Kluwer Arbitration Blog

Anti-arbitration: problems and complaints answered here

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Here are some recent issues colleagues or acquaintences tell me they are facing with international arbitration, without (or with slightly altered) information that might identify a particular proceeding or party.
My own comments follow each. I invite readers to amplify with their own views on how to handle these situations, or compare with issues they are facing.

I recently received this note from a transactional lawyer who is engaged in a contract negotiation in Asia:
The customer's terms and conditions specify dispute resolution before a local arbitration chamber, ABCD. We rejected this and offered instead a number of different options, both institutional and UNCITRAL arbitration.
We just received the following ultimatum from the customer: "As per our legal advice, your proposed options are not acceptable. Arbitration is only admissible under ABCD rules, in [city of customer]. Please confirm by COB today you will withdraw your exception to the arbitration clause and accept what is stated in our terms and conditions."
Our sales team really wants to close the deal, but I do not think we can accept this institution.

Problems like this are not uncommon in international commercial contract negotiations. There has been a proliferation of local or regional institutions in recent years, and which should be carefully vetted before being accepted. Typically, we would start with information available on the institution's website, but ABCD's website is not helpful. Over half the site's pages are under construction or broken links. We tried to contact their offices by phone and e-mail, but never received an answer.
While the sales team will always want to close a deal, my colleague's instincts are right. The term "dealbreaker" was invented for rare situations like this when a lawyer will play a decisive role.
In this case, there is *nothing* to indicate that ABCD could manage an arbitration fairly and competently, especially with the complexities of international parties. It is also suspicious that the counterparty will not even consider any of the other options proposed.
The would be folly to tell the sales team they can accept ABCD.

A colleague involved in negotiating large infrastructure contracts mentioned a recurring problem:
A repeat issue we are seeing is that major [certain heavy industry] companies in Europe, with sites located in France and Netherlands, will not agree to arbitration as our contractual dispute resolution. They have told us that arbitration is a waste of money and that the Paris courts in particular are better and neutral enough to address issues between international companies.

My colleague's company finds the court option unattractive but not necessarily a "dealbreaker" as in the first example. Most of their project documents are in English and it would be costly and cumbersome to translate them for use in Dutch or French courts in the event of a dispute. Her company also believes that the court of first instance in Paris is not well suited to deciding the legal issues that can arise in large international contract disputes.

She is looking for options. One is to try to find a compromise mechanism that suits the interests of both parties. Perhaps the other side prefers courts because their disputes are highly technical and they believe they prefer resolution via an expert by the court to determine where fault lies (and Paris courts are well-known for doing this). If so, my colleague could propose a bespoke arbitration process in which technical issues will be decided by a neutral expert appointed either by the tribunal or an arbitral institution, with a simplified (and less costly) resolution process. (But she should check first whether the institution will appoint technical experts.)

If, however, the other party will not budge from its preference for the courts, then the options will be more limited: (a) insist on arbitration at the risk of losing the deal (not usually a desired outcome); (b) accept the courts but in exchange for something else of value in the contract's terms and conditions, such as better price (to cover the perception of increased risk of a non-preferred forum); and/or (c) include a step-mediation requirement, as a means to mitgate acceptance of a sub-optimal forum by increasing the likelihood of settling before a court is called upon to decide any disputes.

Here is an issue raised by an acquaintance in-house counsel whose company is not regularly involved in arbitration:

Our contract provides for arbitration, UNICTRAL rules, and specifies three arbitrators. The claims and counterclaims in our dispute total [less than $500,000] and the respondent rejected our proposal to agree to have a sole arbitrator instead of three. We appointed the tribunal, which then asked the parties to pay a deposit that is half the amount of the total dispute. Both sides voiced a concern, and the tribunal just answered that their advance is based on the complexity of the claims, and that there will be a cost allocation in the final award. That was no consolation to my business manager, who is furious that we will pay these fees upfront, before we even pay the lawyers. She is demanding we either force the tribunal to reduce their fee or we stop including arbitration clauses in our contracts.

While your manager's anger is understandable from a business point of view, you might want to show you have a spine as well. Point out that the advance could be interpreted as a means of encouraging the parties to settle befor they incur substantial costs, either of the arbitrators or appointed counsel. (The arbitrators could have billed in phases for the same or a greater amount, but they are telling the parties upfront what the proceeding will cost them.)

There is also the option of revisiting the cost issue with the tribunal. Obviously, it would be more effective to do this together with the other side. It would be even more helpful to present a change in circumstances that justify the issue being given new attention. For example, you could propose to the other side to reduce the number of claims or simplify the issues in dispute. In response, the tribunal might accept to modify its advance in proportion to the reduced complexity.

For the future, however, you might consider adapting your arbitration clauses to provide for either a sole arbitrator or the common language of "one or three arbitrators". This will avoid situations like this, in which three arbitrators are unlikely to be worth the added cost.

Another protection, especially if your business is not regularly involved in arbitration, would be to specify an arbitration institution instead of ad hoc proceedings. An institution will administer the tribunal's compensation and, perhaps more importantly, provide each of the parties a protected channel to convey unhappiness to the tribunal about their handling of certain matters, such as this

one.

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