IMPORTANT FACTORS TO CONSIDER WHEN DRAFTING THE ICC ARBITRATION CLAUSE

At the present time most foreign economic relations are based on international treaties made by and between business entities.

At the same time, commercial relations of two or more parties to civil relations often involve, and sometimes end in, a dispute. Therefore, one of the underlying matters to be considered when drafting a commercial contract is the dispute resolution procedure outlined therein.

When determining the procedure of dispute resolution, the parties to civil relations often face the need to identify local courts or an international commercial arbitration as a venue for dispute resolution. At the same time, while doing so, the parties, among other things, should make sure that the procedure they choose is effective, and that any judgment delivered can be enforced.

In modern publications, the primary focus is on comparison of application of the above referenced methods of dispute resolution. In particular, many practicing lawyers agree that the use of arbitration as a method of a dispute resolution, prevails over submission of disputes to local courts.

One of the advantages of an arbitration clause is proper resolution of a dispute that is achieved by appointment of arbiters that possess required area-specific knowledge, which is not the case in many local courts, as well as efficient enforcement of arbitration award in the states that are members to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) which was ratified by the Republic of Kazakhstan as well.

In spite of the above-mentioned advantages that an arbitration clause offers, in reality it is not uncommon that the parties to civil relations do not fully understand the consequences of its application. Moreover, these parties lack experience in situations when an arbitration clause comes into effect.

As is widely known, currently there are two main types of international commercial arbitration: ad hoc arbitration and institutional arbitration, which is more common. Examples of institutional arbitration include the London Court of International Arbitration (LCIA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Vienna International Arbitral Center (VIAC), Netherlands Arbitration Institute (NAI), and the International Court of Arbitration of the International Chamber of Commerce (ICC Arbitration).

It is worth mentioning that, in reality, the choice of the International Court of Arbitration of the International Chamber of Commerce (ICC Arbitration) is the most common. As a result, in this article we would like to focus on the practical aspects of this arbitration clause as illustrated by a case from Unicase Law Firm's practice in which the parties named the International Court of Arbitration of the International Chamber of Commerce in Geneva as a venue for dispute resolution in accordance with the current ICC Rules of Arbitration then in force.

1. Contractual arbitration clause or arbitration agreement

- A typical arbitration clause of ICC Arbitration reads as follows: "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."
- At the same time, just like with other arbitration clauses, we suggest that the parties include a more elaborated arbitration clause as described below in more detail.
- It is worth noting that an arbitration clause may be included both in the contract made by and between the parties, and in a separate arbitration agreement. In reality, when using arbitration clauses in bilateral contracts, we recommend that an arbitration clause be inserted in the contract made between the parties. A separate arbitration agreement is recommended when: (i) there are more than two parties to the legal relations; and/or (ii) legal relations between the parties are governed by, and outlined in, multiple contracts.

2. Rules of arbitration

According to the general principles outlined in the ICC Rules of Arbitration (ICC Rules of Arbitration) as at present in force, all disputes shall be settled in accordance with the rules as in force on the date arbitration proceedings commenced, unless the parties agreed to apply the rules as in force prior to conclusion of the arbitration agreement.

It should be noted that the amendments introduced to the ICC Rules of Arbitration are predominantly beneficial for the parties to arbitration proceedings. In particular, amendments related to accelerated arbitration proceedings or, in other words, "expedited procedures", were introduced in 2017. In any event, we recommend that, when drafting the arbitration clause, you take into account the above outlined provision of ICC Rules of Arbitration pertaining to the version thereof.

3. Place of arbitration

The parties determine the place of arbitration when drafting the arbitration agreement (clause). When choosing a city or a country, the parties need to account for related expenses associated with flights (of which there may be over 10), lease and type of facilities where arbitration hearings will take place, including internal meetings of the arbiters. Considering the foregoing, when selecting the place of arbitration, we recommend taking into account any expenses that will be incurred by the parties and later reimbursed by the non-prevailing party.

4. Governing law

ICC Rules of Arbitration provide that the parties shall be free to choose the law that will be applied by the arbitral tribunal when resolving the dispute. In the event the parties fail to determine the governing law, the arbitral tribunal will apply the law they consider to be most relevant.

When including the mention of the governing law in the arbitration clause/agreement, one should consider the potential need to involve lawyers specializing in a particular jurisdiction. Again, in reality, this need might involve additional expenses.

5. Accelerated arbitration proceedings

- As mentioned above, certain amendments were introduced to the ICC Rules of Arbitration on 1 March 2017. In particular, these amendments included introduction of a notion of "expedited procedures" that applies to disputes in which the disputed amount does not exceed 2,000,000 USD, unless the parties have agreed to exclude this provision. Moreover, this procedure applies only to arbitration agreements (clauses) made after 1 March 2017.
- At the same time, please note the ICC Rules of Arbitration provides that the parties may resort to "expedited procedures" even if the disputed amounts exceed the established threshold.
- The differences between the "expedited procedures" and standard arbitration proceedings, include, but are not limited to:

(i) ICCCourt may appoint a sole arbiter even if the arbitration agreement (clause) provides otherwise;

(ii) The Terms of Reference do not apply;

(iii) Arbitration expenses and arbiter fees are significantly lower;

(iv) Expedited procedures may be conducted by means of a video-conference or without hearings and examinations;

(v) Arbitration proceedings timeframes are shorter due to inapplicability of the terms of reference and limited timeframes for procedural actions to be taken by the arbitral tribunal.

- Thus, the "expedited procedures" are aimed at reduction of costs to be incurred by the parties and the overall duration of the dispute resolution process. At the same time, in reality, the parties are deprived of the opportunity to defend their point of view and appoint three arbiters.
- In view of the above, and taking into account the fact that most arbitration agreements (clauses) include a provision on finality of an arbitral award for the parties, which ipso facto implies lack of appeal rights, we believe that in reality the "expedited procedures" are not a preferred mode of dispute resolution for the parties to the arbitration.

CONCLUSION

In summary, we can infer that when drafting an arbitration clause, one should first and foremost take into account the practical aspects of its application. Moreover, it is also important to consider the need to pay all fees and charges incurred throughout the entire arbitration process. In other words, the party initiating arbitration proceedings should have financial means that will allow it to pay any expenses incurred in course of arbitration. Here, we would also like to mention the so-called "third party funding" existing in many countries. This definition applies to companies that provide financial support to the parties in course of judicial proceedings.

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