

## The Risks and Benefits of Mandatory Preliminary Meetings Between Senior Representatives

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**Commercial arbitration agreements may contain dispute resolution clauses that require senior representatives of the parties to meet for a designated period of time before further dispute resolution steps may be taken. This article examines the risks and benefits of such clauses as well as key factors that parties to such agreements should consider.**

Dispute resolution clauses for commercial agreements often require senior representatives of the parties to meet for a designated period of time before further dispute resolution steps may be taken. One example of such a clause is:

Senior representatives of the disputing parties shall, upon written request by any disputing party, meet in person, within [●] business days from the date of service of a written notice of dispute or as agreed to between the senior representatives, for a total of not less than [●] hours, or any shorter period that results in an agreement, to attempt to resolve the dispute. The senior representatives of each disputing party shall have sufficient authority to negotiate a binding settlement on behalf of the disputing party they represent. If the senior representatives are unable to resolve the dispute within [●] business days and do not agree to extend the discussion process, then the dispute shall be finally resolved by arbitration pursuant to ..... [the “**Example Clause**”].

The basic purpose of such clauses is to enhance or exhaust the possibility of settlement before formal dispute procedures are engaged, including even the appointment of an arbitrator. Among other things, there is a possibility that involving senior representatives at this stage may eliminate certain “human” issues of subordinates intimately involved with the dispute, and instead provide an opportunity for strategic business decision-making in the settlement process.<sup>1</sup> These clauses may be particularly useful in long-term contracts that require continued cooperation among the parties; for example, in the construction or energy industries.

While it is not uncommon for disputing parties to waive a contractual requirement to have such a meeting and instead proceed forthwith to formal proceedings, there are strategic reasons why a party may want to rely on of this type of clause. Most fundamentally, such a clause can forestall formal action and bring the parties together to facilitate settlement discussions. While most disputes may not require such a clause to enable settlement discussions, sometimes the parties do not explore settlement as thoroughly or as early as they could. Therefore, inclusion and observance of such a clause may save time, money and relationship damage. In addition, if a party has a legitimate reason for delaying the formal institution of proceedings, such a clause may offer that ability.

The parties should consider defining in such a clause who qualifies as a “senior representative”. Identifying senior representatives as, for example, a CEO may be impractical and entail delay as certain senior representatives may have limited availability to meet. However, specifying sufficient seniority (and someone with direct knowledge of and responsibility for the dispute) may enhance the likelihood of

<sup>1</sup>*Drafting Dispute Resolution Agreements: A Construction Lawyer’s Perspective*, Karen Martin, CLE BC <https://www.cle.bc.ca/PracticePoints/LIT/12-DisputeResolutionAgreements.pdf>, pg. 1.3.4.

informed, and successful, negotiation. Defining the term “senior representative” will also help avoid procedural disputes over whether or not the clause has been fairly performed. A countervailing factor though is that the parties may want to retain some flexibility in populating the meeting(s).

If a party wants the ability to move quickly, use of a “senior representatives” clause may be problematic if not properly qualified. As such, the parties may want to consider including an additional, complementary provision enabling the simultaneous pursuit of preliminary or injunctive relief in specific circumstances. This will enable the parties to move swiftly if necessary notwithstanding such a clause.

Some variations of these types of senior representative clauses dictate that the parties use their best or reasonable efforts to settle the dispute before commencing proceedings. Caution should be used with this language, as a party could intentionally delay matters by claiming that this criterion remains unsatisfied. The Example Clause provides the certainty of a “drop-dead” time, after which next steps may begin.

Finally, some arbitration procedures require the parties, or alternatively offer them the option, to proceed to mediation following a mandatory meeting process. Whether this additional provision is appropriate will depend upon the nature of the agreement or dispute in question. Among other things, the parties will have to consider whether the “tiering” of required stages is cumbersome and may allow for unnecessary delay, strategic manoeuvring or posturing. However, this possibility, like the option of a preliminary meeting clause, illustrates the advantages of being able to design consensual dispute resolution procedures to enhance the possibility of early, cost-efficient settlement.

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