

Legal Update: International Arbitration & Drafting ADR Provisions

One of the most important aspects you should analyze when drafting (or entering into) an agreement if the contracting parties are located in different countries or the performance of the agreement will take place in different countries – besides whose country’s substantive law will apply to and control the contract – is how and where any legal disputes will be resolved. There are a variety of considerations that you need to carefully analyze and solutions that you should incorporate in such a situation, including:

1. Where will a dispute be litigated when it arises? Will it be in court possibly far away in a foreign country? Or, often a better choice, will the dispute be arbitrated in a neutral forum and location?
2. Should the parties be required to mediate their dispute before either litigating or arbitrating the dispute, and if so, how will this be handled and where?
3. If you choose arbitration, where will the arbitration take place?
4. If you choose arbitration, what arbitration tribunal will be used to handle the dispute?
5. If you choose arbitration, what arbitration rules and procedures will apply to the dispute?
6. If you choose arbitration, how many arbitrators will hear the dispute?
7. If you choose arbitration, must the arbitrator(s) have certain skills, background or other qualifying criteria to serve as an arbitrator?
8. If you choose arbitration, will there be discovery, how much, and what type of discovery will be permitted?
9. If you choose arbitration, how will witness testimony be presented (for example, will there be written pre-trial witness statements? Will there be cross examination?) and will remote testimony be allowed at the hearing?
10. If you choose arbitration, in what language will the arbitration be conducted and how will translations of testimony and evidence be handled?
11. If you choose arbitration, will each party bear its own costs (the American rule) or will the arbitrator(s) be allowed to award attorneys’ fees and costs?

These are just some of the important issues that you and your client will need to consider before entering into any agreement that involves an international business relationship.

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