

As featured in **Seattle Business**

# The Heat of the Moment

When inking that big deal, make sure dispute resolution provisions are on your checklist.



The strength of the Seattle area economy has been attracting both national and international attention. The bird that is synonymous with economic activity — the construction crane — is visible from downtown to South Lake Union and from Belltown to Bellevue. The real estate market is hot. The pace of deals and resulting projects remains strong.

While the essential terms like price and completion schedule receive appropriate attention during contract negotiations, in the rush to ink the deal, other important terms may not get the attention that they deserve, particularly when times are good. For example, dispute resolution provisions are often overlooked and insufficiently considered. After all, everybody's in love with the deal and it's hard to imagine having a disagreement with your new best friends.

An effective contractual dispute resolution section in a contract should provide mechanisms for resolving issues that arise both during performance and after completion. Sometimes, these mechanisms are referred to as prelitigation and litigation provisions. Prelitigation procedures often are structured to include multiple

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measures, beginning with attempts to resolve issues at the lowest operational level, and escalating to project level managers and then the respective corporate leadership. In the event that principal-to-principal discussions fail to resolve the issues, nonbinding mediation facilitated by a professional mediator often is selected as the next step. It is prudent for the parties either to agree in advance on a mediator or, alternatively, to designate a process for selecting a mediator.

There are several advantages to including a prelitigation dispute resolution process. First, it often enables work to continue. Second, it encourages management to bring resources and expertise to bear early in resolving a problem before incurring substantial delay and expense.

Not all issues get resolved absent of litigation, so it is prudent to consider the forum where any dispute should be resolved. Absent inclusion of an agreement to arbitrate, the dispute will be litigated in a court of competent jurisdiction.

Consideration of whether to include a provision obligating the parties to resolve disputes in arbitration rather than through the courts is important and not always easy. Arbitration sometimes

has the advantage of being a faster and cheaper dispute resolution mechanism. Arbitration proceedings are private, which can be beneficial if the dispute involves trade secrets, or confidential or sensitive information. Arbitration also is final. Once an award is made, the only role for the courts is to confirm the award and enforce the judgment. Litigation in court is public and there are rights to appeal an adverse result.

If arbitration is desired, it is important to remember that the parties have significant latitude in specifying how the process will work. An effective arbitration clause should address these issues:

**Who.** There are several questions that begin with this word, including:

- Who will be the parties subject to arbitration?
- Can all who are necessary for a final resolution (such as subcontractors or consultants) be compelled to participate in the arbitration?
- Who will arbitrate the dispute? One arbitrator or a panel?
- If the parties cannot agree in advance on who the arbitrator should be, then what will be the process for selecting the arbitrator?
- Who will pay for the costs of the arbitrator?

**What.** Specifically, what procedural rules and substantive legal standards will govern resolution of the dispute?

**Where.** The parties should specify the location of where the arbitration will take place. This decision is particularly important when the parties are headquartered in different states or countries.

**When.** The key question is when will the arbitration occur? Do the parties want to wait until performance is completed or is a resolution necessary to complete the work?

**Will.** Will the parties empower the arbitrator to award attorney's fees and costs to the prevailing party and what standard will the arbitrator use to determine who is the prevailing party?

The contract formation stage provides the best opportunity for tying down details of how disputes will be resolved. An agreement will save time, money and stress in the event the business relationship hits a pothole or, heaven forbid, a sinkhole.

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