

ADR Insights on Business Divorces: Choices (Part 3 of 9)

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*I've had choices, since the day that I was born
There were voices that told me right from wrong
If I had listened, I wouldn't be here today
Living and dying with the choices I made.*
(George Jones' Choices)
(Written by Billy Yates and Mike Curtis)

This is the third in the “*Breaking up is Hard to Do*” nine-part series exploring dispute resolution for business divorces.

Choices. Disagreements are inevitable. There are many choices available to resolve them. The first important choice is to include a dispute resolution clause in the governing documents. Having clearly defined procedures may alleviate some of the tension as the parties work toward a resolution.

When choosing a dispute resolution clause, rather than using a boilerplate provision, business partners should think about their specific needs and concerns. Co-owners should consider different forms of dispute resolution including mediation, arbitration, and courthouse litigation. They should think about confidentiality, cost containment, time constraints, relationship preservation, formality, and industry factors. They should examine procedural issues including jurisdiction, venue, forum, governing law, and statutes of limitations.

If relationship preservation is a primary driver, then early mediation may be the best place to start. However, provision should be made for next steps if efforts at consensual resolution are unsuccessful.

If confidentiality is of great importance, then mediation and arbitration may be good choices because both may be conducted confidentially.



If cost containment or time constraints are essential, then deadlines can be embedded in the dispute resolution clause governing mediation and arbitration. In addition, for arbitration, the clause can provide for a sole arbitrator and establish limits on discovery.

If the dispute resolution clause includes mediation and/or arbitration, then it should also address whether it will be administered by a third party (i.e., AAA, CPR, AHLA, JAMS, etc.) or governed by the procedural rules of a third party even if non-administered.

One word of caution. At inception, there is no way to predict the nature, breadth, or depth of disputes in the future. Make sure to build into the clause sufficient flexibility so that it will remain relevant regardless of how the future may play out.

There are many dispute resolution clause drafting tools available for free, including through the American Arbitration Association and JAMS, which can be used to design a dispute resolution clause tailored to fit the situation.

With so many choices, business partners should take the time to understand their options and explore their concerns, then customize a dispute resolution clause that fits their specific needs.

Disclaimer: “You’re So Vain, You Probably Think This Song is About You” (written and sung by Clary Simon). Please note that this series is drawn from over 30 years of experience as counsel or neutral in business separations, reconciliations, and divorces. Nothing in this series is based on any specific dispute in which I have been involved. In addition, nothing contained herein constitutes legal advice nor does it create a professional relationship.