

Presented:
28th Annual Technology Law Conference

May 21-22, 2015
Austin, Texas

Key Dispute Resolution Clauses in Technology-Related Contracts

Minh Hien Nguyen, Dell, Round Rock, TX
David C. Mattka, Munsch Hardt Kopf & Harr, P.C., Austin, TX
Jessica Neufeld, Munsch Hardt Kopf & Harr, P.C., Austin, TX

INTRODUCTION

Disputes that otherwise might be resolved in protracted and expensive court proceedings are increasingly being addressed and determined through private dispute resolution techniques, including mediation and arbitration. These dispute resolution processes are normally the product of negotiated commercial agreements. The popularity of contract clauses calling for informal dispute resolution, mediation, and arbitration in business and technology relationships is driven in large part by the parties' preferences regarding a host of factors, including: control over the selection of decision makers, the time and place of hearings, expected reduced discovery costs, an expected expedited consideration of claims and defenses in a private forum, and finality without lengthy appeals.

In most business negotiations, the parties are focused on finalizing the transaction. Dispute resolution provisions may be viewed as a low priority because they anticipate problems right at the time the deal is coming together. Negotiating procedures for dispute resolution in advance can, however, greatly reduce risks, time, and expense for the parties.

While technology clients are often encouraged to include such provisions in their agreements, they should do so with a clear understanding of the benefits and potential burdens of various dispute resolution processes. This paper and presentation explore some of the pros and cons of typical dispute resolution techniques with respect to technology related contracts by addressing examples of typical contract clauses used by in-house counsel, with feedback through the lens of outside litigation counsel.

Checklist of Things to Think About

- **What type of dispute resolution do you need?**
- **What types of disputes are you anticipating? Do they involve IP issues?**
- **Should you exempt certain types of issues from binding arbitration?**
- **Is this a US only agreement or do you expect cross-border disputes?**
- **If you're going to agree to arbitration, which rules (CPR or AAA) are preferred for your company?**

TABLE OF CONTENTS

INFORMAL DISPUTE RESOLUTION	3
SIMPLE:	3
DETAILED:	3
AFTER INFORMAL DISPUTE RESOLUTION FAILS.....	5
MEDIATION:	5
ARBITRATION:	5
LITIGATION	6
ADDITIONAL ARBITRATION CLAUSES	8
ARBITRATION RULES	8
SPECIFYING NUMBER OF ARBITRATORS.....	8
INJUNCTIVE RELIEF STILL AVAILABLE	9
CARVE OUTS FROM ARBITRATION	9
CONFIDENTIALITY	10
WHO PAYS?	10
CROSS BORDER ARIBTRATION.....	10

INFORMAL DISPUTE RESOLUTION

SIMPLE:

(1) The Parties shall attempt in good faith to resolve informally any claim, dispute or controversy (whether in contract, tort or otherwise) arising out of or relating to this Agreement promptly by face-to-face negotiation with persons fully authorized to resolve the dispute.

(2) Each Party will appoint a representative to meet and negotiate in good faith to resolve any dispute arising under this Agreement. The location, form, frequency, duration, and conclusion of these discussions will be left to the discretion of the representatives. Upon agreement, the representatives may utilize other alternative dispute resolution procedures such as mediation to assist in the negotiations.

DRAFTER'S COMMENTS:

- Option to add "telephonic negotiation" to (1)
- Option to add to (1): "In attempting these good faith negotiations, the Parties shall consider the appropriate personnel to be involved in such negotiations, including executives at the appropriate level of the respective companies depending upon the circumstances of the dispute."
- This language signals that mediation is in the mix for resolution of the dispute.
- Option to add qualifiers to the "representatives."

SEMI-DETAILED:

Before initiating a lawsuit against the other relating to a dispute or claim herein, the Parties agree to work in good faith to resolve between them all disputes and claims arising out of or in relation to this Agreement. To this end, either Party may request that each Party designate an officer or other management employee with authority to bind the Party to meet to resolve the dispute or claim. During their discussions, each Party must cooperate with the other Party in exchanging data and correspondence necessary to resolve any such dispute.

DRAFTER'S COMMENTS:

- You've specified an affirmative duty of cooperation.

DETAILED:

Any Party may give the other Party written notice of any dispute (Dispute Notice) by sending same per the Notice Provision of this Agreement. Said Dispute Notice shall succinctly state the nature of the dispute and designate which representative with full authority to settle will attend the negotiation. Within seven (7) days of the receipt of the Dispute Notice, the receiving Party will advise the other Party of the identity of its representative with full authority to settle who will attend the negotiation. Within thirty (30) days of receipt of the Dispute Notice, the designated Party representatives shall meet at a mutually acceptable time and place to attempt to resolve the dispute. The timetables set forth in this subsection may be extended by mutual agreement, and the Parties may agree to escalate this informal dispute resolution to a higher level of representatives authorized to settle the dispute if necessary.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Key Dispute Resolution Clauses in Technology-Related Contracts

Also available as part of the eCourse

[Complex Agreements and Transactions](#)

First appeared as part of the conference materials for the
28th Annual Technology Law Conference session

"Key Dispute Resolution Clauses in Technology-Related Contracts"