Wednesday, 30 September 2015 – Panel 2: 10:30 am – 12:00 pm

Panel 2

Smooth Sailing: Negotiating, drafting, and revising the arbitration clause with a view toward enforcement, sample clauses, selecting the right seat and choosing the right rules, limitations on the ability to contract for arbitration.

Rapporteurs: Marisa M. Beller and Alexandre A. Kachin

Moderator: Moderator- Elizabeth Silbert, King and Spalding, Atlanta, Georgia

Panelists: Marek Krasula, Deputy Counsel for the North American case management team of the ICC International Court of Arbitration in New York

Kurt Lindquist II, Womble Carlisle, Charlotte, North Carolina

Bruce Jackson, Vice President, General Counsel, and Chief Compliance Officer of JAS Worldwide

Honorable Stanley F. Birch, Retired United States Circuit Judge on the Eleventh Circuit Court of Appeals, JAMS Neutral, Atlanta, GA

Renato S. Grion, Pinheiro Neto Advogados, Sao Paulo, Brazil

The panel focused on how to negotiate arbitration clauses in contracts. Additionally they discussed how to leverage the clause to the client’s benefit and when the clause is merely an after-thought. The panel looked at sample clauses and special considerations in determining whether or not it is best to tailor the arbitration clause to the client’s needs, or change them. Finally, the panel looked at choice of rules in the seat of arbitration and enforcement.

The key themes the panel focused on were risk reduction, risk mitigation, enhancing predictability during the dispute, and enforceability of arbitration awards.

The question of whether or not to arbitrate is influenced by several factors: opting out of traditional dispute resolution mechanisms at the pre-judgment phases; deciding in advance to take to a dispute to a different body because in the international context there can be contentious cross cultural matters; and, whether it is better to have the seat closer to your home base or your opponent’s. It is important to think about common law and civil law traditions when drafting the clause to ensure it is
tailored to resolve the dispute as smoothly as possible. The panel also discussed arbitration clauses that are improperly drafted, which can lead to costly problems in the dispute phase.

As a vehicle for the discussion, the panel was presented with the following hypothetical:

**Manco, U.S. based manufacturer of rail cars, wishes to sell rail cars via a sales agreement to China Co., a Chinese based company. Manco wants to avoid jurisdiction of the Chinese courts and China Co wishes to avoid jurisdiction of U.S. courts. The governing law of the contract is UK law. The original language of the contract is English. The contract is for a large dollar amount, which can increase the possibility of a dispute occurring. Additionally, there may also be smaller disputes that you may want to resolve more quickly. Manco wants to limit discovery because they believe China Co. is less likely to comply with U.S. style discovery, which has broad rules. China Co.'s main assets are in China and Singapore. The location of the assets is important because a U.S. court judgment would have to be converted to a Chinese court judgment to be enforced. An international arbitration award between two parties to the New York Convention is enforceable via that mechanism.**

**First Question:** If you were representing China Co. what advice would you give about whether China Co. should agree to arbitration in these circumstances?

**Renato S. Grion:** Mr. Grion believes arbitration should be the default method of dispute resolution in international agreements. It is a good method when the respective parties come from different cultures and legal backgrounds. In this case China would be concerned with enforcement of an award. With rail cars, there may be a delay in delivery or there may be defects in rail cars, so an arbitration clause is ideal.

Additionally, China may be thinking about enforcement issues. With the New York Convention, awards are often enforceable globally because 145 countries have ratified the convention. China Co. may also be thinking about the seat of arbitration.

**Second Question:** What if China Co. was a Brazilian company? What seat of arbitration would be preferable?

**Renato S. Grion:** The concerns would be the same as they are with China Co. The Brazilian company would favor Brazil as the seat of arbitration. If the award is given in Brazil, you must enforce it in Brazilian courts. If you obtain an award outside Brazil, such as China or the U.S., you would have to take any award to confirmation proceedings before the Superior Court of Justice. It would take about one
and a half years for a company to enforce an award against a Brazilian company. If the Brazilian company has assets around the globe, then you could have a neutral seat and take enforcement in other jurisdictions.

*Third Question:* If Manco decided to get China Co. to come to the U.S., what would be the difference between using traditional litigation and arbitration? China Co. says it does not want to come to the U.S. because of unpredictable juries. In your experience is this a valid complaint?

**Bruce Jackson:** Mr. Jackson believes the purpose of arbitration is predictability. Given its culture and history China Co. would be reticent to allow a U.S. jury to decide the matter. This does not mean you cannot contract around that issue. The parties would waive any rights to a jury trial and agree to try case before an Article III judge or a neutral judge where life tenure and re-election are not concerns. Other countries may have the same problem, for example the U.S. may be hesitant to go to a non-common law country and rely on a judicial officer, especially in Europe or Asia.

*Fourth Question:* Are there situations where you would advise international arbitration instead of traditional court?

**Judge Stanley Birch:** Judge Birch believes in an intellectual property situation where a licensor of source code may want to keep the code confidential because the exploitation of the intellectual property (the source code) could ruin the company, it would be essential to have quick access to an enforcement mechanism like a Federal Court, in order to obtain a Temporary Restraining Order to prevent the release of the confidential Intellectual property being licensed. You may also want to obtain an asset freeze if licensee agreements fail, or a dispute arises over the license agreement, or the licensee goes into bankruptcy and its assets are vulnerable to disclosure. Asset freezes, however, are very difficult to obtain in arbitration. The key is to contract around this. You can still have traditional arbitration with a contract provision that includes the right to use federal court to obtain an order to stop the release of confidential material. Additionally, you may want to give the parties a right to resort to court to prevent the release of intellectual property. The important thing to look at is the country you are in and what kind of tangible and intangible assets the company has.
Fifth Question: How would you advise Manco if the company believed that a pre-shipment paid letter of credit would alleviate the need for an arbitration clause, because they did not foresee a dispute arising?

Kurt Lindquist II: Mr. Lindquist believes whoever explained the situation to Manco did not do a good job explaining the benefits of arbitration, especially between China and the U.S. If it were easy to use guaranteed payment and delivery of product at the end of a contract, lawyers would be out of business because there would be no disputes. Manco needs to have an arbitration provision in this contract to govern issues that may arise from the minute the contract is inked to delivery of the product.

Sixth Question: In a sale of goods contract, do you think arbitration is a good place to hear problems such as warranty defect or the sale of goods?

Kurt Lindquist II: Mr. Lindquist said it depends on the substantive law that applies. The Uniform Commercial Code (UCC) would work nicely through arbitration. In addition, the Convention on Sale of Goods applies to this case, which provides different ways to deal with product quality issues.

Seventh Question: Would you advise your client Manco to go forward with an international arbitration clause where the UCC doesn’t apply?

Kurt Lindquist II: Mr. Lindquist said that some provisions under the convention are favorable to the seller. The UCC is equipped to handle warranty defects but you would need to determine the substantive law that applies to make a well-informed decision. Moreover, the U.N. Convention on the sale of goods, which is applicable, has ways to address warranties and product quality.

Eighth Question: In your experience shipping for international contracts do you see a lot of arbitration clauses?

Judge Stanley Birch: Judge Birch believes putting U.S. law in international contracts doesn’t make sense. He proposed an alternative in which Manco would carefully draft alternatives and present them in a reasonable way with an explanation hoping they agree. It is important that Manco be in a position to enforce the arbitration award. One issue with enforcement in China is that the court will have to determine whether a matter is foreign or domestic. If both parties are from China, the matter would be viewed as domestic. Matters of Foreign Direct Investment are considered foreign matters. Even though
China signed the convention, Chinese courts will sometimes not enforce an award unless the courts perceive they are receiving reciprocal treatment.

With the increasing costs of arbitration, companies are shifting back to using the courts. Therefore, it is important to look at where the U.S. Company is located, where you are likely to get relief, and tailor your arbitration clause to fit.

*Ninth Question:* What are some of your favorite clauses/provisions to have included in an Arbitration Agreement?

**Bruce Jackson:** Mr. Jackson feels that one of the most important provisions in an Arbitration Clause is whether to have one or three arbitrators. Provisions that allow each side to pick an arbitrator do not generally have good results. The neutral arbitrator can end up mediating between the two party-appointed arbitrators. If having three arbitrators is unavoidable, the drafter should seek to have the arbitration held in a familiar venue. In contracts for transport of goods, it is important to exclude from the scope of arbitration liabilities that are otherwise addressed, such as insurance for cargo.

Mr. Jackson also pointed out that in order to prevent a foreign court from scrutinizing an arbitrator’s opinion, it is best to not have the arbitrator render a reasoned opinion. This is particularly important in Saudi Arabia and China where the courts scrutinize arbitration awards for fairness.

*Tenth Question:* Can you think of an example where you would want to deviate from a standard clause?

Mr. Lindquist pointed out that disputes dealing with intellectual property or copyrights should not be arbitrated because they must be resolved in the public domain.

Additionally, it may be beneficial to add a step clause to an arbitration agreement. Although there is a lot of debate about the efficacy of step clauses, they can be effective in resolving the dispute. Step clauses typically require parties to first meet to discuss differences, then to mediate, and then to arbitrate the dispute. Having leaders of companies talk to one another can be effective in resolving the dispute early.
Arbitration clauses in agreements between multiple parties, especially in the construction industry, may or may not have a provision that addresses the different ways to resolve a dispute that a step clause covers. It may be prudent to include provisions in an arbitration clause that address the situations where this is the case.

**Eleventh Question:** What are some ways that you have seen a party mess up an Arbitration Clause?

**Judge Stanley Birch:** Judge Birch said that it is better to use arbitration clauses that have been used frequently in the past and have precedent interpreting their meaning. Tried and true clauses with clear meaning are easier to have enforced in court than new and innovative ones.

**Twelfth Question:** Are there ways to rehabilitate a defective arbitration clause once the dispute occurs?

**Judge Stanley Birch:** Judge Birch pointed out that parties must contract to have the arbitration clause in the first place, so it can always be renegotiated, even if parties disagree about the meaning of the clause. Even very costly discovery issues get negotiated sometimes.

**Thirteenth Question:** What are some mistakes that are fatal to an arbitration clause?

**Judge Stanley Birch:** Judge Birch responded that attempting to limit what the arbitrator can do often causes problems. It is better to specifically state the qualifications that would enable the parties to trust the arbitrator.

**Fourteenth Question:** If the parties specify the ICC Rules of Arbitration but also add something in the clause that is problematic, is there any way for ICC to correct the mistakes that parties make?

**Marek Krasula:** Mr. Krasula said that simply stating ICC rules govern is not enough; there are many parts of the ICC rules. The ICC has a gatekeeping role in determining whether the parties have in fact agreed to arbitrate. Most times when there are two participating parties they will both agree to continue with arbitration. The problem arises when there is a non-participating respondent. Out of 800
cases per year, over the span of four years, there were only 26 cases where the parties had not agreed to arbitrate at the ICC. Some of the problems that arise in the agreement are:

1. Agreements that refer to institutions that do not exist.
2. Parties should be careful not to specify too many qualifications for an arbitrator because it makes it very difficult to find an arbitrator that meets all of the qualifications.
3. Arbitration agreements that specify that an institution other than ICC will use ICC Rules. Only the ICC is authorized to administer ICC Rules.
4. Time limits for hearing awards. Failing to meet those limits can endanger the award due to uncertainty.

Bruce Jackson: Mr. Jackson also pointed out that in Saudi Arabia and other countries that are signatories to the Riyadh Convention, courts will examine the arbitration award to see if it comports with Sharia Law. In countries that are signatories to the Riyadh Convention, it is a good practice to have an arbitrator who is familiar with Sharia Law.

Fifteenth Question: Is a bad arbitration clause better than no arbitration clause?

Mr. Lindquist stated that even in the eleventh hour situations it is better to attempt to draft an arbitration clause that all parties agree to rather than having a poorly drafted clause.

Sixteenth Question: How do you convince clients that an arbitration clause is too important to throw in at the last minute?

Renato S. Grion: Mr. Grion said that clients often do not recognize the scope of problems that can arise when the arbitration clause is not carefully considered. It is important to have someone point out some of the specific problems that can arise and force the client to reconsider some of their assumptions. For instance, when arbitrating a case against a state owned company, failure to include a provision dealing with waivers of sovereign immunity can render the whole award unenforceable after a long arbitration process.
Seventeenth Question: What is the difference between Seat, Venue and Governing Law?

Marek Krasula: Mr. Krasula explained that sometimes parties may choose one place as the Seat of Arbitration but, for practical reasons, choose to have the actual arbitration located in another physical location.

Eighteenth Question: Have you ever had a difficult scenario or a problem with the Seat of Arbitration? Do you have a favorite Seat of Arbitration?

Judge Stanley Birch: Judge Birch stated that the distinction between Seats of Arbitration is what procedure they use, but that does not mean that in the Contract the parties cannot alter that. For instance in an Arbitration that is held in Europe that involves a lot of discovery, it may be practical to choose U.S. Federal Rules, particularly when the case involves a lot of American business issues. However, one must keep in mind that the particular law that is chosen may not be appropriate. Foreign arbitrators can be hostile to the idea of U.S. style discovery.

Nineteenth Question: What are some of the considerations that you take into account when considering governing law of the arbitration?

Kurt Lindquist II: Mr. Lindquist suggested that first, choose home jurisdiction if possible. Otherwise, one should look for a jurisdiction or law that is similar to the home jurisdiction. It may be better to consider a jurisdiction that has well-developed law that deals with the issues in question regularly.

Twentieth Question: Does ICC see a lot of proceedings that are not in English and that you have to provide translation services for?

Marek Krasula: Mr. Krasula pointed out that most often there are arbitration clauses that specify that the arbitrator will speak English and Spanish. In rare situations when a contract does not clearly specify a language, the ICC will appoint an individual that is able to handle a dispute between two parties that speak different languages.
Twenty-First Question: Once there is an award, how does the Court handle the enforcement of an arbitral award?

Judge Stanley Birch: Judge Birch said that the Courts often prefer certain issues to be heard in arbitration. Any case that is arbitrated is one less that the Court has to deal with. Judges understand that this is part and parcel of the process. Manifest disregard of the law is no longer available as grounds for challenging an award in the 11th Circuit. Other circuits may handle challenging an award for manifest disregard for the law differently. It is important, particularly in a foreign jurisdiction, to find out before drafting an arbitration clause if it is enforceable.

Twenty-Second Question: What is your experience with award enforcement?

Renato Grion: Mr. Grion pointed out that most awards do comply with local rules but a few parties may resist payment. It may be wise to pay careful attention to the proceedings to determine if the opposing party has assets in that jurisdiction to make the award collectable.