Dispute Resolution Clauses - Best Practice In International Contracts

I recently moved to Singapore and almost immediately found myself involved in an international arbitration hearing in Singapore's excellent facilities at Maxwell Chambers. After one very long day I decided to treat myself to a taxi ride home. I jumped in a taxi and to my surprise the taxi driver asked me "which way do you want to go?" This is not something that a taxi driver had ever asked me in the UK, so I simply replied "whichever way is the quickest!"

It got me thinking about international contracting and the disputes that tend to arise. Parties often get into difficulties because what one party considers 'normal' practice in one jurisdiction can actually be very different in another. Often the only common consensus is that the parties want their dispute resolved as quickly as possible.

Unfortunately the dispute resolution clauses (which are almost always found at the end of any contract) do not always get the time or attention that they deserve before the contract is signed. This is often explained away by parties not wanting to dwell on 'negative' issues when they are at a 'positive' stage in the project. This, however, can lead to an unnecessarily slow, complicated and expensive dispute process.

I would like to persuade all contract drafters to ***pay very careful attention to the dispute resolution clauses at the outset***.

If you are intending to include international arbitration as one of the options for dispute resolution, here are **6 suggested steps to achieving best practice**:-

1. Consider all of the parties and whether you will be able to enforce an arbitration award.

Consider who you are contracting with and other parties up and down the line. It is important to think about whether you would be able to recover monies if matters went wrong. Ask yourself:-

- Is the owner/employer good for the money?
- Is the owner/employer a state entity? This could make bringing claims and enforcement very difficult, particularly if you want to continue working in that country. Obtain waivers of Sovereign Immunity for both jurisdiction and enforcement.
- What would you do if they did not pay you - where are their assets?
- Are the courts where assets are situated independent and efficient?
- The New York Convention is very effective when enforcing against multi nationals, but it may be much less effective in dealing with “domestic” entities (e.g. in Russia or India).

2. Ask whether the arbitration agreement is valid under national laws and treaties?

The arbitration agreement usually needs to be in writing (e.g. NYC 1958, UNCITRAL Rules 1976, Model Law 1985, Singapore International Arbitration Act 1995), but note that under the revised Model Law 2006 and UNCITRAL Rules 2010 it can be oral (and this could be a risk), so make sure the contract specifies the desired procedure.

- Check local law issues.
- Check on relevant corporate law (e.g. in Turkey special powers of attorney are required).
- Can the local government department actually submit to arbitration?

Best Practice: ensure you have a valid arbitration agreement when you contract.

3. Where is the seat of the arbitration?

This is much more important than people often realise, because it determines:

- Procedural rules and rules of evidence;
- Privilege;

- Safety (of the people involved in and conducting the dispute);
- Legal infrastructure (do you have a good choice of arbitrators, lawyers and suitable venues?);
- Appeals (e.g. this can take a very long time if your seat is in Paris); and
- Court interference (e.g. the courts India may intervene which is unwelcome, whereas in Singapore they generally will not).

Best Practice: choose a seat which is safe, independent, legally mature and has effective court support

4. Consider other contract dispute resolution structures.

Often there are tiered dispute resolution procedures, but standard timetables can make the overall process too slow, e.g.

- Engineer's decision 42 Days
- Dispute Resolution Board 84 Days
- Mediation 90 Days
- Appointment of Arbitrators 90 Days
- TOTAL 306 Days

Best Practice – reduce the number of tiers and/or reduce the time scales

5. Consider which procedural rules and appointing bodies to use.

- Decide whether to have an administered arbitration (e.g. ICC, LCIA, SIAC, CIETAC). This makes dealing with the administrative side of the arbitration easier, but can be expensive and slow.

- Alternatively have a non administered arbitration (e.g. UNCITRAL or just and ad hoc arbitration). This can be cheaper and faster if the parties are cooperative.

Best Practice – choose UNCITRAL to appoint the arbitrator and rules suitable for your seat (e.g. IBA) and a seat where the courts support arbitration effectively.

6. Think carefully about the law of the contract and the language of the arbitration

- The substantive law of the contract is very important and often underestimated. This should be very carefully considered at the outset.
- Major differences in the application of the law includes the approach to:-
    - Good Faith
    - Penalties
    - Interest
    - Notices
- It is also very important to select the language of arbitration at the outset, otherwise this could result in protracted arguments at the commencement of any dispute.

Take note of the above when drafting and if matters do result in a dispute, you can 'Relax La' (as they would say here in Singapore!) knowing that your procedures are in place so that you can get to your 'desired destination' of concluding the dispute in the quickest way possible.

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