

COMMENTARY

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Structuring dispute resolution clauses in international contracts

By HARSHITHA RAM

The magnifying global economy largely depends on international business to counter uncertainties in global transactions. A crucial aspect of preserving an enduring business relationship is to choose the right mechanism to resolve disputes. Often stipulating the method of resolution before a dispute arises can stabilize the situation, protect the prospects of future business and preserve the parties' business relationship. In the absence of an appropriate dispute resolution clause, the parties may lose time looking for an appropriate forum that has both subject matter and personal jurisdiction over the dispute.

Choosing an arbitration clause for the resolution of international commercial transactions produces more predictable outcomes than litigation and ensures neutrality in the procedure. The nature of the international contract, the type of transaction involved, the cultural differences, and the variety of jurisdictions involved are all essential factors to consider when setting forth a resolution clause. The rising global economy may prompt lawyers to place greater emphasis on drafting effective ADR clauses to face unpredictable international business outcomes. A coherent clause will put the disputant parties at ease as this would enable them to focus on the resolution of the dispute that has arisen instead of losing time working on making cosmetic corrections to the clause itself.

The purpose of the ADR clause is to convey the parties' intention to resolve any contractual or non-contractual dispute. It should perhaps reflect the parties' interest and intention of resolving the dispute and preserving the business relationship rather than accomplishing continued unresolved open areas of conflict. The ADR clause must be clear and concise. The complexities of international commercial transactions often befuddle even the expert international attorneys. The simple solution is to construct an effective built-in dispute resolution clause. Failing to incorporate an efficacious dispute resolution clause and ignoring the ramifications may lead to ruminative consequences that are often time-consuming and expensive.

Choosing between litigation and arbitration requires the parties to take into account several important factors. In most cases, stipulating to litigate the dispute in a foreign court is not the right solution to the problem. The possibility of future business predominantly relies on a stable and pleasant business relationship. ADR clauses allow the parties to have better communication and avoid greater losses. The resolution clause may be for negotiation, mediation, arbitration, or another hybrid mechanism. There are certain advantages and disadvantages in using litigation over arbitration and vice versa.

However, the fundamental objectives of the processes differ. Broadly speaking, arbitration is the optimal dispute resolution method in international contracts. It is understood that often in dispute resolution the outcome will depend on the neutral that decides the requisite legal standards



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applicable to the matter.

It's quite common for parties to inadequately formulate dispute resolution clauses during the contract negotiation phase, which often results in havoc during the performance of the obligations. The advantage of providing an effective dispute resolution clause in a contract is to keep the dispute out of the purview of state courts. Structuring the dispute resolution clause can be challenging. It is pertinent to note that some specialized language may not be intuitive even for legal practitioners who are generally accustomed to drafting domestic contracts. This simply means that devoting extra effort will promote success in reaching the intended results when structuring the clauses in an international business contract.

The United Nations Commission on International Trade Law (UNCITRAL) was adopted by the United Nations general assembly in 1976, it is a set of fine guidelines for arbitral clauses and it serves as the basis for rules of existing arbitration institutions. Some of the popular international arbitral institutions include the ICC international court of arbitration (ICC), the International Centre for Dispute Resolution (ICDR), The London Court of International Arbitration (LCIA), Stockholm Chamber of Commerce (SCC), Singapore International Arbitration Centre (SIAC), etc. Although there are a set of boilerplate clauses available through these institutions when formulating arbitration clauses, the parties need to focus on some key factors, such as the choice of forum, choice of law, the seat of arbitration, venue, language, the appointment of arbitrator, discovery rules, awards and enforcement of awards.

UNCITRAL Model Clause: Any dispute, controversy, or claim arising out of or relating to this contract or the breach, terminations, or invalidity thereof, shall be settled by arbitration by the UNCITRAL Arbitration Rules as at present in force.

The appointing authority shall be (name of the institution or person) The number of arbitrators shall be (one/three) The place of arbitration shall be (city and/or country) The language(s) to be used in the arbitral proceedings shall be (language) This clause may be used for both institutional and ad-hoc methods of resolutions. In international arbitration, it is not unusual for a contract to have more than one state's law. There can be a variety of applica-

ble laws including 1. the law governing the substantive contract, 2. the law governing the procedural aspects of the arbitration, 3. the law governing the arbitration agreement, and 4. the state law where the award will be executed. The governing law of the arbitration agreement need not be the same as the law of the contract. By the doctrine of separability, the arbitration agreement may be governed by a different law than the law of the substantive contract.

Further, it is important to understand the fundamental difference between the venue and seat of arbitration, and parties should have clarity in their clauses. 'Seat' in international arbitration simply means the place where the state court has governing powers over the arbitral proceedings. Whereas, venue means the place where the proceedings of the arbitration take place, which is the physical hearing location of the arbitration process.

Parties involved in international transactions should initially attempt to understand the differences between domestic and international commercial dispute resolution processes and the fundamental differences in their execution. This will give them the confidence to choose one approach over the other. Certainly, incorporating a dispute resolution clause in the contract will enable the parties to reap intangible benefits during the dispute resolution process. Frequently, in international contracts, cultural differences and working styles are most often the potential aspects of disputes. The international arbitration community strives to find solutions to harmonize the multi-pronged approach in resolving international disputes and to settle for a standard approach. In principle, arbitration bestows special advantages that often outweigh its shortcomings. A crucial advantage of an arbitration clause is the avoidance of the nightmare of standing before a foreign court dealing with unfamiliar procedures.

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'The 1619 Project' shines a light on a topic critics are unwilling to truly see

By SAMUEL C. DAMREN



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This is the third commentary in a series focused on 2021 laws enacted in five states prohibiting the teaching of discriminatory concepts related to "race or sex."

The first commentary closely analyzed the wording of five of eight concepts that were banned by Teaching Prohibition Laws, or TPLs in each state. The commentary also questioned the need for enacting the TPLs when there was no indication that any of the prohibited concepts (for example, that "one race is inherently superior to another") were actually being taught.

The second commentary turned focus to the long list of discriminatory concepts that were not banned by the TPLs. The commentary suggested that these omissions were "dog whistles" that enabled lawmakers in the five states to signal to like-minded individuals which groups it was permissible to persecute in Iowa, New Hampshire, Oklahoma, Tennessee, and Texas and which groups it was not.

This commentary and the next will discuss The New York Times "The 1619 Project" through the lens of the three remaining prohibited concepts that the TPLs share.

Governors and legislators acknowledge that alleged negative views of American ideals and history in "The 1619 Project" were part of the inspiration for the TPLs. Texas went so far as to ban educators from requiring students to "have an understanding of the 1619 Project."

"The 1619 Project" was recently expanded and published in book form. Among other African American perspectives given voice, the book takes the position that America was not founded with the Declaration of Independence, but in 1619 when the first Africans were brought in captivity to the Colonies and enslaved.

This is an African American perspective on the origins of America as being inextricably intertwined with slavery, its "de jure" practice for 250 years, Jim Crow, racist segregation and the continuing consequences of deep-seated prejudice.

To those who are not acquainted with this perspective and the facts supporting it, "The 1619 Project" will be eye opening. What makes it the center of controversy is that it challenges the long standing political gospel of our founding story and asserts that without this African American perspective, the history of American's origin is incomplete and more nostalgic than truth.

The book includes 18 essays by different highly credentialed authors arranged as chapters with one-word titles: Democracy, Race, Sugar, Fear, Dispossession, Capitalism, Politics, Citizenship, Self-defense, Punishment, Inheri-

tance, Medicine, Church, Music, Healthcare, Traffic, Progress, and Justice.

The first of two concepts in the TPLs under consideration here is the prohibition on teaching "that meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race."

Notably the TPLs do not assert that America is a meritocracy. Good thing, because it's not.

In America, due to circumstance, some Americans start on the 50-yard line for a sprint to the goal line.

Other Americans are positioned on the 40-, 30-, 20-, or 10-yard lines when the starting pistol fires. We all know that. "The 1619 Project" notes that race is a factor, not for all, but for many of the starting line designations.

Whether you believe American ideals support this starting line designation is another question.

The authors of the essays in "The 1619 Project" do not. But one of the most interesting observations in the essays is that even though leaders in the African American community long knew their starting line was rigged, they repeatedly leaned into, and embraced, ideals expressed by the founders to combat the betrayal of those ideals in practice.

Nikole Hannah-Jones, who organized "The 1619 Project," goes so far as to assert in her essay, "Democracy," that given all the obstacles placed in the path of African Americans dating from their arrival in chains to today, their devotion to these founding ideals makes them the "most American."

Not surprisingly, her comment provoked umbrage in certain quarters, including supporters of the TPLs.

The second concept prohibited by the TPLs for consideration in this commentary is teaching "that an individual, by virtue of the individual's race or sex, bears responsibility for actions committed in the past by other members of the same race or sex."

Who would think such a thing? Well, as applies to "race," that

prohibited concept was a bedrock to American slavery. Beginning with the Virginia House of Burgesses in 1662, the elected legislators of the English colony decided that the race of a person, and accordingly whether they were "slave or free," was determined by the race of the mother. Thus, the issue of enslaved "negro" women were born enslaved, even if the father was a white Englishman. Accordingly, the children were forever condemned - by their blood, not deeds - to status as members of a slave race.

Enslavers were permitted under these laws to rape enslaved women and if a child was born, to add new "property" to the enslaver's wealth. The practice increased after 1808 when the United States barred the importation of slaves from other countries as did the break-up of slave families when members were sold by an enslaver in one state to enslavers in another.

Prohibitions on interracial marriage, which were central to slave laws, continued in many states until 1967 when so-called "Racial Integrity" acts in Virginia and elsewhere were declared unconstitutional.

For further details, read Dorothy Roberts' essay "Race."

Trymaine Lee's essay "Inheritance," points out that while Americans are not responsible for the acts of their ancestors, white Americans did benefit from slavery and that those benefits place them, and their descendants, closer to the finish line of the 50-yard sprint than descendants of slaves.

Matthew Desmond's essay "Capitalism," explains how the economic model of the slave economy found new forms of expression in other sectors of the economy long after the abolition of slavery. In many of those sectors, American capitalism was influenced by that economic model to make competition between business owners as much about who could more efficiently exploit their workers as it was about other factors.

A study by the Oxfam America released on March 21, 2022 found that one-third of all American workers are paid less than \$15 an hour in wages.

Khalil Gibran Muhammad's essay "Sugar" is particularly insightful and a difficult read. It describes horrific living and working conditions for slaves on sugar plantations in Louisiana in the lead up to the Civil War. However painful, it is a must read to understand how such a place could come into existence in a country established on the enshrined ideals of the founders.

This leads to the topic of the final commentary in this series: Discomfort.

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COMMENTARY PAGE

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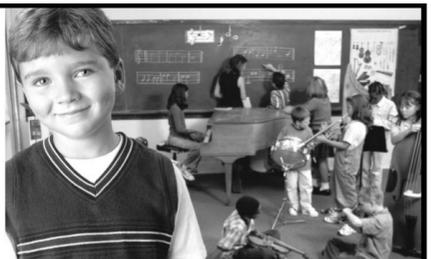
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