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Business Litigation Alert

Now's A Good Time to Consider Including Arbitration Clauses in Business Agreements

The COVID-19 pandemic and the ensuing economic collapse have resulted in a huge uptick in commercial disputes. In particular, litigation involving *force majeure* clauses — where the coronavirus or resulting governmental restrictions have either frustrated a party's performance of its contractual obligations or rendered it impossible — has already begun to materialize.

With most courts closed to the public and facing a backlog of cases when they eventually reopen, many parties immersed in disputes will likely seek alternative methods of resolution, such as mediation and arbitration.

This Alert focuses on arbitration and the inclusion of a tailored arbitration clause in a "contract" or "agreement" (used interchangeably throughout).

The Advantages of Arbitration Over Litigation

In normal times, one of the principal advantages to arbitration is that it takes the business dispute out of the hands of a jury, which is often ill-equipped to fully grasp the nature of the dispute or the appropriate measure of damages, and puts it into the hands of an arbitrator.

During this pandemic, a critical advantage of arbitration is that it offers a speedier course to resolution. Some courts have been able to implement measures to encourage some cases to proceed. For instance, last week the United States Supreme Court heard oral arguments by telephone for the first time in its history. However, many cases are in a virtual standstill. Deadlines for discovery responses and depositions have been automatically

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extended or put on hold in many jurisdictions, while trials have been continued in almost all courts.

In contrast, most established arbitration services are well-positioned to utilize virtual/remote technology, typically handling most of the arbitration process without ever requiring in-person appearances. Telephonic/video hearings are routine. And an added benefit of this streamlined, technological approach is a reduction in legal fees, as attorneys spend less time on tasks such as traveling and waiting for hearings.

The Arbitration Clause

Because arbitration is a creature of contract, one party cannot unilaterally compel another to arbitrate their dispute. And once litigation has begun and the parties have dug in their heels, it is often difficult, if not impossible, to get both sides to agree to arbitrate (absent extenuating circumstances). The best time to reach such an agreement is at the time a contract or agreement is executed and before any disagreements have arisen. This can be accomplished by inserting a well-crafted, tailored binding arbitration clause into the contract.

Unfortunately, parties (and their attorneys) often overlook the use of arbitration clauses or utilize boilerplate arbitration clauses that add no value. Most boilerplate arbitration clauses say little about the arbitration process, and usually contain standard provisions about where the arbitration will occur, who will pay for the arbitration, which arbitral forum will be used, and how many arbitrators are to be used. But there is so much more that the parties can agree upon in an arbitration clause.

Importantly, the parties to the contract can utilize an arbitration clause to formulate the process for handling any dispute that might arise, including inserting the following (among others):

- Limits on discovery, including the amount of written discovery one party can serve on the other side, and the number of depositions each side can take;
- Provisions for when the arbitration hearing must take place relative to the timing of the filing of the demand;
- Limits on the actual number of arbitration hearing dates;
- Permission for dispositive motions to be heard by the arbitrator;
- Permission (or a requirement) for the arbitrator to award attorneys' fees to the prevailing party; and
- If the need for emergency injunctive relief is vital (for example, with misuse of confidential/ proprietary information), permission for the non-breaching party to seek such relief in court.

Arbitration's Drawbacks

This is not to suggest that arbitration is the panacea for an overburdened and technologically ill-equipped court system. Drawbacks include:

- The costs associated with the arbitration proceeding itself can be expensive, with arbitrators typically charging by the hour.

- A party to the dispute may inevitably have to go to court to confirm an arbitration award in order to collect what is owed.
- An arbitrator's ability to compel a third party to comply with a discovery request is limited and can be challenged in court.
- An arbitrator's ruling is, with few exceptions, final and not reviewable by a court.

Conclusion

The COVID-19 pandemic and the effect it has had on our court system underscores the need for businesses to seriously consider contractually bargaining for alternate avenues for dispute resolution. Commercial contracts and agreements should be reviewed carefully to determine whether they contain arbitration clauses and, if so, whether such clauses are tailored to the entity's preferences.

If there is one thing that we can be sure of, it is that business disputes will spike in the aftermath of this pandemic. The better prepared businesses are for disputes, the more likely they are to obtain the relief to which they are entitled, more quickly, efficiently and cost-effectively.

If you have any questions about this Alert, or if you would like assistance with your contracts or agreements, please contact the authors listed below or the Aronberg Goldgehn attorney with whom you work.

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