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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

12 Things To Consider Before And During Int'l Arbitration

Law360, New York (December 10, 2013, 11:47 PM ET) -- International arbitration is an ever-growing field. Even experienced litigators who find themselves representing a client in an international arbitration are often surprised at how fundamentally different it is from U.S. litigation. Below is a list of some of the key things to keep in mind when navigating the waters of international arbitration.

The time to be concerned about dealing with an international arbitration begins well before a claim is filed — during the contract-drafting stage. It is at that point when some of the critical decisions that may have serious consequences on the outcome of the arbitration are made. Among the most important of these are:

1) Selection of Arbitral Organization

There are several international arbitral organizations — the International Chamber of Commerce, the International Center for Dispute Resolution and others. Procedural rules of these organizations tend to be similar, but not identical, and should be reviewed before the parties agree on a particular organization.

The rules are also amended from time to time. Generally, unless the parties agree otherwise, the applicable rules will be those in effect at the time when the claim is filed, and may thus differ from those which were in effect at the time of the agreement. Providing in the agreement that the rules to be applied will be those in effect at the time of the signing of the agreement would remove this uncertainty.

2) Selection of the Number of Arbitrators

Most international arbitrations are conducted before either one or three arbitrators. Unless the parties specify the number in their agreement, the arbitral organization will make the decision for them, guided, as a rule, by the amount in dispute. The parties may also provide in their agreement for specific qualifications which the arbitrator(s) must possess (e.g., the arbitrator must be a lawyer, or from a specific country or must have expertise in a particular area).

3) Selection of the Place of Arbitration (Forum)

This is perhaps the most important decision during the contract stage as it directly implicates the legal environment of the selected forum. It is critical in selecting the forum to choose a jurisdiction whose arbitral awards will be enforceable in other jurisdictions. It is likewise important to select a forum whose own law will recognize, and, if necessary, enforce, the agreement to arbitrate.

Other factors to be considered are: (1) Will the forum's courts entertain an application to vacate an arbitral award, and, if so, what would be the scope of any such review? (2) Will the forum's courts allow a party to interfere with the arbitration process with dilatory applications, thereby delaying it? (3) Will the forum's courts provide assistance with discovery (e.g., enforcement of arbitrators' orders), and, if so, what type of assistance would be available? (4) Will the forum's legal system permit non-nationals to appear as counsel in the arbitration? (5) Are there any limitations imposed by the forum's law as to the qualifications of the arbitrators, or as to the language in which the arbitration must be conducted?

Once arbitration is commenced, parties and their counsel should be mindful of the following:

4) Pleadings

Pleadings in international arbitration are expected to be much more precise and fact-focused than their litigation counterparts. Employing cryptic, boilerplate language or the well-informed conjecture, "on information and belief," will not serve a party well. Also, in contrast to U.S. litigation, pleadings in international arbitration are amended very infrequently, so it is important to get it right the first time around.

5) Vetting the Tribunal

When selecting the arbitrators, special care must be taken to vet them (and their firms) for conflicts, as well as for professional and personal relationships with opposing counsel and potential witnesses. While the arbitral organization will conduct a conflict review prior to appointing an arbitrator, counsel should conduct their own thorough research and reject or object to candidates if conflict issues are revealed. Counsel may also request to pose questions to prospective arbitrators to flesh out potential conflicts. It is also a good idea to conduct periodic research on an already appointed arbitrator during the course of the arbitration to make sure that he (or his firm) has not become conflicted since the commencement of the arbitration.

6) Motions to Dismiss

Motions to dismiss the complaint for failure to state a cause of action — a staple of U.S. litigation — are virtually nonexistent in international arbitrations. While arbitration rules do not generally prohibit such motions, in practice they are rarely made and even more rarely granted. Once an international arbitration is commenced, the parties should expect for it to proceed through all its stages to a hearing and a final award.

7) Document Discovery

Document discovery, while available in international arbitration, is much more limited in scope than in U.S. civil litigation, requiring narrow and specific requests and a far more exacting showing of relevance and materiality than is the norm in litigation. An arbitration tribunal will often allow for discovery of but a handful of documents. The same matters, if litigated, would result in massive production of thousands of pages. Requests that begin with the formulaic "all documents concerning" or "all correspondence relating to" will usually be rejected by the tribunal.

8) Depositions

Depositions are not allowed in international arbitration. This means that the first time a lawyer will examine the other side's witnesses will be at the hearing, i.e., the trial. It also means that a lawyer will not know how his own witnesses will stand up to the pressure of cross-examination until the trial (when it may be too late to do anything about it). Also,

importantly, this means that lawyers do not have the benefit of being able to develop and mold their cases based on the evidence adduced in depositions, as they would in litigation.

9) Preparation and Submission of Evidence

Unlike in U.S. civil litigation where factual evidence is presented to the judge or jury for the first time at trial, in international arbitrations the presentation of evidence begins early in the process and long before the hearing. Direct evidence in international arbitration is submitted by means of sequential memorials which include witness statements and documentary evidence. Witness statements function as direct testimony; the witness is then subjected to a cross-examination at the hearing. These submissions commence shortly after the tribunal is constituted and continue over a period of several months up to the hearing.

As a rule, an arbitral tribunal will not admit into evidence at the hearing any testimony of witnesses under the control of a party that was not contained in a witness statement and submitted as part of one of the sequential memorials. This means that a lawyer must make many key strategic decisions — including who will testify, what each witness will and will not say, how they will say it, how he will navigate the anticipated hazards, and, indeed, what those hazards might be, what documents the witness will and will not be shown and asked to explain, and many others — virtually at the inception of the arbitration.

10) Summary Judgment Motions

Like motions to dismiss for failure to state a claim, summary judgment motions are not part of the international arbitration process. This means that defense lawyers who would expect in a litigation to be able to narrow the issues for trial by having some of the weaker, throw-away claims dismissed on summary judgment will, as a rule, be required to proceed to an arbitration hearing on all of the claims asserted by the claimant.

11) Bifurcation

It is common for international arbitrations to be bifurcated into the liability and damages phases. Generally, the tribunal has the power to order such a bifurcation regardless of the consent of the parties — and often does. This practice has been the subject of some criticism from lawyers who are concerned that arbitrators (who get paid by the hour) would be less inclined to find no liability since doing so means giving up their fees for the damages phase. Bifurcation also obviously entails additional legal fees and extends, sometime doubles, the arbitration process.

12) Challenging Arbitral Awards

Appealability of international arbitration awards is extremely limited. Courts will not, as a rule, review the merits of the arbitral decision, the tribunal's interpretation of facts or its application of the law. The only valid objections to the enforcement/recognition of an arbitral award are those grounded in the tribunal's bias or procedural or jurisdictional irregularities. As a practical matter, an international arbitral award is not appealable on the merits.

—By Oleg Rivkin, Carlton Fields PA

Oleg Rivkin is a shareholder and commercial litigation attorney with Carlton Fields in New York.

A longer version of this article, titled "Contrasting U.S. Litigation and International Arbitration," appears in the fall issue of the ABA Journal.