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#MondayArbitrationDay

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"THE BENEFITS OF CHOOSING ARBITRATION"

Arbitration is a method of resolving disputes without going to the court. Oftentimes, an attorney recommends arbitration to a client as the best means to resolve a claim. In arbitration, the dispute is submitted to a third party (the arbitrator) that resolves the dispute after hearing a presentation by both parties. The presentation may consists of solely documents that are submitted to the arbitrator by each side. More often, in addition to the documents submitted, each side may make an oral argument in person. Usually, each side may have an attorney to make the oral argument for them. Occasionally, the presentation also includes witnesses who testify.

What method of binding the dispute resolution is best for a company? There is no way to know in advance if it is the right decision, because many of the key considerations are double-edged swords.

1. Who makes the decisions

The majority who argue for binding arbitration cite this as the primary reason for arbitrating disputes instead of litigation. The arbitrators will either be experienced lawyers or non-lawyer commercial professionals (engineers, architects, developers, etc.). They are familiar with the language and the types of disputes that can arise, which sometimes may be quite complicated. As a result, arbitrators can get more quickly to the heart of the matter and ignore all the tricks that lawyers may throw at them. Decisions are more predictable, which lends themselves to better evaluation of a potential settlement.

In litigation, it would be difficult for a judge to understand the multiple detailed disputes in just a few days of a trial, considering that an experienced arbitrator should know about the standards of the dispute.

This is the reason why many times private companies choose as arbitration seats large arbitration institutions, such as the ICC, in Paris. For large scale and complex public sector contracts with foreign entities or corporations in infrastructure, telecommunication, energy and mining, or gas industry, the ICC arbitration is the most preferred choice.

2. The Time to Get a Final and Binding Decision

Currently, courts are clogged up with cases. In the Albanian jurisdiction, for example, judges will not set a case for trial until the long "discovery" process has been fully completed. Moreover, even when that time arrives, the available trial dates, especially when several days (and sometimes weeks or month) are needed, are years away. Sometimes, especially in the courts of appeal, criminal trials take priority over the.

scheduling of civil trials, which are carried on at the last minute. By way of contrast, even though there are exceptions, even multi-million-dollar, multi-day arbitrations can be set for final hearings within a year of filing an arbitration demand.

In 2018, the ICC was involved in 842 (eight hundred and forty two) of disputes. For smaller claims arbitrations, hearings may take place in less than six months. Seldom does it occur that having disputes resolved as quickly and efficiently as possible is not an advantage to both parties because, as it is known time is money.

3. Discovery, Legal Fees and Expenses

In litigation, there can be multiple motions filed that require significant time for lawyers to respond, even if filed in bad faith. Third parties who are not a part of the main contract can be brought into the case and cause further delays.

In construction disputes, for example, which are considered the most expensive types of civil dispute because most of the time there are multiple issues to be resolved, each disputed change order has its own story. In arbitration, the general rule is that unless there is a contrary provision in the arbitration clause, written pre-hearing, discovery is very limited, as there may not be any depositions allowed. The ability to bring in other third parties is severely limited. For instance, a contractor may not be allowed to bring into arbitration 10 different subcontractors, as the case may be with the litigation, which can delay any hearing for an owner for years.

For the most part, legal fees are reduced in arbitration. There is also a consensus that what can be done in one full day of arbitration can be accomplished in three hearing days in court. Filing a lawsuit is inexpensive and a judge is “free” however, this is not the case with arbitration. Filing an arbitration (such as through the ICC Paris) can require a considerable filing fee. Arbitrators normally charge an hourly rate, which, although split by the parties, can be very expensive, especially if there is a panel of three arbitrators.

4. Finality

This factor is frequently cited by opponents of binding arbitration. After a trial, either side normally has the absolute right to appeal any unexpected decision to an appeals court, usually because of a claimed error of law. If an appeals court decides that there was an error of law, the decision can be vacated or sent back for another trial.

Sometimes appeals can take years, and by that time, one party may not even be in existence and the winning company simply cannot continue to exist without collecting the money that it has been awarded. By contrast, in arbitration, finality is the rule rather than the exception. There are limited exceptions, but for the most part, it is virtually impossible to have a trial or appeals court reverse an arbitration award, even if it is found that the arbitrator made a horrible decision, such as ignoring a contract clause or misapplying the law. This factor is an example of a double-edged sword.

5. Privacy

Any court filings are normally open to public scrutiny. Although protective orders can be imposed by a judge, if there are issues about profit margins, employment agreements, embarrassing text messages, etc., all of these come out in a public trial. If it is a large dispute with a large local company, anything that may have an appeal to the public (or to competitors), there can be publicity, either online or through traditional media. No one likes their dirty laundry aired in public. Arbitration is private and confidential. No other third party can attend an arbitration hearing. Arbitration awards are only sent to the parties.

6. Location of the Hearing

In litigation, the parties normally do not have control over where the final hearing will take place. If the project is in Albania, but the parties are located in EU and their lawyers are in different countries, the hearing will normally be in Albania—and with that comes the possibility of "home cooking" from a local judge. In arbitration, the parties can agree on the most convenient location for any final hearing.

7. Drafting Arbitration Clauses to Reduce the Cons of Arbitration

Arbitration is a matter of contract. It is a contract clause. If the concern about arbitration is the decision-maker, a clause can be added to the contract based on the required arbitrator qualifications. If there are concerns about a solo arbitrator going wild, then mandate a panel of three arbitrators (but that can get expensive). Other negotiable requirements include ensuring that the rules of evidence apply or that at least a few pre-hearing depositions are.

The bottom line is that any party to a commercial contract should think long and hard about where and under what circumstances any dispute in a proposed project will be finally resolved. Not all disputes can be anticipated, and at the same time, there is no clear cut “yes or “no” on choosing arbitration vs. litigation, but these factors and considerations should be helpful for those that have to make such decisions.

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