



Questions to Ask Before Starting International Arbitration

By B. Ted Howes – December 22, 2011

No one can deny the increasing importance of international arbitration in today's connected business world. Because arbitration awards are much easier to enforce abroad than domestic court judgments are, and due to the perceived neutrality of international arbitration compared to home-court lawsuits, arbitration has significant advantages over litigation in resolving international commercial disputes. For most sophisticated corporations, arbitration has become the default dispute-resolution mechanism for international transactions. As a result, international arbitration has grown in tandem with the explosive growth of international trade.

Despite the rapid growth and the acceptance of international arbitration, some U.S. litigators and in-house counsel are not prepared for the special demands of this unique dispute-resolution mechanism. What many U.S. practitioners fail to appreciate is that international arbitration is a hybrid form of dispute resolution that combines characteristics of both the common-law and civil-law legal systems. International arbitration is also, by definition, complicated by transnational legal issues and competing legal jurisdictions and cultures. As a result, those attorneys who are not accustomed to the unique procedures, rules, and customs of international arbitration may encounter unpleasant surprises if they rush into a case without adequate forethought.

To effectively plan for and manage an international arbitration, attorneys are advised to ask six strategic questions at the beginning of the arbitral process—which, for a plaintiff/claimant, means before the commencement of the arbitration, if possible, and, for a defendant/respondent, means on receipt of the claimant's arbitration threat. Answering these questions (or, for in-house counsel, demanding answers to these questions from outside counsel) should not be a rote exercise; doing it right takes time and mental energy. That said, a thorough and realistic evaluation of these six inquiries will likely save legal fees in the long run and significantly increase the chances of victory in the arbitration.

If You Win an Award, Can You Enforce or Collect It?

An arbitration award that cannot be collected is not worth the paper it's written on. It is therefore crucial that a party considering international arbitration determine, as an initial matter, whether it can enforce and collect a future arbitral award in its favor. As outside counsel, the last thing you want to tell your client is that you won the arbitration but cannot collect the award.

Needless to say, an arbitral tribunal does not have the power of the state at its disposal and, accordingly, cannot force a recalcitrant losing party to pay the winning party. Thus, when a losing party refuses to voluntarily pay an arbitration award, it becomes necessary for the winning party to enforce the award in a court located in the jurisdiction where the losing party resides

Published on the Commercial & Business Litigation Committee's website, <http://apps.americanbar.org/litigation/committees/commercial>. © 2011 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.



and/or where the losing party's assets are situated. While the same holds true for a purely domestic arbitration, enforcement takes on added complications in international arbitration because the losing party's assets are normally located abroad, requiring the intervention of foreign courts and the analysis of foreign laws.

To determine whether a future international arbitration award is collectible, a party considering the commencement of arbitration should make two fundamental inquiries. First, the party should inquire whether its adversary has sufficient assets to satisfy the best estimated dollar value of a future award and, if so, in which countries those assets are located. Because the answer to this inquiry is not always obvious, it may be necessary to delegate the inquiry to a private investigator with expertise in the area of tracing foreign assets. Moreover, even if it is determined that the adverse party has sufficient assets in a particular country, other foreign law questions may still need to be answered. For example, if the adverse party owns assets only indirectly, such as through a subsidiary or other affiliate, do the country's laws recognize that subsidiaries may be treated as "alter egos" of their parent corporations, such that a subsidiary's assets can be attached to support an arbitration award against the parent? Also, in the event that the adverse party attempts to transfer the assets to a third party after the commencement of the arbitration, can the transfer be nullified or enjoined as a fraudulent conveyance under the foreign country's laws?

Second, a party contemplating international arbitration should always determine whether the country in which the adverse party's assets are located is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards. The New York Convention is the highly successful multinational treaty that forms the backbone of the international arbitration regime. Under this treaty, signatory nation states agree to prohibit their citizens from litigating disputes that are subject to a foreign arbitration agreement and to require their courts to recognize and enforce foreign arbitration awards. As of November 2011, 146 countries have ratified the New York Convention. [U.N. Commission on International Trade Law](#) (last visited Nov. 28, 2011). This includes almost all of the industrialized nations and most of the developing world.

That said, if the adverse party and its assets are located in one of the few countries that is not a signatory to the New York Convention, the country's courts will not be treaty-bound to enforce a future arbitration award. Moreover, even if the adverse party resides in a country that is a signatory to the New York Convention, it is advisable to investigate how faithfully the country's courts actually honor the treaty's obligations. Under article 5(2)(b) of the treaty, most signatories have reserved the right not to enforce foreign arbitration awards that violate "public policy." While most countries have interpreted this public-policy exception narrowly and are therefore consistent at enforcing foreign arbitration awards without second guessing, the courts of some signatory states, particularly in the developing world, have been known to refuse to enforce foreign arbitral awards based on a broad interpretation of the public-policy exception. *See, e.g.,*

Published on the Commercial & Business Litigation Committee's website, <http://apps.americanbar.org/litigation/committees/commercial>. © 2011 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* § 9–30 (3d ed. 1999) (“The fact that different states have different concepts of their own public policy means that there is a risk that one state may set aside an award that others would regard as valid.”); Obinna Ozumba, [Enforcement of Arbitral Awards: Does the Public Policy Create Inconsistency?](#) [PDF], University of Dundee Centre for Energy, Petroleum, and Mineral Law and Policy (last visited Nov. 28, 2011). One should therefore consult with local counsel in the country at issue to obtain a realistic assessment of the risks involved in enforcing a future arbitral award.

Do You Need Preliminary Injunctive Relief from the Courts?

Contrary to common wisdom, international arbitrators are empowered to issue preliminary injunctive relief. For instance, article 23 of the International Chamber of Commerce (ICC) Rules of Arbitration provides that “[u]nless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitration Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate.” The same holds true with most of the other major international arbitration rules, including article 25 of the London Court of International Arbitration (LCIA) Rules and article 21 of the International Centre for Dispute Resolution (ICDR) International Arbitration Rules.

However, there is a significant limitation on obtaining preliminary injunctive relief from an arbitration panel: An arbitral panel cannot issue injunctive relief until it is constituted. Because it normally takes two to three months from the time an arbitration demand is filed to select and constitute an arbitration panel, there is a window of time at the beginning of a dispute when there is no arbitration panel in place to issue a preliminary injunction. Unfortunately, this is the time when parties frequently need to obtain emergency injunctive relief.

Thus, if a party contemplating the commencement of international arbitration knows that it will need injunctive relief on an expedited basis, it is important to evaluate—before filing the arbitration demand, if possible—whether such relief can be obtained from the courts that have jurisdiction over the adverse party. Like the United States, most countries have judicial rules in place that allow courts to issue injunctive relief “in aid of arbitration” (such as pending the composition of the arbitration tribunal). Determining whether such injunctive relief can be obtained from a foreign court, however, can be a time-consuming process. First, it is necessary to decide where such preliminary injunctive relief should be sought—in the courts where the adverse party resides, in the courts where the adverse party’s assets are located, or some combination of the two? Next, it is necessary to research the laws of the relevant countries to confirm the availability of preliminary injunctive relief over the adversary or its assets and then, assuming such relief is available, to determine what procedural hurdles must be overcome to obtain the relief and how quickly the relief can be obtained. All of this will require the early retention of foreign counsel.



Obtaining a preliminary injunction is never easy. It takes on added difficulty and time in the context of an international arbitration. Planning ahead is key to a successful injunction strategy.

It should be noted that some international arbitration organizations have recently amended their rules to provide for the appointment of an “emergency arbitrator” to hear applications for injunctive relief pending the constitution to the arbitration tribunal. If this procedure is available, it should be considered as an alternative to seeking injunctive relief in the courts.

What Should You Look For in an Arbitrator?

Choosing an arbitrator is necessarily a subjective process—an art rather than a science. However, it is also one of the most important decisions, if not the most important decision, that a party will make in an international arbitration. One should never rush an arbitrator choice or just accept the first candidate presented. On the contrary, it is advisable to slow down and consider which arbitrator candidates have the personal traits best suited for international arbitration. Certain guidelines will help in this regard.

First, it is always advisable to choose an arbitrator with the intellectual heft necessary to understand and adjudicate complex international legal issues. The circle of reputable international arbitrators is rather small, and a neophyte without any experience in international law could be rolled over by the other two arbitrators. After all, decisions on a three-person arbitration panel only require a majority vote.

Second, it is never advisable to choose a friend or colleague who is “in your corner.” An arbitrator who openly advocates for the party that appointed him or her will quickly turn off the other two arbitrators and lose the respect of the panel. Integrity is critical. Sensitivity to other cultural and legal traditions is likewise important, as the other two arbitrators on the panel will usually not be American citizens.

Third, one should always take the time necessary to conduct due diligence on arbitrator candidates. This includes something as obvious as checking the arbitrator’s background to ensure that he or she has no disciplinary violations or a criminal record. It also includes reviewing the arbitrator’s published writings to try to gauge how he or she may view the case at hand. Most contractual disputes come down to a “contract” side versus an “equity” side; the published writings of an arbitrator candidate may give a clue as to which side he or she would favor.

Finally, while there are certain limited circumstances in which it may be advisable to appoint a nonlawyer as an arbitrator, this is usually not a good idea. International arbitrators, like judges, apply and decide the law. If technical expertise is needed, expert witnesses can always be retained to teach the arbitrators.

Should You Try to Seek Early Resolution on Any Claims?

International arbitration rules do not expressly include procedural devices for the expedited

Published on the Commercial & Business Litigation Committee’s website, <http://apps.americanbar.org/litigation/committees/commercial>. © 2011 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.



resolution of claims, such as motions to dismiss and motions for summary judgment. On the contrary, many international arbitration rules appear to require evidentiary hearings. *See, e.g.*, ICC Article 20(2) (“After studying the written submissions of the parties and all documents relied upon, the Arbitration Tribunal shall hear the parties together in person if any of them so requests . . .”). Consistent with its civil-law roots, there has also been a long tradition in international arbitration for arbitrators to defer the resolution on all claims until the end of the arbitration.

Despite this tradition, it is becoming more common for parties to seek the expedited resolution of claims in international arbitration. The basis for seeking early claim resolution comes from two complementary rules that exist in most international arbitration rules. First, almost all international arbitration rules provide arbitrators with wide discretion in how they wish to conduct the arbitration. Article 20(1) of the ICC rules, for example, gives arbitrators the authority to establish the facts “by all appropriate means.” To take another example, article 14.2 of the LCIA rules provides that “[t]he Arbitration Tribunal shall have *the widest discretion* to discharge its duties” (emphasis added).

Second, most international arbitration rules give arbitrators the authority to bifurcate the arbitral proceeding. Article 26.7 of the LCIA rules illustrates this point: “The Arbitral may make separate awards on different issues at different times. Such awards shall have the same status and effect as any other award made by the Arbitral Tribunal.” Similarly, article 16(3) of the ICDR rules provides that the “tribunal may in its discretion . . . bifurcate proceedings . . . and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.”

Together, these two rules lead to a pathway for creative advocacy. By appealing to the broad authority of the arbitrators, including their authority to bifurcate issues, it is indeed possible to score an early knockout of a frivolous claim asserted by the adverse party. It is even possible, though more difficult, to obtain an early decision on a claim asserted against the adverse party. However, like all good things, this takes advanced planning.

To seek expedited dismissal of a claim in international arbitration, it is, of course, necessary to first determine whether any claims are susceptible to dismissal as a matter of law or undisputed fact. For example, claims barred by the statute of limitations or claims that are contrary to the unambiguous language of the contract fall in this category. If it is determined that such claims exist, it is recommended that the moving party make a written application to the arbitration tribunal, seeking a bifurcated decision on the deficient claims, as early as possible. The sooner the tribunal is alerted to the existence of a frivolous claim, the more likely it is that it will entertain an early disposition of the claim without waiting for the final hearing.



Obtaining an expedited decision (or an “interim award”) on an affirmative claim for relief is more difficult and may require showing the threat of irreparable injury if the claim is not decided quickly. Like any decision-makers, arbitrators do not want to make a decision after it is too late for the decision to provide adequate relief. Arbitrators want their decisions to have meaning. At the same time, a party seeking the early disposition of an expedited claim should be prepared to consent to an evidentiary hearing on the claim if the tribunal so requires.

The lesson here is simple: Tradition should not stand in the way of a good application for the expedited resolution of a claim in international arbitration. There is little to lose in trying. If the arbitration tribunal permits a party to move forward with such an application, it could result in the early disposal of the adverse party’s most frivolous (and often largest dollar) claims and, in turn, possibly induce the adverse party to settle. If the application is denied on technical or traditional grounds, it will still serve to highlight the weaknesses of the adverse party’s claims to the tribunal at an early stage in the proceeding. This early painting of the dispute will hopefully color the tribunal’s perspective when it has to decide the claim later on in the arbitration.

What Documents Do You Need to Prove Your Claims/Defenses?

It is well known that the scope of document discovery in U.S. litigation is extremely broad. Under both U.S. federal and state-court procedural rules, parties are generally allowed to request “any and all” documents concerning a wide variety of subject categories, even if the documents may not be admissible at trial. Indeed, Federal Rule of Civil Procedure 26(b)(1) provides that parties may make any document request so long as the request “appears reasonably calculated to lead to the discovery of admissible evidence.” The result is that U.S. litigators are relieved of the pressure, at least early in litigation, of identifying the specific documents that they need to prove their case. U.S. litigators have the luxury to cast a wide net and see what interesting documents they may catch. The same holds true, though to a lesser extent, in domestic U.S. arbitration.

This is not the case in international arbitration. In international arbitration, parties are normally expected to propound their requests with “reasonable specificity.” *See* W. Laurence Craig, William W. Park & Jan Paulsson, *International Chamber of Commerce Arbitration*, § 26.01 (3d ed. 2000). Generally speaking, this means identifying specific documents (such as a copy of a particular contract) or relatively narrow categories of documents. As *International Chamber of Commerce Arbitration* notes, international arbitration does not countenance “fishing expeditions.”

As any seasoned arbitration attorney will attest, identifying the specific documents that attorneys need to prove their claims and defenses is not an easy task. It takes careful strategic forethought, and it takes time. And, for the most part, international arbitration does not afford parties a lot of time to prepare their document requests. Parties are usually expected to explain what discovery they intend to seek at the initial conference with the arbitrators and, then, to exchange their document requests shortly thereafter. Moreover, unlike U.S. rules of civil procedure, most



international arbitration rules do not permit parties to serve supplemental document requests as a matter of right. There is no guarantee of a do-over.

It is therefore advisable that parties to an international arbitration ask themselves early in the process what specific documents they need to prove their claims and defenses. Taking the time to answer this question will not merely serve as preparation for document requests; it will also help crystallize what document discovery is actually achievable in the arbitration and give clients a better understanding of what they can, and cannot, get from the other side.

Do You Need Third-Party Discovery, and Can You Get It?

It is far more difficult to obtain third-party discovery in international arbitration than it is in U.S. litigation. Indeed, if the arbitration is taking place outside the United States, as most international arbitrations do, or if the potential third-party witness is located outside the United States, which is also routine in international arbitration, many countries do not allow arbitration tribunals to compel third-party discovery at all. At the very least, obtaining discovery from third parties located outside the United States will involve lengthy and time-consuming judicial procedures. It will also require the retention of foreign attorneys and the research of foreign laws. For this reason, it is bad practice to wait to investigate whether third-party discovery can be obtained abroad; it is good practice to investigate the question at the beginning of the international arbitration.

It is even difficult to obtain third-party discovery for international arbitrations taking place inside the United States. The authority of arbitration tribunals sitting inside the United States to compel third-party discovery derives from section 7 of the Federal Arbitration Act (FAA). This statute requires, among other things, that third parties must produce evidence before the arbitrators.

The arbitrators . . . may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case . . . Said summons . . . shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons

9 U.S.C. § 7 (West 2006)

As a result of this requirement, most U.S. courts have prohibited third-party depositions in arbitration because deposition testimony is not given “before the arbitrators.” *See, e.g., Atmel v. LM Ericsson Telefon*, 371 F.Supp.2d 402 (S.D.N.Y. 2005); *In Matter of Integrity Insur. Co.*, 885 F.Supp. 69 (S.D.N.Y. 1995). Some U.S. courts have even forbidden third-party document



production unless the production is presented by the third party at a hearing before the arbitrators. *See, e.g., Life Receivables Trust v. Syndicate*, 549 F.3d 210 (2d Cir. 2008); *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004).

Section 7 of the FAA also prohibits parties from issuing subpoenas for third-party witnesses from any courts save “the United States district court for the district in which such arbitrators . . . are sitting” As a result of this restriction and the well-known rule that federal courts cannot subpoena witnesses who are located more than 100 miles from the courthouse, some U.S. courts have prohibited arbitrators from issuing discovery subpoenas to third-party witnesses located more than 100 miles from the place of arbitration. *See, e.g., Dynergy v. Trammochem*, 451 F.3d 89 (2d Cir. 2006). *But see In Matter of Security Life Co.*, 228 F.3d 865 (8th Cir. 2000).

The net result of these decisions is that a party to a U.S.-based arbitration should only safely expect discovery from third parties who are within 100 miles of the arbitral situs and will testify or produce documents at an actual hearing before the arbitrators. It may be possible to get more third-party discovery, depending on the circuit in which the arbitration is taking place. However, to date, the Supreme Court has not addressed the limitations under section 7 of the FAA, and, if anything, the trend has been toward allowing less, not more, third-party discovery in arbitration.

Given the above, a party contemplating the commencement of international arbitration should always consider, as early as possible, whether any third-party witnesses or documents are critical to proving its case. If the answer to that question is yes, the party should promptly investigate whether such third-party discovery is possible. The best way to obtain third-party discovery, of course, is to try to convince the third party to testify or produce documents voluntarily. If that is not possible, the party should promptly begin researching the laws of the applicable jurisdiction and take appropriate steps to compel disclosure.

There are no guarantees on obtaining third-party discovery in international arbitration, and, in truth, it is unwise to count on it. However, should third-party discovery be necessary or important to one’s case, addressing the issue early on will maximize the chances of success.

Conclusion

Although thinking ahead is important in all forms of dispute resolution, it takes on added importance in international arbitration. Seriously considering and answering the six questions posed in this article, either at or before the beginning of an international arbitration, is the best way to avoid unexpected pitfalls in the process. It is also the best way to achieve the goal of a realistic victory.

Keywords: litigation, commercial, business, international, arbitration

[B. Ted Howes](#) is a partner in McDermott, Will & Emery, LLP.



Commercial & Business Litigation

FROM THE SECTION OF LITIGATION COMMERCIAL & BUSINESS LITIGATION COMMITTEE

Winter 2012, Vol. 13 No. 2

ABA Section of Litigation Commercial & Business Litigation Committee
<http://apps.americanbar.org/litigation/committees/commercial/home.html>

Published on the Commercial & Business Litigation Committee's website, <http://apps.americanbar.org/litigation/committees/commercial>. © 2011 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.