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Client Alert

April 2010

STATE OF THE ART DISPUTE RESOLUTION: WHAT'S IN *YOUR* CONTRACT?

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When a contract dispute arises, the most important provisions in the contract may be those governing dispute resolution. They typically dictate who will decide the dispute, what law will govern, and where the dispute will be decided. These "who, what and where" questions are forum, choice of law and venue. If the contract is silent on these, they may be answered by a race to the courthouse.

In today's business world, dispute resolution provisions are as varied as the businesses involved and the problems to be solved. Here are six basic approaches and their main features, which may be advantages or disadvantages, depending upon the parties and the context:

Courts. Contracts should specify the jurisdiction (e.g., California), the venue (e.g., Los Angeles) and the choice of law (e.g., California). The court system offers full discovery, evidentiary rules and the rule of law, rights of appeal, juries, public decisions, hometown bias, and widely varying times to resolution.

Judicial Reference. Contracts should specify that disputes are to be resolved pursuant to California Code of Civil Procedure section 638, and describe any special rules for the resolution of the dispute. This procedure enables the parties to specify the appointment of a "referee" (whom the parties or the court may choose) to decide their disputes, and have the referee's decision entered as a court judgment, subject to appeal. A judicial reference combines many of the advantages of both courts and arbitration. The parties can agree on the decision-maker or have the court determine the referee based on qualifications the parties specify, limit discovery, avoid a jury, invoke the rule of law, have rights to appeal, and obtain a faster and less expensive resolution.

Standard Arbitration. This is traditional arbitration by an arbitration provider such as the American Arbitration Association, JAMS or the International Chamber of Commerce. These organizations offer established arbitration rules and panels of pre-qualified arbitrators. This kind of arbitration is self-executing (meaning arbitration can be accomplished without any court order), is private, has limited discovery, avoids a jury, is final and binding, and is *sometimes* faster and less expensive to resolution.

Custom Arbitration. This is arbitration where the parties specify their own rules in the contract, for binding arbitration with or without the involvement of an arbitration provider. Parties often specify the method of choosing an arbitrator, the necessary qualifications of the arbitrator, what discovery, if any, is permitted, and other procedural rules and deadlines. If customized arbitration is not conducted under the auspices of an arbitration provider, a court's involvement

may be necessary. This kind of arbitration generally has the advantages of standard arbitration, but the customized rules may offer greater predictability and a more specialized and sympathetic arbitrator.

Mediation. This is usually used in addition to one of the other forms of dispute resolution, usually as something the parties must do before filing suit or commencing arbitration. Mediation is a process whereby the parties submit their dispute to a neutral third party, who will review the competing positions and assist the parties in attempting to negotiate a voluntary resolution. Mediation offers the possibility of a very quick and relatively inexpensive resolution, and even if unsuccessful, educates the parties on the strengths and weaknesses of their respective cases.

Economical Litigation Agreements. This is a new idea, sometimes referred to as a "litigation prenup," whereby parties to a contract or involved in an ongoing business relationship enter into a separate agreement containing detailed procedures for dispute resolution. These agreements may require direct negotiation by key executives, mediation, limited discovery, limited motion practice, fee shifting, and ultimately arbitration. ELAs are intended as litigation and arbitration hybrids, offering an abbreviated litigation process conducted under the auspices of arbitration.

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Sophisticated businesses understand the importance of dispute resolution provisions to a favorable outcome and choose procedures to fit the contracts and the industry. In so doing, they minimize the expense of resolving disputes and increase the likelihood disputes will be decided in their favor.