Resolving Legal Disputes in the United States: Litigation, Arbitration or Mediation

By Cynthia A. Murray

As Indonesian companies expand their businesses into the United States, the potential for conflict also increases. Many parties doing business in the United States opt to resolve their disputes through litigation in the U.S. court system. There are, however, alternatives to litigation. The two most common types of alternative dispute resolution are arbitration and mediation. Arbitration clauses are commonly found in many types of commercial contracts in which the parties agree on the rules governing where, how and by whom a dispute will be resolved. Parties also can choose to engage a neutral person to act as a mediator to help the parties find a solution to their dispute. It is important to understand the advantages and disadvantages of each in order to determine whether to resolve a dispute through litigation, arbitration or mediation.

Litigation

Litigation is the use of the court system to resolve a dispute. The rules applied to a particular dispute will depend upon the jurisdiction and the court overseeing the litigation. Courts in the United States operate at the federal and state levels. Parties to a contract can, and often do, agree upon the location for any litigation relating to their contract and the law of the country or state that governs their contract. In both federal and state courts, the first step in a civil case is the initiation of a lawsuit. A plaintiff initiates a lawsuit by filing a complaint with the court and serving the complaint on the defendants(s). In response, the defendant will serve and file an answer (or, in some cases, a defendant will file a motion to dismiss one or more claims in the complaint). The next phase in the litigation is called discovery, which is the process that, with a few exceptions, each side can obtain information relevant to the issues in the case. Discovery includes the production of emails, text messages, letters, notes, memoranda, photographs, etc. It also includes depositions — the process by which a witness provides testimony under oath in response to questions posed by the other side's lawyer and is recorded by a court reporter, and often videotaped. Discovery is often the most expensive part of litigation.

Despite what is typically shown on television and in movies, the vast majority of cases that are brought in the U.S. court system never go to trial. Rather, most cases are resolved through either settlement or dispositive motions. There are two types of dispositive motions: (1) a motion to dismiss which is filed shortly after the complaint in which the defendant(s) asks the judge to make a determination that, assuming the facts alleged in the complaint are true, the plaintiff is not entitled to relief and (2) a motion for summary judgment which usually is filed after discovery has been completed in which either party can ask the judge to dismiss one or more claims on the grounds that there is no genuine dispute as to any material fact that must be resolved at a trial and the moving party is entitled to judgment as a matter of law.

If a case cannot be resolved by a settlement or by dispositive motion, the case will proceed to trial. Depending on the type of dispute (in some cases, the parties will waive their right to a jury trial by agreement), the issues will be decided by either a jury or a judge (called a bench trial). In a jury trial, the judge decides what law applies and the jury decides all issues of fact and determines the amount of damages, if any. Unlike the legal system in many countries, each party to the litigation pays its own legal fees, subject to certain exceptions (for example, a contract between the parties might provide that the losing party pays the winning party's legal fees).

One of the key advantages of litigation is the enforceability of a decision rendered by a judge or jury. There is, however, an inherent amount of unpredictability and uncertainty when parties ask a judge or jury to resolve their dispute. Litigation can be costly and it can take years for a case to wind its way through the court system and appeals process.

Arbitration

Arbitration has become an increasingly popular alternative to litigation which takes place with little or no court inter-

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vention. Arbitration is purely a creature of contract, meaning that before a dispute even arises, the parties can negotiate and include in their contract an agreement to have their disputes resolved through arbitration, as well as the rules to be applied in the arbitration proceedings. For example, the parties can agree to limit or even eliminate costly discovery and depositions, select the location of the arbitration and the law of the country or state that will apply, choose the method of selection and number of arbitrators and may require that the arbitrator(s) have experience in specialized fields (*e.g.*, finance, construction, accounting, etc.). Even after a dispute arises, parties can agree to submit their dispute to arbitration.

Arbitration is often administered by a third-party organization (*e.g.*, the American Arbitration Association or JAMS). The parties are responsible for paying the arbitrators, and any other administrative costs and filing fees. Arbitration is initiated by filing a demand for arbitration. If a contract contains an arbitration clause, and one of the parties to the agreement initiates a lawsuit to resolve a dispute that is covered by the arbitration clause, a court will enforce the arbitration provision and order the parties to resolve their dispute through the procedures set forth in the parties' agreement.

Depending on the size and complexity of the dispute, the arbitration hearing can last from one day to a few weeks or longer. The arbitrator(s) will review the evidence and the testimony provided by the parties, deliberate and issue a written decision or award. A binding arbitration decision becomes legally enforceable when it is confirmed by a court.

A key advantage of arbitration is that it can be — but is not always — quicker and less expensive than litigation due to a limited discovery process. In addition, the parties have more control over the process because they are able to establish the rules governing the arbitration. Another important factor for many parties is that, unlike court proceedings, arbitrations generally are not public and afford greater confidentiality than do litigation proceedings.

One significant drawback of arbitration, however, is that there are very limited grounds upon which a party can challenge an arbitration decision and courts in the United States generally will not review claims that an arbitrator has made a mistake of fact or law. Unlike a judge or a court, arbitrators are not required — and often do not—provide a written explanation of their rationale for their rulings.

Mediation

Mediation is another type of alternative dispute resolution. Like arbitration, mediation typically takes place with little or no court intervention. The parties will select a neutral person to help them find a solution to their dispute and hold a meeting during which each side speaks to the mediator separately (known as "*ex parte*"). Mediators often are trained in negotiations and their role is to help the parties to reach a settlement of their dispute.

It is important to note that the mediator's role is not to decide the case and she cannot force the parties to settle. In addition, mediation is non-binding. In the event the mediator is able to facilitate a resolution of the dispute, the parties will enter into a settlement agreement that provides for all the terms of the settlement. Because there are no rules governing mediation, the mediation can result in creative solutions that might otherwise be unavailable. If mediation is not successful, then the arbitration or litigation resumes.

Conclusion

In the event a dispute arises, it is important to be aware of and to consider the benefits and risks of the various forms of dispute resolution in the United States. Schnader has experienced lawyers that can help Indonesian parties evaluate the different types of dispute resolution options that may be available and develop a strategy for even the most complicated dispute.

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