

Dispute Resolution: **Set the Rules when Contracting to Save Money and Time**

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Good fences make good neighbors. Clear, concise contracts make good business relationships. And, good dispute resolution provisions can make resolving future disputes quicker, cheaper, and even preventable.

Generally, disputes in the United States take one or more of three tracks after negotiation fails: mediation, arbitration, and litigation.

- Mediation adds a third party neutral, often a retired judge, to shepherd negotiations. It can resolve disputes before a business relationship becomes irreparable.
- Arbitration involves a third party decisionmaker, who is paid to hear each side's case and decide. This is usually a lawyer, and the arbitration process places limits on discovery and procedure that results in a quicker and less expensive dispute resolution process. In exchange, the parties surrender certain due process and discovery rights.
- Litigation is the court process, either before a judge or a jury.

Additionally, a toolbox of contract provisions can help fend off and reduce the cost of future disputes, such as:

- Attorneys' fee shifting provisions where the losing party pays the attorneys' fees of the winning party;
- Venue and jurisdiction provisions to require that lawsuits can only be brought in certain courts to prevent being sued in a distant or unexpected place; and
- Waiving the right to a jury trial so that complex business relationships remain with judges, often business court or federal judges, who have experience resolving complex, and often esoteric, business disputes.

These rules should be set at the time of contracting – when the parties are agreeable – and not left to the time their relationship deteriorates when the parties may be inclined to take advantage of the litigation process (and gaps in their previously agreed dispute resolution process). Working with counsel, businesses should consider, among other things:

- Is any confidential information being shared? If so, the sharing party may wish to retain the right to quickly file a lawsuit to put a stop to any improper use if the information is sensitive.

- Is there a prior relationship or is the other business well-established and respected? If so, agreeing to first mediate any dispute may reduce costs and save the relationship in the case of a future issue.
- Is the contract particularly complex or does it involve technical details? Arbitration before an arbitrator who is well-versed in the industry may be ideal, or, at the least, ensuring that the right to a jury trial is waived can keep any future dispute from spinning out of control before a jury of laypeople.
- Are trade secrets involved? Arbitration may be ideal to avoid such details being discussed in open court or in public filings.

Further, considering the interplay of the above tracks and tools can pay dividends. For example, in smaller disputes, businesses are often forced to settle litigation given outsized attorneys' fees for the amount in controversy. But, if the parties had agreed to mediate or arbitrate claims under a certain amount (i.e., \$50,000 or \$75,000), then the party in the right can short-circuit expensive and time-consuming litigation and need not unjustifiably compromise to avoid paying the cost of litigation, including an expensive jury trial. Or, the parties may elect to progressively apply mediation before arbitration or litigation to increase the chances that parties can resolve issues before their relationship (and ability to make money together) becomes irreparably damaged.

If you haven't considered these options, it may be time to dust off your old contracts and consider updating them. Burke, Warren attorneys have experience drafting such provisions with the insight that comes from extensive litigation, arbitration, and mediation experience. Contact Rachel Bossard at rbossard@burkelaw.com or (312) 840-7029 or Josh Cauhorn at jcauhorn@burkelaw.com or (312) 840-7055 for assistance in evaluating or drafting ideal dispute resolution provisions in your business' contracts.