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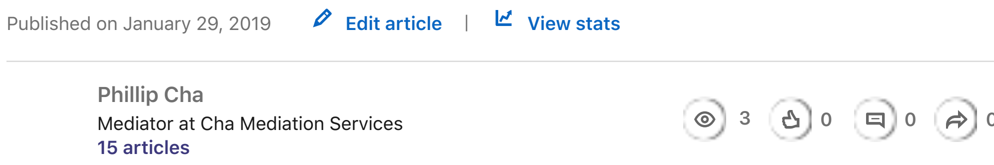
Drafting a Cross-Border Dispute Resolution Provision



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While #MeToo, data privacy and class-action waivers made the headlines in 2018, international arbitration has quietly become one of the hottest areas of the law.

The growth of international arbitration coincides with an increasingly global, interconnected economy. The growth of cross-border transactions naturally gives rise to an increase in cross-border disputes when those deals go bad.

Much of the literature on arbitration focuses on the pros and cons of arbitration in comparison to court litigation. While this is a valuable exercise, let's face it, international arbitration is here to stay. So it is incumbent on attorneys representing clients that do business internationally to understand the ins and outs of drafting an effective alternative dispute resolution provision.

To Mediate or Not to Mediate?

One consideration when drafting an alternative dispute resolution provision is whether to include a requirement to go to mediation prior to commencing arbitration. Mediation is usually completely voluntary, and the parties can decide to go to mediation at any time during the life of the dispute. However, there are benefits to requiring the parties to try mediation prior to initiating an arbitration. Most importantly, resolving a dispute prior to investing the time and money in an arbitration proceeding is the more cost effective and

efficient option for businesses.

That said, mediation is not a widely accepted practice in every jurisdiction. As a result, one or both parties may be resistant to it. Also, a jurisdiction that does not have an established culture of mediating legal disputes may not have a good supply of qualified mediators. Therefore, if the parties want to include a mediation requirement in their dispute resolution provision, they should take steps to ensure that they can find a good supply of mediators. This leads us to the next consideration.

Location, Location, Location

One of the biggest considerations when drafting an international dispute resolution provision is the venue for the arbitration. The New York Convention (formally known as The Convention on the Recognition and Enforcement of Foreign Arbitral Awards) ensures the enforceability of arbitration awards among its 156 signatory nations. While a foreign arbitration award will be recognized and enforced in each of these nations, the traditional venues for the actual arbitration proceedings have been located in places like New York, London, Paris and Hong Kong.

With the explosion of cross-border business involving Asia, arbitration providers based in Japan, South Korea, Singapore, China and other Asian countries are now investing heavily in establishing their own regional dispute resolution centers.

California has a promising future as an international dispute resolution center. Historically, California has been left out of the mix, as California law barred non-California licensed practitioners from representing their clients in arbitrations taking place within the State. However, the recently-enacted Senate Bill 766 (codified at California Code of Civil Procedure §§1297.185-189) is a game changer. The new law, which became effective January 1, 2019, opens the door wide open for foreign attorneys to represent their clients in international arbitration proceedings in the State of California.

Now that California is back in the mix as a potential seat for international arbitration, it should be a highly attractive venue given the size and scale of its economy and its connection to Asia and the Pacific Rim. The unsung benefit of having California as an international dispute resolution center is its robust culture of using mediation as a form of alternative dispute resolution. As a result, California offers a deep pool of experienced, diverse mediators who are able to tackle the most complex global commercial disputes.

Subject Matter and Related Procedural Issues

Not all international disputes are created equal. Thus, the procedural and substantive rules that will apply to the dispute are another critical consideration. Each arbitral forum will have its own rules and procedures that will be applicable to the type of dispute at issue, whether it is a construction, intellectual property or employment dispute.

Other important considerations include the arbitrator selection process, governing law and scope of pre-hearing discovery, all of which can make or break a party's probability of success in arbitration.

Given these high stakes, it makes sense for both transactional and litigation counsel to collaborate on the crafting of the dispute resolution provision. After all, each can lend a first-hand perspective on the process.

A Word About Diversity in ADR

As the world gets smaller and cross-border disputes increase, there should be a call to action for more diversity in the pool of arbitrators and mediators when it comes to characteristics like gender, race/ethnicity and age. As noted by many, diverse neutrals can offer valuable insight, perspective and cultural sensitivity in these types of cases. Diversity and inclusion initiatives are growing in prominence in corporate America for these same reasons. The word is out that diversity is a good thing for business.

The call to action in the alternative dispute resolution field is likely to be driven by the practitioners and their clients, but ADR providers also bear responsibility to ensure that they have a well-stocked panel of diverse neutrals ready to answer the call. At least one high-profile ADR provider, JAMS, is experimenting with a diversity and inclusion rider among its model dispute resolution provisions designed to address these goals.

According to the JAMS proposed inclusion rider, the parties to the dispute pledge that they: "[W]ill seek to appoint a fair representation of diverse arbitrators (considering gender, ethnicity and sexual orientation), and will request administering institutions to include a fair representation of diverse candidates on their rosters and list of potential arbitrator appointees."

While not mandatory by any means, the hope is that this type of language will get the parties to start thinking about the benefits of having diversity in their potential pool of neutrals. Ultimately, who drives the call to action, and whether the call will be answered, remain to be seen.

To sum up, international arbitration has been, and will continue to be, one of the fastest-growing areas of the law. This growth raises new issues for counsel to consider when drafting cross-border dispute resolution provisions. By staying on top of the latest developments, counsel can keep up with their clients in the fast-paced world of international transactions.

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