INSIGHTS + NEWS

Client Alert: As COVID-19 Surges, So Too Should the Use of Well-Crafted Contractual Arbitration Clauses

BY TIMOTHY P. VAN DYCK • MAY 6, 2020

Virtually every aspect of our lives has been disrupted in one way or another as a result of the COVID-19 pandemic and the ensuing economic collapse. While certain of these disruptions have been difficult to predict, at least one has not: a huge uptick in commercial disputes. Simply by way of illustration, disputes implicating force majeure clauses (where, for example, a party's performance of its obligations has been frustrated by an interruption in the supply chain or an inability to access the labor market) have already begun to materialize. And just this week, a major restaurant chain sued its insurer for rejecting its damages claim stemming from the pandemic, alleging that its "all risks" policy covers financial losses after Massachusetts and other states ordered restaurants to close except for takeout service.

With most courts closed to the public and facing a backlog of cases when they eventually reopen (where criminal matters will undoubtedly take priority), many parties who find themselves immersed in these disputes will likely seek out alternative dispute resolution and, in particular, the use of arbitration. In the post-pandemic world, parties need to be prepared to avail themselves of the benefits of arbitration by crafting thoughtful, tailored arbitration clauses to ensure that their disputes are resolved cost-effectively, fairly, and with as little business disruption as possible.

IT TAKES TWO TO TANGO

Because arbitration is a creature of contract, one party cannot unilaterally compel another to submit to it. Instead, parties must contractually agree to arbitrate their disputes. Once litigation has begun and the parties have dug their heels in, 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 is executed, when all parties are playing nicely in the sandbox and before any disagreements have arisen. This can be accomplished by inserting a binding arbitration clause into the contract.

THE ADVANTAGES OF ARBITRATION OVER LITIGATION

A well-crafted arbitration clause can have significant advantages over traditional litigation. However, in the past, parties (and their attorneys) have often either overlooked the use of arbitration clauses altogether or have simply inserted boilerplate arbitration clauses that provide no value-added. They do so at their peril.

THE TECHNOLOGICAL ADVANTAGE

Courts, to their credit, have swiftly implemented certain measures during this pandemic to encourage some cases to proceed. Indeed, just this week, the Supreme Court of the United States heard oral arguments by telephone for the first time in its history. Among the changes some courts have made are tolling of limitations periods during the crisis (presenting an interesting constitutional issue sure to be challenged), authorizing electronic signatures by both court

personnel and parties, and permitting service on opposing parties by email rather than hard copies sent by mail. Relatedly, the recent passage of the Virtual Notarization Act in Massachusetts permits documents to be notarized remotely, thereby alleviating the requirement that notaries be physically present when a document is executed. However, these steps, while helpful, simply are not confronting the bigger picture: justice delayed is often justice denied. That is what is currently happening to many litigants who have been forced into a virtual standstill because of the havoc this pandemic has had on the judicial branch. Deadlines for discovery responses and depositions have been automatically extended or put on hold by the parties in many jurisdictions. Indeed, the mere fact that, at least at the state level, many courts have maintained the antiquated practice of requiring filing of pleadings in hard copy has exposed the courts for how far behind the technology curve they truly are.

In stark contrast, any arbitration service worth its salt (and there are many of them) should be well-positioned to leverage the virtual landscape with which we are all becoming increasingly familiar. It should be in a position to fully address all stages of the arbitration process without ever requiring in-person appearances. Telephonic/video hearings are routine in arbitration. Parties may agree to conduct depositions by video conference, documents may be exchanged and reviewed entirely electronically, and direct examinations at hearings can be submitted in writing. An added benefit of this streamlined, technological approach is a reduction in legal fees, as less time spent on tasks such as traveling and waiting for hearings maximizes the value returned to the client.

THE CLAUSE ITSELF: YOU CAN PAY ME NOW OR YOU CAN PAY ME LATER

One of the principle advantages to arbitration is that it takes the business dispute out of the hands of a jury often ill-equipped to fully grasp the nature of the dispute and/or the appropriate measure of damages to be awarded, and puts it into the hands of an arbitrator. Often, that is where the analysis begins and ends, with many arbitration clauses buried in the agreement's boilerplate (much like force majeure clauses, also coming to the fore right now) and barely given the time of day by its drafters. At best, most arbitration clauses usually contain provisions about where the arbitration will occur, who will pay for the arbitration, which arbitral forum will be used (often a poor selection), and how many arbitrators are to be used.

Yet, there is so much more that the parties can agree upon with a well-crafted arbitration clause. U.S. arbitral institutions have all established their own respective set of comprehensive arbitral rules addressing most of the common issues that can arise in a dispute, which foster predictability and streamline dispute resolution. The parties should pick one of these arbitral rules as a basis for their dispute resolution. That said, there is nothing preventing the parties from amending or setting aside the default rules if the parties agree on an alternative as part of their arbitration provision. For instance, rarely will one find an arbitration clause that, for example, does the following:

- limits the amount of written discovery one party can serve on the other side;
- limits the number of depositions each side can take;
- provides that the arbitration hearing must take place within a certain period of time from the filing of the demand;
- limits the actual hearing dates of the arbitration to one or two days;
- permits dispositive motions to be heard by the arbitrator;
- provides clear guidance on the actual scope of the arbitration clause;
- provides guidance on the ability of the parties to use technology to conduct discovery and to participate in the hearing;
- permits (or requires) the arbitrator to award attorneys' fees to the prevailing party; and
- perhaps most importantly, requires the arbitrator to be well acquainted with the parties' business and/or have a

certain number of years as a federal or state court judge.

Yet, all of this—and so much more—can be easily written into any arbitration agreement if the parties so desire.

IT'S NOT EVERYONE'S CUP OF TEA

Of course, none of this is to suggest that arbitration is the great panacea for an overburdened and technologically ill-equipped court system. For instance, if the need for emergency, injunctive relief is paramount (for example, with misuse of confidential/proprietary information), the parties should (and often do) carve out a clause allowing the non-breaching party to seek such relief in court, something an arbitrator cannot do. Expense is also a factor. The costs associated with the arbitration proceeding itself can be expensive, and arbitrators usually charge by the hour. They, like lawyers, are not cheap. Additionally, there may be certain clients who simply do not wish to make life easier for their potential adversary. They may insist on use of the courts so that they can engage in protracted, expensive discovery and motion practice, thereby effectively wearing down their adversary. Parties also need to be mindful of the fact that one side may inevitably have to go to court to confirm an arbitration award to collect what is owed. Finally, the need for information from third parties should be evaluated because an arbitrator's ability to compel a third party to comply with a discovery request is limited and can be challenged in court.

CONCLUSION

Discerning organizations should seriously consider contractually bargaining for avenues outside of the courts that will more quickly and efficiently arrive at a fair resolution of disputes. The COVID-19 pandemic and the havoc that it has wreaked on our court system only underscores this need. Now is the time for companies to review their commercial contracts carefully to determine whether they contain arbitration clauses and, if so, whether such clauses are tailored to fit their particular needs. If there is one thing that we can be sure of, it is that business disputes will spike in the aftermath of this pandemic, and the better prepared those businesses are for those disputes, the more likely they are to get the justice to which they are entitled, and at a price they can afford.

