Kluwer Arbitration Blog

Anti-Arbitration: Drafting?

Michael McIlwrath (MDisputes) · Wednesday, May 11th, 2011

Conferences on arbitration frequently include a session on “drafting” dispute resolution clauses for international contracts. The term *drafting* is also included in the title of many articles, book chapters, and entire books. While the actual content that follows this topic heading is often helpful, especially for non-specialist in-house counsel and transactions lawyers, the term itself conjures up an idyllic image of the lawyer sitting comfortably at a desk writing out an ideal form of dispute resolution, for peaceful inclusion in the parties’ contract.

If only life were so simple.

The reality is that huge battles are fought over dispute clauses. Contracts can be won and lost on the basis of what goes into (or stays out of) them. Often appearing in contracts at Article 26 or later, the dispute clause can be a true deal-breaker. When these occasions arise, as they do, the in-house lawyer will be called to explain to senior management not the risks of accepting a potentially defective clause (they will have understood that part already) but to propose compromise solutions that the other side might accept. Senior managers aren’t interested in ideal forms of dispute resolution; they just want to get the deal done without selling the farm.

For most contracts of any import, therefore, the real challenge is not in *drafting* the dispute clause, but in *negotiating* the important concepts of what will go into it: the where and how of resolving any disputes.

Let’s say that A has informed B that their contract-to-be must have an arbitration clause, and that this clause must include a joinder requirement (meaning a consent to being joined in disputes involving other parties and their contracts). B accepts that disputes shall be resolved by arbitration but states that her company’s policy prohibits accepting joinder of this type.

Assuming both sides truly want the contract to be concluded, the only way forward is by negotiating towards a point of agreement.

In its most rudimentary form, the negotiation may be no more than a simple game of chicken, with each side standing its ground and betting the other will drop its requirement first. The prepared negotiator, however, will have more in her toolkit than a willingness to brave such a risky game. At a minimum, she will want to be in a position to propose a form of trade. She may suggest that in return for Side B’s acceptance of joinder, that Side A concede a different contractual term, such as a guarantee of payment. Or, taking this concept further still, she may try to trade Side B’s acceptance of joinder for a concession in price due to a perception of increased risk. (Inflexibility

may present opportunity to one party and cost to the other.) To get there, she may have to negotiate first within her own side, to convince her constituencies that the approach makes sense.

A further option may be to identify an alternative that satisfies the interests of both sides, without requiring true concessions from either. This will require actively engaging the other side to understand what it seeks to accomplish through joinder, and an ability to find solutions that can address this. For example, Side A's desire for joinder may arise from a perceived risk of inconsistent results arising from technical disputes that touch upon different contracts and parties. Upon learning this, the lawyer for Side B may propose that, instead of joinder, the parties provide for a neutral institution to appoint an expert to determine technical matters arising under multiple contracts, and authorize any expert's report to be produced in arbitrations arising under those other contracts.

A jointly authorized expert report might fully address A's concerns for avoiding inconsistent determinations, while also addressing B's concerns about the complex procedural difficultes that joinder poses for arbitration. In order to put herself in the position to propose this solution, however, B's lawyer would need to identify an institution able to host the parties' agreed procedure in the event of a technical dispute. After making inquiries she may find, for example, that the ICC will appoint experts (the ADR group manages this process) even if the institution's rules and website say nothing about joint appointments or disputes involving multiple parties, and the ICC's arbitration rules themselves do not provide for joinder.

Thus, to address just this one line in their dispute clause, the parties may have to negotiate within their own houses, and then each other, and potentially with an institution, and then, only after a viable solution has been found and agreed, will they know what sort of clause they should begin "drafting".

In other words, to speak of *drafting* risks reducing the entire discussion to only what takes place once all the hard work has been done.

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