New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
DECEMBER 10, 2021

Outside Counsel

Drafting an Arbitration Agreement in 2022: 2021 Considerations

By **Myrna Barakat**

The events of the past couple years have forced us all to take a step back and rethink a broad array of matters that were previously on "auto pilot." Arbitration agreements are no exception. Obviously, the traditional features of a solid arbitration agreement remain unchanged for the most part. That being said, a number of new considerations are now de rigueur as practitioners embark on a drafting exercise that aims to not only secure clarity on the historically important matters but also take into account new realities and social priorities. Below I will briefly reiterate the key items that we've generally wanted to include in an arbitration agreement and then reflect on some of the newer matters to be considered.

The main objectives in drafting an arbitration clause are to reduce (if not eliminate) the risk that a dispute will be referred to a court at any point other than once enforcement of an arbitration award is sought, and to ensure that nothing in the agreement could lead a court to reject enforcement once an award is rendered. An arbitration agreement should therefore be clear in reflecting the parties' intent to resolve disputes in arbitration, specify its scope (i.e., the nature of disputes that must be resolved in arbitration) and include an agreement that judgment may be entered on the award. It should also indicate which procedural rules will govern the arbitration and ensure that the laws governing the arbitration agreement itself as well as the substance of the dispute are designated in the arbitration agreement if not otherwise included in the parties' contractual arrangement. Additionally, it will name the body that will oversee the administration of the arbitration and the actual seat of the arbitration. Finally, it should include the number of arbitrators to be appointed and the method for selecting them. In international arbitrations, parties should also specify the language in which proceedings will be held. These are the core items to include in an arbitration agreement. There are obviously other matters, such as whether arbitrators can award punitive damages and attorney fees, the scope and limits of discovery, consolidation and joinder, and similar items that a practitioner may want to consider including to tailor the arbitration agreement to the specific matter at hand.

In addition to the foregoing, today's drafters are more often than not called upon to reflect on matters related to the global events and social priorities of the past couple years.

MYRNA BARAKAT *is a commercial arbitrator and mediator; she divides her time acting as a neutral and advising a broad range of domestic and international companies and investor groups on mergers, acquisitions, and other strategic initiatives.*

In Person or Virtual

The most notable consideration du jour is whether the arbitration agreement should provide for virtual hearings to be held, specify in-person hearings or remain silent on the matter as has been historically the case. The answer may not be clear cut and may even require a bifurcation. Indeed, the parties could agree that for smaller disputes, even in a post-COVID-19 world, virtual hearings will be conducted, while in-person hearings would be the default for disputes involving a larger quantum. Currently, when an arbitration agreement is silent on the matter, arbitrators will typically defer to the parties. However, where parties disagree, the arbitrators will generally have jurisdiction to determine whether to proceed virtually or in person. By considering the matter early on, practitioners give their clients the opportunity to have some visibility on the issue to the extent it's of importance. It may be particularly relevant to avoid unnecessary costs and delays when the amounts in dispute don't justify in-person hearings as the global community has successfully adopted virtual hearings. It can also give the parties the ability to agree, and thus secure, an in-person hearing in pre-determined circumstances without having to worry about it being questioned. Obviously, including such a requirement could lead to delays; the parties will have to weigh its benefits and risks considering the possibility that unforeseen events could dramatically upend their initial thinking and planning.

Cybersecurity

Although cybersecurity matters should not be new considerations per se, the increased use of virtual hearings and virtual rooms for document-sharing, coupled with what appears to be a growth in hacking incidents, should motivate all parties to consider what they can, and should, do to strengthen cybersecurity defenses. For example, in selecting the arbitration center and seat, parties should consider the scope and strength of a venue's cybersecurity procedures. Further, in their own agreement, parties may wish to agree specific document-sharing standards. In a best-case scenario, the parties will be able to rely on an arbitration center's security protocols for all of their dealings once an arbitration is initiated. That being said, given the heightened risks involved, this is definitely a matter where parties and their attorneys would be well served to take a step back and reassess the adequacy of the norms they had previously adopted. They will want to ensure that they consider and assess the magnitude of the cybersecurity threats and include in their arbitration agreement whatever measures they believe will limit the possibility of such threats occurring, as well as their potential impact should they materialize.

This article briefly reiterates the key items that generally have been included in an arbitration agreement and then reflects on some of the newer matters to be considered.

Including a Mediation Clause

The economic shock of the COVID-19 pandemic should motivate all parties to consider including a mediation provision in their dispute resolution agreements going forward. Indeed, almost overnight, the economic indicators that formed the basis of pre-COVID-19 agreements were replaced by metrics that reflected uncertainties and a dramatically different global landscape. Many pre-COVID-19 agreements could simply no longer be executed on the basis of the pre-COVID-19 terms. The most obvious examples are in real estate leases involving businesses that were forced to close or reduce their operations considerably during the pandemic. Similar issues have arisen in a broad array of arrangements and industries, leading many contracting parties to try to terminate agreements on the basis of force majeure, or any other outs they can find. This in itself has led to increased adjudication activity and delays, whether via courts or arbitration. The reality is that many parties would have benefited from a mediation clause that would have forced them to try to rethink the underlying terms of

their contractual arrangements instead of immediately turning to a court or arbitration where the decision maker is bound by the terms of an agreement that is no longer reflective of the current state of affairs. Parties are obviously always free to try to resolve their disputes even in the absence of a mediation clause. That being said, by including such a clause, they give themselves a much-needed incentive and roadmap to try to mediate and avoid an adjudicative process without impacting either party's negotiation posture or creating further delays.

Arbitration Center

COVID-19 has taught us that we shouldn't take anything for granted or assume that our realities are set in stone. With that in mind, I am now of the view that there is some benefit to parties either listing two arbitration bodies as options to administer the proceedings or otherwise ensuring that they account for the possibility that their choice may not exist in the future. Earlier this year, in a surprise to many industry players and experts, the Dubai government issued a decree that basically combined the three main arbitration centers in the Emirate. As a result, the Emirates Maritime Arbitration Center and the DIFC Arbitration Institution have been dissolved and the Dubai International Arbitration Center remains as the surviving entity. Parties who had selected one of the now defunct arbitration centers without an alternative, or without providing for a successor entity to take on the role in the event of a combination such as the one that occurred, are now left in somewhat of an unfortunate limbo. This is a good example that may also be a precursor to more consolidation on the global stage. It should encourage all drafters to rethink the rationale, benefits and risks of the sole arbitration venue choice that has been traditionally adopted.

Social Consideration: Equity, Diversity and Inclusion

As an increasing number of businesses focus on the need to proactively adopt policies that are in line with their EDI goals, drafters should contemplate reflecting such aspirations in their arbitration agreements. Indeed, parties may want to agree an arbitrator selection process that ensures that all groups are represented in the list of arbitrator candidates and that such list is adequately considered by the parties in its entirety, i.e., taking into account criteria that include EDI objectives. They may also opt for an arbitration panel with specific diversity requirements amongst the three arbitrators chosen as well as for chair selection. In addition, the parties should evaluate the EDI policies of the arbitration centers they're considering selecting. Key matters to examine should include not only a center's arbitrator list diversity requirements and arbitrator selection criteria but also the scope, metrics and effectiveness of its EDI promotion activities for all those involved in the arbitration process. Such scrutiny will help parties ensure that the policies of the arbitration seat they select are consistent with their own EDI priorities, both on paper and in practice.

It's imperative that any drafter consider all these matters and determine where a party's interests lie. That being said, it's equally important not to go overboard and try to cover every single contingency. This could lead to the parties either settling on an impracticable arbitration agreement or wasting an inordinate number of hours contemplating and negotiating items that ultimately are not of importance to them. I would be interested in hearing your thoughts on the above and any additional considerations that you believe should be taken into account going forward. Please email me mbarakat@mb-cap.com and I may, with your permission, include them in a follow-up article on this topic.

New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
JANUARY 14, 2022

Outside Counsel

Drafting an Arbitration Agreement in 2022: the Drafter's Perspective

In an article published on Dec. 10, 2021, the first in a series titled "Drafting an Arbitration Agreement in 2022: 2021 Considerations," I highlighted matters to consider including in dispute resolution agreements to reflect recent events and current social priorities. In this second article of the series, I examine the issue from the perspective of practicing transactional attorneys. Indeed, it's those lawyers who draft the arbitration provisions that the litigators ultimately have to defend or critique and that we, as arbitrators, must consider and often decide on.

With that in mind, I asked three corporate lawyers for their thoughts: Jan Joosten, a corporate partner at FisherBroyles, specializing in cross-border transactions;

By **Myrna Barakat**

Cathy Rossouw, a partner in Chapman and Cutler's bankruptcy and restructuring group; and Melissa Sawyer, head of Sullivan & Cromwell's global M&A practice and co-head of its corporate governance and activism practice.

As the reader may recall, in my first article, I suggested exploring the following five items for inclusion in dispute resolution agreements: an alternative arbitration center the parties may turn to in case their initial choice is no longer an option due to unforeseen events; whether hearings should (or may) be held virtually or in-person; cybersecurity measures to follow during proceedings; a description of equity, diversity and inclusion considerations to take into account when selecting arbitrators and arbitration venues; and a mediation clause before parties can move to an adjudicative process.

Arbitration Center

Not surprisingly, the selection of the arbitration center(s) is a matter that corporate lawyers will typically discuss with their litigation partners and on which they are likely to defer to them. Melissa points out that, in M&A deals, the disputes that arise are generally related to post-closing disagreements over the calculation of earn-outs or purchase price adjustments. These are often handled by accountants acting as arbitrators. I would therefore note that, similar to arbitration venue selection, one may want to consider having more than one accounting firm as an option or a fallback choice in case the appointed firm can't act for an unforeseen reason.

MYRNA BARAKAT *is a commercial arbitrator and mediator; she divides her time acting as a neutral and advising a broad range of domestic and international companies and investor groups on mergers, acquisitions, and other strategic initiatives.*

In-Person or Virtual … Or Hybrid

Generally, all three practitioners believe that specifying whether hearings will be held remotely or in- person will very likely be considered by drafters and their clients going forward. Ultimately, a hybrid approach may be the optimal one when a dispute could involve participants from different locales. For parties who prefer in-person hearings but don't want to delay proceedings significantly, Jan suggests drafters include a timeframe after which a hearing must be held virtually if it can't be held in person prior to the specified milestone or period due to unforeseen events.

Jan also highlights the need to consider the challenge of time zone differences for virtual hearings and agree on a fair schedule for all. He gives the example of an all-day session "with one party located in the Netherlands and the other on the West Coast, a nine-hour time difference. When the biological clock of the participants in the Netherlands tells them to go home and get some sleep, the people in California are wide awake and alert."

Cybersecurity

A common theme in all of our discussions was the appeal of, and absolute need for, confidentiality in any alternative dispute resolution proceeding. Including cybersecurity protocols and scrutinizing those of the arbitration venues considered were therefore on the top of everyone's list of key matters to consider going forward, in particular as virtual hearings become more common.

Cathy notes that these protocols should extend to privacy matters generally. She suggests that "arbitration centers that develop a 'best practices' set of rules that are clear, commercial and widely adopted, or that become leaders in setting benchmarks relating to privacy and cybersecurity in the context of online proceedings, are likely to put themselves ahead of their competition."

Social Consideration: Equity, Diversity and Inclusion

As I had previously noted, transaction parties may want to consider scrutinizing an arbitration venue's equity, diversity and inclusion (EDI) protocols when deciding which one(s) to select. For M&A deals, such examination should apply to accounting firms when they're asked to act as "arbitrators." For international matters, Cathy reminds us that EDI has a different meaning for different nationalities. Although it isn't uncommon to consider arbitrator nationalities for the makeup of an arbitration panel, parties will also have to account for specific and varying cultural and national perspectives when agreeing on EDI parameters in cross-border matters.

Mediation Clauses

Although to date one rarely sees traditional mediation clauses in M&A agreements, Melissa notes that parties do often agree on other forms of pre-adjudication negotiation processes, also referred to as "step clauses." For example, "disputes first go to business unit presidents, then to global presidents, and only then to arbitration, if the parties are unable to resolve their differences."

Cathy further notes that "clients may view an agreement to mediate as unnecessary" but she agrees that "a binding obligation to mediate, as a first step, gives the mediation a deeper sense of meaning: if the parties are obliged to commit resources to a mediation, it is more likely to be successful and—ultimately—save both parties time and money, especially in the context where a changed environment resulting from the pandemic means that performance under the original terms is impossible or unfeasible."

Jan is a true convert: "Having been involved in multiple

mediations, I have become a big fan of mediation, particularly in the cross-border context. I was very skeptical at first. My thinking was that parties could always agree to mediation later on. The reality is, however, that once there is a dispute, parties are often reluctant to propose mediation out of fear that it will make them look weak and eager to settle. I now strongly believe that you need a contractual obligation to force parties to take a serious stab at resolving the matter through mediation. Nobody has to fear losing face or looking weak. The overriding goal is to get parties to the negotiating table—and impress on them that the other side probably also has a good (or at least a decent) story to tell. A lot of the work required for a mediation would have to be done in any case for a full arbitration or litigation, so the incremental cost is relatively limited. I would never have thought that a virtual mediation would work—and yet both virtual mediations that I was involved with during COVID resulted in settlements."

Additional Considerations: Speed and Confidentiality

Speed and efficiency are key advantages of arbitration. To avoid unnecessary delays, Melissa suggests including additional procedural items in arbitration agreements, such as scope of discovery and timing of award. By agreeing to these matters at the onset, the parties avoid having to address them after the fact at a time when all issues can become unnecessarily acrimonious and take longer to resolve. After all, the parties' ability to define such parameters is unique to arbitration and allows them to secure a more efficient and economical process than litigation.

Confidentiality is another important attribute of arbitrations. Although arbitration proceedings themselves are, by their very nature, meant to be confidential, parties would be well served to consider including additional language to limit the parties' ability to disclose the existence of the dispute and proceedings beyond what they may be required to divulge under the applicable laws. As Melissa notes, any "ambiguity on this subject could conflict with the objective of confidential arbitration."

I'm grateful to Jan, Cathy and Melissa for their willingness to share their personal views on a matter for which many corporate lawyers shy away from or simply defer to their litigation colleagues. As a transactional lawyer myself, I understand the reflex for corporate lawyers to focus on deal terms and attribute less energy and negotiation time to a provision we all hope our clients will never have to use. That being said, as an arbitrator, when asked to decide on a matter related to the wording of an arbitration agreement, one can't help but wonder what those lawyers had in mind when they drafted, and ultimately signed off, on the provision.

Corporate lawyers memorializing an agreed deal are generally closest to both the specificities of the transaction at hand and their clients. Although it's typical to liaise with specialist colleagues for certain provisions, including dispute resolution provisions, I'm confident that the time and cost efficiency of all dispute resolution processes would be increased significantly if the relevant provisions were given greater attention by the drafters and tailored with more focus to the specifics of the contractual arrangement they cover.

New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
JANUARY 21, 2022

Outside Counsel

Drafting an Arbitration Agreement in 2022: The Litigator's Perspective

In the first article in this series titled "Drafting an Arbitration Agreement in 2022," I highlighted matters to consider including in dispute resolution agreements to reflect recent events and current social priorities. In the second article, I examined the issue from the perspective of transactional attorneys. In this third article of the series, I consider the views of four litigators, the professionals who are often consulted by their corporate partners to advise on drafting and who ultimately have to defend or critique the provisions: Lea Haber Kuck, a partner in Skadden's international litigation and arbitration group, where she concentrates her practice on the resolution of complex commercial disputes arising out of international business transactions; Cecil Key, head of the DGKeyIP Group of DiMuroGinsberg P.C., who focuses on the protection, enforcement and licensing of intellectual property rights; Taline Sahakian, a partner in Constantine Cannon's antitrust litigation & counseling and commercial litigation groups, where she has represented parties in international arbitrations and in the context of mediations of commercial disputes; and Dan Weiner, co-chair of Hughes Hubbard & Reed's litigation department and a regular arbitration counsel in high-stakes commercial disputes.

By **Myrna Barakat**

As the reader may recall, in my first article, I suggested exploring the following five items for inclusion in dispute resolution agreements: an alternative arbitration center the parties may turn to in case their initial choice is no longer an option due to unforeseen events; whether hearings should (or may) be held remotely or in-person; cybersecurity measures to follow during proceedings; a description of equity, diversity and inclusion considerations to take into account when selecting arbitrators and arbitration venues; and a mediation clause before parties can move to an adjudicative process.

Arbitration Center

Selection of arbitration center(s) is often a matter on which litigation partners are asked to advise when their corporate colleagues are drafting an arbitration agreement. As Lea notes, whether or not it's advisable to include a second arbitration venue option depends on the circumstances: If the parties are choosing a well-established arbitration center, there shouldn't be a need for a fallback option. If, however, the parties opt for a less mature center, it should be given serious consideration. Generally, the litigators agree that, if parties determine that it's advisable to select more than one venue, drafters should ensure that the provision is clear about the order of preference. As Cecil puts it, "a precise structure is key to avoid a separate dispute or litigation over where the dispute is to be decided."

In-Person or Remote … or Hybrid

With the pandemic, the litigators have seen firsthand how arbitration centers have generally been much more effective than courts in establishing a reliable infrastructure for remote proceedings. This, in itself, has made arbitration more attractive. Cecil mentions having witnessed the challenges of the courts in handling

MYRNA BARAKAT *is a commercial arbitrator and mediator; she divides her time acting as a neutral and advising a broad range of domestic and international companies and investor groups on mergers, acquisitions, and other strategic initiatives.*

remote hearings, often "forcing proceedings to be drawn out with longer periods between hearings or appearances. The net result is increased costs, delays in resolution and hardening of positions. There have also been instances when the court's technology, or facility with the available technology, does not allow for smooth operation, which inhibits presentation." Separately, Taline points out that: "virtual appearances could resolve many issues in producing witnesses for international arbitration regardless of the pandemic. Parties can sometimes have difficulty traveling to the seat of arbitration or may not want to travel for various reasons. Having the ability to testify remotely would allow them to still participate."

Notwithstanding the clear appeal of arbitration's remote capabilities, all litigators expressed some concerns about the inclusion, and drafting, of a provision that specifies which medium to use for hearings. As Taline put it, "if the parties want to consider remote hearings in certain circumstances, they should specify what triggers those circumstances and it should be clearly defined. Otherwise, every ambiguity *can* become a cause for dispute and delay once things go wrong." Both Lea and Dan suggest that the parties avoid the drafting perils and simply agree to defer to the arbitrator(s). Indeed, Dan would include language to the effect that "in the interest of convenience and avoidance of delay, the arbitrators can determine to hold any proceedings in the arbitration, including evidentiary hearings, either in-person or remotely." Lea would favor not addressing the issue at all in the arbitration agreement but rather that it be "addressed with the arbitrators at the outset of the case, usually at the preliminary hearing."

Cybersecurity

Cybersecurity clearly continues to be a concern and focus for all. Cecil reminds us that, with the current pandemic, all arbitration participants, including witnesses, can appear from their homes or other random locations. This raises additional concerns about security protocols that need to be addressed. Lea, a member of the Working Group that drafted the ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration, believes that it is not "prudent to simply rely on the institutions to address cybersecurity". Instead, she encourages "parties to take responsibility for this issue and make use of resources such as the Cybersecurity Protocol which lists the factors that parties, arbitrators and lawyers may consider in determining what cybersecurity measures may be appropriate and reasonable for a particular dispute."

Equity, Diversity and Inclusion

Here again, although all litigators favor diversity and a proactive approach to ensure EDI priorities are considered and effective, there were some reservations on whether it's wise to elaborate on the matter in the arbitration agreement. Lea points to enforceability: "while this is definitely an issue that needs to be addressed, the arbitration agreement is not the place to do it. Indeed, depending on how a clause was drafted, I would be concerned about whether a court would enforce such a provision or whether it could give rise to issues relating to the enforcement of the award. I do agree, however, that parties should consider the EDI policies of the arbitration center being selected. My view is that this issue is most effectively addressed by clients requiring that their lawyers provide them with lists of well-qualified potential arbitrators consistent with their EDI objectives."

On EDI generally, Dan makes an interesting side note that, "as female arbitrators determining high-stakes commercial arbitrations become more prevalent in what had historically been an "old boys' club," the importance of female representation among lead arbitration counsel becomes even more heightened." Taline echoes Dan's view, pointing to the trend within courts for "some judges (in their personal rules) requiring that a certain number of attorneys who appear and argue motions before them be junior attorneys or from diverse backgrounds." It remains to be seen whether arbitrators will adopt a similar practice for attorneys appearing before them.

Finally, as the reader may recall, in the prior article exploring the drafter's perspective, we discussed the fact that EDI may mean different things to participants from different nationalities. Lea reminds us that this could be the case even within our borders and a clearer approach would be to focus on "under-represented groups" rather than debating whether particular groups are "diverse."

Mediation Clauses

Generally, the litigators view mediation as a viable and potentially promising option to try to avoid an adjudicative process. Cecil recommends that mediation clauses parallel the matters that we're discussing for arbitration agreements. Lea, however, has some reservations given the potential for poor or incomplete drafting. She emphasizes: "If the parties are inclined to include a clause requiring mediation, the dispute resolution provision must be carefully

drafted to make clear whether mediation is a required pre-requisite to initiating arbitration or litigation or whether it is an independent obligation that may proceed in parallel with arbitration or litigation. If mediation is to be a required first step, then the drafters also need to be very specific about when the parties' obligation to mediate has been satisfied in order to avoid a jurisdictional dispute in the resulting arbitration and to avoid the possibility of mischief by one party trying to drag out the process."

Speed, Confidentiality and Drafting Pitfalls

As Dan points out, "the virtual world has effectively speeded up arbitrations, since it is easier to schedule hearings without having to build in travel time for parties, witnesses and arbitrators." However, the emphasis on efficiency remains an objective, as noted in the prior article by the drafters who favor expanding arbitration clauses to include procedural timeframes. Dan supports this view for certain matters, such as limiting scope of discovery, but points to the fact that, "as a practical matter, specifying time limits for completion of hearing stages or issuance of an award often proves ineffectual—busy arbitrators will ask the parties to agree to extend the deadlines, and no party in its right mind will refuse." Generally, as Lea points out, this is "another one of those areas where drafters need to be careful in trying to anticipate issues in advance as their clients' interests and objectives may not be clear until the particular dispute arises."

With respect to confidentiality, Lea reminds us that "parties often make incorrect assumptions regarding the nature of the confidentiality obligations as between the parties themselves. The arbitral institution rules often impose confidentiality obligations on the institution and the arbitrators, but not on the parties themselves." Dan echoes Lea's point, stating that "while arbitrations are meant to be non-public, their existence and content—including filings, hearing transcripts and awards—can be freely publicized by the parties unless specific provision is made to keep those aspects confidential. But there are ways to ensure they are … by providing clearly that the proceedings, documents, and any other private exchange be kept confidential."

Generally, it's worth noting that all four litigators had some concerns about a drafter's ability to memorialize specifics in an arbitration agreement in an effective manner when there are so many unforeseeable events that can arise. Lea highlights the tension that most arbitration participants face: "Of course, one of the advantages to arbitration is the ability to define a dispute resolution process tailored to the particular parties and nature of the transaction, and there will be instances that cry out for a very tailored clause, but a lot of the pathological clauses result from drafters, or parties, with a little bit of arbitration knowledge being too specific or trying to get too creative and ending up with a clause that, when the dispute actually arises, does not work.

One example is providing such specific criteria for the arbitrator that it is impossible to find an appropriate person who satisfies the requisite criteria." She further points to the practical realities of how the arbitration clauses are often drafted, negotiated and agreed: "At the drafting stage, parties (and also transactional lawyers) are looking for a clause that will work if a dispute arises, but are generally not willing to spend much negotiating capital on the provision; in other words, in choosing their negotiating battles, the dispute resolution clause is generally not at the top of the list. As a result, as a disputes lawyer, I am often instructed to simply review the clause proposed by the counterparty and to only make adjustments that will ensure it will be effective should a dispute arise."

I appreciate Lea, Cecil, Taline and Dan taking the time to reflect on these issues and sharing their thoughts. As they noted, and many of us have witnessed, the ability of arbitration platforms and participants to adapt swiftly and effectively to drastic, unforeseen changes has been proven in the past two years. It's yet another reason parties will want to consider including an arbitration provision in their agreements. That said, the key concern they raised throughout our discussions, namely the adverse consequences of poor drafting, should resonate with all of us.

To date, we generally haven't yet seen new elements reflected in arbitration agreements. Changes however are likely imminent as we take stock of the "new normal" and try to leverage it to the extent it can be used to accelerate processes, reduce costs and otherwise increase efficiency. As we consider these new matters for transactions going forward, drafters would be well served to reflect on the litigators' cautionary words and ensure that, whatever route is taken, it is one that is carefully worded and tailored to the specifics of the transaction and the needs of the parties.

New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
JANUARY 28, 2022

Outside Counsel

Drafting an Arbitration Agreement in 2022: The Arbitrator's Perspective

In this series of articles titled "Drafting an Arbitration Agreement in 2022," I explore the current events and social trends that practitioners should consider when drafting dispute resolution agreements. I covered the issue initially from my perspective, and then from the perspective of the drafters and the litigators.

By **Myrna Barakat**

In this fourth and final article of the series, I have sought contributions from four independent arbitrators, the professionals who ultimately are called upon to decide on disputes relating to arbitration agreements: Elisabeth Eljuri, an arbitrator focusing on cross-border energy, infrastructure and M&A disputes, and a former arbitration and transactional partner; Mike Lampert, a commercial arbitrator and mediator, and a former deputy general counsel of a financial institution; Jack Levin, a commercial arbitrator and mediator, and a former litigation partner; and Rebekah Ratliff, a JAMS arbitrator, mediator and neutral analyst focusing on commercial complex insurance and employment matters, and a former insurance professional.

As the reader may recall, in my first article, I suggested exploring the following five items for inclusion in dispute resolution agreements: an alternative arbitration center the parties may turn to in case their initial choice is no longer an option due to unforeseen events; whether hearings should (or may) be held remotely or in-person; cybersecurity measures to follow during proceedings; a description of equity, diversity and inclusion considerations to take into account when selecting arbitrators and arbitration venues; and a mediation clause before parties can move to an adjudicative process.

Arbitration Center

The consensus from the litigator and drafter contributors seemed to be that naming an alternative arbitration center may be wise, especially if the center is a less established one. However, they also all stressed that, in doing so, the drafters must be clear in how parties are to select the fallback option to avoid any confusion and unnecessary disputes at the onset.

Elisabeth however believes that "it is better to select a single arbitral institution, albeit one of the well-established ones to avoid any risk of the center shutting down." She notes that, typically, "for mergers of arbitral centers, there will be guidance in the applicable rules of both centers on how the cases will be handled moving forward."

Mike, on the other hand, notes that "even when well-known institutions are named, things can go awry. Consider the recent Dubai shakeup or the famous case where a drafter used a mistaken name for a well-known provider and the courts concluded no arbitration at all was the result, since the named provider didn't exist. In drafting the agreement, the parties may want to unequivocally state their goal of resolution by arbitration as primary, and specifically empower a court to remedy an inadvertent pathology to preserve that goal."

In-Person or Remote…Or Hybrid

As with their litigation colleagues, the arbitrators seem to have differing views on whether drafters should specify if hearings should be remote or in person in arbitration agreements. All acknowledge the benefits of holding virtual hearings: Rebekah notes that parties are now beginning to understand the considerable time and cost savings of remote mediation sessions and arbitration hearings. Elisabeth expects that, "most carefully worded arbitration clauses going forward will include language addressing this topic in some form. Some form of virtual is here to stay. For example, jurisdictional hearings as well as case management

conferences, preliminary conferences, and first sessions will now likely all be virtual regardless of where the parties and counsel are located."

Jack highlights another key advantage of remote hearings, namely that "it permits clients to have a view into the process at any stage, which is always a benefit. One of the constant problems with litigation is that the client must rely on reports of what opposing counsel, a witness, a judge or an arbitrator said. Remote technology can take the mystery out of that and may improve lawyer-client accountability. The lawyer's performance is witnessed directly, and the client must step up to deal directly with events it has seen and heard directly."

Notwithstanding the appeal of remote proceedings, Jack has some reservations on whether it should be covered in the arbitration agreement: "Although parties now know that the possibility of remote proceedings is not an abstraction, it can be difficult for parties to anticipate their needs and wants in this regard before a dispute has arisen. For example, it may turn out that the dispute will involve a lot of money or that credibility will be important and so one or both sides will want one or more witnesses to testify in person. The best proceeding may turn out to be a hybrid. A cautious draftsperson will want to be careful not to trade away such rights in advance." He concludes that this issue "is a balance that lawyers and clients may want to negotiate closer to the hearing."

Cybersecurity

Generally, cybersecurity is an area that everyone recognizes is important but the consensus seems to be that drafters shouldn't necessarily cover the issue in the arbitration agreement. Jack's approach is a practical one: "don't try to accomplish too much in the clause." As industry group protocols, such as the ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration, and best practices are developed, this could be an issue that need not be controversial. Parties may therefore be best served if it is not discussed at the drafting stage in depth but rather left to counsel to agree should a dispute arise.

Equity, Diversity and Inclusion

Rebekah notes that a number of "national ADR providers' practices and processes have evolved to include pledges that encourage the promotion and selection of diverse neutrals. There are also efforts underway, such as the Ray Corollary Initiative (housed at the National Academy of Arbitrators), aimed at increasing awareness around diversity in alternative dispute resolution." She further points to the fact that, with the option of hearing cases remotely, neutrals can appear from anywhere, thus giving parties a greater pool of arbitrators to choose from and giving diverse arbitrators greater visibility and opportunities.

Although there is a general consensus on the need to continue to promote equity, diversity and inclusion (EDI) efforts, this is yet another area where the arbitrators question the wisdom of covering the matter in the arbitration agreement. Indeed, Elisabeth advises against including EDI considerations in the arbitration agreement itself. Instead, she encourages parties to ensure that the arbitration venue they select adopts protocols for diversity consistent with the parties' own EDI objectives. She points to "highly specialized cases where it is already quite difficult to find arbitrators who meet the qualifications (industry expertise, languages skills, conflict clearance)" and questions whether adding a diversity criteria would then make selection quasi-impossible.

Jack also believes that it may be wise to table the EDI discussion, "not because the issue isn't worthy of attention, but because cultural and other differences make it hard to work out in advance. It might be unwise to try to align parties thoughtfully and effectively in advance on such a complex issue. And as the issue relates primarily to arbitrator selection, how to treat it may depend on the number of arbitrators to be selected and the selection process to be undertaken. For example, if each party appoints one and the two select the chair, that might be the best juncture at which to consider EDI."

Mediation Clauses

Generally, all the arbitrators consulted support attempting to resolve a dispute through mediation before engaging in arbitration. Jack notes that "the fact that sophisticated people still view mediation with suspicion, or see it as creating misperceptions of negotiating strength, demonstrates how much education parties and even their counsel still need. A good step clause should always be considered. The timing of mediation should meet the needs of the parties and can be well drafted so that it will be a benefit and not an obstacle."

Similarly, Mike supports the use of step clauses but notes that, "to the extent mediation is a condition precedent to arbitration or court, in cases of urgency it may empower obstruction by an evil doer." He therefore suggests including "a safety valve that would allow either party to seek urgent relief without mediation if it can persuade the arbitrator or a court that the matter could not wait for a mediation."

Separately, Rebekah makes an interesting point regarding the benefits of co-mediation in multifaceted cases involving technical matters: "Leveraging subject matter experts adds valuable perspectives to manage the different personalities and challenges that can come with complex matters. They can be assigned various roles and work together throughout the mediation process to facilitate resolution. This can be done by separating issues by mediator or by a team approach in private caucuses." She notes that "attorneys work

in teams (as arbitrators do in tribunals), why not mediators?"

Additional Considerations

Finality of Awards. Jack raises an additional topic that isn't often explored in depth, namely the finality of arbitration awards. He notes that "some in-house lawyers and their clients are leery of arbitration because they had a bad experience—the arbitrator made an obvious mistake—with no right of appeal. It is incredibly simple to draft a clause that permits a motion to reconsider. It might add modest expense, but it's a precious safety valve. No arbitrator, when confronted with an obvious error, would not want to correct it. For those who think this just adds a layer of proceedings, consider that it can be done quickly, while providing protection similar to appellate review at a fraction of the cost in time and money. This is yet another example of how parties can take control of the arbitration process. Some arbitration providers are considering offering this on an opt-in basis."

Elisabeth has a different view, she believes that "arbitration awards are not meant to be appealed. That is precisely one of the advantages of arbitration. It is not an endless process. Therefore, the grounds for motions to set aside, which are filed in the courts, are narrowly defined. If a party wants a process with appeals, it should not select arbitration to begin with."

Tension Between Specificity and Foreseeability. A common theme that has arisen throughout our discussions revolves around the clear tension, and ideal balance, between specificity and foreseeability. In that respect, Jack notes that "all these matters merit consideration; as part of their examination, drafters and their clients should reflect on the appropriate balance between trying to foresee needs and interests, while not trying to out-negotiate the other side in an arbitration clause." He thus favors "focusing only on matters that can make it more efficient for all parties involved." He would also "encourage drafters to be well acquainted with the procedural rules of the arbitration venues they are considering selecting. Those rules might already anticipate important issues."

Mike further fleshes out the tension that has been pointed to: "On the one hand, specificity at drafting time means parties may not know where their interests lie and so can be more objective. On the other hand, two factors come into play: first, the people who write the clause may not have real experience—or knowledge—of the consequences of their choices, and second, unforeseen events, such as the pandemic, may cause unintended consequences from choices (such as demanding in person which turns out to cause a delay of two years)."

Mike therefore encourages drafters to "avoid writing a pathological clause, but, being more practical, draft a fall back in case you do." He parallels such fallback option with the severability clauses that are typically included in commercial agreements to protect the spirit of the arrangement in case a clause of the agreement is found to be invalid. Mike further points to instances where he's seen parties include "an explicit statement that the principal goal of the parties is arbitration; that, if a detail fails, the court may adjust to preserve the goal of arbitration."

All that being said, Jack reminds us that "a good discussion and negotiation about the clause is not necessarily a zero-sum game. Addressing issues one knows will come up if there is a dispute can aid both sides later on. And although it's obvious, even after a dispute has arisen, the parties should remember that they have the power to modify their agreement to serve the process. Retaining power over the process is a huge advantage of arbitration over litigation."

I appreciate Elisabeth, Mike, Jack, and Rebekah sharing their views based on their firsthand experience reviewing and opining on arbitration agreements. As one may note, although the various contributors have different views and approaches on these matters, there is a general consensus that all these issues merit consideration. The key question is not if they should be explored but rather at what stage should they be discussed and agreed. The other key finding is that drafters and their clients should familiarize themselves with the rules and procedures of the arbitration venue(s) they select since their scope will likely impact their decision-making, whether it relates to EDI protocols, cybersecurity, procedural time frames or confidentiality.

It's helpful to think of the arbitration provision as a complement to those procedures. With respect to strategy, it's important to focus on ensuring a smooth process and not simply attempting to gain a strategic advantage, which can quickly shift as unforeseen events occur. And if drafters opt to cover additional matters, they should ensure that the language is clear and any alternative options or triggers are clearly defined, with an overarching principle included to guide the adjudicator if appropriate.

Finally, everyone is best served when counsel collaborate in the interests of speed, efficiency and effectiveness to devise a plan of action that achieves those goals. While the subject matter of the dispute may be contentious, the process need not be.

Myrna Barakat *is a commercial arbitrator and mediator; she divides her time acting as a neutral and advising a broad range of domestic and international companies and investor groups on mergers, acquisitions, and other strategic initiatives.*