

Financial Adviser

Mediation and Arbitration: An Attractive Alternative to Financial Litigation

The best strategy, when negotiating business plans or contracts, is to have your certified public accountant assist lawyers in explaining and inserting clauses on how disputes will be resolved, should an adverse turn of event take place.

For those unfortunate companies considering litigation as a way to head off a thorny dispute, the use of mediation and arbitration is growing in popularity. Typically called "alternative dispute resolution (ADR)," ADR saves precious time and cost while effectively and efficiently resolving issues.

In fact, in January 2008, the U.S. District Court for the Western District of Pennsylvania, which sits in Erie, Pittsburgh and Johnstown, mandated ADR usage by all judges in virtually all civil cases, following a successful pilot program in 2006-2007. During the pilot, 41 percent of all Western District cases were assigned to ADR, with 51 percent settling. A majority settled through mediation.

MEDIATION

Mediation is a non-binding, flexible and confidential process that focuses on reaching an agreement between parties. A neutral professional, such as a certified public accountant or attorney, serves as a mediator to help both parties resolve their dispute voluntarily on mutually agreeable terms. "Non-binding" means that the mediator has no power to make the decisions and the parties ultimately determine the outcome themselves, whether in agreement with the mediator or not. The cost of a mediator for one day generally is about the same as the parties would incur taking a deposition for a day in traditional litigation. As well, the facts

in the case remain private, unlike in the public fishbowl of a trial.

ARBITRATION

Arbitration is a binding process focusing on achieving an award to one party or another. The parties forego filing a complaint in court, a neutral party serves as arbitrator and resolves disputes between parties at a hearing called arbitration. Binding arbitration means the award can be enforced in the courts. A hearing is held in the presence of the arbitrator, following the rules of arbitration. The process results in an enforceable award versus an agreement, that is, mediation. Arbitration generally is less costly than litigation and generally more expensive than mediation.

CPAs trained as mediators and arbitrators by the American Arbitration Association typically have a greater understanding of the underlying sophisticated financial data than the judiciary who may have more of a general background and not be trained in accounting. This gives the parties the advantage of more informed financial judgment in resolving the matter.

PROS OF ADR

Mediation provisions in a contract typically should include a mandatory non-binding clause requiring the parties to participate in non-binding mediation within a set time period resulting in an agreement settlement versus an award to one party. Because a CPA mediator has an independent, objective viewpoint, he or she can evaluate the dispute and ask the right types of questions to allow the opposing parties to reach more rational decisions. CPAs perform well in this role because of their experience as a business's most trusted adviser,

in defusing strong emotions and personalities, and in understanding complex financial data.

In ADR, control of the dispute is in the hands of the parties instead of the courts. Most mediation clauses include an exception allowing the parties to bypass mediation when emergency measures require it.

CONS OF ADR

Of the few cons of ADR, one is the lack of immediate relief in a business emergency where arbitration or a lawsuit may be the only advisable option in enforcing important rights, such as theft of trade secrets or defection of key employees that could imperil the entity's immediate revenue stream.

AN OUNCE OF PREVENTION

Unfortunately, business relationships and contracts too often turn into unexpected conflict. Consider addressing the use of ADR at the planning stages of any business relationship.

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