

# Resolving disputes

How international arbitration can help protect your business Interviewed by Jayne Gest

**B**efore entering into an international commercial agreement, it is vital to ensure your company will be protected in the event of a dispute.

Litigation can drag on for years and can be extremely disruptive and expensive. Litigating against a foreign company can be particularly complex with issues that include service of the complaint in a foreign country and jurisdictional objections that can be raised by a foreign defendant. That is why international arbitration may be the answer, says Michael B. Dubin, a member with Semanoff Ormsby Greenberg & Torchia, LLC.

"International arbitration is an easy way to litigate against a foreign company that allows you to avoid a lot of the headaches," says Dubin. "With any international commercial agreement, consult with an attorney early to assist with both the structure of the business terms as well as contingencies in the event of a dispute."

*Smart Business* spoke with Dubin about the advantages and intricacies of international arbitration.

## What is international arbitration?

International arbitration is a confidential, private arbitration proceeding to resolve disputes between parties to an international commercial agreement. The agreement provides that all disputes arising out of or relating to the agreement will be resolved by binding arbitration by one or more arbitrators (usually three) selected by or on behalf of the parties and sets forth under what rules the arbitration will be conducted.

The arbitration is similar to a trial but heard before experienced attorneys and/or businesspeople sitting as the arbitrator(s), rather than a judge or jury. After the arbitration, the arbitrator(s) will issue a binding award that cannot be appealed except under limited circumstances, such as for fraud or undue influence on the arbitrator(s).

## How can international arbitration help resolve a dispute for my company?

International arbitration provides a quicker, more efficient resolution of a dispute than litigation and allows the parties to avoid the uncertainties of litigating in a foreign court. A typical international arbitration can be completed in approximately



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one year from the date of filing.

Arbitration generally, including international arbitration, substantially limits the exchange of discovery between the parties, thereby expediting the entire process. The arbitrator(s) routinely allow the parties to request information and documents from the opposing party and possibly take a limited number of depositions, if warranted. However, depositions are discouraged.

One disadvantage to arbitration is the actual out-of-pocket costs to the parties. For example, a party initiating an arbitration seeking damages of \$500,000 to \$1 million can expect to pay a filing fee of approximately \$8,500. In addition to the filing fee, the parties are required to pay the hourly or daily rates of the arbitrator(s), which can be expensive in a case with three experienced arbitrators.

## How can companies best protect themselves before international arbitration, especially mid-sized companies that might not be familiar with the process?

Most mid-sized companies are unfamiliar with international arbitration. If your company is contemplating entering into an international commercial agreement, consult with an attorney during the initial stages of

negotiation instead of waiting until after the agreement is signed and a dispute has arisen.

There are several critical items that companies should consider and provisions that should be included in international agreements if arbitration is the desired dispute resolution method. These provisions include:

- A clause providing that all disputes arising out of or relating to the agreement will be resolved by binding arbitration.
- Under what rules the arbitration will be conducted.
- That interim (injunctive) relief shall be permitted.
- The number of arbitrators and how they will be selected. For instance, agreements commonly provide for three arbitrators, one to be selected by each party and the third arbitrator, who will act as the chairperson, to be selected by the two party-selected arbitrators.
- The language in which the arbitration will be conducted.
- The state and/or country's substantive laws that will govern the arbitration.
- The city and country where the arbitration will be conducted.
- Whether the prevailing party will be awarded its attorneys' fees and costs.
- The award can be enforced in any court of competent jurisdiction, meaning the prevailing party can enter the award as a judgment in court to enforce and collect on the award.

## What steps should a company take once it becomes aware of a dispute?

Once you become aware that your company is involved in a dispute that could lead to arbitration or litigation, it is important to preserve all relevant documents and to inform your employees (and IT team) not to delete or destroy any documents, including electronic documents, that may be relevant to the dispute. Also contact your company's in-house counsel and/or outside counsel early on to best protect your company.

International disputes can be complicated and expensive, but a well-drafted international commercial agreement can simplify the process, help control costs and put your company in the best position for a successful resolution. <<

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