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INTERNATIONAL ADR: WHY MEDIATION OF ENVIRONMENTAL AND CONSTRUCTION DISPUTES IS ESSENTIAL

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A DECISION BY A FOREIGN COURT IS UNACCEPTABLE

With many domestic companies making investments in and designing and building projects in other countries, it is essential that the parties focus on the most fair and effective dispute resolution method. When millions of dollars are at stake, in a breach of contract lawsuit, the parties will be reluctant to be bound by the local courts. Foreign courts offer different substantive laws, different procedures, unfamiliar venues and home court advantage. These factors have convinced domestic parties that foreign courts are not the place to be and have placed a great deal of emphasis on ADR.

USING A BINDING ADR PROCEDURE LEAVES GROUNDS FOR PROCEDURAL CHALLENGES

With the obvious strategic unacceptability of adjudication by foreign courts, the use of binding ADR venued in the United States, may seem a logical choice for solving disputes on construction projects in foreign countries. Use of binding ADR often leaves the parties with grounds to contest the outcome, which can only be sorted out by protracted procedural battles. The rules governing the setting aside of arbitral awards is the New York Convention.

Domestic Arbitral Awards

Domestic arbitral awards, awards involving United States parties and rendered in the United States, may be vacated if it was entered with manifest disregard of the arbitration agreement or of the applicable law.

Foreign Arbitral Awards

A foreign award for purposes of the New York Convention is an award rendered in another country.

Non-Domestic Awards

A non-domestic award for purposes of the New York Convention is an award rendered in the United States that involves a dispute between (i) parties one of which is domiciled or has a principal place of business outside the United States or (ii) United States parties concerning property located abroad, contractual performance abroad or some other relationship within a foreign state.

Setting Aside Foreign and Non-Domestic Awards

The grounds for vacating both foreign and non-domestic awards are set forth in Article V of the New York Convention. [Fn. 1] The grounds for seeking the overturn of an award are specific and are consistent with the intent of encouraging arbitration and discouraging attempts to overturn awards.

Further complicating the standard for overturning foreign and non-domestic arbitral awards is the willingness of the courts to entertain challenges to awards as having been "entered with manifest disregard of an arbitration agreement or of applicable law", even though the standard is not one of the grounds for setting aside and vacating and award stated under Chapter 1 of the Federal Arbitration Act, 9 U.S.C. sections 1-16.

The courts recognize that, consistent with the policy of encouraging arbitration, setting aside an award for manifest disregard of an arbitration agreement or of applicable law is to be construed narrowly. As one court defined the standard, an error by an arbitrator must have been "obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator." Brandies, 656 F.Supp. at 164.

Among other decisions, Yusuf Ahmed Alghanim & Sons WLL v. Toys "R" Us Inc., ~F 3d~, 1997 WL 560044 (2d Cir. Sept. 10, 1997) and Chromalloy Aeroservices v. Egypt, 939 F. Supp. 907 (D.D.C. 1996) – have considered applying the "manifest disregard test to arbitral awards governed by the New York Convention, one of these cases found authority for doing so under Article V (1) (e) of the Convention and the other under Article VII.

The Trouble With Binding ADR

Binding ADR has been touted as more efficient and cost effective than litigation. This premise has increasingly been questioned by executives and lawyers who are involved in the resolution of construction and environmental disputes from day to day. Shortcomings in binding ADR include: (1) Lack of discovery relegates the exchange of documents to the arbitration proceeding itself, lending to a very inefficient process; (2) Scheduling is difficult because arbitrators do not have the same control as do judges; (3) Admissibility of documents and testimony are not limited by rules of evidence and therefore the process is inefficient; (4) Arbitration of complex construction or environmental claims often carries over to dozens of sessions over a period of years, while litigation can be kept in bounds more effectively by a court; and (5) Collateral effect of the arbitration proceeding on other parties often operates an unfair result because arbitration, unlike litigation, does not allow for the bringing of all of the parties together in a single proceeding.

The Additional Trouble With Binding International ADR

Even though the grounds for overturning an arbitration award governed by the New York Convention, are limited, the New York Convention and the case law which has evolved under it, sets out a recipe for challenging an award and leaves a disappointed party with a road map to utilize in blocking enforceability of an award. When an award is challenged, the prevailing party is left with an uneven path because it must incur additional legal fees and expenses, while, at the same time, facing many variables which do not exist in getting a domestic arbitral award confirmed, thereby making the outcome more unpredictable.

Effectiveness of Non-Binding ADR

In resolving complex construction and environmental cases, the use of a form of non-binding ADR makes the most sense. The details of the process must be spelled out, at the outset of the project, in the contracts of each of the parties. The contract clause must define how to get all of the parties into a room in the event of a dispute and it must designate a mediator or define how the mediator is to be chosen.

Litigation has a way of "settling on the courthouse steps" after an extraordinary amount of time and money has already been spent. Before going that far, mediation should be employed. In the context of complex litigation, a detailed analysis of every relevant document, coupled with an indepth review of the knowledge of each expert and fact witness, presented through a mediation, should, without fail, be able to accomplish the same result before it has been necessary to make extraordinary expenses.

Effectiveness of In-House Counsel Affects Mediation Outcome

Inhouse counsel who is well integrated into the business operations of the client and has the confidence of management serves a critical role. An effective inhouse counsel is able, not only to facilitate outside counsel's ability to get to the heart of the matter by gathering information, finding documents, and locating crucial witnesses, but also in evaluating the client's true needs, by having the end in mind – Where does the client need to end up? What is the real financial picture? Who is helped or hurt by the outcome? Who will want to settle? Who will want to fight all the way?

Resolving a dispute over a construction or environmental project being performed in another country is a challenge which is better analyzed cooperatively with the help of an astute neutral than in an adversary proceeding.

Focusing On the Merits Is the Key to A Successful Mediation

Once a complex matter goes to binding dispute resolution, it develops a life of its own. Conversely, mediation forces the parties to focus on the merits. Without regard to a procedural motion or to admissibility, a mediator can "cut through" extraneous thresholds and focus on the merits. Counsel will be faced with probing questions from the mediator which the client will be forced to answer; core issues will be addressed.

Conclusion: Mediation Works In Resolving International Disputes

When parties commit to mediation, the case almost always settles. Surveys show that in excess of 85% of disputes entering mediation are resolved then and there. In the contracts we draft, we add a mediation requirement with resort to the courts if mediation does not work. The more fully defined the requirements, the better, because the more detailed the mediation procedure, the more likely the parties are to follow it. There appears to be no legitimate objection to including a mediation requirement in each and every contract and the fact that the mediation process is non-binding should satisfy all objections to its use.

It is clear that inhouse counsel are in the best position to set the stage for the use of mediation through active advocacy in the initial contract drafting and through choosing outside counsel with the capability of carrying it out effectively and efficiently.

The grounds for setting aside an arbitral award under the New York Convention are set forth in Article V of the Convention, and include

incapacity of a party, invalidity under law, lack of proper notice of the appointment of the arbitrator or of the proceeding itself, lack of opportunity to present the case, matters considered being outside the scope of the arbitration agreement, arbitral authority or procedure not in accordance with the law of the country where the arbitration took place, the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or the recognition or enforcement of the award would be contrary to the public policy of that country.

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