Article Information

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Webinar Q&As: 2024 ‘Clause & Effect’ Series | Negotiation Fundamentals in Commercial Contracts (Part 2)

Piper Alderman provides answers in response to the questions received during our 2024 ‘Clause & Effect’ – Negotiation Fundamentals in Commercial Contracts webinar on 20 August 2024.

We received numerous insightful questions during the webinar on 20 August 2024. This article provides further insights by addressing additional questions related to commercial contract drafting and dispute resolution.

Commercial contract drafting related questions

1. How much stock do you place on jurisdiction and Governing Law clauses in negotiations/NDAs etc? What do you consider as critical items to think about when jurisdiction/governing law deadlocks arise?

Jurisdiction and governing law clauses are critical in commercial negotiations because they determine how and where disputes will be resolved, and what legal framework will apply to the contract.

These clauses significantly impact the cost, time, and outcome of any legal disputes that may arise, so they should not be overlooked.

If deadlocks arise over these clauses you need to consider the following 10 key points:

1. Jurisdiction and governing law clauses provide clarity on which laws will be applied to interpret the contract and which court or arbitration body will hear any disputes. This reduces uncertainty in case of disagreements.
2. The choice of jurisdiction and governing law can affect legal fees, travel costs, and convenience for the parties. It is often more favourable for a party to litigate or arbitrate in their home country under familiar laws.
3. Some legal systems are more predictable or favourable to one party (e.g., countries with well-developed commercial laws like England and Australia). A company may prefer to select a jurisdiction where the legal system aligns with their interests, such as stronger protection of intellectual property or contract enforcement.
4. Different jurisdictions may have varying enforcement mechanisms for judgments or arbitration awards.
5. If both parties are from different countries and can’t agree on their home jurisdictions, consider using a neutral country or a reputable international arbitration centre (e.g., London, Singapore, or the International Chamber of Commerce (ICC) arbitration). A neutral jurisdiction might increase costs, but it can provide a balanced solution. It’s crucial to ensure that the neutral jurisdiction has a stable legal system and that court rulings are enforceable.
6. If parties can’t agree on a court system, arbitration can be a good alternative.
7. In case of deadlock, some contracts include clauses that give different parties control over different aspects of jurisdiction or governing law. For example, the contract may state that disputes over interpretation follow one law, but disputes over performance follow another.
8. In some cases, the jurisdiction and governing law may be dictated by local laws. For example, in Australia the Competition & Consumer Laws can apply regardless of the jurisdiction and governing law clause.
9. Ensure the chosen jurisdiction has treaties in place with the other party’s country to enforce judgments or arbitration awards.
10. If one party has significant assets or operations in a particular jurisdiction, that could be a strong argument for selecting that country’s laws or courts, as enforcement of rulings may be easier.

2. Can you please again explain the difference between NDA and Confidentiality Agreements?

A Non-Disclosure Agreement (NDA) and a Confidentiality Agreement are very similar in purpose, but there are differences that need to be understood when you contemplate using these documents.

A confidentiality agreement is any agreement where one or more parties agree to keep certain information confidential. It can be a stand alone document or embedded in another agreement. The information that is agreed to be kept confidential must not be in the public domain. It is usually a broad and long lasting agreement, and can be relevant to the commercial interaction of parties over a long period of time and the exchange of many amounts of information.

An NDA is a specific type of confidentiality agreement. It is designed to restrict one or more parties from disclosing sensitive or confidential information to third parties. Usually it is a stand alone document. It is often used at the beginning of business negotiations, merger negotiations, partnership negotiations, or intellectual property discussions where you want to ensure that you do not disclose ideas or inventions that are yet to receive the protection of registration. It is a focused document, which is usually devoted to an immediately identifiable issue, deal or event.

Both agreements give rise to rights to restrain the use of information disclosed pursuant to the agreements. The agreements can also enable the recovery of damages in the contractual mechanisms in the document.

Dispute resolution related questions

3. What's your view on pre-mediation conferences to establish what each side needs in order to resolve the dispute, hurdles to overcome etc?

Pre-mediation conferences are almost always good ideas. They help parties understand the process, clarify information needed to undertake the mediation and assist the mediator to understand the background to the mediation. Usually these conferences are undertaken with a mediator, in the absence of the opposing party or parties.

Helpful tips you may wish to consider to get the most out of a pre-mediation conference are:

1. Make sure you clearly articulate needs, interests, and what you hope to achieve through mediation. Understanding these objectives upfront can help the mediator tailor the process to address the core issues effectively.
2. Tell the mediator what a satisfactory resolution might look like, helping to set realistic expectations and focus on achievable outcomes.
3. Identify potential hurdles, such as legal constraints, emotional barriers, or logistical issues, to help the mediator and the parties prepare strategies to address them.
4. Make sure you ask about and if necessary clarify procedural matters, such as the format of the mediation, time constraints, and necessary documents.
5. Explore what information needs to be shared before mediation, ensuring that all participants have the necessary facts and documents to make informed decisions.

4. Could you please touch on the cultural difference regarding Japan's approach to dispute resolution as per your slide?

The Japanese are wonderful people and they have a deep and rich culture. That culture permeates their business dealings and the way in which they resolve disputes.

It would be possible to write a PHD on the topic of the cultural differences between Western countries and Japanese when it comes to dispute resolution and then still barely touch on the intricacies of the topic.

This answer therefore is limited to 10 comments that could be made about what to consider when trying resolve a dispute with a Japanese counter party.

10 considerations of note are:

1. For the Japanese, litigation is disruptive and undesirable, and associated with the breakdown of relationships. Litigation is therefore a last resort. Pre-litigation resolutions are encouraged and even when litigation is commenced, the Japanese look to ways to resolve the matter before judgment. That being said, if necessary Japanese will stand firm to their principles and will pursue matters to judgment.
2. Mediation and conciliation are common approaches in Japan and align with the cultural preference for resolving disputes without confrontation. These methods are seen as more cooperative and allow for third-party assistance in resolving conflicts.
3. Japanese culture places a high value on maintaining harmony and avoiding open conflict. Dispute resolution methods in Japan often focus on preserving relationships and preventing escalation. So, there is a strong preference for negotiation, mediation, and conciliation, which focus on finding amicable solutions without direct confrontation.

4. In negotiations, Japanese parties often avoid direct refusal and may convey dissatisfaction subtly. Reading between the lines and understanding non-verbal cues is crucial. For example, a Japanese person may prefer to acknowledge a point in issue rather than outright disagree with the point.
5. Relationships in business and social contexts are highly valued in Japan. Dispute resolution focuses on maintaining long-term relationships rather than winning or losing.
6. Japanese parties often prefer to resolve disputes privately and without public scrutiny to avoid damaging reputations or relationships. There is an emphasis on achieving a resolution that satisfies both parties and prevents future conflict.
7. Consensus-building, is a key feature of decision-making in Japan. It involves informal, behind-the-scenes discussions to get input and approval from all relevant parties before making formal decisions.
8. Before a formal resolution is reached, there is often an extended period of informal negotiation and consultation. Be prepared for a negotiation to take some time! Parties involved in the dispute will seek to gather opinions and ensure that all stakeholders are aligned. This can make the process longer but helps ensure smoother implementation of any agreement.
9. The Japanese legal system are based on the civil legal system. As a result, the Japanese legal system does not place as much emphasis on legal precedent as Common Law jurisdictions, especially in dispute resolution. That can mean that the Japanese are more flexible in their approach to dispute resolution and not as concerned that a deal will create a precedent which is impactful beyond the deal at hand.
10. Saving face is critical in Japanese culture. People avoid situations that could cause embarrassment or humiliation to themselves or others. The emphasis on face-saving means that disputes are often resolved in a way that allows all parties to retain dignity. Solutions that publicly humiliate or show someone as “losing” are generally avoided. Even when an agreement is reached, the language used is often neutral to avoid assigning blame.

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