Dispute Resolution Clauses:
A Practical Approach

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No one mentioned defenestration but some 120 lawyers attended a valuable pragmatic discussion of dispute resolution provisions in commercial agreements at the annual IBA Conference in Prague on the afternoon of September 29, 2005. The session was co-sponsored by the Litigation Committee, the Arbitration Committee and the International Sales and Related Commercial Transactions Committee. A hypothetical fact pattern formed the basis for part of the discussion, supplemented by observations from a multi-national panel of seasoned counsel and lively questions and comments from the floor.

Pierre Bienvenu, Vice Chair, Arbitration Committee, Ogilvy Renault, Montreal, Canada, and Jonathan P. Wood, Clyde & Co., London, co-chaired the program. The panelists were John Heaps, Eversheds, London, Senior Vice Chair of the Litigation Committee; James M. Klotz, IBA Deputy Secretary General C[anada], Davis & Co., Toronto, Canada; Christoph Martin Radtke, Chair, Agency Distribution Agreements Committee, Lamy Ribeyre et Associés, Lyon, France; Kina Chuturkova, Borislav Boyanov & Co., Sofia, Bulgaria; Jean-Claude Najar, Vice Chair, Corporate Counsel Forum, general counsel, GE Oil & Gas Nuevo Pignone, Florence, Italy; and Fei Ning, Haiwen & Partners, Shanghai, China,1

Overview

Messrs. Wood and Heaps made introductory remarks, each citing an experience in practice to support the conclusion that dispute resolution clauses need to be viewed as an integral part of commercial agreements, and not mere afterthoughts. Mr. Wood gave the example of a reinsurance contract with a time frame for dispute resolution which, in isolation, might seem reasonable, but which wholly ignored the need to recover funds promptly. Mr. Heaps opened with the example of the recent dispute between Apple Corps, formed by the Beatles, and Apple Computers. In an earlier dispute, it had been agreed the two Apples would deal with music and information technology matters, respectively, a line which seemed clear enough until the appearance of the iPod and iTunes. Computers. In an earlier dispute, it had been agreed the two Apples would deal with music and information technology matters, respectively, a line which seemed clear enough until the appearance of the iPod and iTunes. The problem, Mr. Heaps noted, is that the dispute resolution clause is often drafted in isolation and at the last minute, when it really should be treated as part and parcel of the fabric of the agreement. A recent American Arbitration Association (AAA) study showed that companies which think these matters through do far better than companies which take a more ad hoc approach. For some companies, such as DuPont, the provision may need to mesh with a corporate approach to dispute resolution, which incorporates various metrics, including speed and cost, to assess the effectiveness of dispute resolutions techniques.

It is important to recognize that the dispute resolution provision is an essential part of the fabric of the agreement. Practitioners should be aware there are a wide range of options available, particularly to maintain rather than disrupt the underlying commercial interests. One size rarely fits all. Instead, in the context of the specific contract, the practitioners must assess what problems may arise and what sanctions and remedies may come into play. For example, some situations may favor imposing a high cost at the outset of a dispute resolution mechanism, so that the stakes are raised quickly for the parties.

While court-based solutions have gotten bad press, Mr. Heaps said he believed the pendulum had swung too far against them. In England, judges can wield considerable power and swift results can be achieved in the wake of the civil justice reforms. While there were 120,000 new proceedings in the High Court in 1999, there were only 14,000 in 2004. Courts can move quickly to protect evidence and property; in cases affecting intellectual property, such steps often are needed urgently.

As to enforceability, the wide acceptance of the New York Convention gives arbitration an advantage. Afghanistan recently became the 135th signatory; many countries have adopted either the Convention or the UNCITRAL Model Law. Warranting continuing attention is the Hague Convention on Choice of Court Agreements, which deals only with exclusive jurisdiction clauses in business-to-business relationships. Signed in June, 2005, it will come into force when ratified by two states.

Mediation has developed most extensively in common law countries, particularly the United States and the United Kingdom, where court-based mediation has been encouraged. An international grouping including France, Italy, the Netherlands, the U.K. and the U.S. has formed to promote mediation internationally and the CPR Institute is holding a conference on the subject in Brussels shortly. Mr. Heaps said mediation can work, but that it is most effective in conjunction with litigation or arbitration. He counsels against making it a pre-condition for access to

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1 The following papers were prepared in connection with the program: Kina Chuturkova, The Bulgarian Approach; James M. Klotz, Dispute Resolution in International Sales Agreements; and the case study by Jonathan Wood. To obtain copies go to www.ibanet.org/conferences/Past_2005_conferencescfm.cfm.
other mechanisms, however, because it rarely works without the presence of a “worse” alternative.

Determination by an expert is another dispute resolution route, but it is rarely seen. In the U.K., in construction disputes, a complete resolution is required in 35 days, regardless of any arbitration or choice of jurisdiction clauses. Mandatory negotiation clauses with provisions for sequentially escalating resolution measures also can be used.

**Typical International Sales Agreement Provisions**

Mr. Klotz highlighted a number of provisions typically arising in international sales agreements. Although the parties are free to choose their forum and country, often this choice is poorly thought out. There is a reflexive tendency to provide for exclusive jurisdiction, which may have drawbacks from an enforcement perspective. Courts in North America and Europe usually will enforce a judgment, albeit subject to a public policy exception. The agreement can specify the language in which proceedings as well as correspondence and negotiations will take place.

It may be desirable to include a provision on legal fees; in the United States, for example, fees don’t follow the litigation result, so a clause may be needed to authorize a court to award them. Because international sales agreements are likely to involve parties with different “home” currencies, it can be useful to include a provision for the currency in which the judgment is to be paid or to provide for a conversion calculation to another currency.

Clauses requiring good faith negotiation for 30 days prior to initiating another mechanism such as arbitration can pose perils. The parties should make sure they are not obliging themselves to undertake meditation; what constitutes good faith also is far from certain. If such a clause is used, drafters should include a provision starting the 30-day clock with service of a notice and should make clear that interim relief is not precluded.

While model arbitration clauses, such as those drafted by institutions such as the International Chamber of Commerce (ICC), the AAA or the London Court of International Arbitration, are intended to smooth the path, they have limitations. Some U.S. courts have struck down arbitration provisions in consumer contracts when they have found the cost of the arbitration to be too high. The Ontario International Arbitration Clause provides for an ad hoc clause for disputes “arising out of” the negotiation, performance, breach, existence, interpretation, termination or validity of the agreement. A clause can be limited, say, to trademark disputes, or can contain exclusions, such as for payment disputes. However, scope restrictions can afford a basis for challenging the arbitration agreement.

It may be worthwhile to address explicitly the availability of resort to the courts for injunctive relief. A provision prohibiting such resort might be unenforceable in North America. Some arbitral rules permit injunctive relief in the event the initiator of the claim goes to the other party’s forum.

Discovery, as known in the U.S., is different from almost everywhere else. Most parties leave this issue to the arbitrators to resolve. Some institutional providers have rules. Mr. Klotz’s experience is that getting adequate discovery is a problem.

The contract can specify the number and qualifications of the arbitrators. If three are to be selected, a list can be employed or each party can propose one, with the two party designees to select a third. Criteria can be specified, such as technical experience in, say, construction disputes. The decision of a majority should govern. Unanimity can be required, but can be difficult to achieve. Mr. Klotz finds that a single arbitrator is less costly. In multi-party agreements, rules for arbitrator selection can become much more complicated. UNCITRAL has no mechanism for joinder of parties.

The agreement can specify the language in which proceedings as well as correspondence and negotiations will take place. It can empower the arbitrator to find the best solution under the contract; if that is not possible, the arbitrator can look to local law.

Provisions can be made that the arbitral award is final, e.g., the arbitration is the sole and exclusive remedy regarding the claims, issues or accountings pleaded. The currency of the award can be specified and it should be free of any tax, deduction or offset. The arbitrators can be given power to determine and award costs; a provision also can charge a party resisting the award with the costs of enforcement. Even if the agreement is silent, interest usually is awarded, but it may be preferable to provide in the agreement for the rate and at what point interest attaches – at breach? At award?

If a governmental entity is a party, a sovereign immunity waiver clause may be desirable. Appropriate legal counsel should be sought as to the enforceability of the waiver and as to whether a particular jurisdiction requires a specific formulation.

This forum’s rules usually specify when the award is to be delivered, although the agreement can as well. A written opinion is not required unless specified (“reasoned opinion”). Finally, confidentiality cannot be assured simply by reliance on institutional rules; if it is desired, this should be specified in the agreement.
Case Study

Pierre Bienvenu, introduced the case study, involving problems in drafting dispute resolution clauses. For purposes of the discussion, it is assumed that both contracts are in English and that there is no choice of law clause.

Perspective: Outside Counsel to French Firm

Christopher Radtke, playing the role of outside counsel to the French parts supplier, would be looking for a resolution process which is quick and not costly. A problem with arbitrations in China is assuring that the award is enforceable and can obtain the benefit of the New York Convention. Enforcement in China of awards in China can be difficult.

Providing for French courts likely would create an enforcement problem in China and the Chinese manufacturer would not be likely to accept it. Italian courts take too long (5-7 years), which would not work here, particularly as the start-up airline is shaky financially. Accordingly, he might favor a non-exclusive jurisdiction clause allowing the parties to go to Italy, but also allowing jurisdiction elsewhere.

France seems a favorable forum for arbitration. There are national procedural rules: France permits arbitration with a sovereign as a party; interim relief is available: courts can provide relief arbitrators can’t; and a juge d’appui is available to appoint arbitrators. Mr. Radtke would not want China as a forum. He also would not choose London, as it is costly and the rules allow discovery and testimonial hearings which would not be available in France.

If arbitration is to be used, the applicable rules should be specified. He would choose the ICC. He said that the ICC often is perceived to be very expensive owing to the large up-front cost it imposes. To save costs, he would provide for only one arbitrator. Similarly, for mediation, he would refer to the ICC Mediation Rules.

Perspective: Inside Counsel, French Party

Jean-Claude Najar, acting as in-house counsel to the French parts supplier, noted that Chinese parties often refuse to agree to arbitration outside China. “China is the new frontier,” he said, “and everybody wants to be there.” Consequently, this demand usually can’t be resisted – it’s CIETAC or nothing.

He also noted that mediation is very cultural. In the United States, business executives are familiar with mediation. In Europe, however, especially southern Europe, it is an unfamiliar concept. It sometimes encounters resistance because clients think it means the lawyers are not doing their jobs. He prefers pre-dispute mediation.

Chinese Courts and Arbitration

Fei Ning agreed with Mr. Najar, that more than technical legal issues are involved, including who has the power in the business negotiations to make the choice of law decision. The speaker provided an overview of the Chinese legal system and the inter-relation of arbitration and courts.

Prior to 1995, there were two arbitration systems: administrative arbitration, for domestic Chinese disputes; and international-related disputes arbitration. Since 1995, with the China Arbitration Law in force, the two systems have been unified. Approximately 170 arbitral institutions have been set up, not under any central administrative control. Several are well-recognized by international investors, including CIETAC.

A litigant can engage the court system at two levels, first instance and second instance. The latter produces a final judgment. Specific courts at various levels include a District Court, an intermediate court, a Province (High) Court and the Supreme Court. The Supreme Court has held that only intermediate courts have jurisdiction of foreign-related disputes.

China became a signatory to the New York Convention in 1987, so a PRC court would apply it to enforce a foreign arbitration award. For an award of a Chinese body, there are two possibilities. If the award is foreign-related, enforcement would be in accordance with the Civil Procedure Law, but review is allowed only on procedural, not merits, issues. If the matter is domestic, both procedure and merits, including evidence, may be reviewed by the court. This is a major defect in Chinese arbitration law at present; the lack of finality assures the losing party will seek review. An amendment to address this is expected soon.

Finally, Chinese courts will provide judicial assistance to arbitration for Chinese arbitral tribunals. If CIETAC takes a matter, an application can be made to a Chinese court for interim relief. This is not the case for a foreign arbitral body.

While some would counsel choosing neither country’s courts because enforcement of an award would be difficult, that is not the case as between France and China. The Mutual Judicial Assistance Agreement was entered into in 1987, providing that each country’s courts have the obligation to recognize and enforce judgments of the other country’s courts in civil and commercial disputes. While
this may be the theory, however, to date, it has yet to happen.

Chinese clients prefer to be in a PRC court. They are more familiar with the legal system and it is more convenient. The language is familiar and costs are lower, although this can vary with the size of the contract at issue. Of course, the contraparty is likely to see these points as drawbacks.

Another possibility is CIETAC arbitration. The forum is well-established. New rules took effect in May, 2005. The parties can choose arbitrators from CIETAC panels, one-third of whom are foreigners. The parties also are free to determine who will be the chief arbitrator. Foreign attorneys also can appear before CIETAC, except as to matters of interpretation of PRC law; they cannot appear in PRC courts. Accordingly, CIETAC may be an attractive option.

If all else fails, a third country forum could be chosen, although this can be costly. China recognizes any foreign award, even if ad hoc. Hong Kong is a nearby possibility.

Finally, as to mediation, it is culturally favored in China, but its major drawback is the lack of binding force. CIETAC will enter an award on mediation terms so that it can be enforced.

A Bulgarian Perspective

Kina Chuturkova commented on the situation which would apply if one of the companies were Bulgarian. Bulgaria is waiting to achieve full EU membership on January 1, 2007. It is improving its law and harmonizing it with that of the European Union.

On May 20, 2005, Bulgaria adopted a Code of Private International Law which changes the procedural law regarding recognition and enforcement of judgments. A contract between a Bulgarian producer and a French company would thus be easy to address because there would be a common legal framework.

She first would identify what law is to govern the contract. If the seller were Bulgarian, she might push for Bulgarian law to apply. On the other hand, Bulgaria’s courts are overloaded now, and an international sales contract can take 4-5 years to reach final decision though a triple-tiered court system.

An arbitration clause would be a possibility, with non-exclusive jurisdiction in Bulgaria. An arbitration law adopted in 1988 is fully compatible with the UNCITRAL Model Law. Bulgaria also is a party to the New York Convention, so enforcement is easy. The costs of arbitration in Bulgaria would be low compared to those of the ICC. Bulgarian courts would act in aid of arbitration with respect to interim relief or preservation of evidence.

Finally, as to mediation, a new law effective December, 2004 provides for it as an alternative form of dispute resolution. However, she feels it needs a culture of mediation to thrive, which Bulgaria now lacks.

John Heaps interjected a comment, from a litigator’s perspective, that the dispute resolution clause must be reviewed in the context of a particular problem arising. He gave the example of an anti-suit injunction where the contract had an exclusive jurisdiction clause. The European Court of Justice holds to the rule that the court first seized of a matter must consider its jurisdiction first. While English courts have said such a clause is still enforceable, these decisions have yet to be reviewed by the European Court of Justice. Such a dispute, or one over arbitration, can lead to delay.

On the issue of litigation vs. arbitration, Jonathan Wood said his rule is that if his client will be seeking to recover sums of money, he prefers the courts. The Chinese manufacturer is supplying goods on credit terms and the French company is providing goods to the start-up with uncertain finances, so he would be worried about how to secure payment. There are various remedies available in court, including pre-judgment attachment or a Mareva injunction. In export credit, it is common to ring-fence the loan obligation to a separate document on which suit can be brought while having an arbitration clause in the sale contract. A show of hands from the audience indicated most thought courts to be the better forum for recovery of money.

Audience Comment

The program concluded with a lively segment of interaction with the audience. A lawyer from India indicated that arbitration can be faster than the courts in his country, and that a new law makes arbitral awards an award of court, leading to a quicker hearing and result. Arbitrators also can award interim relief, which also can be sought from a court during the course of an arbitration.

Another audience member noted that the practitioner should anticipate what future problems will be. Defenses, as well as claims, need to be considered.

A Florida lawyer described a case where her client never got notice of an arbitration in a foreign country. The award was then enforced under the New York Convention as a treaty, leaving very few grounds on which to try to set it aside. There was a long trial turning on what constituted proper service.
An American lawyer said Article V of the New York Convention permits an award to be set aside for failure to give notice. He, too, would go to court if only money were sought. In a sale of goods claim, however, there is always likely to be a counterclaim that the goods were defective, so he would favor arbitration. He noted a Ninth Circuit case which questioned the enforceability of arbitral awards in some situations as violative of Constitutional due process. He believes ultimately the issue will be addressed by the Supreme Court. He also noted that Sweden twice has set aside arbitral awards on public policy grounds.

A speaker from Zimbabwe said the justice system in that country has collapsed. Consequently, achieving a judicial result would be unlikely, favoring arbitration as the choice.

Anne Marie Whitesell, secretary general of the ICC International Court of Arbitration, was invited to address the group. She agreed with the view that the ICC is the most widely recognized and well-known forum, and said it is the only truly international one. While headquartered in Paris, it is not a French institution as such; the ICC is a neutral forum.

The ICC has handled 14,000 arbitrations since 1923. That it is expensive is a myth, she said. Costs are scaled to the amount in dispute, so a party knows in advance what the cost will be and can make a business judgment whether to pursue the claim. This also discourages frivolous claims. Payment actually is in three stages, not all initially, and the payments are not linked to arbitral fees. She said an ICC study showed that, in international arbitration, 2% of costs are ICC fees, 16% are arbitral fees and 82% are counsel fees. In ad hoc arbitration, there is no control of the costs or the duration. She said matters that commence as ad hoc arbitrations often wind up at the ICC.

Mr. Najar said sometimes too much can be put into an arbitration clause, which may create inconsistencies with actual rules in force. Mr. Bienvenu cautioned lawyers to be careful before modifying a model clause.

Kathleen Scanlon of New York said disputes are messy and expensive, which is why mediation clauses are becoming popular in the United States. In particular, mediation is flexible. For example, the mediator can meet with each party’s CEO separately, then with the attorneys.

Mr. Wood noted that in some jurisdictions mediation is unlawful, e.g., in Turkey, where the Turkish government has said it is mandatory to take disputes to the Turkish courts. In a case involving a road building contract, he had to persuade the Turkish authorities that what was occurring was a facilitated negotiation and not a mediation.

**Conclusion**

From the practitioner’s perspective, the Prague session offered useful insights into the manifold issues which can arise in connection with dispute resolution provisions, and the need to tailor them to the particular circumstances. The subject of dispute resolution provisions and how well they perform in different contexts warrants further examination.
About the Author

David Jacoby concentrates his practice in intellectual property and litigation. He has tried or argued cases in state and federal trial and appellate courts, in private arbitrations and at the Iran-U.S. Claims Tribunal at The Hague. His intellectual property-related work has included matters in the haute couture, motion picture, financial and software industries, involving trademarks, anti-counterfeiting, copyrights, trade secrets and contract rights. His general litigation practice has involved telecommunications issues, insurance coverage issues, trusts and estates disputes, defamation claims, and matters involving art galleries, limited partnerships and real estate.

Mr. Jacoby has lectured and written on intellectual property, litigation, environmental, insurance, freedom of information law, Internet and other topics in the United States and abroad, including at the International Bar Association and the American Bar Association. His articles have appeared in treatises and the National Law Journal, International Legal Practitioner, and The Insurance Advocate, among other periodicals, and he has been quoted on legal topics in Women's Wear Daily and various general circulation newspapers.

He served on the Board of Editors of The Columbia Law Review and was a law clerk for the Honorable William H. Timbers, U.S. Court of Appeals for the Second Circuit.

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