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To ADR or not to ADR – That is the question; Determining if ADR is the right choice by Loretta Gastwirth

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Kristine Wolf
Loretta Gastwirth, Meltzer, Lippe, Goldstein & Breitstone LLP

To ADR or not to ADR? The answer is…it depends. This non-answer is often the right answer when drafting agreements and considering the addition of an alternative dispute resolution (ADR) clause that provides for arbitration and/or mediation instead of litigation. A litany of further questions, however, will determine whether ADR is the right choice.

Most clients and their transactional lawyers abhor talking about the end of a business relationship while trying to make the deal that builds one. But inserting a "boilerplate clause" that you think will be non-controversial in negotiating a deal may prove disastrous. While focused on the economic advantages of the deal, a few minutes thought about the economics of what happens if the deal doesn't work is equally important.

Whether arbitration is a good fit is a more considered discussion; inserting a mediation clause in a contract is a no brainer. A mediated resolution could save a client a ton of money in the long run. While business people make business decisions and negotiate for a living, courts follow the law. The outcome of a litigation is win or lose; not, e.g., whether parties can negotiate a payout of monies owed–which can be negotiated in a mediated settlement.

Ideally, a contract will contain a clause requiring the parties to mediate prior to litigation or arbitration. Some say it's too early to mediate before swords are drawn. I disagree. When a conflict arises, agreeing to first mediate before an unbiased expert in mediation makes eminent sense. A good mediator asks the opposing parties to come armed with information – even with an accountant or other expert – to detail the situation, and increase the likelihood of a resolution. Even if that mediation is ultimately unsuccessful, it will give the parties a reality check as to their positions and possible outcomes.

What if the matter cannot be resolved in mediation? If the stakes are low, litigation should be avoided because the cost in terms of both time and money will likely exceed any judgment that may be obtained. More complicated or longer term contractual relationships with more money at stake usually warrant litigation.

Arbitration is an excellent way for business people to get their problems resolved within a year – not years, as is

often the case in court. Clients can ill afford to divert their attention away from their business to spend endless time with litigators and a knock-down, drag out litigation is expensive. While there will be document discovery in arbitration; there will likely not be interrogatories or depositions. Although arbitration may seem to have larger upfront costs beyond litigators' fees – i.e., the extra cost of paying an arbitrator and arbitration filing fees – there is long-term savings in that the controversy is over sooner and without excessive discovery, motions and court appearance costs. Remember, a contract containing an ADR provision should always reserve the right to seek immediate injunctive or similar relief in court in an emergency situation. CPLR 7503(c), in fact, provides for injunctive relief in aid of arbitration.

Other clauses to consider

If you choose arbitration in your contract, unless you have the gazillion dollar controversy, always insert a clause that says the matter will be arbitrated by a single arbitrator. Otherwise, the default rules of different arbitral forums may require a three member panel for a controversy exceeding certain amounts, costing a client three times the amount of arbitration fees. Having sat as a "wing" on arbitration panels, three is not better than one.

A simple arbitration selection clause in the contract will save on costs associated with the court appointing an arbitrator. Arbitration and mediation fees and expenses can be controlled through low cost forums, such as The Nassau County Bar Association's Arbitration and Mediation Panels.

Arbitration clauses should further state that the arbitration or mediation will be held locally to make life easier for everyone involved. This saves on the travel costs when arbitration hearings last several days or more.

Two more points of caution

First, although an arbitrator can compel parties to produce documents, parties may lack the ability to compel non-parties to produce documents or appear at trial when they are located outside the jurisdiction. Arbitration is a great forum for a client if he or she has the documents and witnesses needed to prove a case in-house. That is becoming more achievable nowadays as the use of email has outpaced telephone conversations and face-to-face meetings.

Second, an arbitral award is "final and binding." A party has a "snowball's chance in hell" of reversing it (to quote David Robbins) on the grounds that it is "in manifest disregard of the law" or "irrational." The finality aspect of arbitral awards, however, is often a most attractive feature to businesses that want the matter over and decided quickly with overall less expense.

Loretta Gastwirth, Esq. is an arbitrator, mediator and commercial litigation partner at Meltzer, Lippe, Goldstein & Breitstone, LLP and is the co-chair, Nassau County Bar Association, ADR committee, Mineola, N.Y.