

## ***"I'll take one mediation clause, to go! An arbitration on the side. No fries with that."*** **Elements of an Effective Dispute Clause**

You're thinking ahead. You're dealing with parties in other countries, or you just want a quick and cost effective resolution to any dispute which may arise. You've decided that you're going to make sure that if a dispute arises you've got a way to resolve it. You're going to put it right in the contract so that you don't have to lose any sleep thinking about whether you might appear to the other side to be weak if you suggest mediation.

### **\*\*Mediation**

You might want to do business with them again - or at least you don't want them as potential enemies. You know that mediation will help you to preserve the relationship while getting to a resolution that uniquely fits the situation. The resolution after mediation is workable and durable because, with the assistance of the mediator both sides use their expertise and creativity to craft the result. It's not someone else's idea imposed on you.

Timeframes will fit your needs and you don't have to wait for the court administration to get around to your case scheduled. You know that using mediation will keep your costs down compared to litigation or even other ADR (alternative dispute resolution) methods such as arbitration. You got all that. Now what?

During the negotiation of the contract you put dispute resolution on the list of topics you want to sort out with the other side. Of course you'll consider the specific needs of your situation - the possible sources of dispute, the nature of the subject of the contract, the urgency of getting a dispute resolved, and geography. Here are some common elements for effective mediation and arbitration clauses.

#### **5N's, 1M**

**Elements for a Mediation clause.**  
**NEGOTIATE. NOTIFY.**  
**NOMINATE. MEDIATE.**  
**NO NEXT STEP. NUMBERS.**

**1. Negotiate.** Give yourselves time to negotiate with each other. Maybe this can be sorted out quickly. This could be limited to a set number of days or end with a notice from one party to another that they want to move on to mediation. This could also direct that the dispute be taken out of the hands of the front-line people after a certain number of days and be negotiated by senior managers or chief executive officers.

**2. Notify.** To activate the mediation process tell them or have them tell you there's a dispute. Notice in writing keeps things clear.

**3. Nominate.** Pick a mediator. This can be open or from a list of mediators agreed by the parties in the contract. If you can't agree on a mediator after a certain number of days you can have a mediation firm or a mediation association name the mediator. When a dispute arises the key is not to get hung up on mediator selection.

**4. Mediate.** In good faith. This could include a requirement for confidentiality.

**5. No next step while mediating.** Until the whole mediation process is completed spell it out that no one takes steps in arbitration or litigation. This could be considered to be part of mediating in good faith. You don't lose anything because you can still go on to other remedies if the mediation doesn't work things out completely. You can include an arbitration clause in the event that mediation fails or use the court system.

**6. Numbers.** Who pays? Usually the parties to the contract will share the cost of the mediator and other costs of the mediation. Each side pays their own costs connected with the mediation, such as legal advice and travel.

How might this look in a contract? At right is an example you can use as a start to discuss with your lawyer. Modify it to fit your specific contract.

### **Sample Mediation Contract**

Any dispute arising out of this agreement or any later agreement between the parties shall be dealt with in accordance with this section.

If a dispute arises and cannot be resolved by negotiation between the parties, one party may give the other party notice that the matter is being referred for mediation to start within 30 days of the notice to mediate unless the parties agree to a later time. The mediator will be selected mutually by both parties. In the event that the parties cannot agree within 7 days from the date of the notice to mediate the party which gave notice will contact the London Area Mediators Association, P.O. Box 44059, Market Tower, 151 Dundas Street, London, Ontario, Canada N6A5S5 telephone 519-675-5656, [www.lama.on.ca](http://www.lama.on.ca) to request the assignment of a suitable mediator. The parties agree to accept the mediator assigned by the London Area Mediators' Association.

The parties will participate in the mediation in good faith and will keep all information provided or discussed in the mediation confidential. The parties will not take any steps to pursue formal legal proceedings on the subject of the mediation until after the completion of the mediation. Unless the parties agree otherwise the mediation will continue at the dates and times set by the mediator until it is completed. Completion of the mediation is when the parties reach an agreement or after at least one meeting of both parties and the mediator when one party withdraws from the mediation.

Each party will pay an equal share of the costs of the mediation, such as the mediator's fees, the mediator's travel and the costs of the meeting location for the mediation. For the purpose of this section each party's own legal and other expenses related to participation in the mediation are not costs of the mediation and will be paid by each party separately.

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**\*Arbitration**

The next question to consider is whether to include an escalating dispute resolution clause. Should there be a further step after mediation if the dispute is not resolved? Again this depends on the circumstances of the contract. For contracts where it is considered important by the parties to have the matter resolved outside of the court system, an arbitration clause would also be included. The considerations are similar to the factors considered in a mediation clause but not exactly the same.

7. What can the arbitrator(s) decide? Will all disputes under the contract be open for arbitration or only certain types of disputes?

8. Location of the arbitration. This is important because it determines the law that applies to the arbitration. If the parties do not decide the arbitrator decides. At the very least it is important to know whether the place chosen for the arbitration follows the United Nations Convention or model international trade law.

9. Choice of law. This may be set out elsewhere in the contract for the general contract terms but it can be specified for the purpose of arbitration.

10. Number of arbitrators. Commonly there are either one or three. If it's three, usually each party appoints one arbitrator and the two appoint the neutral chairperson. There have been cases where two arbitrators worked out well. The number of arbitrator is a factor to consider related to cost and length of time for a decision at the end.

11. Choosing the arbitrators. If the par-

ties can't agree there need to be another way to get an arbitrator chosen, for example the appointment is made by a named arbitration firm or association or by application to a court.

12. Procedure of the arbitration. This can be spelled out in detail, or refer to an arbitration act or internationally accepted model law format. Don't forget such details as the language of the arbitration.

13. Interlocutory matters. Generally the procedural issues that come up as the arbitration is progressing are decided by the arbitration panel - including issues like language and location if they're not in the contract. If it is a panel of three usually just one arbitrator, the chair, is designated to decide procedural matters. Usually there is no appeal allowed for these matters even if there is an appeal permitted on the final award.

14. Appeal. There can be no appeal, limited appeal only for certain matters, or a right of appeal to a court specified in the contract.

15. Confidentiality. Often there is a provision to keep confidential the fact of the arbitration and the documents associated with it. In high profile cases an agreement might specify that certain documents or information may be released because total confidentiality is not realistic.

16. Costs. Just as in mediation it's best to be clear about this right from the beginning.

How might these ideas be added into an agreement? For example, where the concern of the parties is cost control and getting a timely decision, the mediation clause above might be followed with this.

**Sample Mediation Contract**

In the event that the matter is not resolved after completion of mediation either party may give notice to the other that the dispute is being referred to arbitration.

The arbitration tribunal shall be one arbitrator appointed by the mutual agreement of both parties. If the parties cannot reach agreement within 7 days of the notice to arbitrate the party giving notice will contact the Arbitration and Mediation Institute of Ontario, 234 Eglinton Avenue East, Suite 500, Toronto, Ontario, Canada M4P 1K5, telephone 416-487-4429, www.amio.org to request the assignment of a suitable arbitrator. The parties agree to accept the arbitrator assigned by the Arbitration and Mediation Institute of Ontario.

The arbitrator shall be instructed that time is of the essence in the arbitration proceeding and the arbitration award must be made within 10 days of the parties' final submission to the arbitrator. The decision of the arbitrator will be final and binding and there shall be no appeal.

Each party will pay an equal share of the costs of the arbitration, such as the arbitrator's fees, the arbitrator's travel and the costs of the hearing location for the arbitration. For the purpose of this section each party's own legal and other expenses related to participation in the arbitration are not costs of the arbitration and will be paid by each party separately.

**Mark Your Calendar**

Upcoming Training Events Presented by Kathryn Munn

**Civil Justice for Mediators**

June 2, 2000

Fanshawe College, Business and Career Development in London

Call (519) 452-4430 Ext 4609 for more information.

**Mediation June 7, 8, & 9, 2000**

The Management Centre, Lambton College, in Sarnia

Call (519)542-7751 Ext. 505 for more information

**Electronic Common Ground**

We're still hearing from readers who prefer to get Common Ground by e-mail. Please let us know if you prefer to be on our [e-mail list](#).

Munn-thly Memo will be back in the next issue.

**What is it?**

\*ARBITRATION = A neutral third party intervenes in a dispute between two or more parties by making a decision which is binding on the parties. The arbitrator controls the process with rules similar to courtroom procedure.

\*\*MEDIATION = A neutral third party intervenes to assist two or more parties to resolve their dispute. The mediator assists the parties to resolve the dispute according to their own needs and interests. The mediator does not make a decision about the resolution of the dispute. The resolution is decided by the parties.

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