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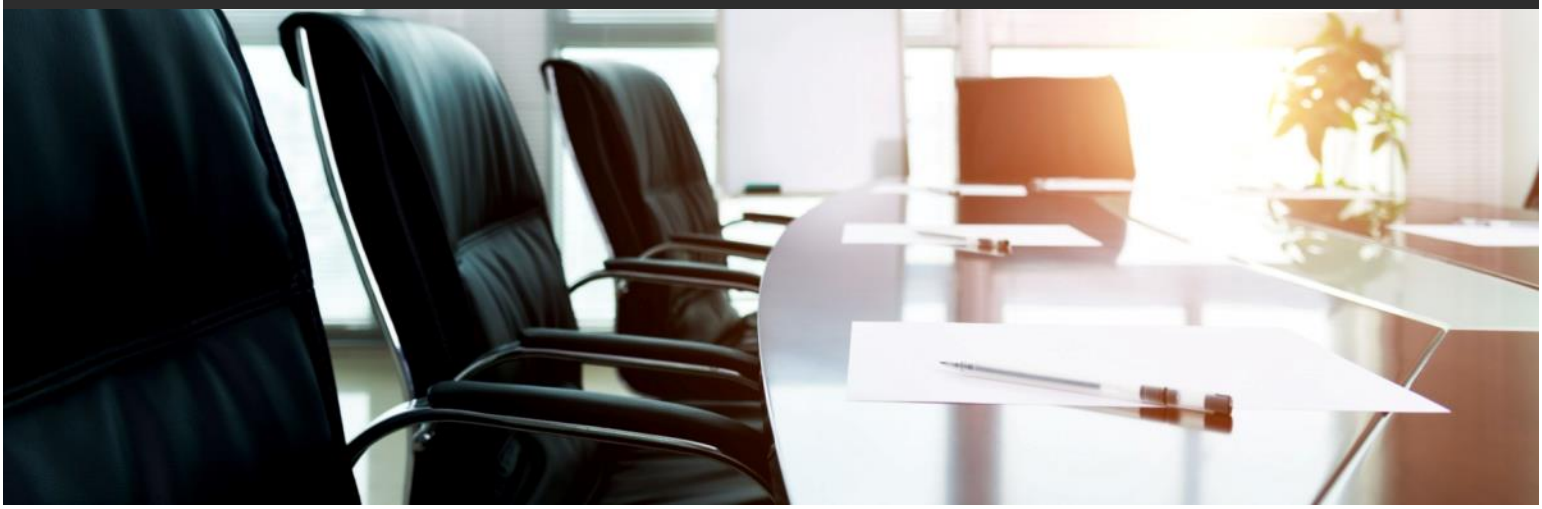
Advisory | Alternative Dispute Resolution



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Multi-Tiered Dispute Resolution Systems—Seeking 'Party-Controlled' Resolution Opportunities Before Arbitration or Litigation

Litigation and arbitration can be time-consuming, expensive, and emotionally draining for all concerned. Although arbitration was designed to be faster and more cost-effective than court proceedings, both are still "rights-based" dispute resolution models at their core. In those models, the parties give control of the outcome of their dispute to someone else—a judge, jury, or arbitrator—who decides who is right and wrong. That loss of control, combined with the inherently adversarial and contentious nature of rights-based adjudicatory processes, may leave everyone dissatisfied, even those who are anointed as the "winners." Moreover, rights-based processes themselves might further escalate the parties' conflict and damage relationships that once worked well. Consider a business that ends up in contentious arbitration or litigation with a long-standing vendor; even if the business wins, the relationship rarely survives.

Alternative Approach: A Party-Driven Resolution Model

There are alternative methods to resolve conflicts such as negotiation, conciliation, and mediation that do not involve someone else deciding what the resolution will be. Those methods typically focus on exploring the parties' interests, reframing conflict narratives, perceptions and beliefs, and identifying joint value. The methods often work because "conflict" generally is understood to be a *perceived* divergence of interests and *belief* that the parties' aspirations are irreconcilable. Perceptions and beliefs, however, often can be changed through effective communication, mutual understanding, and problem solving, which is

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where party-driven approaches like negotiation, conciliation, and mediation come in. They also seek to provide the parties with an opportunity to maintain control over the outcome of their dispute and may help preserve and even foster relationships.

Creating Problem Solving Opportunities Through a Multi-Tiered Dispute Resolution System

To encourage effective communication, mutual understanding, and problem solving, some companies use multi-tiered dispute resolution (MTDR) systems that incorporate one or more party-driven processes as mandatory "steps" or "tiers" before any rights-based dispute resolution process begins. These systems often are created through MTDR clauses. For example, a company's vendor contract may contain a dispute resolution clause that requires, as step one, a meaningful negotiation between executives with decision-making power for each party to resolve a conflict. If negotiation does not resolve the conflict, the parties move on to step two, which often is conciliation or mediation. If conciliation or mediation does not resolve the conflict, the parties then move on to the final step, which often is arbitration or litigation.

Informed Consent and the MTDR Clause

Parties should give their informed consent to use an MTDR system. What is required for informed consent will vary depending on the parties' relationship and circumstances. Generally, parties should be provided enough information that allows them to understand the system and its processes, the benefits of the system, and what rights are being waived by agreeing to use the system. In addition, obtaining informed consent seeks to establish a shared understanding as to why the parties are agreeing to use the system, e.g., to reduce costs associated with resolving conflicts, to preserve relationships and continue to do business together, and to promote fairness and respect, etc. That shared "buy in" not only may help to support using the system once a conflict arises, it may also help make sure that the parties abide by any resolution reached.

The MTDR clause is the backbone of these systems, and the clause must be drafted properly to be enforceable. For example, in the United States, enforceability may depend on, among other things, (i) clear definitions of each step, related procedures, timelines, and obligations; (ii) the relationship between steps and whether the steps serve as conditions precedent to arbitration or litigation; and (iii) how terms like "good faith" are defined and measured. Enforcement considerations may differ state-to-state in the United States, and in national courts in other countries for international business relatioships. Although the language of the clause may vary, example MTDR clauses and drafting assistance can be found in the International Bar Association's "Guidelines for Drafting International Arbitration Clauses" and the American Arbitration Association's clause drafting resources. Those resources may be helpful starting points; however, legal counsel can assist companies draft MTDR clauses for their own specific circumstances.

Conclusion

With an appropriate multi-tiered structure, as agreed to through informed consent and a properly drafted MTDR clause, companies gain more opportunities to resolve conflict through communication and problem-solving before turning to a "rights-based" resolution process, which may reduce the cost of conflicts and preserve relationships.

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