LITIGATION MINUTE: DRAFTING INTERNATIONAL ARBITRATION PROVISIONS FOR CROSS-BORDER MANUFACTURING CONTRACTS

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WHAT YOU NEED TO KNOW IN A MINUTE OR LESS

Potential future disputes are a reality in all cross-border manufacturing agreements—whether for the sale or purchase of goods or services, or corporate transactions—even for the best drafted contracts. Planning ahead for any such disputes to be resolved by international arbitration via a well-drafted international arbitration provision can have many benefits, and significantly reduce future costs, delays and risks. In a minute or less, here's why, how to go about it, and examples of common mistakes to avoid.

THE “WHY” (BENEFITS)

International arbitration as a binding form of dispute resolution can offer many benefits, including:

- *Enforceability*. An international arbitral award is readily enforceable virtually worldwide as a result of the 1958 New York Convention, to which more than 160 nations are a party.
- *Procedural flexibility and party autonomy*. Arbitration allows for a more flexible, bespoke dispute resolution process, and allows for party autonomy in setting both the procedure and selecting the decision-makers. This can be particularly important for companies involved in technical industries.
- Providing a *neutral forum*, the potential for *cost recovery*, and increased opportunity for *confidentiality*, which can be very important in the manufacturing industry.

THE "HOW" (DRAFTING)

When drafting an international arbitration provision manufacturing companies should make sure they have considered and addressed seven essential elements of any well-drafted arbitration provision:

1. *Agreement to arbitrate* (clear and mandatory)
2. *Scope* (categories of disputes covered)
3. *Type of arbitration* (ad hoc or institutionally administered, and under which institution's rules)
4. *Method* of appointment and number of arbitrators, along with any eligibility criteria

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5. *Seat of arbitration* (i.e., legal place of the arbitration—this will have important impacts with regard to the national courts responsible for any challenges to arbitrators or to the final award, among other things)
6. *Language* of the proceeding
7. *Governing law* of (i) the main contract, and (ii) the agreement to arbitrate

THE "DO NOTS" (COMMON MISTAKES TO AVOID)

Attention at the drafting stage is key to ensure, for example, the following common mistakes are avoided—saving unnecessary time-consuming and costly disputes down the line:

- *A one-size-fits-all does not always fit all*. All contracts and deals will be unique. Consider the location of the parties, the goods/services to be provided, and the nature of the contract when drafting the provision. What works for a provision in one contract may not work in another.
- Generally speaking, it is wise to *stick with the safety and simplicity of the selected institution's model arbitration clause*. Depart from the model wording with care—do not over-prescribe; generally, “less is more.”
- *Avoid conflicting clauses*. Reusing contracts or copying and pasting previously used clauses can result in conflicting clauses. Carefully review how the international arbitration provision fits with any other dispute-related provisions.
- *Beware of carve-outs for particular claims*. This can expose companies to the danger of parallel proceedings and disputes in an unintended forum. If providing for a separate expert procedure for technical disputes under a manufacturing supply contract, draft with care.
- *Pay special attention to multi-tiered/escalation causes*. Poorly drafted escalation clauses can cause disputes to become “stranded” on a tier for various reasons, such as the lack of time limits and determining whether the criteria for escalation has been satisfied.

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