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5 International Arbitration Blind Spots GCs Can't Ignore

By **Melissa Maleske**

Law360, Chicago (March 18, 2016, 2:40 PM ET) -- As businesses become more international, so do their disputes, which can raise a whole host of new issues for general counsel who are more used to the U.S. court system than international arbitration. Here's what the experts say in-house counsel should watch out for.

Clause Considerations

An arbitration clause may be a standard part of a business contract, but that doesn't mean you should settle for boilerplate provisions. While you may enter into a business relationship or transaction with optimism, disputes do happen, and the clause can seriously hurt or help you depending on how it's written.

"Drafting is really the lynchpin of being successful in international arbitration," says Nancy Geenen, a managing partner at Suann Ingle Associates. "If I was inside counsel, I would spend a lot of time understanding how the dispute resolution clause is going to work and, if we get a judgment, where are we going to enforce it. I think it would be a real shame to assume that an international arbitration clause is going to be effective if it's boilerplate."

Arbitration clauses should be written from a perspective that's well informed and up to speed on how various countries approach arbitration and enforce awards so you can agree on a venue. And drafting is the time that you should look ahead defensively and consider what kinds of disputes are most likely given the business transaction in question.

"When you negotiate these provisions, you have to go through the whole process, from what the likely dispute will be and all the way through to the law, the venue, who's hearing it and how you're going to enforce it," says Michael Verde, a partner at Katten Muchin Rosenman LLP. "You've really got to kind of war game through the whole thing because you can end up with some very nasty surprises."

The Sealed Offer

Sealed offers, or Calderbank letters, only effectively exist in English civil procedure and in international arbitration, but in-the-know in-house counsel can use them to bring down the costs of arbitration in certain situations.

If parties agree to adopt this rule before an arbitration, both parties are agreeing that if the respondent offers a settlement and the other side rejects it, that settlement is then sealed — in other words, the arbitrators do not see it. If the final judgment comes down and it's lower than the offer the respondents made, the other party is responsible for all of their costs as of the moment they made the settlement offer.

White & Case LLP partner Ank Santens says most counsel who aren't familiar with English court procedures don't know about sealed offers, but those who have experience with it tend to like it. That's helping it catch on in arbitration, where it can alleviate uncertainties about whether the loser will pay at least some of the other side's fees or whether each side will pay its own costs regardless of the case's outcome.

"We've used it a number of times, and we find it to be a very good procedural device if you find yourself in a case where, for instance, you're the respondents and you think there will be some liability, but it's a lot less than the other side claims," Santens says.

Parties should agree to follow this standard before the arbitration begins, Santens says. Once it's a possibility, the parties know that the sooner they make an offer the more quickly they can cap their costs.

Telling All

Playing your hand close to your chest can be an effective strategy in U.S. litigation, but in international arbitration there are a few situations when you'll need to lay it all out on the table.

For one thing, in many arbitrations — such as those at the ICC — there is no direct examination of witnesses. Instead, witnesses submit written statements. Litigators new to arbitration may be taken by surprise by the importance of the witness statement: It is only through the statement that exhibits can be introduced into the record.

"Sometimes the other side seems not to have gotten that point, so they put in very vague and superficial witness statements without attaching any documents and exhibits," Verde says. "That is your case in chief. That is the equivalent of getting up and examining a witness on background. If you haven't put everything you need in all of these witness statements, you really have no opportunity to make your case."

There's also the fact that arbitration awards are very difficult to set aside as there are no effective appeals processes. And this may change the strategy behind presenting a case.

"Often in court, you're protecting the record on appeal, and you always have your eye out for the possibility of going to appellate court," says Grant Hanessian, head of Baker & McKenzie LLP's international arbitration practice in North America. "In an arbitration, there's much less of that. It's important to get everything in front of the people that are hearing the evidence."

Civil Law Concepts

In preparing for a U.S. arbitration, two focuses of litigators are discovery and precedent. But when civil and common law regimes collide in an arbitration, you may find yourself with neither to rely on.

"If somebody has a domestic focus, particularly a domestic litigation focus, they can be surprised by the lack of discovery and the fact that there are no formal rules of evidence or hearsay rules," Hanessian says. "It does take some adjustment."

As in civil law countries, in arbitration discovery is solely at the discretion of the arbitrators, Verde says, and if parties can't agree, generally there is none.

"Everyone hates discovery because it's such a pain in the neck, then when you have a case that goes to arbitration and you have no discovery at all, you realize, thank god for discovery," Verde says.

Santens says that it can help to put things in writing, such as a request that the other side institute a litigation hold. If they don't abide by it and documents are not preserved, it will not give the arbitrators a good impression, she says.

One way to at least clarify discovery standards in a proceeding is by starting with commonly accepted guidelines, such as the International Bar Association's Rules on the Taking of Evidence in International Arbitration, which Santens says are generally accepted to provide a clear set of rules both sides can use.

"Even if they're not accepted in full, they're useful to at least have a discussion about the areas they cover and try to understand what the other side's approach is so that you can anticipate and act accordingly," Santens says.

Another major difference between common law and civil law is stare decisis, and arbitrators are not obligated to rely on prior decisions as a matter of precedent.

"Our arbitrators could certainly read and be made aware of them, but they don't have to decide the same way," Geenen says. "For U.S. counsel, unless they're coming from Louisiana, the concept of precedent and common law versus civil law may be lost."

Arbitrator Appointment

While there may not be precedential decisions in arbitration, parties do have the ability to select their arbitrators, which Geenen says can be almost as good. To use the power of choice to your full advantage, stay informed about arbitrators or turn to outside counsel who can provide that knowledge to you.

"Develop the inside scoop of who knows your industry, and then follow those people to see what they're doing and how they're deciding," Geenen says. "As a legal department, I'd love to have that in my pocket so I wasn't doing it last-minute. Getting to choose means having knowledge ahead of time, not scrambling."

The selection process is also an opportunity to ensure that the proceeding won't be challenged down the line because of potential conflicts and that they don't have conflicts that could make you question their impartiality in your case. When arbitrators are proposed for an appointment, they are obligated to disclose any connections they have with the stakeholders in a case, but Santens suggests simply asking a potential arbitrator about what disclosure they would make before they're selected to hear a case.

"A few times we or the other side appointed an arbitrator, and then the arbitrator made disclosures that were surprising, and frankly, if I had known them upfront I would have thought twice about appointing this person," Santens says. "They may ultimately be harmless … but if you get a laundry list of disclosures it's just not a very good way to start a case."

--Editing by Jeremy Barker and Kelly Duncan.