usually not available to the public, especially on party agreement. Confidentiality of arbitration can be especially beneficial in the context of disputes regarding trade secrets and other proprietary information. To ensure that the arbitration is confidential, the parties' contract should include an express provision regarding confidentiality to avoid otherwise confidential information becoming public if enforcement proceedings in court become necessary.

Arbitrator expertise

One of the main benefits of international arbitration is the ability to select the arbitrator (in contrast to the randomly assigned judge). If appropriate given the nature of the business, the parties can choose an arbitrator with specific industry knowledge. Choosing an arbitrator with knowledge of the subject matter at issue can streamline submissions and presentations. There is no requirement that the arbitrator be a lawyer, but in complex international disputes this is often the case and is the recommended practice. If the parties cannot agree on an arbitrator to conduct the proceedings, the arbitration venue may have rules governing selection of an arbitrator.[5]

Limited discovery and motions practice

Another feature of international arbitration is limited discovery. Tribunal/venue rules and party-guided procedures govern discovery. The parties will conduct an initial meeting with the arbitrator and determine what timetable and procedures are appropriate for the dispute at issue.[6]

Unlike court practice, motion practice in international arbitration typically is more limited. Default judgments and motions for summary judgment generally are unavailable, absent clear circumstances where the claim is frivolous or lacks legal basis.[7] However, the parties may contract for inclusion of summary judgment in their arbitration proceedings.

No formal evidentiary rules

Importantly, traditional rules of evidence such as the Federal Rules of Evidence do not apply in the context of international arbitration.[8] While each venue may have specific evidentiary rules, the Tribunal tends to be the sole judge of relevance.[9] More often than not, the arbitrator will consider all information presented and then make a determination regarding relevance and credibility as part of a reasoned decision/award.[10]

At a Glance

International arbitration is increasingly prevalent in the global supply chain. A well-crafted international arbitration clause in the parties' supply chain contract is necessary to achieve an efficient resolution of an international commercial dispute.

Enforceability and limited appeals

Decisions rendered in international arbitration are binding. One of the key benefits of arbitration is the ease of enforceability. As discussed, most countries are signatories to the New York Convention, which provides for recognition of arbitral awards. Under the express terms of the New York Convention, enforcement may be refused only under very particular circumstances, such as incapacity, lack of notice, or if the award is contrary to public policy.[11] On the other hand, successful appeals from an arbitration award are unlikely unless there is evidence of arbitrator bias, fraud, or failure of due process.[12] Once the Tribunal makes its award, that award should be considered final.

Cost

Despite popular belief, arbitration is not always cheaper than litigating a case in the court system. This is especially true in the event of a highly complex, multinational dispute. In addition to arbitration fees, the parties also may be responsible for Tribunal fees, venue fees, attorneys' fees, travel expenses, and translation services, among other things.[13] There are, however, numerous ways to streamline arbitration proceedings that may not be available in the courts. If the parties agree to "fast track" or expedite the arbitration, there could be cost savings.

International arbitration clause checklist

Successful international arbitration starts with a well-crafted arbitration contract clause. Unfortunately, arbitration clauses often are not the focus of contract negotiations. Proper consideration should be given to the implications of an arbitration clause before entering into an international supply agreement. Failure to think through key considerations such as venue, location, and choice of law can lead to added expense and potential disadvantage in the event of a dispute.[14]

Though every situation is unique, below is a list of basic items an international arbitration clause should identify.

Venue and seat of the arbitration

The first consideration that the parties must include in their arbitration clause is the agreed-upon organization that will conduct the arbitration. The venue should be considered neutral by both parties and have clearly established rules and procedures. The parties also should specify the precise physical location where the arbitration is to take place. Selecting the place of arbitration determines the applicable national law as well as the court having supervisory jurisdiction over the arbitration proceeding itself. It is usually preferred to have arbitration in a major metropolitan area to allow for resource availability and ease of travel.

Common Venue/Seat	Address and Website
ICC International Court of Arbitration (ICC)	112 avenue Kléber 75016, Paris France https://iccwbo.org
International Centre for Dispute Resolution (ICDR-AAA)	120 Broadway, Floor 21 New York, New York 10271 https://www.icdr.org
London Court of International Arbitration (LCIA)	70 Fleet Street London England EC4Y 1EU http://www.lcia.org
Hong Kong International Arbitration Centre (HKIAC)	38th Floor Two Exchange Square 8 Connaught Place Central Hong Kong http://www.hkiac.org
Singapore International Arbitration Centre (SIAC)	32 Maxwell Road #02-01 Maxwell Chambers Singapore 069115 http://www.siac.org.sg
Vienna International Arbitral Centre (VIAC)	Wiedner Hauptstraße 63 1045 Vienna Austria http://www.viac.eu/en
Belgian Centre for Arbitration and Mediation (CEPANI)	8 Rue des Sols 1000 Brussels Belgium http://www.cepani.be/en
German Arbitration Institute (DIS)	Beethovenstr. 5-13 50674 Cologne Germany http://www.disarb.org/en
Swiss Chambers' Arbitration Institution (SCAI)	4, Boulevard du Théâtre P.O. Box 5039 CH - 1211 Geneva 11 Switzerland https://www.swissarbitration.org
Stockholm Chamber of Commerce (SCC Institute)	Brunnsgatan 2 P.O. Box 16050 SE-103 21 Stockholm Sweden http://www.sccinstitute.com

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Governing law and applicable rules

Once the parties have determined the venue and location, the next decision involves the substantive law to apply to the arbitration. The decision regarding which law to apply will likely depend on the relative bargaining power of the parties. In addition, the parties should expressly reference the rules of their chosen venue to alleviate any doubt as to applicable rules.

Number of arbitrators

The vast majority of arbitrations are overseen by either one or three arbitrators. Cost is a main consideration when determining whether to use a sole arbitrator versus a three-person panel. A sole arbitrator means lower fees and (usually) quicker resolution of disputes. However, if the parties choose to move forward with a sole arbitrator, they are prevented from each selecting their own arbitrator, as is the case with a three-person panel. In highly contentious matters, it may be preferable to have each party choose an arbitrator and then have those arbitrators jointly choose the third member of the panel.

Language of the proceeding

When parties to an international contract do not have the same native language, it is recommended that they decide in advance on the language in which the arbitration will be conducted. In doing so, the parties should consider the language of the key documents at issue as well as the language of main witnesses. Even if the parties agree in advance on a language in which to conduct the proceedings, it is still likely that translation services will be needed by both parties to assist with document interpretation and witness testimony.

Confidentiality

Even though most arbitrations are presumed to be confidential, this is something the parties should not take for granted. Every arbitration clause should include a specific reference to confidentiality of the proceedings, documents, submissions, and the award itself. In addition, it is recommended that the parties also enter into a protective order in the event of a dispute. This provides further protection for all of the information exchanged.

Injunctions

An important drafting question is whether to include a clause allowing for injunction actions outside of arbitration. Often, injunctions are carved out of an arbitration clause. Though some Tribunals have authority to issue injunctions, it is typical to seek injunctions through the court system. This is a necessary consideration especially in the context of supply chain disputes, where injunctions are often sought to obtain prompt relief.

Recognition and enforcement of awards

Even though most countries are signatories to the New York Convention, it is advisable to include a specific provision in the arbitration clause where both parties confirm that any award will be enforceable and the location of enforcement. The parties also should agree in advance to submission to the jurisdiction of a particular court for enforcement purposes.

Sample International Arbitration Clause

Any dispute arising out of or in connection to this Agreement, including questions of validity, termination, or breach, shall be referred to and finally resolved by binding arbitration in [insert international location or seat] by [insert venue] in accordance with the [insert rules] in force at the time of the filing of the Request for Arbitration. The Tribunal shall consist of [1 or 3] arbitrator[s] to be appointed by party agreement, or, alternatively, in accordance with the [insert rules]. The language of the arbitration shall be [insert language]. The arbitration will be governed by the laws of [insert country/state]. All of the arbitration submissions, documents, proceedings, and awards should be held strictly confidential by all parties and participants. The parties acknowledge and agree that the arbitration award should be deemed enforceable and parties submit to the jurisdiction of the courts of [insert country/state] for purposes of enforcement. The parties further acknowledge and agree that a claim for specific performance, injunctive, or other equitable relief shall be exempted from this arbitration provision and subject to suit in the courts of [insert jurisdiction].

Conclusion

As with other vital contract provisions, a well-thought-out international arbitration clause will alleviate numerous concerns in the event of a dispute with a foreign company. Though international arbitration may not be right for every party or every dispute, companies entering into high-stakes, cross-border transactions and agreements should give serious consideration to including an international arbitration clause in their contracts. ■

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ENDNOTES

1. 9 USC 2 (arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"). See also *Allied-Bruce Terminix Co v Dobson*, 513 US 265, 281; 115 S Ct 834; 130 L Ed 2d 753 (1995) and *Perry v Thomas*, 482 US 483, 492, n 9; 107 S Ct 2520; 96 L Ed 2d 426 (1987).
2. 9 USC 201 and United Nations Conference on Int'l Commercial Arbitration, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958) <http://www.newyorkconvention.org/new+york+convention+texts>. Any arbitration agreement or award arising out of a legal relationship considered to be "commercial" falls under the New York Convention, but it does not cover agreements or awards entirely between citizens of the United States unless the relationship involves "property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." 9 USC 202. See also *Tierra Verde Escape LLC v Brittingham Group LLC*, opinion of the United States District Court for the Western District of Michigan, issued August 28, 2017 (Case No. 1:16-cv-100). All websites cited in this article were accessed July 26, 2018.
3. New York Arbitration Convention, *Contracting States* <http://www.newyorkconvention.org/countries>. Note that some countries maintain a "reciprocity" requirement for enforcement of arbitration awards, e.g., the People's Republic of China applies the New York Convention only on the basis of reciprocity to the recognition and enforcement of arbitral awards made in the territory of another signatory country.
4. *M&C Corp v Erwin Behr GmbH & Co, KG*, 87 F3d 844, 848 (CA 6, 1996).
5. See, e.g., Hong Kong International Arbitration Centre (HKIAC), *2013 Administered Arbitration Rules*, Article 7.2 <http://www.hkiac.org/images/stories/arbitration/2013_hkiac_rules.pdf>: "If the parties fail to designate the sole arbitrator within the applicable time limit, HKIAC shall appoint the sole arbitrator."
6. See, e.g., Singapore International Arbitration Centre (SIAC), *SIAC Rules 2016*, Article 19.3 <http://www.siac.org.sg/our-rules/rules/siac-rules-2016>: "As soon as practicable after the constitution of the Tribunal, the Tribunal shall conduct a preliminary meeting with the parties, in person or by any other means, to discuss the procedures that will be most appropriate and efficient for the case."
7. Some venues are becoming more open to the possibility of including summary proceedings. See, e.g., Arbitration Institute of the Stockholm Chamber of Commerce, *2017 Arbitration Rules*, Article 39(1) <http://sccinstitute.com/media/169838/arbitration_rules_eng_17_web.pdf>: "A party may request that the Arbitral Tribunal decide one or more issues of fact or law by way of summary procedure, without necessarily undertaking every procedural step that might otherwise be adopted for the arbitration."
8. Born, *International Commercial Arbitration—2d Ed* (The Netherlands: Wolters Kluwers, 2014), § 15.09(A); *Generica Ltd v Pharm Basics Inc*, 125 F3d 1123, 1130 (CA 7, 1997) (arbitrators "are not bound by the rules of evidence") (internal citations omitted).
9. See, e.g., Int'l Centre for Dispute Resolution, *International Dispute Resolution Procedures* (2014), Art 20(6) <https://www.adr.org/sites/default/files/ICDR%20Rules_0.pdf> and United Nations Comm on Int'l Trade Law, *UNCITRAL Arbitration Rules* (2010), Art. 27(4) <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>.
10. Born, *International Commercial Arbitration*, § 15.09(A).
11. United Nations Conference on Int'l Commercial Arbitration, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Article V. The vast majority of attempts to set aside an arbitration award utilize the "public policy exception" of Article V. See also 9 USC 207 ("The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in [the New York Convention].") and *Satyum Computer Servs v Venture Global Engineering LLC*, opinion of the United States District Court for the Eastern District of Michigan, issued July 13, 2006 (Case No. 06-cv-50351-DT) (misapplication of substantive law is insufficient to justify a public policy limitation on enforcement under the New York Convention).
12. *Yusuf Ahmed Alghanim & Sons WLL v Toys "R" Us Inc*, 126 F3d 15, 21–22 (CA 2, 1997). For a comprehensive discussion regarding appeal and annulment actions in the arbitral seat, see Born, *International Commercial Arbitration*, § 25.02.
13. Chartered Institute of Arbitrators, *CIArb Costs of International Arbitration Survey 2011* <www.international-arbitration-attorney.com/wp-content/uploads/2017/01/CIArb-Cost-of-International-Arbitration-Survey.pdf>.
14. See, e.g., *George Fischer Foundry Sys Inc v Adolph H. Hottinger Maschinenbau GmbH*, 55 F3d 1206 (CA 6, 1995) and *Williams Int'l Co LLC v New West Mach Tool Corp*, opinion of the United States District Court for the Eastern District of Michigan, issued January 22, 2010 (No. 09-12516).