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Do Parties Adopt Model Arbitration Clauses from Arbitral Institutions?

Christopher Drahozal (The University of Kansas School of Law) · Monday, December 24th, 2018 · Institute for Transnational Arbitration (ITA), Academic Council

Arbitral institutions commonly offer model arbitration clauses for parties to incorporate into their contracts. Gary Born has stated that "[i]n the overwhelming majority of cases, … international arbitration agreements are straightforward exercises, adopting either entirely or principally the model, time-tested clauses of a leading arbitral institution."[1)] But there is reason to question whether that is in fact the case. Almost thirty years ago, Stephen Bond examined clauses giving rise to ICC arbitrations and found that "the standard ICC clause, with perhaps minor variations in wording, was used in 47 arbitration clauses (20%) in 1987 and in 21 arbitration clauses (10%) in 1989, generally with the addition of the place of arbitration."[2)] So how often do parties use model arbitration clauses from arbitral institutions?

The question is one of many that John Coyle and I consider in *An Empirical Study of Dispute Resolution Clauses in International Supply Contracts*, 52 Vand. J. Transnat'l L. (forthcoming Mar. 2019).[3)] A draft of the article is available on ssrn.com. We find, consistent with the Bond study, that most of the arbitration clauses in our sample depart in notable ways from the model language suggested by international arbitral institutions—in particular, as to how the clauses define the scope of the agreement to arbitrate and how they identify the seat or place of arbitration.

Sample and Limitations

The sample we studied consists of 157 international supply contracts collected from filings with the U.S. Securities and Exchange Commission (SEC) from January 1, 2011 through December 31, 2015. Of those 157 contracts, 87 (or 55.4%) included arbitration clauses. The text of one of the arbitration clauses was unavailable (because the contract incorporated an arbitration clause by reference from another contract), leaving 86 arbitration clauses in the sample.

Several characteristics of the sample are worth noting:

- First, as already indicated, the sample is limited to international supply contracts. Because the use of dispute resolution clauses varies across different types of contracts, one must be cautious in extrapolating our findings to types of contracts other than the one studied.

- Second, almost all of the contracts in the sample have at least one U.S. party, meaning they almost always were entered into between a U.S. party and a non-U.S. party. Because the empirical results here are essentially limited to international contracts with a U.S. party, they may not be generalizable to contracts between non-U.S. parties.
- Third, the contracts in the sample were all identified by the filing party as "material" contracts, defined by SEC regulations as contracts "not made in the ordinary course of business."[4] The contracts we studied thus do not include routine contracts and may not be representative of such contracts.
- Fourth, the contracts in the sample are concentrated in three industries: the pharmaceutical industry (72 of 157, or 45.9%); companies producing medical supplies (18 of 157, or 11.5%); and manufacturers of electronic components and accessories (12 of 157, or 7.6%). Contracts from other industries may differ.
- Fifth, while the contracts in the sample were all filed with the SEC from 2011 through 2015, some were entered into between the parties before those years. To the extent the terms of dispute resolution clauses change over time, the results here might not reflect the current state of such provisions.

Scope of the Arbitration Clause

An arbitration clause must define the set of disputes that the parties are agreeing to submit to arbitration—i.e., its scope. Almost all of the arbitration clauses in the sample we studied had broad, general language (all but one, which was limited to certain specified types of disputes). But the variation in phrasing of the scope language is striking. Thus, in the international supply contracts in our sample, the parties rarely followed the scope language in the model clauses suggested by leading arbitral institutions: only nine of the arbitration clauses (of 86, or 10.5%) included language matching the model clauses suggested by the International Centre for Dispute Resolution, the International Chamber of Commerce, or UNCITRAL.

Even more notable is the large degree of variation in each of the central elements of the scope language in the clauses. The 86 clauses used 20 different formulations of the disputes subject to the arbitration clause, with "dispute" or "disputes" the most common (29 clauses), "dispute, controversy, or claim" the second most common (23 clauses), and "controversy or claim" the third most common (11 clauses). They used 35 different formulations to describe the source of the dispute, with "contract" or "agreement" the most common (31 clauses) and "contract, or breach thereof" (10 clauses) the second most common. And they used 21 variations of the language describing the relationship between the two, with "arising out of or relating to" the most common (31 clauses) and "arising out of or in connection with" the second most common (11 clauses).

Overall, combining the three elements, the 86 arbitration clauses in the sample contained 70 different formulations of scope language, with no formulation being included in more than four contracts. The four most common formulations were: controversy or claim arising out of or relating to the agreement or breach thereof (4 clauses); dispute arising out of or in connection with the agreement (3 clauses); dispute arising out of or relating to the agreement (3 clauses); and dispute arising under the agreement (3 clauses).

Ultimately, the variations in language likely have little legal significance. Almost all American courts would treat most if not all of these arbitration clauses as broad clauses (rather than narrow

ones),[5] likely finding the clause to apply to a range of disputes collateral to the contract. But in drafting the scope language, the parties do not appear to have followed the model clauses suggested by leading arbitral institutions.

Choice of the Arbitral Seat

Likewise, the arbitration clauses in the sample did not follow the drafting advice of arbitral institutions in specifying the arbitral seat. The place or seat of an international arbitration is of critical importance because it determines the applicability of the New York Convention, the governing arbitration law, and the country in which actions to vacate the award must be filed.[6] All but eight of the 86 arbitration clauses in the sample specified some location for the arbitration. But of those 78 clauses, barely a third (29 of 78, or 37.2%) expressly labeled the location as the "place" or "seat" of the arbitration, or identified it as the place the award would be issued.

The remaining clauses that named a location for the arbitration did not identify it as the place or seat. Instead, they used language that expressly identified the location as where the arbitral hearing would take place (one clause, or 1.3%) or used language that was ambiguous whether it was specifying the place of arbitration or the location of the hearing. The clauses referred to the "venue" or "location" of the arbitration (4 of 78, or 5.1%), stated that disputes would be "referred," "submitted," or subject to" arbitration (4 of 78, or 5.1%) or "settled," "resolved," or "determined by" arbitration in the specified location (7 of 78, or 9.0%), or provided that the arbitration would be "conducted," "held," or would "occur" or "take place" in (or at) the specified location (33 of 78, or 42.3%).

As a practical matter, the ambiguity in the clauses may not matter because courts and arbitral institutions might nonetheless construe the provision as naming the arbitral seat. But at a minimum, the language further illustrates how the international arbitration clauses studied depart from model arbitration clauses. Thus, the ICDR and UNCITRAL, as well as the IBA Guidelines for Drafting International Arbitration Clauses, all recommend that arbitration clauses specifically identify the "place" or "seat" of arbitration.[7] Most of the clauses in our sample do not follow that advice. A possible explanation is that the drafters were influenced by drafting practices in U.S. domestic arbitration, in which the arbitral seat is not a particularly relevant concept. The extent to which the drafting of domestic arbitration clauses influences the drafting of international arbitration clauses (and vice versa) is worth further research.

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Our study of dispute resolution clauses in international supply contracts provides additional evidence that parties often do not adopt the model arbitration clauses provided by arbitral institutions and others. If that is so, it raises the further question of how parties in fact do draft their international arbitration clauses. And this issue barely scratches the surface of the information available from studying the provisions of arbitration clauses (and forum selection and choice-of-law clauses as well) in international contracts.

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References

?1 Gary B. Born, International Commercial Arbitration 212 (2d ed. 2014).

?2 Stephen R. Bond, *How to Draft an Arbitration Clause (Revisited)*, 1(2) ICC Int'l Ct. Arb. Bull. 14, 16-17 (1990), reprinted in Christopher R. Drahozal & Richard W. Naimark, Towards a Science of International Arbitration: Collected Empirical Research 69-70 (2005).

?3 The excerpts from the article included in this post are reprinted with permission from the Vanderbilt Journal of Transnational Law.

?4 17 C.F.R. § 229.601(b)(10)(i).

?5 Restatement of the U.S. Law of International Commercial and Investor-State Arbitration § 2-15, reporters' note (ii) to cmt. a.

?6 Id. § 1-3.

?7 See also Born, International Commercial Arbitration, at 2124 ("It is desirable to avoid references to the 'situs,' 'venue' or 'forum' of the arbitration.… [T]he foregoing usages (referring to the venue, situs, or forum) produce unnecessary uncertainty and should be avoided as a drafting matter.").

This entry was posted on Monday, December 24th, 2018 at 6:11 am and is filed under Arbitration,

Arbitration clause, Arbitration Institutions and Rules, Surveys

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