

The Value of Having a Dispute Resolution Clause

A dispute resolution clause can save you money and help you reach an agreement more quickly. Despite this, many organisations still don't routinely include one in their contracts.

In this article, David Pritchard, an ex-solicitor and one of our expert dispute consultants, explains exactly what a dispute resolution clause is and why you should always insist on having one.

When I was a practising solicitor if my clients were involved in a dispute they would often ask me to advise them on the strength of their contract. The first thing I always did was to check the jurisdiction on the back page and then look for a dispute resolution clause.

I remember I would frequently suck my teeth in the manner of a builder presented with shoddy workmanship when, as was often the case, the contract contained no such clause.

Like the tooth-sucking builder I was well aware my client was likely to be in for some steep - and usually unnecessary - bills.

How you can avoid unnecessary bills

A well drafted dispute resolution clause (also called an escalation clause) is a simple way to reduce your legal costs. It gives you a binding structure to refine and seriously test a dispute at different levels before it gets anywhere near a litigator.

Most contract disputes are about either performance or payment. In theory, if the parties are keen to carry on working together, such disputes are easy to fix. However, more often than not human nature gets in the way because, for the fix to work, one or other party has to give ground. And, as humans, we never like to give ground, even when we're in the wrong.

Most escalation clauses require the dispute to be addressed at CEO level within a set timeframe. Because, on the whole, we value our relationships with our CEOs, we often find the rationale and motivation necessary to resolve the dispute before it gets that far.

However, if the dispute is escalated, CEOs are in the perfect position to take a wider view. They're able to look at it in the context of the whole business and have the authority to agree a fix that will overcome any operational obstacles. If that still proves too difficult, they can call on a mediator for independent, expert and objective advice that is very likely to secure a solution. 80% of mediations do.

All the time this is going on, the parties are still trading together. There is a dispute, but because it is being handled within the contract there is no need to break off relations.

This means the parties don't polarise and, crucially, continue to have a strong commercial incentive to get back on the right footing. In fact, a carefully managed dispute resolution process can even lead to improvements in workflow.

The value of early mediation

Some escalation clauses call for 'early neutral evaluation' of the legal position. In this case, parties pay equally for independent insight into the dispute. Note this means independent from each party's own legal advisors, as they may have a strong vested interest in supporting their own contract wording. They may even already be mentally adding the litigation fees to that year's billing target.

Disputes that go to mediation early, before the lawyers have done their best to identify every legal facet of the dispute (possibly adding some that only serve to drive the parties further apart), are more likely to reach settlement. This is because the parties are still basically friendly and haven't been driven apart by a litigation process that is designed to grind low and small.

When we begin a business relationship, it can seem a jinx, and perhaps unseemly, to insist on an escalation clause before the honeymoon has even begun. But just like prenuptial agreements, we need to assume the worst and prepare for it. Otherwise it will be the lawyers who benefit - and who wants that?

Many businesses acknowledge and even promote their commitment to dispute resolution. Go one step further and include a dispute resolution clause in your contracts and you'll ensure that within a given timeframe your company has an 80% chance of sorting out any differences with suppliers and customers.

We have some excellent model dispute resolution clauses for contracts and settlement agreements. For a free copy and advice on what will best suit your needs please get in touch by calling us on +44 (0) 20 3287 2802 or emailing us at contact@moothill.co.uk