Dispute Resolution, Choice of Forum and Choice of Law

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A customer's three choices for dispute resolution mechanisms are mediation, arbitration and civil litigation. All three differ in a number of important respects.

Arbitration is a binding procedure in which the parties agree to have one or more neutral third parties, typically retired judges or experienced attorneys, adjudicate the parties' dispute. Depending on the extent to which the parties agree to limit pre-hearing discovery and other proceedings, arbitrations can be quicker and less expensive than civil litigation, but this is not always the case. As arbitration hearings typically involve live testimony and cross-examination, arbitrations are often quite disruptive to the parties' business relationships.

Arbitrations have the potential advantage of being private and not of public record. This is useful for parties who would like to keep their disputes with contractual partners out of the public view.

Potential disadvantages with arbitration are the relative lack of appellate review available. Typically, absent a showing of fraud or collusion, or a simple mathematical error on the part of the arbitrator in arriving at an award, courts are very unlikely to disturb an arbitrator's award. In addition, there is typically less effective recourse in the event of discovery abuses and misconduct on the part of the parties.

Civil litigation, as is apparent from the discussion of arbitrations, has no small amount of similarity with arbitration. Regardless, for customers who value full discovery and appellate rights and procedural protections, and for whom the public nature of the proceedings is not a disadvantage, civil litigation may be preferable to arbitration. This is especially so for a litigant for whom injunctive relief is important, as courts are in a much better position to grant this relief than private arbitrators.

Mediation is a non-binding procedure in which the parties agree to have a neutral third party, typically a retired judge or experienced attorney, attempt to broker a settlement. Because it is non-binding, mediation is never going to be a sufficient form of dispute resolution by itself, without being combined with some choice of binding dispute resolution mechanism. However, it does have the advantages of being potentially much less

lengthy, expensive and disruptive to the parties' business relationships. It is also private rather than public, and as with most settlement related communications, the parties are typically able to agree that evidence of statements made during mediations are not admissible in litigation involving the same dispute.

The potential downside of mediation is that mediation is only as viable as the parties' willingness to reach an agreement. Absent this willingness on both sides, mediation is unlikely to be fruitful in either settling the dispute or bringing the parties closer to a settlement.

Another dispute resolution issue that customers should address in the contract is the forum for dispute resolution. In the absence of a provision selecting a location for dispute resolution, the parties are going to be subject to being sued in whichever jurisdictions that they are subject to the court's exercise of personal jurisdiction. Typically, a court will exercise jurisdiction over a party if that party is found to be in the jurisdiction, has systematic and continuous contacts with the jurisdiction, or if the party's contacts with the jurisdiction that relate to the subject matter of the dispute would make it fair for the court to exercise jurisdiction. *See, e.g.*, *Asahi Metal Indus.*

Co v. Superior Court, 480 U.S. 102 (1987); *Calder v. Jones*, 465 U.S. 783 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *International Shoe v. Washington*, 326 U.S. 310 (1945).

A customer should seek to have the forum for any dispute be the customer's home jurisdiction. Typically, the customer is going to have sufficient leverage at the outset of the relationship to insist on litigating in the customer's home jurisdiction, as presumably the vendor will be sufficiently motivated to obtain the customer's business that the vendor will concede this point.

It is inconvenient and costly to have to litigate in faraway jurisdictions, as the customer must arrange for transporting witnesses and documents to the jurisdiction. Moreover, the customer's attorney may not be admitted to practice law in the other jurisdiction, and may not be familiar with the procedural rules of the other jurisdiction. The customer and its attorney may be less sympathetic to a judge or jury from the other jurisdiction, and conversely the other party may be more sympathetic to a judge or jury from its home jurisdiction. Indeed, when the amount of controversy is small, the choice of forum may create or shift sufficient expense, inconvenience or leverage as to be outcome determinative.

The choice of substantive law is another issue that requires attention at the contract drafting stage. While it is sometimes difficult to predict in advance which legal issues might give rise to disputes and how the substantive rules of law and results may differ from jurisdiction to jurisdiction, in general, a customer's attorney is likely to be more familiar with the laws of his or her own jurisdiction, and so there is a general natural advantage usually inherent in choosing the law of the customer's home jurisdiction.