

Pointers and Suggestions for Dispute Resolution Clauses

- **Mediation first**: Consider requiring mediation upon the outset of a dispute, prior to arbitration. Provide that if the mediation is unsuccessful, the parties shall engage in best efforts to structure an efficient arbitration process.
- **Scope of arbitration**: Determine which disputes arising under the agreement will be subject to mediation or arbitration. Agreements most often provide that "any and all claims or disputes arising out of or relating to this agreement" are subject to alternative dispute resolution. You can narrow scope and application of the ADR clause if the parties agree that certain disputes should be subject to regular litigation, if necessary.
- **Location of proceedings**: With parties in disparate locations, this can be a key provision relating to the efficiency and cost to a particular party. Of course, home turf is preferred.
- **Number of arbitrators and method of selection**: The size and complexity of the prospective dispute will influence whether to opt for one arbitrator is sufficient or whether three, which theoretically reduces the chances of a "arbitrary" decision with a lot at stake. The agreement can provide the parties will attempt to agree upon an arbitrator or arbitrators, and, failing that, will default to the selection process of the dispute resolution provider firm.
- **Designation of an ADR provider**: While the agreement can, and often does, provide which ADR firm will administer the dispute, the parties can make that decision at the time that the dispute arises, which may be preferable to provide for more flexibility. Or, the parties also can decide by agreement to use a provider firm other than one specified in the agreement.
- **Designation of the rules that are to apply**: The agreement should specify the rules that will apply in arbitration (there are no prescribed rules for mediation). The rules can be those of the specified provider firm, or one provider firm can be designated, while rules of another can govern the proceedings.
- **Damages permitted in the proceedings**: The parties can agree to limit the nature and scope of damages that an arbitrator may award. For example, it is not unusual that an agreement include an award of punitive or exemplary damages. Beyond the efficiency and lower cost of arbitration, this can provide a significant distinction-- and potential advantage--from traditional litigation.
- **Allocation of costs**: Generally costs are shared between or among parties to a mediation or arbitration, although the agreement can provide that attorneys' fees and other costs can be awarded to the prevailing party. One issue here may be that it is not always clear in arbitration which party has "prevailed", so specificity could be helpful with this provision to minimize ambiguity or uncertainty.