Inside Counsel

8 arbitration surprises awaiting the uninitiated

Know these eight ways in which international arbitration differs from U.S. litigation to ensure that you and your client are not caught unawares

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U.S. companies doing business overseas frequently insert international arbitration provisions as an alternative to resolving disputes in the local courts of one of the contracting parties. As discussed in an earlier article, international arbitration has numerous benefits and is a logical compromise between the parties. However, international arbitration also holds a number of unique features that may come as a surprise to the uninitiated. We discuss below eight ways in which international arbitration differs from U.S. litigation to ensure that you and your client are not caught unawares.

1. Choose your own procedural adventure

At the outset of a federal court lawsuit, an experienced litigator can advise his or her client of the basic procedures the court will follow. Not so in international arbitration. Because arbitration is intended to be flexible and less rule-bound than U.S. litigation, arbitrators have vast discretion in setting the procedures that will govern the arbitration. Counsel and tribunal members hailing from differing legal traditions, *e.g.*, common law versus civil law jurisdictions, may seek very different procedures to govern the arbitration. Counsel must be prepared to advocate for their "vision" of the arbitral procedure at the preliminary conference.

2. No fishing expeditions

Arbitration — whose roots lie in civil law — is characterized by very limited discovery (called "disclosures"). This means that absent mutual agreement, the parties typically get no depositions or interrogatories and will obtain document discovery that is restrained by U.S. litigation standards. The limited discovery tradition is touted by arbitration proponents as a benefit since it cuts down on cost. Nonetheless, the sharp limits on discovery can be a shock for first time users accustomed to the transparency of U.S. litigation. Counsel who anticipate needing extensive discovery in the event of a dispute should negotiate for more expansive discovery procedures in the dispute resolution provision itself.

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3. "I'll give it the weight it's due"

Evidence that would typically be excluded in U.S. courts because it is deemed "unreliable" or inadmissible for hearsay or other reasons is often admitted in international arbitration. An arbitral tribunal has broad authority to admit or exclude evidence, and evidence of questionable value or reliability is often admitted with the caveat that the tribunal will determine what weight, if any, should be given to the evidence. Under the New York Convention, recognition and enforcement of an arbitral judgment (called an "award") may be refused where a party was not afforded an opportunity to "present his case." A tribunal may be concerned that failing to admit important evidence presented by the unsuccessful party could give that party a basis to challenge the award.

4. Write that down

Direct witness testimony in international arbitration is typically presented in the form of a detailed written statement, which the witness is merely asked to affirm upon taking the stand. Witness submissions can be quite long, with all supporting evidence attached as exhibits. As such, during an arbitration trial (called a "merits hearing"), there will be little direct witness testimony and the parties essentially begin with cross examination. In a complex business dispute, counsel present their case-in-chief through various substantive pleadings. Such pleadings can run hundreds of pages long, attaching lengthy witness statements and copious exhibits, with citations to the testimonial and documentary evidence incorporated into the briefs. Unlike U.S. courts, which often set page limits on trial briefs, arbitral tribunals generally do not impose such limits.

5. "Split the baby"

When it comes time to render the award, many arbitral tribunals have a tendency to shy away from an all-or-nothing approach and instead reach some level of compromise between the parties. Some arbitration practitioners and arbitrators will dispute this notion. Nonetheless, there are experienced practitioners who believe the only explanation for certain awards is that the arbitral tribunal wanted to give something to each side. One possible reason for this phenomenon is that tribunals comprised of three arbitrators may render an award that reflects horse trading and compromise among the arbitrators. Another possible explanation is that arbitrators may be loath to develop a reputation as being overly harsh. A third explanation is that some arbitrators give greater weight to equitable considerations than is customary in U.S. litigation, resulting in fewer one-sided awards.

6. The decision is final (mostly)

The finality of arbitration is both a reason for the efficiency of the process and a drawback for parties because there is little recourse if the result is undesirable, unfair or just wrong. Absent specific language in the arbitration clause, an arbitral award may not be appealed. However, under the New York Convention's specifically defined circumstances, it may be possible to vacate an award if, for example, recognition of the award "would be contrary to the public policy" of the country where recognition or enforcement is being sought, or if the arbitrators exceeded their authority by considering "matters beyond the scope" of the arbitration agreement. Unsubstantiated perceptions of unfairness or simple legal error are not typically sufficient to overturn an award.

7. I'm paying for what?

Absent a statute, some basis in case law, or a contractual clause requiring the losing party to pay the prevailing party's attorney's fees and costs, each party to U.S. litigation bears its own attorney fees and costs regardless of the outcome of the proceeding. This is typically referred to as the "American

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Rule" of attorney's fees. Other jurisdictions provide for a loser-pays regime, most often referred to as the "English Rule" of attorney's fees. In international arbitration, attorney's fees and costs are awarded at the discretion of the arbitral tribunal, limited only by the language of the arbitration clause and the applicable institutional rules. In fact, many institutional rules require the tribunal to make an award on costs and some reflect a general acceptance of the "English" loser-pays regime. An arbitrator's practice and legal tradition will likely influence an award of costs and fees. Be sure to advise your client that if you lose the arbitration, your client may end up bearing the adversary's fees and costs in addition to its own.

8. Another bite at the apple

Unlike precedent in U.S. litigation, an arbitral award has no preclusive or binding effect on subsequent arbitrations or court action. At most, arbitral awards provide persuasive authority and arbitral tribunals may be motivated to reach an outcome consistent with published awards. In reality, arbitral tribunals do reach conflicting decisions on the same legal principles, sometimes even involving the same party. Yet, parties may seek out arbitration because of, not despite, the lack of preclusive effect. Intellectual property disputes, for instance, might be better brought in an arbitration setting where the impact of a negative outcome is limited to that specific dispute and does not result in broader consequences.

Conclusion

In today's global economy, U.S. companies are increasingly exposed to international arbitration. This article, while necessarily brief, provides a glimpse into the unique world of international arbitration and identifies some of the features that may be surprising to those more accustomed to U.S. litigation.

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