

Arbitration of international disputes by universities

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International engagement continues to define modern higher education. Despite recent concerns about foreign influences on United States education and research, cross-border contracts continue apace. Complex agreements with foreign governments, universities, and commercial entities are nothing new for education institutions, but greater scrutiny is now being applied to the terms and conditions of these engagements, especially in these times of heightened attention to foreign engagement.

Universities around the globe work hard to avoid formal disputes in contracts. But disagreements still occur, and so it is imperative for contracts to include thoughtful dispute resolution clauses. Such clauses provide valuable protections against known and unknown risks, and they should be reviewed regularly and tailored to effectively address the unique challenges that arise in transnational programs. This note summarizes the benefits and drawbacks of pursuing arbitration in lieu of litigation and describes the main issues that counsel should consider when drafting these clauses.

Arbitration or litigation?

Before defaulting to an arbitration or litigation proceeding for any contract, the initial question is whether arbitration or litigation is the appropriate dispute resolution forum for the contract at hand. (This is not to suggest that other formal and informal dispute resolution methods such as mediation are disfavored, but we focus here on arbitration and litigation only.) While arbitration is widely seen as preferable to litigation (in light of its finality and private nature, among other things), there are myriad reasons why a party may prefer – or be forced to pursue – one path over another.

- **Is arbitration permitted?** Many public institutions, both within and outside the United States, are not permitted to participate in arbitration, or they are precluded from arbitration without special internal approvals and procedures. Certain kinds of disputes (such as employment disputes) also may not be submitted to arbitration in various countries. Counsel may need local law input on these issues before finalizing the dispute resolution clause.
- **Availability of remedies.** Most international arbitration rules do not allow for punitive damages or other special damages. Injunctive relief and specific performance are difficult to obtain or enforce when issued by an arbitral tribunal. If a party requires any of these remedies, litigation may be a better option.

- **The seat of arbitration.** Depending on the jurisdiction, local law of the seat (which will typically govern the procedural aspects of the arbitration) may mandate that certain kinds of disputes are heard by a court, or allow for undue interference by local courts in some non-U.S. jurisdictions. Selecting the seat of arbitration carefully is one of the most important aspects of crafting a dispute resolution clause.
- **Importance of choosing a neutral forum and adjudicator.** Local courts in certain countries may exhibit a bias in favor of the local party, but arbitration allows both parties to agree to an impartial forum and adjudicator.
- **Importance of expertise.** Depending on the complexity of a potential dispute, parties may prefer to select arbitrators who are more familiar with the subject matter at issue. This can be particularly useful for a university, as disputes can include complex questions involving real estate, intellectual property, or other subjects that a given judge may not have the time or experience to understand.
- **Confidentiality.** Because the proceedings and results of arbitrations are usually kept confidential, they prevent the kind of publicity that frequently accompanies court cases.
- **Enforceability.** Decisions of a foreign court are only enforceable in that country and in any other country that recognizes judgments from the issuing jurisdiction. This can be a significant hurdle, as many countries do not recognize the legal judgments of others and, without this recognition, these judgments are nearly impossible to enforce. However, arbitral awards from the 148 countries that have signed the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) are recognized by all signatories. This recognition makes it much easier for the prevailing party to actually enforce an arbitral award in any relevant jurisdiction.
- **Finality.** Arbitral awards are rarely appealable and can be reviewed only on limited grounds – a characteristic that can be beneficial but one that also carries significant risk. Eliminating lengthy appeals can help reduce the cost and length of the dispute resolution procedure. However, removing this recourse puts much more importance on the arbitration itself. Perceived irregularities or biases are difficult to remedy once the arbitration begins because binding arbitration typically leaves both parties with only "one bite at the apple."
- **Exchanging evidence.** American-style litigation frequently involves a long and expensive discovery process, where both parties are entitled to examine a wide range of documents. This can be beneficial in some instances, particularly where the university might be the claimant. But in instances where the university wishes to minimize exposure to legal proceedings, arbitration can ensure a more limited scope of disclosures.
- **Expedience and cost.** Although arbitration can be faster and cheaper than litigation, this is not always the case. Many factors can slow down the pace of arbitration proceedings and increase the cost. While parties should take this into account when choosing arbitration, the arbitrators may still drag out the process despite the parties' best efforts. Disputes may also arise between the parties about arbitral procedures, which can lead to satellite or parallel proceedings.

Defining arbitration objectives

There are many decisions to make when drafting an arbitration clause, and repurposing the same clause from contract to contract may not be effective. A study abroad contract with a foreign university is very different from scientific research collaboration with a foreign sovereign. Each

initiative has unique goals and considerations – and distinct risks – that inform the content of a dispute resolution clause. Nevertheless, some overarching objectives in designing a cross-border disputes mechanism often include:

- a) Selecting a neutral and fair forum for the resolution of any dispute arising from the contract.
- b) Minimizing the cost of a dispute process.
- c) Ensuring that the dispute resolution process does not disrupt the ongoing relationship or the business of the university, wherever feasible.
- d) Protecting confidentiality and reputation.

For example, universities have regulatory obligations to provide students a reasonable opportunity to complete their education program if an institutional location ceases to operate before enrolled students have completed their program of study. A carefully drafted arbitration clause may ensure that both parties continue to provide this opportunity to students notwithstanding initiation of an arbitration proceeding. These and other considerations specific to the international program are critical to tailoring an arbitration clause that will effectively guide any arbitral processes that arises from the contract.

In order to be enforceable and effective, any clause must i) be mandatory ("shall" rather than "may"); ii) define the scope of the covered disputes ("all disputes between the parties" or "all disputes arising from this contract," for example); and iii) select how the disputes are to be administered.

Arbitral institution or ad hoc?

While all three of the foregoing requirements are equally important, the last one (administration of the arbitration) is more complicated and deserves further discussion. Selecting the governing rules for any dispute is initially a choice between using an international arbitral institution or resorting to ad hoc arbitration. Arbitral institutions provide trained staff to help ensure an efficient process, and some (like the International Chamber of Commerce) offer scrutiny of draft arbitral awards, which can prove quite valuable. The parties can agree to opt out of any or all of the rules in their contract, but the framework these arbitral institutions provide lends legitimacy and dependability to the process. Of course, these benefits do come with a price, and the fees to the institution can add to the overall cost of the arbitration.

An ad hoc arbitration, on the other hand, can provide a cheaper process because it does not involve a formal arbitral institution. Depending on how cooperative the parties are, they can work together to create a specific set of rules that is more narrowly tailored to the needs of the dispute than the institutional frameworks. This can help lower costs and shorten the overall process.

Other items to consider in drafting a clause

Key factors include, but are not limited to, where the parties are from, what kinds of disputes are typical to the transaction, and in which position (claimant or respondent) the client is most likely to find itself and accordingly how much discovery they will be seeking. The arbitration clause must strike a delicate balance; too much detail and future procedures will be stunted because of unreasonable rigidity; not enough detail and there will be too much room for interpretation. Mindful of these considerations, institutions should make up-front decisions about the following items while drafting an arbitration clause.

How many arbitrators to hear a dispute

The vast majority of arbitration tribunals are made up of either one or three members. The parties may have different views on this when drafting the arbitration clause, as it can largely depend on the parties' belief in their ability to work together during a dispute. Small disputes that do not involve complex questions or large sums of money are better served by sole arbitrators who are jointly selected by both parties. Sole arbitrators are cheaper and tend to shorten the length of arbitration.

However, if disputes covered by the arbitration clause are likely to be complicated or involve large sums of money, the parties are better off using three arbitrators. In a three-person tribunal, each side usually is able to select one arbitrator, and the two appointees together select a third who serves as the chairperson of the tribunal. While having three arbitrators is more costly and can cause the arbitration to last longer, this full tribunal adds stability and legitimacy to the proceedings. Because the parties cannot challenge the ultimate award, having more than one person serving as the adjudicator decreases the potential of unforeseen or unfair outcomes. Furthermore, because each party can vet and nominate one-third of the panel, they can exert more control over the arbitral process itself.

Choose an appropriate seat of the arbitration

Not only must the parties consider the cultural and geographic neutrality of the arbitral seat (as discussed above) but they should also consider other specific characteristics of the seat as well. For example, the law of the arbitral seat governs the procedural aspects of the proceedings not covered in the arbitration rules. The seat also dictates where an award can be set-aside (nullified).

Fee distribution

How arbitral fees are distributed can significantly reduce the university's risk of exposure to arbitral disputes. A dispute resolution clause that mandates a "fee-shifting" arrangement (where the losing party must pay the legal fees for itself and for the victor) is likely to deter legal challenges because the initiating party bears more risk by bringing forward a complaint. The "American Rule" on the other hand, where each party bears its own fees, tends to encourage more conflicts because the challenging party does not risk having to pay both parties' legal fees.

Conclusion

Looking ahead, the importance of sophisticated and thoughtful dispute resolution terms in cross-border agreements will be crucial as scrutiny of international engagements grows. Cost-effective, expeditious international arbitration is possible with close attention to an appropriate arbitration clause and a carefully orchestrated arbitration process.

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