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In partnership with the Chamber, our objective is to provide Chamber members with information on the complex US legal landscape, which might assist in US-NZ business relationships, and to assist NZ businesses expanding into the lucrative US markets. In our monthly column, we write about legal issues which we deal with in our representation of NZ businesses doing business in and with the US, however, we are also open to suggestions on topics about which members are interested in learning. So, please feel free to email us with your comments, questions and any suggested topics at [info@nz-uslegal.co.nz](mailto:info@nz-uslegal.co.nz)

**Arbitration: Is It Really All It’s Cracked Out To Be?\***

Most international commercial agreements contain clauses which provide for final and binding arbitration to settle any disputes between the parties. Many lawyers are inclined to tell their clients that arbitration is the best way to settle commercial disputes, as it is faster and cheaper than court litigation. Do these clichés really hold true?

In many cases, the decision to choose the court room over arbitration entirely depends on the situation. Court litigation generally becomes expensive because of *discovery* and *motion practic*e. Discovery is the process by which litigants gather evidence to prove their case or defense before the court. In the United States for example, discovery generally consists of *requests for production of documents interrogatories* (written questions), and *requests for admissions*, *third party document subpoenas*, and *witness depositions*. Discovery can last from several months to several years, depending on the matters in controversy in the case. “Motion practice” is the general terminology used to refer to the various motions traded between parties asserting legal arguments before a case goes to trial. A typical case will contain *motions to compel discovery* (to settle disputes regarding discovery) and *motions for summary judgment* (asking the Court to decide the case on the law without the need for a trial). Many cases between international parties also contain jurisdictional challenge motions. Each of these US court procedures can cost several thousand dollars, with witness depositions and motions for summary judgment sometimes costing in the tens of thousands of dollars (in a worst-case scenario). On the other hand, a small case might only incur a few thousand dollars in discovery expenses and attorneys’ fees. Most if not all of these expenses can be avoided through arbitration.

That being said, arbitration is no cheap endeavor. It requires upfront expenses which are not incurred with court litigation. Initiating a commercial arbitration case generally requires an up-front average fee of approximately $9,000.00 USD. This fee generally covers the filing fee, the arbitration administration association’s fees, and the costs of a venue for the arbitration. This does not include the additional $5,000.00 USD to $30,000.00 USD or more in attorneys’ fees for the initial arbitration submissions and notices, or the general fee of $5,000.00 USD to $10,000.00 USD for a single arbitrator to hear the case and issue a ruling. Most arbitration clauses call for a panel of three arbitrators, and this can substantially increase the costs. Initiating a lawsuit in court generally requires a filing fee of approximately $300.00 USD depending on the state or federal court where the case is filed, plus attorneys’ fees from $500.00 USD to around $5,000.00 USD or more. Further, the upfront costs of arbitration can increase significantly where one of the parties is not a willing participant. As happens quite often, many commercial disputes that require arbitration result in one party simply refusing to come to the table at all. Thus, the party that wishes to initiate the arbitration is forced to file a lawsuit in court in order to have the court issue an order for the arbitration to go forward and for all parties to participate. This common situation significantly increases the up-front costs for the party making the arbitration claim.

There is also a common belief that arbitration is more expedient than court litigation, but industry studies conflict on whether arbitration is truly quicker than court litigation. In our experience, arbitration is indeed quicker if the parties both participate in the process. Generally speaking, if there is a single arbitrator, you can agree from the outset that the arbitrator must issue an opinion within a set amount of time. This sort of dictate cannot be placed on a court which generally operates on its own time frame.

Arbitration is also final. There are no appeals and there are very limited circumstances where a court will overturn an arbitration award. In the US, a party that is victorious at trial in court litigation can as a matter of course expect the other side to appeal, or at least threaten to appeal, in an attempt to either overturn the trial court’s decision or force the claimant into settling for less than the amount of the judgment.

So what does all this mean in the end? Arbitration does not actually cost that much less than court litigation and that it sometimes costs more. Our general opinion is that an arbitration clause should only be included in an agreement if the client can afford the upfront costs of arbitration. If you are a small business and money is tight, then arbitration may not be the best option for you if you need to enforce your agreement in case of a breach. A contract with an arbitration clause that is not well thought-out may force your business into situations where significant breaches cannot be dealt with adequately or timely. This is because the amount of the upfront investment required for arbitration may be completely unaffordable for your business or too burdensome on your business given the likely outcome of the case.

Arbitration is an important mechanism in the world of international commercial transactions it should remain, in the appropriate situations, a mainstay of a well-drafted international commercial agreement. However one size does not fit all. Every business should carefully and honestly analyze its ability to incur the upfront set costs of arbitration before including such a clause in its agreements.

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