

GAINING POPULARITY: 'STEP-UP' ARBITRATION CLAUSES REPLACE COSTLY LITIGATION

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Alternative dispute resolution, or ADR, is the practice of resolving disputes by submitting them to a private resolution forum. As the costs of litigation have risen and courts have been plagued with overcrowded dockets, parties are seeking less costly and expeditious dispute resolution.

Parties to a contract can agree at the time of contract that ADR—mediation, arbitration, or both—will be part of the process for resolving any dispute. The contract generally must contain a conspicuous paragraph indicating that any dispute arising out of or relating to the agreement will be mediated or arbitrated. This 'relating to' language is usually sufficient to require arbitration or mediation of all claims.

The caveat is that, under Arkansas law, tort claims are not arbitrable. Contracting parties are allowed, however, to contract for how the mediation or arbitration will take place. They may agree as to what rules shall apply, what venue will be used, where the arbitration or mediation will be held, who will pay the costs, and even what law will govern. By

agreeing, for example, that the Federal Arbitration Act (rather than Arkansas law) will apply, the parties can agree to arbitrate tort claims.

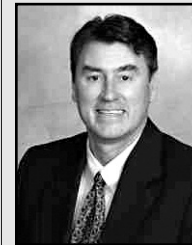
Mediation is essentially a voluntary, facilitated settlement process. It does not require the calling of witnesses or production of documents, and the parties are not bound by any recommendation by the mediator. Conversely, arbitration acts without the formal strictures of trial, but results in a binding decision.

Many business clients utilizing specialized contracts are now choosing to include 'step-up' ADR clauses. These clauses require the parties to first submit a dispute to the non-binding mediation process. Only if the parties cannot successfully mediate the dispute will they be allowed to arbitrate.

From both legal and practical standpoints, this system has benefits. Mediators in Arkansas report an 85% to 95% success rate for commercial-type mediations, and mediation is the least expensive means of dispute resolution. In the event mediation is unsuccessful,

arbitration is still less expensive than a jury trial and often results in a resolution in half the time. Both mediation and arbitration share the common benefit that the parties may select a mediator or arbitrator with specialized, technical expertise to resolve complicated disputes. And the process of requiring mediation as a condition precedent to arbitration allows the parties to better understand each other's position before ultimately submitting the dispute to a binding decision.

When drafting contracts, consider not only how performance will occur, but how breaches should be resolved. Utilizing the 'step-up' ADR process, contracting parties find themselves ending disputes quickly, less-expensively, and amicably.



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