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PERSPECTIVES

DISPUTE RESOLUTION TRENDS: SPECIALTY TREATMENT OF 'SMALL CLAIMS'

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> DIFC COURTS

As the costs associated with legal disputes continue to rise around the globe, businesses are seeking options to defray legal costs and better ensure collection of claims. Arbitration has been a common option, often seen as lower cost; however, such costs are rising. Another option traditionally available for businesses facing smaller-value claims has been 'small claims' tracts within national courts.

Nevertheless, there is an ongoing and global disconnect between the judicial and institutional definition of 'small claims' and the reality facing most businesses. The institutional definition of 'small claims' varies around the world, with certain value claims eligible to receive expedited and low-cost treatment in national courts and arbitration institutes. Most national courts currently impose a cap on small claims close to $10,000. A number of arbitral institutions have also expedited procedures for small claims and tend to include higher value disputes as eligible for such treatment, yet parties must typically agree in advance to use of these procedures.

The timetable for a small claim usually moves faster than traditional claims, often including lower administrative fees, fewer court appearances and disclosure requirements, and elements of mediation or conciliation. Small claims may limit legal representatives, greatly reducing overall costs. Typically, small claims procedures will result in an

enforceable order or judgment treated with the same authority as any other court order or arbitral award.

What may be a 'small claim' for a business, after weighing costs and benefits, often does not qualify for 'small claims' treatment by national courts and arbitral institutes. Therefore, legal costs often outpace the value of the claim itself, rendering the claim worthless unless lower cost options can be found. The high cost of pursuing small claims may result in a net loss on numerous claims of significant value to small and big businesses alike. There is great need for a remedy to this ongoing issue.

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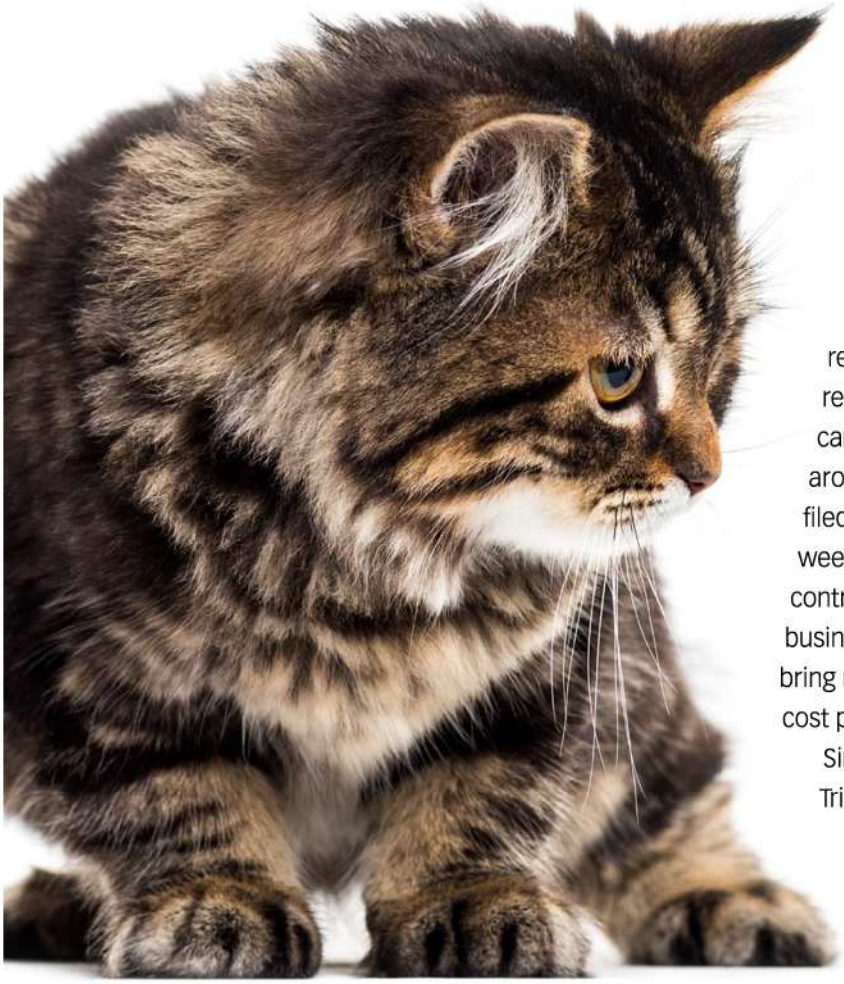
Trend to watch: raising the cap on 'small claims'

A new trend is emerging that will increase legal resolution of smaller claims and will greatly improve the administration of disputes in both national courts and arbitration: raising the monetary value eligible for 'small claims' treatment.

National courts: more change is necessary. As mentioned above, most national courts currently impose a cap on small claims close to $10,000, with some variation up to $25,000. For example, in the United States, small claims courts exist in each state with monetary caps ranging from $2500 to $25,000 with most states close to $10,000. In the United Kingdom, small claims courts are generally capped around £10,000 and in Singapore the cap is $10,000 or up to $20,000 upon agreement of parties. These options are often based on locality and intended for individuals and personal claims. While some of these courts implement specialised procedures depending on the type of case (employment, tenancy, family, etc.), businesses can often take advantage of these procedures for smaller contract and civil disputes. Unfortunately, the monetary caps are often too low for the procedures to be of value to most businesses. In certain instances, these small claims courts can lag with procedural updates, representing a missed opportunity for positive change.

However, a small number of national courts are rising to the challenge and raising the monetary cap on small claims, such as the Small Claims Tribunals in both Hong Kong and the Dubai International Financial Centre (DIFC).



The DIFC Courts have instituted a Small Claims Tribunal (SCT) (DIFC SCT) that includes a default monetary cap of $136,000 and an alternative cap of $272,000 if parties agree to the higher cap in writing. The rules allow parties from all over the world to 'opt-in' to the jurisdiction of the DIFC Courts in writing in order to use their procedures for commercial and civil disputes. The DIFC SCT incorporates unique features including reduced fees, a heavy focus on mediation, significantly expedited procedures, and default rules against the allowance of legal representatives.

The DIFC SCT's services are also available remotely through the use of 'smart' dispute resolution technology, whereby attendance can be accommodated from anywhere around the world. Ninety percent of cases filed in the DIFC SCT are resolved within four weeks of successful service. These features contribute to reducing legal costs by allowing businesses that choose to use the DIFC SCT to bring numerous claims that would otherwise be cost prohibited.

Similarly, the Hong Kong Small Claims Tribunal (HK SCT) does not allow for legal representation in most circumstances. The claim value is capped at $50,000. The HK SCT also incorporates a phase appropriate for voluntary settlement and expedited and informal procedures to facilitate quick resolution of claims.

Arbitral institutes: pre-dispute choice matters. Numerous arbitral institutions across the globe have expedited procedures for small claims and tend to include much higher value disputes as eligible for such treatment. The monetary value caps vary considerably and while most institutions require parties to specifically 'opt-in' to the small claims tract, some allow use of the small claims procedures by default for appropriate claims. Some institutions will not include a hearing by default, some only at arbitrator's discretion, and some include mandatory

hearings. Most institutions rely on a single arbitrator by default, however the option is often available to include three arbitrators if circumstances require. The typical time frame for expedited small claims procedures can vary from as little as three months to 9-12 months.

While many arbitral institutes have had small claims procedures in place for years, there has been a recent uptick in the creation and revision of these types of procedures to enhance efficiency and reduce costs for parties. This trend is based largely on demand from consumers of arbitral services, who cannot ignore the rising costs of arbitration and legal disputes in general.

One example of this recent trend is the ICC's creation, implemented in March 2017, of a small claims tract for arbitral matters valuing up to $2m. The expedited procedures will apply by default to all disputes falling under the threshold unless there is compelling reason to apply the full procedures, with parties able to apply the small claims procedures to higher value claims upon agreement of the parties. The procedures rely on a sole arbitrator, except where deemed inappropriate and the timetable is truncated, with the elimination of terms of reference, option for no hearing and/or no examination of witnesses and experts, and a six-month time frame from case management conference to final award with strict limitations on extensions of time.

How does this trend help businesses?

This dual trend in national courts and arbitral institutes marks an important acknowledgement that businesses around the globe, both small and large, need better options to recover on small value claims. Access to these lower-cost procedures for even higher-value claims drastically changes a business' cost-benefit analysis when determining which claims are worth pursuing. This trend needs to continue to create necessary shifts in the global market for legal services, otherwise jurisdictions limiting small claims to very low-value disputes will find themselves left behind.

Furthermore, active attention to updating the procedures and qualifying factors relevant to small claims courts and specialised arbitral tracts will often include updates to enforcement and collection procedures. Secondary to the unique features of both the DIFC and HK SCTs, but equally important, are the numerous initiatives implemented to ensure that even small claims decisions are enforceable around the world with as few legal and cost burdens as possible. Separate enforcement proceedings occurring after an initial dispute add significantly to legal costs and can often be unsuccessful. Thus, dual attention to opening the definition of small claims and bolstering the enforcement methods available on small claims decisions will result in a great boon for businesses.

How can businesses take advantage of this trend?

First and foremost, businesses and their legal teams will need to stay current on these developments, especially in relevant jurisdictions. It is important to note the great variation between qualifying factors and available procedures applied to small claims by different institutions. This significant variation makes wording of dispute resolution clauses incredibly important, especially with smaller value claims in mind.

Legal teams must aim to craft their dispute resolution choices in order to maximise the potential to collect on smaller value claims while also minimising the costs associated with those claims. This may often include attention to unique jurisdictions or arbitral institutes like the DIFC SCT and the ICC, which have created opt-in procedures beneficial for businesses pursuing smaller value claims. Smaller investments in legal knowledge now can save immensely in legal costs later, especially as many of these newer small claims options will allow for reduced costs for legal representation and administrative fees while increasing the chance of collection.

Legal teams should note that many of these procedures require opting-in, usually in writing and before a dispute arises. This means that efforts to update standard documents and contracts for future business in order to better outline a cost-efficient dispute resolution strategy will often be a worthwhile exercise.

Businesses should also consider amendments to past contracts and agreements to include more thoughtful dispute resolution clauses. There is opportunity to include varying choices in a dispute resolution clause for larger versus smaller value claims, allowing a business more flexibility in its dispute resolution choice, based upon the value of the claim at stake.

As this trend continues, it will remain important for legal teams to think outside the box and often look outside of immediately relevant jurisdictions or frequently chosen arbitral institutes for options that better fit their businesses' dispute resolution risk.

Conclusion

With legal costs showing no sign of a decrease in the near future, the rise of smart and efficient small claims procedures is an important development around the globe. Businesses should not be hesitant to consider these developments when mapping dispute resolution strategies moving forward, acknowledging that lower cost, more efficient procedures for small claims collection can make a big difference to their bottom line. CD

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