

Annotated Dispute Resolution Clause

Dispute Resolution.	Notes:
<p>Any disputes, disagreements, controversies, questions or claims arise out of or relate to this Agreement, including, without limitation, with respect to its formation, execution, validity, application, interpretation, performance, breach, termination or enforcement ("Disputes"),<1> shall be resolved in accordance with these provisions.</p>	<p>1. "Disputes" is very broadly defined. This ensures everything is subject to arbitration. Many standard clauses automatically exclude certain matters, such as intellectual property claims, from mediation or arbitration. That may not be wise. It may mean that the parties have to fight separate but related claims in two places, with a risk of conflicting results.</p>
<p>Without prejudicing any rights the parties may have, including termination of this Agreement, the parties agree that they will attempt to resolve the Dispute by negotiation between their authorized representatives, who shall discuss and attempt to resolve any such Disputes.<2></p>	<p>2. Consider which representatives are required to negotiate. Can this be delegated?</p> <p>Some clauses say "meet and attempt to resolve." Does that require in-person meeting?</p>
<p>If a Dispute cannot be resolved by the parties within five (5) business days <3> of the first meeting between the parties to resolve the Dispute, then either party may submit the Dispute to mediation. The parties will jointly appoint a mediator <i>[who shall be a member of ...]</i>. If the parties are unable to agree on the selection of a mediator within ten (10) days after the Dispute is submitted to mediation, then either party may refer the dispute to binding arbitration. The parties agree to participate in mediation and any related negotiation for a period of not less than ten (10) and not more than thirty (30) days in accordance with the procedures directed by the mediator.<4> All conduct, opinions and statements made in the course of the mediation are confidential.<5> No party will call the</p>	<p>Note that this clause does not say "negotiate in good faith". That can lead to more disputes over whether there was good faith or not. There is, however, a general duty to act in good faith, recognized by the Supreme Court of Canada in <i>Bhasin v. Hrynew</i>.</p>
	<p>3. It is a good idea to set a short default time limit for each step. The parties can always agree to extend the time, if negotiations are continuing.</p>
	<p>4. Consider whether to include mediator qualifications in the clause.</p>
	<p>Decisions about the mediation process (including when to terminate the mediation) should be left in the hands of the mediator, if the parties cannot agree.</p>
	<p>Specify a short time for this phase, unless the parties agree to extend the time.</p>
	<p>5. Do not assume mediation is confidential. This must be expressly agreed. The mediation agreement will normally include the provisions in the following sentences (can't call mediator as witness, admissibility of documents and other evidence presented at the mediation), but it may be useful to spell them out in the dispute resolution clause.</p>

<p>mediator as a witness for any purpose in any arbitral or judicial proceeding, nor will any party seek access to any documents prepared for or delivered to the mediator or any notes or records of the mediator in any proceeding. Evidence that is otherwise admissible or discoverable will not be rendered inadmissible or non-discoverable as a result of its presentation or use in the mediation. Each party will bear equally the cost of the mediation.</p> <p>If no settlement is reached by negotiation or mediation according to the preceding provisions of this Section, the parties agree to submit the Dispute to arbitration by a single arbitrator <i>[who shall be a member of ...]</i> <6> in accordance with the [Act or Rules]. <7> The place of arbitration procedure will be [City, Province]. The language of the arbitration will be [French/English]. <8> The award of the arbitrator shall be final <9> and binding and may be entered and enforced in any court of competent jurisdiction. <10></p>	<p>6. Consider whether there should be one arbitrator (quicker, cheaper, but what if they get it wrong?) or three (more expensive, but maybe three heads are better than one). If there are specific qualifications for the arbitrator, state them as well. It is generally <u>not</u> a good idea to name a specific individual or to specify qualifications that are so narrow that they cannot easily be met. It may then be impossible to get an arbitrator who meets the criteria (and is available).</p> <p>7. Expressly state the governing arbitration statute or rules. If there are any agreed modifications to those rules, they should also be expressly stated.</p> <p>8. Specify the language and place of arbitration. Consider a neutral location. The place of arbitration does not have to be the same as the governing law, but separating the two does complicate things.</p> <p>9. Consider whether there should be any right of appeal. If so, is it limited to questions of law? Is the appeal to another panel of arbitrators? If the appeal is to a court, be certain that the court will take jurisdiction and hear the appeal.</p> <p>10. Consider where any ultimate award may have to be enforced – where are the parties located, where do they have assets, which courts would have jurisdiction over the parties or the subject matter of the dispute and do those courts recognize arbitration awards. (Generally, it is easier to obtain enforcement of an arbitration award than a foreign court judgment.)</p>
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DISCLAIMER: This sample contract clause is provided for illustration purposes only. Each clause should be tailored to the specific situation, with appropriate legal advice.