SHOULD ARBITRATION BE A PART OF YOUR CONTRACTS?

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The cost of legal fees in resolving disputes remains one of the biggest challenges in managing your business. Disputes that are over the minimum you can bring in conciliation court (generally $7,500 - $10,000 depending on the court) and less than $50,000 can net you a legal bill higher than the amount you recover. Are there less costly, quicker and more effective solutions?

In the past I've written about ways to control your lawyer and your legal fees. Leveraging Attorney's Fees to Avoid Litigation; Is There a Lawsuit in Your Future? How to Control Costs, Risks and Your Own Attorneys. Fee shifting provisions that require a defaulting party to pay your attorney's fees can be an effective tool. It is not always possible to get the other party to agree to that kind of clause however, and in some cases where the contract involves consumers, a court could be hesitant to enforce it. Another technique is to include in your agreements a clause that requires the other party to either mediate or arbitrate a dispute. Mediation involves hiring a third party to act as a go-between to try and resolve the dispute. A mediator can't make an award for one side or the other, he or she simply tries to negotiate a resolution. Arbitration involves a short-form trial, where the arbitrator declares a winner and loser based upon the contract and the conduct of the parties, and his or her decision is legally binding.

Arbitration is a regular feature in many contracts and has certain advantages. It is generally a quicker process, there is less time and money spent in discovery and there are no appeals. The downsides are that you have to pay for your share of the arbitration costs which will run several thousand dollars, arbitration doesn't resolve the issue of whether you can actually collect on your award, and because there is no appeal, the arbitrator's decision can be completely incorrect and you still have no basis to appeal it.

Generally speaking, the best situations to include arbitration are contracts where the possibility of a dispute is high and you need quick resolution, where the dollar amount that could be in dispute is too low to justify the cost of a lawsuit, and where the issues are such that you do not need either a complex analysis or a decision that could be binding in the future. Do not use arbitration clauses for situations where you have the superior bargaining position and can include a fee-shifting clause to your advantage or where you may need the enforcement power of the court such as in a non-compete where you are looking to bar an employee or other party from taking your customers.

Mediation is an often over-looked consideration in contractual disputes. Because mediation does not involve a final "decision" or award, it can be viewed as not an effective alternative. In reality, however, mediation may be the most effective way to resolve a dispute. Most cases filed in court end up in mediation and are resolved through that process long before they ever get near a trial. When parties are required

to sit down and examine both the strengths and weaknesses of their case through the eyes of a neutral third party mediator, they typically find their way to a fair resolution. I would recommend considering the use of a mediation provision in your agreements as an effective tool for reducing the cost of resolving your contractual disputes.