DRAFTING TIPS FOR "STEPPED"
NON-ADJUDICATIVE DISPUTE RESOLUTION CLAUSES

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The dispute resolution clause in any business contract is a matter deserving of thoughtful consideration, both by the business's lawyer but by company executives as well. The clause should describe an appropriate method of dispute resolution, taking care to prescribe a method of dispute resolution appropriate for the business arrangement created, the parties, and the types of disputes likely to arise. Mediation is only one form of dispute resolution. Particularly where a party desires a contractual "stepped" dispute resolution process, if mediation is to be contractually required as a predicate to a form of adjudicative dispute resolution, whether by litigation or arbitration, it must work well – and efficiently and seamlessly – with whatever other form of dispute resolution is provided for. Some drafting tips[2]:

A. Mediation is not, of course, the only non-adjudicative method of dispute resolution. It is, however, the most popular such method and is therefore treated in more detail here.

B. In mediation[3] , the services of an independent neutral...the mediator...are

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[1] Phil Cutler is a lawyer, mediator and arbitrator in Seattle WA. Having spent over 40 years representing and advising clients in complex commercial and business litigation (trials and appeals), and over 30 years serving as mediator and arbitrator in such matters, in 2011 Phil began focusing his practice on serving exclusively as mediator and arbitrator. He is a member of the American Arbitration Association's Mediation Panel and the Western District of Washington's Rule 39.1 roster of neutrals. He is also chair of the ADR Roundtable (www.adrroundtable.com), an informal association of leading Seattle-area lawyers, law teachers and ADR neutrals.

[2] These drafting tips were prepared originally for a longer set of materials for a WSBA CLE on the intracacies of drafting dispute resolution clauses. Other resources that may be of use to the drafter include the American Arbitration Association's "Drafting Dispute Resolution Clauses – A Practical Guide", available at www.adr.org (click on Education & Resources and search by title).

[3] The description of mediation which follows is generic and not intended to reflect how mediation is considered or handled in foreign countries or in all states. Moreover, the term *mediation* is used throughout these materials to describe a facilitated resolution of a dispute. Counsel should be aware that in the international context, mediation is often referred to as *conciliation*. The processes are similar, but may not be identical in all respects. Careful counsel will

employed to assist the parties in *negotiating settlement of a dispute*.

- The mediator attempts to facilitate an out-of-court settlement between the parties by identifying key considerations and interests of the parties, by building upon areas of common agreement and by challenging the parties and their lawyers to think critically about the case, potential outcomes, and the business and other risks which attend continued pursuit of the dispute (or the lawsuit, if one has been filed).

- In most states in the United States the mediation process is confidential, either by statute or court rule[4]; no information disclosed to the mediator during the mediation process may be revealed outside the mediation setting (or even to the opposing side without consent).

- Although all parties are expected to come to the mediation prepared to negotiate in good faith, mediation is an entirely voluntary undertaking; no party is required to agree to a settlement. The terms of any settlement reached are decided and agreed-upon by the parties (most often with advice and counsel of their attorneys), not the mediator.

- The mediator is not a judge and does not function like a judge. Nor is the mediator the lawyer for any party. While the mediator may, in the course of the mediation, give the parties and their lawyers his or her opinion or best judgment, based on experience, as to a matter in dispute, the mediator does not decide who is right and who is wrong, nor does the mediator "decide" any of the issues in the dispute. There is no "loser" in a mediation.

- If a settlement of the dispute results, it is because the parties decided that a settlement on the terms agreed-to was more advantageous, overall, than the continued expense and uncertainty of litigation. Unless the parties decide to publicize the terms of the settlement, those terms remain confidential.

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ensure that all parties to the international business agreement have the same understanding of whatever term is used.

[4] In Washington, *see* RCW 5.60.070 (Uniform Mediation Act). Many other states have adopted the uniform act. In Washington, *see also* Local Rule CR 39.1(c)(5), Local Rules for the U.S. District Court, Western District of Washington; Local Rule 16.2(d)(3), Local Rules for the U.S. District Court, Eastern District of Washington. The Alternative Dispute Resolution Act of 1998, enacted by Congress in October 1998 provides for confidentiality of mediation proceedings in all federal courts. *See* 28 U.S.C. § 652(d).

C. While mediation can be used as a stand-alone ADR method, it is commonly used either as the first stage in dispute resolution (with either litigation or arbitration following) or as an adjunct to either a pending lawsuit or arbitration proceeding. Mediation (or conciliation, as it is frequently known internationally) is an especially attractive method of dispute resolution in countries in which businesses are not especially litigious or in which the adversarial system of dispute resolution is disfavored.

D. In some countries mediation is required as an initial step in the dispute resolution process. Additionally, some countries display an historical antipathy toward non-consensual adjudicative dispute resolution. Consider adding mediation or some other form of informal, direct party-to-party dispute resolution as a prerequisite to adjudicative dispute resolution. Pre-arbitration conciliation can be either informal (the dispute is referred first to senior management, then to the parties' respective chief executive officers) or formal (using a mediator). Some possible clauses:

➜ ***Drafting suggestions:***

General

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Before [proceeding to invoke adjudicative dispute
resolution of any dispute covered by] [demanding
arbitration of any dispute under] this section,
the parties shall first....
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Negotiation

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In the event of any dispute, claim, question, or
disagreement arising from or relating to this
Agreement or any party's performance or alleged
breach thereof, the parties shall [each designate
a senior executive, who shall] use their best
efforts to settle the dispute, claim, question or
disagreement.  To this effect, they shall consult
and negotiate with each other in good faith and,
recognizing their mutual interests, attempt to
reach a just and equitable solution satisfactory
to both parties.  If they do not reach such a
solution within a period of ___ days, then, upon
notice by either party to the other, all disputes,
claims, questions, or differences shall be finally
settled by arbitration.....
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Mediation

If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by [mediation] [conciliation] administered by ... before resorting to [arbitration under this section][, litigation, or some other dispute resolution procedure]. If they do not reach a resolution within a period of ___ days, then, upon notice by either party to the other, all disputes, claims, questions, or differences shall be finally settled by arbitration.....

E. When including a pre-arbitration negotiation or mediation clause, consider whether the parties should be required to continue to perform the contract pending negotiation or mediation. Also, consider tolling applicable statutes of limitation during the negotiation or mediation phase – or expressly providing that such statutes are *not* tolled. If negotiation or mediation prior to entering into an adjudicative dispute resolution proceeding is contractually required, be careful to follow the dictates of the clause before seeking adjudicative dispute resolution so as not to impair your client's ability to proceed with arbitration or litigation.

F. Mediation clauses can address qualifications of the mediator, how the mediator is selected, how mediation fees and expenses are allocated, locale of the mediation or negotiation, time limits to complete the mediation or negotiation, and similar ministerial – but nonetheless important – concerns.

G. Mediation can ordinarily be begun on a "submission" basis, even in the absence of a clause requiring it. In "submitted" mediations, all parties agree to submit a particular dispute to mediation under the rules of a particular provider (*e.g.*, AAA Mediation Rules) or on terms described in the submission agreement.

H. Finally, whether or not to submit a dispute to mediation requires an analysis of the parties' interests, not just their rights. The same is true when, having submitted a dispute to mediation, the parties engage in mediation proceedings.

Phil Cutler, August 2014