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corpcounsel.com | July 15, 2015

Drafting the International Arbitration Clause

From the Experts

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In too many transactions, the dispute resolution clause is treated as mere boilerplate. In fact, dispute resolution clauses present an opportunity for lawyers to add significant value to their clients' transactions. Giving thought to issues such as the types of disputes likely to occur, where those disputes will arise, which party is most likely to be claimant and whether the disputes are likely to implicate third parties will assist the drafter in determining the arbitral scheme that best fits the client's interests and expectations, provided the drafter understands the different options available.

When drafting an arbitration clause, the obvious threshold question is whether the arbitration should be *ad hoc* or administered by an arbitral institution. That initial decision will determine, in large part, the arbitration procedure to be followed in any future dispute. But the prudent drafter, when making this initial determination, will also consider issues such as joinder and consolidation, arbitrator selection in multiparty disputes, the availability of interim relief and possible appeal. An examination of these issues can ultimately drive the answer to both the threshold question and the secondary one: if institutional, which institution?

In 1976, the United Nations Commission on International Trade Law (UNCITRAL), recognizing the value of arbitration as a method of settling trade disputes, issued its first set of arbitration rules designed for use in *ad hoc* arbitrations. In 2010, in response to the explosion of global trade and the concomitant use of international arbitration to resolve disputes, UNCITRAL amended its arbitration rules "to conform to current practice in international trade and to meet changes that have taken place over the last 30 years in arbitral practice." The leading arbitral institutions soon followed, with the International Chamber of Commerce (ICC) amending its rules in 2012, followed by the International Centre for Dispute Resolution (ICDR) and the London Court of International Arbitration (LCIA) in 2014.

The issues of joinder and consolidation, arbitrator selection in multiparty disputes, emergency relief and possible appeal have arisen due to the proliferation of complex global trade. An examination of the most popular arbitration rules, however, reveals that the manner in which these issues have been addressed can vary greatly, resulting in unintended results for the unwary. This article on joinder (i.e., adding third parties to an existing arbitration) and consolidation (i.e., combining two or more arbitrations into a single proceeding) is the first in a series of four articles that will be posted over the next several days. The other three will examine arbitrator selection, the availability of interim relief and possible appeals.

Joinder

Ad Hoc Arbitration

A. UNCITRAL Rules

Article 17(5) of the UNCITRAL Rules empowers the arbitrators to decide the question of joinder. The rules impose no time limit by which a party to the arbitration may move for joinder, but the party to be joined must be a party to the same arbitration agreement. In deciding the joinder question, the arbitral tribunal is required to give all parties, including

the party to be joined, an opportunity to be heard. Joinder is permitted unless it will result in prejudice to any party, including the party to be joined.

Arbitral Institutional Arbitration

B. ICC Rules

The manner in which the ICC administers arbitrations makes the question of joinder under its rules a bit more complex, involving both the administrator and the arbitrator. Article 7 of the ICC Rules requires a party wishing to join an additional party to submit its request for arbitration against the additional party to the ICC Secretariat. Unlike the UNCITRAL Rules, which have no time limitation for requesting joinder, no party may be joined after the confirmation or appointment of any arbitrator, unless all the parties, including the additional party, agree. The ICC Rules also permit the secretariat to fix a time limit for the submission of a request for joinder. But the secretariat does not ultimately decide whether the joinder will be allowed.

Importantly, joinder is further subject to Articles 6(3)–6(7) and 9 of the ICC Rules. Article 6(3) empowers the arbitral tribunal to decide whether all claims made in the arbitration shall be determined in a single arbitration. Even this power is not absolute, however, and is further qualified at Article 6(3) with the phrase "unless the Secretary General refers the matter to the ICC Court for its decision pursuant to Article 6(4)."

Article 6(4), in turn, provides that in cases referred to the International Court of Arbitration of the International Chamber of Commerce (ICC Court) under Article 6(3), the ICC Court is to decide whether and to what extent the arbitration is to proceed. The arbitration will proceed in two instances. First, if the ICC Court is *prima facie* satisfied that there is an arbitration agreement under the rules binding all the parties, including those joined. Alternatively, in those instances in which the claims are made under more than one arbitration agreement (Article 9, multiple contracts), joinder can occur if the ICC Court is *prima facie* satisfied that (a) the arbitration agreements are compatible; and (b) the parties have agreed that the claims can be determined in a single arbitration. In the event the parties are notified that one or more parties cannot be joined, any party retains the right to seek a judicial determination as to whether or not, and in respect of which of them, there is a binding agreement to arbitrate.

C. ICDR Rules

The ICDR's approach is to leave the decision with the arbitral tribunal. Under Article 7, a party wishing to join an additional party to the arbitration is to "submit to the Administrator a Notice of Arbitration against the additional party." Similar to the ICC Rules, the ICDR Rules further provide that no additional party may be joined after the appointment of any arbitrator, unless all parties, including the party to be joined, agree. Therefore, the ICDR Rules, like the ICC Rules, provide a deadline that can be extended only by agreement of the parties. Article 7 is further subject to Articles 12 and 19. Article 12 concerns the appointment of arbitrators, while Article 19 grants to the arbitral tribunal the jurisdiction to determined "whether all the claims, counterclaims and set-offs made in the arbitration may be determined in a single arbitration."

D. LCIA Rules

The LCIA's treatment of joinder is in accord with the ICDR's. Article 22.1(viii) gives the arbitral tribunal the power to determine joinder. Upon the application of any party or upon the arbitral tribunal's own initiative, the arbitral tribunal may join any additional party after giving the parties a reasonable opportunity to state their views. This power, however, is predicated upon the third person and the applicant party "hav[ing] consented to such joinder in writing following the Commencement Date or (if earlier) in the Arbitration Agreement." Significantly, the LCIA Rules do not have the strict joinder deadline found in the ICC and ICDR Rules.

Consolidation

Ad Hoc Arbitration

A. UNCITRAL Rules

By design, the UNCITRAL Rules are used as the procedural framework in *ad hoc* arbitrations. Given that *ad hoc* arbitrations are not subject to institutional oversight and management, the rules, not surprisingly, contain no provision for consolidation of arbitrations. Accordingly, given that it is neither expressly authorized nor expressly prohibited, consolidation would presumably require the consent of all involved—arbitrators and parties alike.

Arbitral Institution Arbitration

B. ICC Rules

In contrast, the arbitral institutions' rules, although using differing procedures, all provide for consolidation. Article 10 of the ICC Rules sets forth a detailed process for consolidating. The ICC Court, at the request of a party, may consolidate two or more pending arbitrations if one of three circumstances exist:

1. The parties have agreed to consolidation.
2. The claims in the arbitrations are made under the same arbitration agreement.
3. The claims are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes arise from the same legal relationship and the ICC Court finds the arbitration agreements to be compatible.

Not unlike the question of whether to consolidate two lawsuits, in deciding whether to consolidate the arbitrations, the ICC Court may consider any circumstances it considers to be relevant, including but are not necessarily limited to whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if confirmation or appointment has occurred, whether the same or different persons have been confirmed or appointed. Should the ICC Court determine that consolidation is appropriate, the arbitrations are consolidated into the first filed arbitration, unless the parties agree otherwise.

C. ICDR Rules

Unlike the ICC Rules, which place the power of consolidation with the

ICC Court, Article 8 of the ICDR Rules provides for a specially appointed "consolidation arbitrator" to determine whether two or more arbitrations are to be consolidated. At the request of any party, the administrator appoints a consolidation arbitrator. The parties may agree on the identity of the consolidation arbitrator, but failing agreement, the administrator makes the appointment. The consolidation arbitrator cannot be an arbitrator who is appointed to any pending arbitration that is subject to consolidation, unless the parties agree.

The consolidation arbitrator is empowered to consolidate two or more arbitrations pending under the ICDR Rules or the ICDR Rules and other rules administered by the AAA or the ICDR into a single arbitration, but only if one of three conditions is met:

1. The parties have expressly agreed to consolidation.
2. All the claims and counterclaims are made under the same arbitration agreements.
3. The claims are made under more than one arbitration agreement, the same parties are involved in each arbitration, the disputes arise from the same legal relationship and the consolidation arbitrator finds that the arbitration agreements are compatible.

In determining whether the arbitrations should be consolidated, the consolidation arbitrator is required to "consult the parties" and may consult the arbitral tribunals. The consolidation arbitrator also may take into account relevant circumstances, including applicable law; whether one or more arbitrators has been appointed in more than one of the arbitrations; the progress already made in the arbitrations; whether there are common issues of law and/or facts; and, whether the consolidation of the arbitrations would serve the interests of justice and efficiency. The consolidation arbitrator is to render the decision within 15 days of the date of the final submission on consolidation, and the decision does not need to include a statement of reasons.

D. LCIA Rules

Article 22.1 of the LCIA Rules bestows upon an arbitral tribunal the power to consolidate arbitrations under two circumstances. In either circumstance, however, the consolidation must be approved by the LCIA Court. The first is straightforward. Like the ICC Rules and ICDR Rules, two or more arbitrations can be consolidated if all the parties to the arbitrations agree to consolidation into a single arbitration, subject to the LCIA Rules. The second circumstance requires a detailed inquiry into:

1. Whether the arbitrations are subject to the LCIA Rules and were commenced under the same or compatible arbitration agreement(s).
2. Whether the arbitrations involve the same parties
3. Whether an arbitral tribunal has been formed for the other arbitration(s)
4. If the arbitral tribunals have been formed, whether the tribunal(s) is (are) composed of the same arbitrators.

If the answer to each of these questions is "yes," with the approval of the LCIA Court, the arbitral tribunal may order consolidation.

The LCIA Rules further provide that without prejudice to Articles 22.1(ix) and (x), if no arbitral tribunal has yet been formed by the LCIA Court for any of the arbitrations to be consolidated, the LCIA Court may consolidate two or more arbitrations subject to the LCIA Rules and commenced under the same arbitration agreement between the same parties. Before acting, however, the LCIA Court is to provide the parties a reasonable opportunity to state their views on the issue.

Conclusion

If the drafter selects *ad hoc* arbitration governed by the UNCITRAL Rules, an additional party may be joined. The UNCITRAL Rules, however, make no provision for consolidation, although consolidation may be possible if all parties agree. If the client's contract is one in a series of transactions or is likely to involve third-party performance or disputes, *ad hoc* arbitration may not be the appropriate choice. Institutional rules may better serve the client's needs, provided that all contracts in the series and in related agreements select identical arbitration rules. Joinder is permitted by the ICC Rules, the ICDR Rules and the LCIA Rules, although who will decide the issue of joinder varies. And while all three institutions will permit consolidation under certain circumstances, the ICDR's groundbreaking consolidation arbitrator provision is the most sweeping.

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