

**Getting Transactional Lawyers Thinking
About Dispute Resolution**

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It has become axiomatic that the lawyers who draft or negotiate contracts are ill-informed about what happens when something goes wrong with one of them; or rather that when a deal is being put together no one wants to spend a lot of time thinking about how to plan for its unraveling. Lawyers who raise these issues are perceived by business people as investing negative energy into the dealmaking process.

Many forms of agreement used by transactional lawyers do contain some language as to submission to court jurisdiction or resolution of disputes by arbitration, and whether the choice is well-adapted to the situation may or may not have been given careful consideration. In some types of agreements such as credit agreements prepared by banks, there is no question that the clauses have been thoroughly scrubbed. In other types, this is usually not the case. Sure, some transactional lawyers have enough sense to consult with their litigation colleagues at some point in the process, but how many times does this come too late, when raising questions at the 11th hour about language that has been in the draft for months is perceived as an impediment to getting the deal done?

If nothing else, the purpose of this paper is to get transactional lawyers thinking about dispute resolution in the early stages of contract drafting and negotiation. If a deal lawyer is preparing the first draft, careful thought should be given to the issues raised in this paper before proposing a dispute resolution clause, in consultation with litigators or experts in arbitration if need be. If a lawyer is receiving a draft, comments to the dispute resolution clause should be in the first round of comments, so they are on the table throughout the negotiation process, and not an afterthought.

The question is perhaps not so problematic in the domestic U.S. context (although one can question this assumption, as discussed below), but in international commercial, corporate and investment transactions, the issue of how to resolve disputes takes on greater importance, primordial importance, I would argue. Indeed, my view is that the dispute resolution clause is the most important clause in the whole agreement because if there is no binding mechanism or efficient forum for enforcing the agreement, all of the negotiated commercial and legal provisions in which so much time and expense are invested by the business people and their lawyers will be for naught. This is a harsh message to have to deliver, particularly to an impatient client who is inclined to think that lawyers are gumming up the works, spinning out remote hypothetical scenarios, but if a contract is to be understood as a tool for allocating risk, the allocation arrived at has to be upheld if things go wrong, which they often do.

CHOICE OF FORUM FOR RESOLVING DISPUTES

What does this mean in practical terms? It means, for instance, that transactional lawyers first of all need to be aware that it makes a big difference in a dispute whether the contract is silent on the forum for resolving the dispute, or whether it specifies the jurisdiction of a court or, instead, arbitration. Practically all contracts contain some reference to governing law, but a surprising number of them make no reference at all to a forum for resolving disputes. If this is the case, a contract may say that it is to be governed by the law of New York or California or Florida, or England or France or somewhere else, but that does not at all mean that a dispute would be heard in the courts of that jurisdiction. A surprising number of lawyers make this erroneous assumption.

In the U.S. context, depending on the nature of the transaction and the domicile of the parties and what they are doing, the conflicts of law and jurisdictional rules of U.S. state and Federal courts will determine where the dispute will be heard if the contract is silent – and the analysis may or may not be simple – or come up with only one answer. The consequence then of silence in the agreement is likely to be delay and extra expense in resolving a dispute if it arises, because the first thing that will have to be disputed is where to hear the dispute – and that could take a long time and cost a lot of money. If you want to end the Vietnam war, you don't want to spend a long time arguing over the shape of the table.

This is true in spades in the international context. At least if there is a dispute among U.S. parties as to what law applies and where a dispute should be heard, there is a process for ultimately resolving the question. If a contract is between a party from country A and a party from country B, a dispute could land in the court of one or the other country with both courts legitimately asserting jurisdiction under a fair application of their own conflicts of law rules, not to mention an erroneous, unfair or biased application. If proceedings go forward in more than one jurisdiction, inconsistent outcomes could be the result. Moreover, the reality in international transactions today is that often multiple parties are involved and they may all be from different countries. Thus, a transactional lawyer is really doing his client a disservice by overlooking a forum clause. Even if it is the courts of one or the other of the countries, chances are the choice will be respected. At least it gives the aggrieved party the opportunity to argue that this is how the parties intended to resolve their dispute if the courts of more than one place could legitimately assert jurisdiction.

Court Jurisdiction vs. Arbitration

So if a forum must be chosen, what should it be? Should the courts of one place or another be named? If so, should the choice be exclusive? Is arbitration preferable? What about mediation and other forms of alternative dispute resolution? These questions are not easy ones, but a lot is riding on the choices made.

One can argue that the answer could well be different in the domestic U.S. context than in the international context. Indeed, in the international context, the question is not

really so difficult – international arbitration is the method of choice. While in some fairly straightforward cases such as a sales or equipment supply agreement or an acquisition, one party may be willing to accept the courts of other party's country, that is virtually never the case in any significant international commercial or investment agreement. The key principle of arbitration that makes it a workable method of resolving international disputes is that an award rendered by an arbitrator or an arbitral tribunal can be enforced in any country that is a member of the New York Convention on the Recognition and Enforcement of Arbitral Awards, known in the practice as the "New York Convention", provided that the award was also rendered in a New York Convention country.¹ Thus, an arbitral award rendered in country A against a party from country B can be enforced against that party's assets in countries C, D and E.

There are certain defenses to enforcement under the New York Convention, which have to do with due process and public policy issues, but the key principle is that courts in most countries will not look behind the substance of an international commercial arbitration award, particularly if it has been issued under the auspices of a well-known institution, and will register it for enforcement in their country like a court judgment or otherwise enforce it under the domestic law that implements the New York Convention.

So, to simplify a little, if the contract is international, the transactional lawyer can skip ahead, because some form of arbitration should be chosen.

Whether to designate courts or arbitration in the domestic U.S. context is a closer question. It really depends on what type of agreement is involved. Nobody really has a problem with agreeing to the jurisdiction of the Delaware Court of Chancery in a merger or an acquisition. In some places in the U.S., there are special commercial courts that offer relatively expedited procedures (e.g. the "Rocket Docket" in Virginia). The United States Federal District Courts tend to be of high quality, and several state courts have excellent reputations.

Another issue to consider in designating the jurisdiction of one court or another in a contract is whether the contract should provide that the particular court has exclusive jurisdiction to hear the case. There are some clients and practitioners who insist that a particular court have exclusive jurisdiction because they are comfortable with that court and want to know that the dispute will be heard there, even if it is at the expense of having to take the judgment to be enforced in another domestic or foreign jurisdiction later. In other cases, clients or practitioners will say that a particular court has jurisdiction to hear a dispute, and that both parties consent to that jurisdiction and will not raise the defense of inconvenient forum, but that the jurisdiction is not exclusive. For instance, if a guarantee is governed by New York law, the beneficiary of the guarantee

¹ At last count, 135 countries have ratified the New York Convention, including most of the major trading nations. Nonetheless, it's always a good idea to check what the status is of a particularly country's adherence to the New York Convention and whether any exceptions were taken in the ratification instruments when considering an arbitration clause.

may well want to name the federal and state courts in New York as having jurisdiction, but if the guarantor is resident in another jurisdiction, it may make sense and be more efficient to go to that jurisdiction first to sue, provided that forum's general jurisdictional requirements are met.

When a transactional lawyer is considering whether or not to designate a court as having jurisdiction, there is one thing to keep in mind, however, which is the speed with which a dispute will be resolved. Virtually everywhere in the United States today, courts are overwhelmed with the case load and simply do not have the resources to move a dispute to a quick resolution. It can take one, two or several years just to get through the first instance or trial level. Then, in most states and the federal system, there are two further levels of appeal.

Horror stories abound. To indulge in one of my own - one of my clients received an unfavorable civil jury verdict in 2006 after a hostile tender offer I worked on in about 2001 led to a dispute with someone having a contract with the target. The outside amount in dispute was about \$3 million dollars. True, my client thought it was in the right and had refused to settle. After the full jury trial, the judge heard motions and set aside part of it. That took some more months. My client then filed a motion to appeal the rest. It was told at that point that the clerk of the trial court, which is in a major northeastern metropolitan area, would need 12-18 months just to produce the trial transcript, which is a necessary element of the appeal in that jurisdiction. So, as I am writing this near the end of 2007, there is no chance at all that the parties' dispute that arose in 2001 and was the subject of a lawsuit in 2002 will be heard by an intermediate level state appeals court before 2008. Then, it will probably take the appeals court about a year to decide, after which it may be possible that it sends it back to the trial court because the judge's instructions were erroneous (my client's position) or that the appeals court decides and one or the other party appeals to the highest court in the state, which may or may not agree to hear it. Or maybe the parties will be exhausted and quit after the appeal, having both spent in legal fees by that time a not insubstantial percentage of the amount in controversy. Whatever the outcome, it will have taken something like 6-8 years from the time the dispute arose to have it is finally resolved. This does not take into account then how the ultimate decision will be enforced. It could be that the winning party will have to go to court to force the losing party to pay - and that can take months or years. What is more, the example I just cited is not exceptional. It's close to being the rule when the parties do not choose to settle.

I haven't identified the parties out of discretion, but all the documents relating to the dispute are in the public domain. Anybody with a computer, a few bucks and some time to kill could find out exactly who the parties and their key executives are, what the dispute is about, what they said in the depositions and at trial, and read the trial verdict and opinions, as well as the notices of appeal. When the appeals decision finally comes down, it will be available for all to study, as well as any eventual decision of the State's highest court. Fortunately, this dispute does not involve sensitive commercial information, but it might have. The practices of courts across the United States are not at all uniform in protecting it.

In sum, and some will dispute this statement for reasons discussed below, my view is that it is almost always a good idea to avoid the U.S. court system. This is particularly the case for foreign companies doing business in the United States who are not used to the intrusive discovery in U.S. litigation or to having full public jury trial in commercial disputes. This is not to mention the propensity of juries in some places in the United States of awarding punitive damages to plaintiffs.

If the courts are to be avoided, the alternative of arbitration is available domestically. If the agreement to arbitrate states that the decision of the arbitrator or the tribunal is final and binding on the parties, all of the various levels of appeal and re-hearing inherent in the court system are avoided. Thus, it is possible to say that my client's dispute referred to above could have been resolved in about a year after it arose, assuming the the arbitrator or panel was reasonably efficient – for a fraction of the cost. Then it would have been a question of taking the arbitral award to the relevant court to have it enforced against the losing party, where the defenses to enforcement in a typical commercial dispute are limited or otherwise unavailable under the relevant U.S. law, the Federal Arbitration Act.

Moreover, the issue of the length of U.S. civil court proceedings is not the only problem with going before U.S. courts with disputes. The jury system in civil cases makes it such that lay persons with little or no understanding of complex commercial issues will be making the ultimate call on the facts. Even if the parties waive a right to a jury trial in the contract, which is possible in civil matters, there is no guarantee that the judge hearing the case and giving instructions to the jury will have the required discipline. In the example I have cited, according to our careful study of the law applicable to the case, the judge's rulings on motions and his instructions to the jury were dead wrong. In any case, it was clear from the verdict that the jury of lay persons considering the fairly complicated question of financial law and accounting principles that underlay the dispute didn't understand a thing about it.

Thus, in litigation, no matter how sure you are of your case, you never know what the outcome of a civil trial will be, if it gets that far, either because you will be before a jury who may or may not understand the case or a judge who might not be up to the task.

If the parties had had the opportunity to put an agreement to arbitrate in the contract in dispute (it was entered into by the target prior to the tender offer so we as the acquiror's counsel had no control over its terms), the parties would have had the opportunity to agree on the method of choosing an arbitrator or panel who would resolve the dispute. While the quality of arbitrators is also not uniform, many are professionals with years of experience in resolving disputes. They can be chosen among lawyers who have a substantive understanding of the matters involved. Also, the dispute would have been carried out entirely in private, with no public airing of all the disagreements and financial statistics involved.

My view is that with arbitration the chances of having someone qualified arrive at a coherent and confidential decision are much higher than allowing your client to be subject to the vagaries of the U.S. court system.

On the other hand, I do have clients who have a strict policy against agreeing to arbitrate. Their view is that they have bargained for rights and want to be able to enforce them in a court should the need arise. They perceive arbitrators as not being as strict as courts and as having a tendency to “split the baby” in disputes. These clients tend to be large and well-funded companies, such that they have the resources to fight protracted legal battles should they find that in their interest.

Some clients have had bad experiences with arbitration. Some arbitrators definitely do go off the reservation – and there is generally speaking no way to appeal a bad arbitral award. Also, while the goal is to have an efficient resolution of the parties’ dispute by a professional or a panel of professionals, there are some arbitrations that drag on for a very long time and cost much more than what the parties might otherwise have expected, such that the process does not really produce any time or efficiency advantages as compared to the courts.

There are also clients who object to the truncated procedural aspects of arbitration. Depending on the rules used, the parties will not have access to the full panoply of discovery measures available to litigants in U.S. courts. Under most arbitration rules, the arbitrators have wide discretion to limit discovery to what that they see as relevant to the dispute at hand. More than one successful litigator has said that he or she will never agree to arbitration because it amounts to taking away weapons, strategic or otherwise, an attorney would otherwise have – and if you are going to the mat in a dispute, you want to have every resource at your disposal.

The point of this paper is not offer a definitive answer as to whether in a particular domestic context it is a good idea to choose court jurisdiction or arbitration, but rather that transactional lawyers realize that it is an important question – and that it should not be given short shrift in the contract formation process. Indeed, it would be progress if as a matter of course transactional lawyers advise their clients that contracts should contain a forum selection clause – and quite a bit of progress if the forum chosen is carefully thought out and makes sense in the given situation.

ADR TECHNIQUES

Another thing to consider in the drafting stage is whether to not to suggest to the parties some form of alternate dispute resolution short of arbitration.

Mediation

One option is to offer to the parties non-binding mediation – or require it - as a first step before the parties can bring their dispute to a binding forum. My view is that requiring non-binding mediation for some period of time before the parties can litigate or

arbitrate their dispute is a good idea, provided that the clause does not prevent a party from seeking interim measures – a temporary restraining order, an injunction, a pre-judgment attachment or the securing of collateral, etc. - if those are appropriate in the circumstances. Many disputes arise through mistakes, misunderstandings or over-reactions to events – and if there is a forum for airing each party’s side of the story before they go to the expense of a more formal mechanism, there is some chance that a dispute can be resolved at an early stage.

It is possible as well to make mediation the required method of dispute resolution in an agreement and there are published rules to support this choice. The result of the mediation can be made binding, depending on the rules chosen. I don’t have any clients who prefer mediation alone as the dispute resolution mechanism, but there are some companies that stress it as a cost-control measure.

Escalating Levels of Management

I have one client that insists on including an “escalating levels of management” clause in each of its contracts as a prerequisite to arbitration or litigation. This approach is a practical one because many disputes arise when lower-level employees make a mistake and then to, mask the effects of the mistake, they take an unnecessarily strident position vis-à-vis the other side, which of course aggravates the dispute. If the parties designate in the contract that a dispute must first be brought to a certain level of management for consideration, then more senior management can make a cost-benefit analysis of continuing the dispute or resolving it. Depending on the size of the transaction, there can even be two levels of management involved – first a mid-level and then a senior manager – or the dispute can go straight to the CEO level if the companies are smaller or the amount at stake is not so large. I have seen potentially expensive disputes resolved in this way before formal procedures begin.

Dispute Boards

Transactional lawyers should also be aware that it is possible to designate a built-in dispute resolution forum, a “dispute board”. This technique most often used in large-scale construction contracts and long-term infrastructure projects where many technical and legal disputes are likely to arise and the parties have an interest in resolving them quickly so that work can continue. A dispute board is appointed by the parties at the outset of the performance and put on retainer so that it is in place when a dispute arises, thus avoiding the delay in choosing an arbitrator or panel of arbitrators later. Once a project is in the implementation phase, the dispute board can meet at regular intervals. One can even contemplate having more than one dispute board in place, such as one for purely technical disputes where the members are engineers or have other technical expertise and one for more legal or commercial disputes. Depending on the dispute board rules chosen, the decision of the dispute board can either be binding or merely advisory. The technique of using dispute boards seems to be gaining wider acceptance.

It is true, however, that some clients of mine have rejected a dispute board clause in a long term contract because they feel that the dispute board undermines their ability to control a dispute and that direct interaction with the other principal is preferable. Care should also be paid to the terms of particular dispute board rules, since some of them do not require dispute board members to follow the governing law of the contract. This is a deliberate expression of the influence of engineers in the process of formulating dispute board rules who have a tendency to think that lawyers inject too much formalism into construction disputes and that engineers shouldn't be shackled by arcane legal rules.

Thus, the decision about whether to suggest some form of mediation or "escalating levels of management" or a dispute board in a contract draft should be vetted with a client, so that the client's risk tolerance and experiences in how disputes come into being and are resolved can be properly gauged.

POINTS TO CONSIDER WHEN ARBITRATION IS CHOSEN

If arbitration is chosen, then there are a number of things that need to be thought through.

Ad hoc vs. Institutional Arbitration

The first thing that has to be given some thought is whether arbitration should be ad hoc or under the supervision of an institution. There is no reason why the parties can't appoint arbitrators to resolve their dispute and the arbitrators can't come to a decision on their own, without the oversight and additional cost of institutional supervision. Many important international arbitrations have indeed been conducted this way. An award issued by an ad hoc tribunal has the same standing under the New York Convention as one issued by a tribunal working under the auspices of an institution. If a party wishes to have *ad hoc* arbitration, it is nonetheless a good idea that some rules be designated in the contract to guide the arbitrators and the parties. The most popular in international arbitration are the ones published by the United Nations Commission on International Trade Law (UNCITRAL). It is also a good idea in an *ad hoc* clause to designate an institution as appointing authority if the parties can't agree on a sole arbitrator or the chair of a panel or the whole arbitral process can be frustrated by a party not agreeing to an arbitrator or a chair. This highlights an important aspect of *ad hoc* arbitration - to work well, it needs a fairly high level of cooperation between the parties and among the arbitrators.

For this and other reasons, today the trend does appear to be in favor of using rules published by institutions, particularly in larger transactions, meaning that the institution chosen will oversee the conduct of the arbitration. My personal view is that oversight by an institution does add value and is worth the fee paid to the institution.

For international transactions, there are many institutional rules available. The most widely used are those published by the Court of Arbitration of the International Chamber of Commerce (ICC), based in Paris, but there are many other choices including

the International Centre for Dispute Resolution (ICDR), an affiliate of the American Arbitration Association (AAA), the London Court of Arbitration (LCIA), the Stockholm Chamber of Commerce, the Vienna International Arbitral Centre and many others. For transactions that can be considered an “investment transaction” entered into by a private foreign investor with a government or a host country state enterprise, the rules of the International Centre for Settlement of Investment Disputes (ICSID), a World Bank organization, are available. China has its own arbitral institution, as do Russia and India. In Singapore, there is a new body publishing rules so that Singapore can become an international arbitration center for Asian disputes.

In the U.S., the main rules used for domestic arbitration are the AAA’s Commercial Arbitration Rules or one of its specialized sets of rules (such as the construction arbitration rules), while the most widely used for international arbitrations with U.S. companies as parties are the ICC Rules of Arbitration. While not widely known, the ICC Rules of Arbitration may also be used for domestic U.S. transactions (or for domestic transactions in other countries for that matter). These rules used to provide that the transaction had to be international for the rules to be used, but this was changed with the last revision in 1997. Many practitioners assume that the international requirement still applies, but this is no longer the case. About 20% of ICC arbitrations are in fact domestic today. Other U.S. institutions with arbitral rules are the International Institute for Conflict Prevention and Resolution (CPR) and JAMS the Resolution Center, both with headquarters in New York. Of course most countries have some sort of domestic arbitral body or chamber of commerce that publishes arbitration rules. These can be considered in purely domestic transactions in those countries, but the quality of these institutions and rules varies widely and someone with experience with those bodies should be consulted before agreeing to a clause with them.

A detailed discussion of the differences between the various institutions and their rules and when one or another should be chosen in a particular context is well beyond the modest scope of this paper. Many experts have devoted careful study to the issue. Suffice it to say that there are some key differences, so a transactional lawyer should not assume that they are interchangeable. If the choice of institution is an issue, an expert should be consulted. This being said, there are a few things of which transactional lawyers should be aware.

Methods of Paying Arbitrators

One is that the rules of institutions provide for different things about how the arbitrators are paid. Most of them allow the arbitrators to be paid by the hour, which may or may not be at a rate that is discounted from their usual hourly rate. Others have flat fee type of arrangements. The ICC Rules, for instance, set the arbitrator’s compensation as a percentage of the amount in dispute and require that this amount, or at least an important part of it, be paid up front to the Secretariat of the Court of Arbitration, which then releases it at different times to the arbitrators. The fees charged by the Secretariat of ICC Court of Arbitration must also be paid up front. This aspect of ICC arbitration creates discomfort for many clients because it means that it must invest a certain amount

in lawyers' fees and administration before it is necessarily sure that it wants to prolong the dispute. It is also the source of the widely-held belief that ICC arbitration is "expensive".

On the other hand, the ICC approach has some advantages. For one thing, it takes away a large element of posturing or the possibility to file a demand for arbitration as a strategic ploy. This can be a good thing for the sake of efficiency, because it means that if a company is starting an ICC arbitration, it must be serious about the dispute and think that it has legitimate arguments. Also, if the other side has a poor argument, it discourages the party with the weak position from dragging the dispute out. Once the ICC process is launched by a claimant, if the respondent does not cooperate, a default award will be entered – and generally speaking the default award will be enforceable against the respondent in the same way as an award rendered on the merits, provided certain procedural protections are respected.

Another interesting aspect of the ICC system, and I can confirm this from having been an ICC arbitrator, is that it greatly incentivizes the arbitrators to be efficient. If the arbitrators know that they are only going to get a certain amount of money for a particular dispute, subject to the due process protections built into the process, they will not allow the parties to waste resources going off on tangents that are not related to the core of the dispute. They will do everything possible to resolve the dispute efficiently, because if they do not, their compensation in hourly terms will be far lower than what they would stand to make in another context. Conversely, it is possible that an arbitrator being paid by the hour will have an incentive not to move the case forward so quickly and allow more arguments to come into play, more discovery and more hearings. Perhaps this is a good thing if a lot is at stake and the parties want to make sure that all arguments are fully aired. However, my experience has been that many disputes, even large ones, turn in the end on relatively discrete questions and well known principles of law, once all the particular factual elements are peeled away.

Possibility of Appeal from Awards

Another key difference among institutions is whether or not a type of appeal from the award is possible. Most rules do not allow this. For ICSID arbitrations, however, recourse to a second level is built into the rules – so when ICSID rules are chosen, this is part of the *règle du jeu*. Losing parties often take advantage of it, which is an aspect that prolongs the process of reaching a final resolution by at least two years, and also results on occasion in reversals of the award of the first tribunal constituted.

The ICC Rules of Arbitration have a unique aspect, which is the scrutiny process applied by the ICC Court of Arbitration before an award is issued. No other major institution has this. Under the ICC Rules, there is no appeal once an award is issued, but before the arbitrators can release any award to the parties, the ICC Secretariat must present a draft of it to the Court of Arbitration, or a committee of it, for scrutiny. As part of this process, the court corrects obvious errors, such as in interest rate calculations, etc. if there are any, but it also directs the arbitrators' attention to aspects of the award that the

members of the court do not understand or find unusual in the light of ICC practice or international arbitral jurisprudence. While this is not intended to amount to a review of the substance of an award, the scrutiny process does serve an important quality control function. The members of the ICC Court of Arbitration come from many countries and are among the most experienced practitioners in the world. When their collective experience is brought to bear on a draft award, real value can be added to the process. Again, I can say from my own experience as an ICC arbitrator that I was very impressed in one particular case with how the court focused in its scrutiny process on precisely the most sensitive aspect of the substantive analysis and asked probing questions of the panel so that it could be sure that the conclusion of the arbitrators was well considered and that the award would be consistent with ICC standards.

Question of “Arbitrability” of Disputes / State Enterprises

One other point in considering the various rules has to do with whether or not a dispute can be considered “arbitrable” under the law governing the contract. With some particular exceptions, this is generally not a problem in a commercial agreement between two private parties, but if a private party is entering into an agreement with a government, one of its instrumentalities or a state enterprise, counsel to the private party should check whether or not there is some provision of local law that prohibits a government entity from entering into agreements to arbitrate. These types of laws are found in countries with civil law traditions and typically apply to the provision of public services. There may also be provisions of law that require some kinds of disputes to be resolved in a certain way, even in the U.S. For instance, arbitration is not at all possible in Federal government contracting. The administrative procedure acts of the various states may have special provisions as well and should be checked if the contracting party is a state or local government entity in the United States.

This is a fairly arcane point and, in my experience, some lawyers are not even aware of it, even lawyers from countries where it is the case. If it is the case in an international transaction, serious consideration should be given to using the ICSID rules, if the host country is a party to the Washington Convention. The reason for this is that the Washington Convention, which established the ICSID rules, has the status of a treaty, while the rules published by the other institutions don’t have any particular legal status. They are just private rules the parties can elect to follow.

One further note of caution in international investment transactions between a private foreign investor and a state or a state enterprise is that a complicated body of ICSID jurisprudence has developed over the past few years as to whether the parties’ agreement to arbitrate should be followed (whether it contains an ICSID agreement or not) or the aggrieved investor can resort to ICSID arbitration under a relevant bilateral investment treaty (BIT), since ICSID arbitration is usually the method designated in BITs for resolving investor treaty claims. Investor/State arbitration issues have been the subject of much commentary recently. If a transactional lawyer is acting in a foreign investment transaction, either on behalf of the investor or the state, a practitioner with expertise in this complex area of law should definitely be consulted, all the more so

because the law continues to evolve and different ICSID tribunals have reached inconsistent results on certain key issues.

DRAFTING THE CLAUSE

So, having gone through the process of deciding between court jurisdiction and arbitration and, having chosen arbitration and settled on *ad hoc* arbitration or a particular institution or rules, how should the clause be drafted?

Standard Institutional Clauses

If an institution is chosen, the answer is surprisingly simple. It usually is best just to use the standard clauses published by the institution with a couple of key things added. The reasons why it is best not to try and tailor a clause, particularly if the draftsman is not experienced in international arbitration, could fill up an entire treatise, so I will not try to go into them here, except for a few considerations discussed below. If a standard clause is chosen, it means that the rules of the institution will cover many of the questions that could otherwise be dealt with in a more complicated way, as reflected in the experience of the institution. Also, the examples of so-called “pathological” clauses are legion. Every major conference on arbitration has a presentation of bad clauses drafted that in the end amount to no real agreement to arbitrate at all, thus defeating the purpose of attempting to choose arbitration in the first place. It is always amusing to listen to the “pathological clause” presentation at a conference, as you wonder what the lawyers who drafted them could have been thinking. It is definitely not amusing to clients, however, when they start getting into a dispute and look at the dispute resolution clause of an agreement and can’t tell what it means.

The few things that definitely should be added to a standard clause, if they are not built in, are the place of arbitration, the language of the proceedings, if it might be an issue, and a statement that an award rendered by the tribunal can be enforced in any court of competent jurisdiction.

Place of Arbitration

The place of arbitration, while sounding like an innocuous enough decision, is actually very important, because the rule in international arbitration is that the courts of the place of the arbitration will control the conduct of the arbitration, meaning that if one of the parties wants to go outside of the arbitral process, the domestic courts of the place of the arbitration will decide the extent to which such deviations are allowed. If the parties have chosen arbitration as their method of dispute resolution, one can assume it is because they do not want to be subject to the jurisdiction of particular national courts, so that court intervention should be kept to a minimum. Therefore, it is generally well to choose a place of arbitration where the courts of that country are known to be favorable to arbitration. These questions are followed closely by the international arbitration community and there is much learning available on the subject. Without getting into too

much detail, fairly safe bets are Switzerland, France, England, Canada and most of the larger U.S. states, but with a certain note of caution regarding California.

I've simplified the foregoing discussion quite a bit, and one of the most vexing questions facing the international arbitration community today is the phenomenon of courts in different jurisdictions issuing conflicting injunctions about the conduct of the arbitration, so-called "anti-suit" injunctions which purport to order a party from one country not to proceed with an arbitration in another. These are complicated issues for which there are no cut-and-dry solutions, the discussion of which is well beyond the scope of this paper.

Language of the Proceedings

As to the language point, if the parties are from countries with different languages, it will save some trouble down the road if the language of the proceedings is specified in the agreement to arbitrate and whether or not documents that are not in the chosen language need to be translated into the language of the proceedings, and at whose expense.

Enforcement in Courts of Competent Jurisdiction

Finally, the point about specifying that any award rendered by the tribunal is enforceable in any court of competent jurisdiction is a formality designed to counter interpretations by courts in some countries of domestic laws to resist the enforcement of international arbitral awards.

Joinder and Consolidation

This is a somewhat more complicated consideration, but attention should be paid in a complex transaction about whether there are related or third parties who will have some bearing on the performance of a contract and whether they can be made a party or not to an arbitration between the principal parties to a contract. The classic example is in an infrastructure project where the investor is dealing with one government agency, say a state power company, but other ones also have some role in a project, such as a port authority or another agency that is responsible for condemning land or providing other utilities to the project – or even the government itself, if it is providing project support. If there is a dispute with one, you don't want to be in the position of having separate disputes with all the other ones. In this case, it is advisable to provide in all the relevant contracts that all the related or third parties agree to be joined in an arbitration between the parties to the main contract – or that there can be parallel arbitrations, but that they be conducted by the same persons. The idea is to have one dispute resolution process that involves several contracts to get to a consistent result that binds everyone involved.

This is also true where there are several different contracts in place to achieve a result. The parties can agree in all of them that an arbitration will be consolidated into one proceeding.

As mentioned, there are complex considerations involved in analyzing these situations and drafting the clauses that can address them. This is definitely an area in which an experienced practitioner should be called upon for guidance.

TAILORED CLAUSES

I know that I have advocated in this article using the standard clauses published by institutions in drafting agreements to arbitrate, particularly if the drafting attorney is not knowledgeable about arbitration. Certain practitioners do not agree with this point and advocate using more elaborate or tailored clauses. The tendency to advocate tailored clauses is particularly prevalent among U.S. practitioners. Some things that might go into a tailored clause include:

- the number and method of appointment of arbitrators;
- particular qualifications that the arbitrators should have;
- deadlines for how quickly the parties have to make filings and the arbitrator(s) to react;
- overall deadlines for the rendering of an award (must be within 90 or 180 days or some other period of time after the demand for arbitration);
- use of domestic rules of discovery or evidence instead of allowing the discretion to the arbitrators that most rules provide;
- requiring that one particular court or another have exclusive jurisdiction for interim measures; and, finally
- specifying a method of recourse if one party is not satisfied with the award or if there are things like “manifest error”, or if “all issues are not decided” or similar.

If a transactional lawyer receives a clause with provisions like these, he or she should definitely consult a specialist in arbitration since the more elaborate these tailored clauses are, the more potential traps there will be for the unwary - and also the greater the chance that the clause will become “pathological”.

Number of Arbitrators

If the parties feel strongly about the number of arbitrators and their method of appointment, this can certainly be specified in a clause. Most of the institutional rules provide for one arbitrator if the amount in dispute is under a certain threshold and a panel of three if it is over that threshold. Typically, if the parties can’t agree on the sole arbitrator, he or she is appointed by the institution. When there is a panel, one party each

appoints an arbitrator and the two arbitrators appointed appoint a chairperson. Again, if they can't agree, the chair is appointed by the institution. Since this is what the various rules tend to provide, there's not real need to repeat it in the clause except if one of the parties feels strongly about the number of arbitrators in the context of the contract. Some parties don't want a sole arbitrator even if the contract is not for a large amount because they fear having a rogue arbitrator handle the case.

Multi-party Agreements

One thing is worth mentioning concerning multi-party agreements. I can't tell you how many contracts I have reviewed where there are more than two parties and the draft agreement to arbitrate provides that each party will appoint its own arbitrator and the chair will be picked by the first two appointed. So if there are five parties to the agreement, how many arbitrators will there be? Six? If there are multiple parties to an agreement, and you don't want to go to the trouble of parsing out disputes between just two of the parties, which is a bad idea, you should make reference to the relevant provision of the rules of arbitration on multi-party agreements. The ICC's rules provide simply that, absent agreement by the parties, the Court of Arbitration will appoint a three-person panel. If this technique is not used, chances are that the agreement-to-arbitrate will be defective in some way. Yet another reason to simply defer to the rules of the institution chosen, provided they do make reference to the issue of multi-party arbitration.

Specific Qualifications of Arbitrators

As to particular qualifications of the arbitrators, most administrators from institutions strongly discourage draftspersons from getting too specific about this because then it makes it very hard to find the appropriate person. Then, assuming this person or persons exist, it is far from certain that they are available in the place of the arbitration at the time the parties would need them there. True, you do want a qualified arbitrator with knowledge of the field handling your dispute, but it is the role of the institution to make sure that this is the case if the parties themselves cannot agree on an arbitrator – and the parties are not doing themselves a favor by making the institution's job too hard.

Deadlines

I've had more than one client that has pushed for drafting strict time deadlines into arbitration clauses on the theory that this will make the arbitration go faster and the parties won't drag their feet. Most experienced arbitrators say that these types of deadlines are counter-productive and end up being ignored by the parties in any case, as the impetus for delays in the process usually comes from the parties themselves, who want to make sure that their case gets a full airing, if it comes to that. Moreover, there is doubt in some legal systems about whether not meeting the deadlines means that the agreement to arbitrate becomes invalid – or that there is a breach of the agreement as a result. This is probably not the case in most jurisdictions, but there's really no reason for a draftsperson to risk this, which means not specifying any particular deadlines in the clause.

Rules of Civil Procedure or Evidence

As mentioned above, some litigators don't like arbitration because most of the institutional rules allow for something less than the full-blown discovery to which the parties would be entitled if they were litigating the case in a U.S. court, or because arbitral hearings are a lot more informal than U.S. court hearings. As a result, you sometimes see provisions in proposed clauses to the effect that the Federal Rules or Civil Procedure will apply, or the Federal Rules of Evidence, or the equivalent provisions of state law. If your view is that arbitration is different from litigation and that it affords advantages to the parties in terms of cost or efficiency, you should resist these types of clauses. Generally speaking, an experienced arbitrator should be able to tailor disclosure requests to the key points in dispute, such that broad "fishing-expedition" discovery requests are not necessary. Often, with some persuasion, the parties' counsel can be made to agree to the scope of discovery. True, the arbitrator does not have the authority of a court to order disclosure of information, but failure of a party to cooperate in the discovery process can be construed against that party. Whether or not this affects the ultimate outcome of a dispute, arbitrators definitely tend to view lack of cooperation in a negative light.

Also, my experience is that the informality of arbitration helps get to the bottom of things. For instance, I find it quite helpful that the arbitrators can ask questions of the parties' counsel and their witnesses, which is a feature of the civil law system but unfamiliar to common law lawyers. Sometimes in a hearing, the parties' counsel do not always focus on what is on the minds of the arbitrators. Another interesting aspect of arbitration is that it also allows the arbitrators to go beyond the formalism of discovery and presentation of evidence in the civil law system, which does not have the adversarial tradition of the common law system. I've had more than one civil law trained attorney tell me that they feared cross-examination in arbitration and wanted to avoid it, but that in the end it did help uncover the truth in a case.

The point is that since the rules of the arbitral institutions tend to be hybrids of the common and civil law systems, and since the arbitrators have a certain amount of flexibility as to how to manage the proceedings (provided they stick to certain key due process protections), you can get the best of both systems working towards an efficient resolution of a dispute. These features cannot be employed if the arbitrators have to respect the formalism of one country or another's rules of civil procedure or evidence. If the parties are sophisticated and that is what they want, so be it. However, I look askance on these types of clauses.

Exclusive Jurisdiction for Interim Measures

I am particularly negative about clauses that purport to designate one court of another as having exclusive jurisdiction for interim measures. Mind you, preserving the ability of the parties to seek interim measures is important, because it may be critical in a particular context to preserve assets or collateral or other rights of the parties. If one

takes the ICC Rules as an example, they provide that interim measures can be had in any court of competent jurisdiction. This is appropriate, because one needs to go to the place of the assets or the collateral to preserve them. And while I sympathize with attempts to limit the possibility of having dueling anti-suit injunctions from courts in different countries, I still disagree with the approach of specifying that only one court in one country can have jurisdiction for interim measures. In any case, there is some question whether this type of clause is enforceable anyhow. If a clause provides that a court in country A has exclusive jurisdiction for interim measures and you go to a court in country B with a legitimate claim for a protective order, what is to stop the court in country B from issuing it? Moreover, suppose a court in country A issues an interim order relating to assets or a situation in country B pending resolution of the arbitration. The party obtaining the order would then have to go to the courts of country B and ask them to enforce the order of the court from country A. This is hardly efficient and potentially counter-productive to the whole notion of legitimate interim measures. If you can't get them quickly, they are not worth much.

Appeals from Arbitral Awards

Finally, whether deviating from the finality provisions of the standard clauses to allow for appeals is a good idea or not is a point engendering some debate in the international arbitration community. Some practitioners support the idea that the parties can contractually expand the limited scope of judicial review afforded by the Federal Arbitration Act. Whether this is permissible in the U.S. context is the issue in a case currently pending before the Supreme Court of the United States, *Hall Sreet Associates, L.L.C. v Mattel Inc.* The Arbitration Committee of the United States Council for International Business, which is the U.S. member organization of the ICC, has filed an amicus brief arguing that this should not be allowed and that a court should not have jurisdiction to hear such a case even if the parties had agreed on it.²

If your view is that the point of arbitration is to resolve a dispute quickly and at a lesser cost than litigation, these types of clauses are not helpful. If your view is that so much is at stake that you can't risk compromising your client's rights in an arbitral procedure that could result in an erroneous ruling, then I suppose you can agree to a second level of review by a court, but it means that a dispute will take a long time to resolve by arbitration in the U.S., assuming this is found by the Supreme Court to be permissible in the first place.

CONCLUSION

The purpose of this article has been to demonstrate to transactional lawyers that a lot is at stake with choices made about dispute resolution in the drafting of an agreement. Hopefully, I have succeeded in making it clear, first of all, that it is good practice to make sure that some method is chosen at the outset. I'm sure it has come through from this

² Brief of the United States Council for International Business as *amicus curiae*, 2007 U.S. S. Ct. Briefs LEXIS 751 (Sept. 14, 2007)

paper that I have a certain prejudice in favor of arbitration, in both the domestic and the international context. Not all clients agree with this, so one important role a transactional lawyer should play is to check with his or her client about its experiences, preferences regarding dispute resolutions and risk tolerance. Further, the issues presented in this paper should be carefully thought through before choosing a method and drafting a clause, if it is to be arbitration.

It would not be reasonable to expect that younger attorneys or attorneys who are otherwise not familiar with dispute resolution techniques will be able to do this without guidance, so if there is one overriding take-away from this article, it is to ask for help from someone who knows. Focused intervention by an experienced practitioner at an early stage can avoid the most potentially damaging mistakes, particularly in international transactions. If your firm does not have this type of expertise, the institutions will by and large be very happy to offer guidance at the drafting stage. Most transactional lawyers do not realize this, but it is a resource that is readily available. For instance, if asked, the Secretariat of the ICC Court of Arbitration will even review draft clauses and offer pointers. This is not formal legal advice and may not go far enough to resolve the thorniest issues, but it is definitely a resource that is available.

The choices about dispute resolution should be in the first draft of an agreement, before the other side sees it, or in the first round of comments if the other side is drafting it. The issue should be on the table from the start, so it is a part of the negotiation, and not an afterthought when there is great pressure to close the transaction.

Finally, the issue of dispute resolution should not be a bargaining chip either. While most commercial issues in a negotiating process are susceptible of compromise, if the very enforceability of an agreement is at stake due to a defective or overly complicated dispute resolution clause or, conversely, the lack of one, a transactional lawyer should dig in his or her heels and make sure that the contract contains an effective clause and, most of all, that the client is making decisions about dispute resolution with full awareness of what is at stake and the inherent risks.