

Prelitigation Dispute Resolution Clauses: Getting the Benefit of Your Bargain

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Alternative dispute resolution is often touted as a necessity in the American legal system to avoid the high monetary, time, and people costs of litigating. Given these benefits, one would think that prelitigation dispute resolution clauses—contractual clauses that require parties to mediate or negotiate before they resort to litigation—would be routinely enforced. The enforcement of such clauses, however, is not a foregone conclusion.

These clauses are sometimes present in franchise agreements and usually take the form of requiring either party-to-party negotiation or third-party neutral assisted mediation. Litigants attempting to enforce such clauses usually assert that compliance is a condition precedent to initiating litigation and move either to dismiss or for summary judgment to effectuate these clauses. Some courts are receptive to enforcing prelitigation dispute resolution clauses based on the parties' agreement, but others are more ready to ignore the clauses and send the matters on their way to litigation.

Courts that do not enforce the provisions often focus on an ambiguity or failure in the language of the applicable provision. But concerns about the voluntary nature of dispute resolution by settlement may also play a part in the reluctance to force parties to attend a mediation or engage in settlement negotiations even if they contractually agreed to a provision requiring it. Despite these possible obstacles, some parties go to great efforts to enforce prelitigation dispute resolution clauses to take advantage of the hoped-for benefits of early settlement efforts.

If one wants to create a prelitigation dispute resolution provision that is likely to be enforced, the provision should expressly state that it is a condition precedent to litigation and should be as specific as possible about the required process. Likewise, if one wants to enforce a prelitigation dispute resolution provision, the party should bring it to the attention of the court at the earliest possible point, such as by a motion to dismiss or a pre-discovery motion for summary judgment.

WHY PRELITIGATION DISPUTE RESOLUTION CLAUSES ARE USED

If prelitigation dispute resolution clauses can be hard to enforce, why go to the trouble of incorporating them into contracts and taking the time, effort, and risk to enforce them? The benefits to enforcing prelitigation dispute resolution clauses are much the same as the benefits of settling litigation, but there are additional reasons why some litigants make the effort to compel dispute resolution at a preliminary stage.

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The most obvious benefit of prelitigation dispute resolution clauses is that, if successful, they facilitate settlement between the franchisor and franchisee before litigation is filed or before it is pursued to completion. This saves all parties costs, time, and risk, such as with discovery disputes, depositions, expert witness costs, and disruptions in the lives of the parties, all of which are often part of litigation.¹ Negotiations and mediations, which the provisions generally require, are typically fairly short affairs, often just requiring a one-day meeting and not requiring the expenses of discovery or motion practice. Moreover, negotiations and mediation may be highly effective. The mediation success rate for resolving disputes before litigation has been estimated to be 70 percent.²

These clauses allow disputes to be aired and resolved privately and, particularly if the matter settles, perhaps confidentially.³ Parties can listen to and address each other's grievances without broadcasting them to the franchise system as a whole and without the advocacy and rhetoric that are usually part of the litigation process.⁴

This process can increase the odds of a mended relationship. Because alternative dispute mechanisms often seek or result in compromises between the disputing parties in which both parties feel as though they have won something (or, sometimes, both feel they have lost something equally), there is a greater possibility of a continued relationship between the parties if termination is not a part of the agreed-upon outcome. This can be particularly relevant in the franchise arena when concerns about continuing a system or a relationship or protecting an investment can be key to one or both parties.

From the enforcing party's perspective, compelling compliance with a prelitigation dispute resolution clause gives meaning to the contract language and the rule of freedom of contract. The doctrine of freedom of contract stands for the simple principle that agreements freely and voluntarily entered into should be enforced.⁵ Under this principle, parties are generally free to agree to whatever they like, and, in

most circumstances, it is beyond the authority of the courts to interfere with their agreement.⁶

From an enforcing party's view, these clauses are condition precedents—"an *act* that must be performed before or an uncertain *event* that must happen before the promisor's duty of performance arises."⁷

CHALLENGES OF ENFORCING SUCH CLAUSES

While prelitigation dispute resolution clauses have many benefits, enforcement should not be an assumed result. Though negotiation and mediation may be framed as condition precedents to litigation, they still are inherently voluntary processes once the parties begin those activities, i.e., courts cannot force a party to agree to settle.⁸ Courts may be reluctant to enforce a voluntary event, especially when it is not clear that the other party wants to attend or negotiate.⁹ Unsurprisingly, this rationale does not appear explicitly in most court opinions that refuse to enforce prelitigation dispute resolution provisions, but this concern may be apparent in the court's reference to a party's refusal to participate in dispute resolution.¹⁰

In addition to the voluntary nature of prelitigation dispute resolution clauses, the very act of sharing information as part of the mediation or negotiation process, outside of the litigation framework, can pose a challenge to the acceptance and enforcement of these clauses. Parties may fear revealing facts relating to their clients' cases, or theories upon which those cases or defenses are based, to the other side during the negotiation. For example, this issue was raised in the related context of dispute resolution by summary jury trial in *Strandell v. Jackson County, Illinois*, where the court used this logic to reverse the trial court's decision requiring alternative dispute resolution by summary jury trial—a settlement procedure whereby the parties present their cases in summary form to a jury, and the jury renders a nonbinding verdict, the point of which is to "motivate litigants toward settlement."¹¹ In *Strandell*, the trial court ordered the parties to participate in a summary jury trial after plaintiffs unsuccessfully objected on the ground that this mechanism would require disclosure of privileged statements. The U.S. Court of Appeals for the Seventh Circuit reversed the order of summary jury trial because, among other things, it feared that such a compelled alternative dispute resolution technique could upset the "carefully-crafted balance between the needs for pretrial disclosure and party confidentiality" in that it could require disclosure of information that would otherwise only be obtainable in the discovery process.¹²

In the context of prelitigation dispute resolution, this fear may be exacerbated due to the fact that the required negotiations and mediations are supposed to occur before litigation is initiated. Thus, a party may be required to reveal its "cards," or at least some of them, for the opposing side to view during the settlement attempts; but if no enforceable settlement agreement materializes, these cards are already "on the table" in the eventual litigation.

This concern, however, may be managed by the party and may depend in part on the nature of the dispute. First,

a party is in control of what information and theories are shared in the negotiation or mediation context. If a party would benefit from not sharing a certain item of information in dispute resolution, that party can keep that information to itself. Second, pretrial mediation and negotiation should not require any disclosures beyond what would be required in the ordinary course of discovery in litigation.¹³ Thus, any information that is gained through mediation and negotiation would likely be discovered well before trial through the discovery process. Pretrial dispute resolution may prevent litigants from saving surprises for the time of trial, but trial by ambush—where the discovery process is eliminated or severely restricted—is not part of our judicial system.¹⁴ When deciding whether to try to enforce a prelitigation dispute resolution clause, concerns about sharing information should be weighed against the benefits of attempting dispute resolution at an early stage and the realities of whether a settlement might be feasible.

COURTS' INTERPRETATION OF SUCH CLAUSES

In recent years, courts have become more willing to uphold mediation clauses, but previously some courts viewed mediation clauses as "nothing more than an unenforceable agreement to agree."¹⁵ Indeed, some courts still harbor lingering doubts about requiring negotiation or mediation before litigation. As with any contract clause, enforceability largely hinges on the clarity of the wording of the particular clause. Courts have been unwilling to enforce prelitigation dispute resolution clauses and stay or dismiss litigation when the clauses are indefinite or vague or when they contain discretionary requirements. Courts that do enforce the prelitigation dispute resolution clauses usually view them as valid conditions precedent to initiating litigation.

EXAMPLES OF NONENFORCEMENT

One rationale courts have given for refusing to enforce a prelitigation dispute resolution clause is that the provision is ambiguous in some manner, especially if the clause is ambiguous in how it is to be carried out. *Cumberland & York Distributors v. Coors Brewing Co.*¹⁶ is an example of a court refusing to enforce a prelitigation dispute mediation provision on the ground that an ambiguity (in this case, the ambiguity was that it lacked a time limit for completing the mediation) allowed the court to refuse to enforce the provision. There, plaintiff Cumberland & York Distributors (Cumberland) sued defendant Coors Brewing Company (Coors) over a dispute regarding their distributorship agreement.¹⁷ The distributorship agreement stated that if any dispute arose between Cumberland and Coors, the dispute would be submitted to informal mediation with the president of Coors within sixty days from the date that the dispute arose.¹⁸ Further, the distributorship agreement stated that mediation was a condition precedent to Cumberland's right to pursue any other remedy available under the agreement or otherwise available under law and went on to require binding arbitration as the ultimate form of dispute resolution.¹⁹ The agreement did not give any time limit for the length of mediation.²⁰

Coors sought to dismiss the action or, in the alternative, stay the action pending arbitration, arguing that their distributorship agreement made mediation a condition precedent to arbitration and filing a lawsuit.²¹ The district court held, among other things, that Cumberland was not required to mediate.²² The court reasoned that because there was no time limit on the mediation, mediation could delay final resolution of the dispute and “surely a party may not be allowed to prolong resolution of a dispute by insisting on a term of the agreement that, reasonably construed, can only lead to further delay.”²³ The *Coors* court also reasoned that it was not required by law to stay the action for mediation but did not cite any law for this particular observation.²⁴ Ultimately, this court’s holding did not give any weight to the parties’ contract language requiring settlement efforts before binding arbitration.

Other courts have gone to great interpretative lengths not to dismiss an action for purported failure to fulfill a prelitigation mediation requirement. In *Fluor Enterprises, Inc. v. Solutia Inc.*,²⁵ the court held that plaintiff had fulfilled a prelitigation mediation requirement by simply selecting a mediator; and thus the filing of an action after that, even before the actual mediation, was appropriate. Fluor Enterprises, Inc. sued Solutia Inc. for breach of contract. The agreement stated that the parties must first attempt various levels of negotiating the dispute, and thereafter the parties should “attempt in good faith to resolve the controversy or claim in accordance with the Center for Public Resources Model Procedure for Mediation of Business Disputes.” However, “if the matter has not been resolved pursuant to the aforesaid mediation procedure within thirty days of the commencement of such procedure . . . either party may initiate litigation.”²⁶ The agreement stated that a party may withdraw from mediation by written notice.²⁷

The parties did commence a two-day mediation, but Fluor Enterprises filed suit on the second day of mediation.²⁸ Solutia filed a motion for summary judgment based on Fluor Enterprises’ failure to comply with the condition precedent to filing the lawsuit, i.e., complying with the mediation procedure and timing set forth in the parties’ agreement.²⁹ Solutia argued that Fluor Enterprises could not properly file the action until thirty days after the first day of mediation and until it fulfilled other steps required under the mediation clause, including giving written notice of withdrawal from the mediation, and thus the case should be dismissed.³⁰

The district court had a different interpretation of the clause—and really of mediation—than Solutia. The court found that the phrase *mediation procedure*, rather than *mediation proceeding*, referred to the first step of the Center for Public Resources’ Mediation Procedure, which was selecting a mediator.³¹ “If the parties wanted the thirty-day ‘standstill’ to start when the substantive mediation proceeding began, or ended, they should have said so.”³² The court made short shrift of Solutia’s other arguments, including that Fluor Enterprises did not properly withdraw from the mediation in writing. As the clause stated that a party “may withdraw . . . by written notice,” the court found that it did

not mandate that such withdrawal occur at all.³³ Because the lawsuit was filed over thirty days from the start of mediation (i.e., the selection of a mediator), the court found that Fluor Enterprises had the right to file suit, and the summary judgment was denied.³⁴ Despite the extensive dispute resolution procedure laid out in the parties’ agreement, calling for negotiation and mediation before the initiation of litigation, this court, too, refused to stop the litigation to require the actual dispute resolution mechanism to take place.

These are not the only cases that did not enforce an extensive dispute resolution clause, however. For example, in *Kemiron Atlantic, Inc. v. Aguakem International, Inc.*,³⁵ the court was called upon to interpret an agreement that called for the parties to first bring to each other’s attention any disputes and to be “available at all times for the prompt and effective adjustment of any and all such differences.” After that, disputes that did not settle between the parties alone next proceeded to mediation, and finally any disputes that did not settle in mediation went to arbitration.³⁶ When a dispute arose between the parties about payment, Kemiron Atlantic, Inc. filed a court action. Aguakem International, Inc. filed a motion to stay the matter pending arbitration.³⁷ The district court denied the motion to stay because the prelitigation dispute resolution provisions were not followed in that “neither party gave notice to mediate or arbitrate.”³⁸ The court of appeals affirmed this decision, finding that the agreement called for conditions precedent to arbitration and that “the parties clearly intended to make arbitration a dispute resolution mechanism of last resort.”³⁹ Again, despite a dispute resolution provision calling for negotiation and mediation, the court’s focus was not on requiring those efforts.

In *HIM Portland, LLC v. DeVito Builders, Inc.*,⁴⁰ the U.S. Court of Appeals for the First Circuit cited *Kemiron Atlantic* in a very similar factual scenario. The parties’ contract called for negotiation, then mediation, and finally arbitration for all disputes arising out of the contract.⁴¹ HIM filed an action without submitting the matter to mediation and subsequently filed a motion to compel arbitration and stay the proceedings pending arbitration.⁴² The district court denied the motion and allowed the suit to proceed on the ground that mediation was a condition precedent to arbitration under the contract and that mediation had not occurred, and the court of appeals affirmed this decision.⁴³ Here, the agreement was crystal-clear as it stated that “[c]laims, disputes and other matters in question arising out of or relating to this Contract . . . shall . . . be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.”⁴⁴ Yet, again, the result was not enforcement of an alternative dispute resolution, but keeping the matter in litigation.

Decisions like *Kemiron Atlantic* and *HIM Portland* enforce the letter of the clause as the parties did not attempt to negotiate or mediate before the action or before attempting to compel arbitration. In *Kemiron Atlantic*, the court relied upon the parties’ intent to make arbitration a resolution provision of last resort, but the decision lost some of

this reasoning in allowing the matter to continue down the path of litigation despite the dispute resolution provision. *HIM Portland* sidestepped this issue, finding that “the parties have only asked us to determine whether this Section establishes mediation as a condition precedent to arbitration, we do not reach the broader, more difficult question of whether the Section also establishes a valid condition precedent to the bringing of suit.”⁴⁵ Parties dealing with enforcement of a prelitigation dispute resolution provision, whether opposing or supporting the enforcement, should be prepared to focus the court on both the letter of the clause as well as on its overarching intent.

EXAMPLES OF ENFORCEMENT

Although the above cases demonstrate that some courts will not necessarily divert cases into alternative dispute resolution simply because the contract iterated that intent in some form, other courts have recognized contractually required settlement efforts as condition precedents to the initiation of litigation. In fact, some courts have taken a hard line in enforcing these provisions and have actually dismissed cases, albeit without prejudice, for failure to comply with prelitigation dispute resolution provisions.

In *Brosnan v. Dry Cleaning Station Inc.*,⁴⁶ Timothy and Carla Brosnan sued Dry Cleaning Station, Inc. and John Campbell for fraud and breach of contract arising from a franchise agreement to operate a dry cleaning store.⁴⁷ The franchise agreement required the parties to mediate all disputes involving the franchise agreement or any other aspect of the relationship, for a minimum of four hours, prior to initiating any legal action against the other.⁴⁸ Defendants filed a motion to dismiss the Brosnans’ claims under Federal Rule of Civil Procedure 12(b)(6) because the Brosnans failed to engage in mediation as required by the franchise agreement.⁴⁹ The Brosnans conceded the failure but sought a stay of the matter instead of dismissal.⁵⁰

The court granted defendants’ motion to dismiss, stating that “[f]ailure to mediate a dispute pursuant to a contract that makes mediation a condition precedent to filing a lawsuit warrants dismissal.”⁵¹ The court found that a dismissal without prejudice, not a stay, was appropriate because defendants did not seek a stay and the Brosnans did not cite any authority supporting such a stay.⁵²

The court took an even harder line in the recent case of *Tattoo Art, Inc. v. TAT International, LLC*.⁵³ Tattoo Art, Inc. entered into a contract with TAT International, Inc. that provided the parties would “submit the dispute to mediation . . . prior to filing any action to enforce this Agreement.”⁵⁴ Tattoo Art filed the action without formally requesting to submit the matter to mediation, though it sought to negotiate the matter with TAT International before and after filing the action. Also, after plaintiff filed the action, defendant requested to mediate the matter, but the mediation did not happen because defendant failed to respond to plaintiff even after making the request to mediate.

Defendant filed a motion to dismiss the action under Federal Rule of Civil Procedure 12(b)(1) for lack of subject

matter jurisdiction for failure to request mediation before filing litigation.⁵⁵ Even though plaintiff was willing to mediate the matter after filing and defendant failed to respond to this effort and plaintiff attempted without success to negotiate with defendant before and after the filing, the court granted the motion to dismiss because plaintiff failed to seek mediation before filing litigation.⁵⁶ The court found this requirement to be a condition precedent and rejected the argument that requiring fulfillment of the condition would be futile. The court viewed the requirement “to submit the dispute to mediation” as merely requiring the party to request mediation, and emphasized the fact that defendants advised the court that they would mediate in good faith.⁵⁷

A similar result occurred in *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*,⁵⁸ where the court enforced a prelitigation alternative dispute provision, though at a later stage in the litigation by summary judgment. Plaintiffs Harold DeValk, John Fitzgerald, and DeValk Lincoln Mercury, Inc. owned a Ford car dealership pursuant to a dealership agreement.⁵⁹ The dealership agreement required that any protest, controversy, or claim by plaintiffs with respect to any termination or nonrenewal of the dealership agreement by Ford must be appealed through mediation within fifteen days after plaintiffs’ receipt of notice of termination.⁶⁰ Further, mediation was explicitly stated to be a condition precedent to plaintiffs’ right to pursue any other remedy available under the dealership agreement or law.⁶¹

Plaintiffs’ dealership was terminated, and defendant Ford Motor Company had to repurchase the remaining inventory.⁶² A dispute arose during this process. Plaintiffs wrote four separate letters to Ford putting Ford on notice that plaintiffs were unhappy, and they even negotiated with Ford for several months.⁶³ Plaintiffs then sued Ford for several causes of action, including breach of the dealership agreement.⁶⁴

Defendants moved for summary judgment, in part upon plaintiffs’ failure to comply with the prelitigation mediation clause. The district court granted summary judgment, and the Seventh Circuit affirmed this order.⁶⁵ The appellate court held that this mediation clause was straightforward and required plaintiffs to appeal any “protest, controversy, or claim” to mediation, and further stated that mediation is a condition precedent to any other remedy available at law.⁶⁶ Further, the appeals court rejected plaintiffs’ argument that they substantially complied with the mediation clause because the clause specifically stated that it was a condition precedent to litigation and therefore “takes itself out of the sphere of influence of the substantial performance rule.”⁶⁷ Thus, although plaintiffs fulfilled some of the purposes of mediation, such as making Ford aware of their claims by sending four separate letters to Ford and spending several months negotiating with Ford, they did not actually mediate and, therefore, did not fulfill the condition precedent.

A MIDDLE GROUND

Although some courts have gone so far as to dismiss actions for failure to comply with a condition precedent, other courts have taken more of a middle ground, such as staying

the action or enforcing the clause in a delayed manner by barring attorneys' fees.

A recent example of a court staying an action based on a prelitigation dispute resolution provision is *N-Tron Corp. v. Rockwell Automation, Inc.*⁶⁸ N-Tron Corporation and Rockwell Automation, Inc. entered into a contract to facilitate cooperative marketing efforts. The contract contained a prelitigation dispute resolution provision, requiring disputes relating to the cooperative marketing program to be submitted to internal settlement negotiations and subsequent third-party nonbinding mediation before submitting the matter to a court.⁶⁹ A dispute arose between the parties, and N-Tron sued Rockwell Automation without submitting the matter to negotiation or mediation.⁷⁰ Rockwell Automation, in turn, filed a motion to dismiss N-Tron's claims because N-Tron failed to comply with the mandatory condition precedent that the parties attempt to negotiate in good faith to resolve any dispute arising out of the contract.⁷¹

Rockwell Automation filed its motion to dismiss based on Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and, alternatively, Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.⁷² The court denied the motion to the extent that it was brought pursuant to Rule 12(b)(1) because it improperly "conflate[d] non-performance of a contractual condition precedent with deprivation of subject matter jurisdiction."⁷³ Although the court also did not dismiss the matter pursuant to Rule 12(b)(6), the court did enter a stay, requiring the parties to negotiate and mediate pursuant to the dispute resolution provision.⁷⁴ The court agreed that compliance with the provision was a condition precedent but concluded that dismissal would unfairly prejudice plaintiff as it would essentially be a dismissal with prejudice because of an expired statute of limitations period.⁷⁵ The court effectively enforced the dispute resolution provision but protected plaintiff's right to have its claims ultimately heard by a court.⁷⁶

Another middle ground is sometimes provided by the dispute resolution provision itself. For example, some courts have enforced provisions that deny an ultimate award of attorneys' fees if the party did not comply with an alternative dispute resolution provision at the beginning of the matter. An example of such a clause is in *Frei v. Davey*.⁷⁷ Here, the court considered a residential purchase agreement that contained a prelitigation mediation provision and further provided that

[i]f, for any dispute or claim to which this paragraph applies, any party commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney's fees, even if they would otherwise be available to that party in any such action.⁷⁸

The Freis sued the Daveys for specific performance of the purchase contract, and the Daveys filed a cross-complaint against the Freis and the real estate agent.⁷⁹ Eventually, the Daveys succeeded on appeal in the matter and moved for attorneys' fees. The trial court granted the attorneys' fee motions, but the appellate court reversed on the ground that the Daveys

did not comply with the prelitigation mediation provision.⁸⁰

The court of appeal very clearly stated its viewpoint in the beginning of the opinion:

As we shall discuss, this case is a textbook example of why agreements for attorney fees conditioned on participation in mediation should be enforced. . . . Hundreds of thousands of dollars in attorney fees have been spent and the parties have litigated through two trials and three appeals. The lesson? There is a good reason the mediation clause was in the Agreement, and the legal consequences specified by the Agreement for refusing to mediate will be enforced.⁸¹

Although mediation was not actually enforced in this case, this is an example of the court, as well as the parties by their agreement, giving "teeth" to the mediation requirement stated in the parties' agreement.

ELEMENTS OF AN ENFORCEABLE CLAUSE

The above cases show the variety of approaches that courts have used in dealing with prelitigation dispute resolution clauses and emphasize the fact that the clause's wording is critical in any bid to enforce it. If one wants to try to create a prelitigation dispute resolution clause with a good chance of being enforced as a condition precedent, there are several elements that should be considered.

#1 *Call the prelitigation dispute resolution requirement a "condition precedent" to the filing of litigation*

There may be no better way to create a condition precedent than simply to say it. For example, in *De Valk*, the mediation clause explicitly stated that mediation was a condition precedent to any other remedy under the agreement or at law.⁸² The court pointed to this when rejecting plaintiffs' substantial compliance argument.⁸³ Conversely, some courts have rejected prelitigation dispute resolution provisions as condition precedents on the ground that the procedures set forth were not clearly identified to be prelitigation requirements.⁸⁴ Using the phrase *condition precedent* will help eliminate any ambiguity.

#2 *Make the clause specific*

The clearer the dispute resolution clause, the greater the chance it will be enforced. Among other things, the clause should specify the type and elements of dispute resolution required (negotiation, mediation, or other); the scope of the application (what type of claims must be negotiated or mediated); and the timing of the resolution efforts (the minimum length of time for dispute resolution or how long the "stay" for dispute resolution efforts is in place before litigation can be commenced).

For example, in *Cumberland*, the court refused to uphold the mediation clause because it did not provide a time limit for mediation.⁸⁵ Because there was no time limit stated in the mediation clause, the court found that one party could take advantage of the other by submitting the dispute to mediation and letting the matter go stale there. The court found that such a delay would undermine the purpose of the mediation clause, which was to quicken the resolution

of a dispute. Contrast this with *Brosnan*, where the court enforced a prelitigation mediation clause that required a minimum four-hour mediation before one of the parties could initiate legal action against the other.⁸⁶

#3 Define any carve-outs from the dispute resolution process

Franchise agreements sometimes carve out specific items from prelitigation dispute resolution requirements, such as disputes over fees due, disputes regarding intellectual property issues, or requests for provisional relief. If that is the case, these items should be clearly specified.

#4 Add consequences for failure to follow the dispute resolution process

To make all parties more willing to follow the prelitigation clause in the contract, a drafter may wish to include penalties, such as the forfeiture of attorneys' fees and costs for not engaging in prelitigation dispute resolution. This mechanism was strongly enforced in *Frei* and should be a deterrent to any party that wants to skip a step in the dispute resolution process.⁸⁷

HOW TO ENFORCE PRELITIGATION DISPUTE RESOLUTION CLAUSES

The most common way to try to enforce a prelitigation dispute resolution provision, at least in federal court, is to move to dismiss the action without prejudice. These authors have not found any case that dismissed an action with prejudice for failure to comply with a prelitigation dispute resolution agreement, and at least one court specifically refrained from dismissing the action (and instead stayed it) so as not to bar a party's claim on statute of limitations grounds.⁸⁸ That said, there appears to be a split in courts as to whether they will stay or dismiss the action for the failure to fulfill the condition precedent of dispute resolution. From a defense perspective, it may be in the party's interest to seek dismissal and not seek the remedy or alternative of a stay if a statute of limitations defense is available. If such a defense is not available or should not be raised for tactical reasons, it seems wise to seek dismissal and, in the alternative, a stay on those grounds.

There have been examples of summary judgment being granted to enforce a prelitigation dispute resolution provision. For obvious cost reasons, it is generally in a party's interest to move to dismiss rather than waiting for summary judgment. If, however, the issue was not raised earlier for some reason, summary judgment is an option.

Another method of enforcement, though not actually seeking the dispute resolution, is to enforce a provision that strips away the possibility of an attorneys' fees award for failure to comply with the prelitigation dispute resolution provision.

CONCLUSION

The enforcement of prelitigation dispute resolution provisions varies depending on the wording of the individual

provision and the court considering it. Attorneys who have the opportunity to draft the provision should express the provision as a condition precedent and put in details of enforcement and consequences for failure to comply. Attempting to resolve disputes before the cost and time of all parties is spent on litigation can be a good choice, but a carefully crafted and clear provision is critical to making this choice enforceable when a dispute arises.

ENDNOTES

1. Richard M. Calkins, *Mediation: The Gentler Way*, 41 S.D. L. REV. 277, 279–80 (1996) (discussing the reasons for the success of mediation).

2. Michael A. Burns, *Give Presuit Mediation a Chance*, 20 L.A. LAW. 60 (1997) (advocating for the benefits of presuit mediation). Other commentators, however, estimate that mediation is far less successful when it is not voluntary. See Robert E. Lovett, *How to Create a Settlement Opportunity When the Court Orders Mandatory Mediation*, 43 ORANGE COUNTY LAW. 36 (2001) (stating that in mandatory, nonvoluntary mediation, the success rate is still only about 50 percent (contrast that with the over 90 percent success rate of voluntary mediation)).

3. Calkins, *supra* note 1, at 282.

4. *Id.* at 280.

5. *Amerisure Mut. Ins. Co. v. Carey Transp., Inc.*, 578 F. Supp. 2d 888, 899 (W.D. Mich. 2008) (holding that the doctrine of freedom of contract is well-settled and stands for the principle that contracts freely entered into should be upheld).

6. *Kemiron Atl. v. Aguakem Int'l, Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002) (stating that the policy favoring arbitration does not operate without regard to the terms of the contract; thus, where parties agreed that mediation must take place prior to any arbitration, the parties must mediate prior to arbitration); see also *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326, 335 (7th Cir. 1986) (holding that the contract was clear that the parties agreed to the mediation clause and, thus, the clause must be enforced); *Willis Corroon Corp. of Utah, Inc. v. United Capital Ins. Co.*, 1998 U.S. Dist. LEXIS 23226, *1, *19–24 (N.D. Cal. 1998) (granting motion to dismiss for filing action one day premature because the parties agreed to a prelitigation dispute mediation clause requiring a thirty-day "standstill" after mediation).

7. 1 B.E. WITKIN, *SUMMARY OF CALIFORNIA LAW Contracts* § 776 (10th ed. 2005) (emphasis in original); see also CAL. CIV. CODE § 1436 (2011) ("A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed."); 1 B.E. WITKIN, *SUMMARY OF CALIFORNIA LAW Contracts* § 781 ("Private arbitration is governed by contract law, and parties may expressly agree that the right is subject to a condition precedent. Thus, when the parties have agreed that a demand for arbitration must be made within a certain time, that demand is a condition precedent that must be performed before the contractual duty arises.").

8. David S. Winston, *Participation Standards in Mandatory Mediation Statutes: "You Can Lead A Horse to Water . . ."*, 11 OHIO ST. J. ON DISPUTE RESOLUTION 187, 188–89, 195 (1996) (stating that mandatory mediation remains a voluntary process despite the fact that the parties are not participating voluntarily because parties always

have the right to decline settlement, which preserves the fundamental fairness and voluntariness of mediation).

9. See *In re Atl. Pipe Corp.*, 304 F.3d 135, 144 (1st Cir. 2002) (“When mediation is forced upon unwilling litigants, it stands to reason that the likelihood of settlement is diminished. Requiring parties to invest substantial amounts of time and money in mediation under such circumstances may well be inefficient.” (citing Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 369–72 (1986))).

10. See e.g., *Cumberland & York Distribs. v. Coors Brewing Co.*, 2002 U.S. Dist. LEXIS 1962, at *3 (D. Me. 2002) (declining to enforce a mediation clause when one party refused to participate in mediation and the clause did not impose a time limit on mediation); *In re NLO, Inc.*, 5 F.3d 154, 157–58 (6th Cir. 1993) (stating that the value of an alternative dispute resolution is questionable when the parties do not engage in the process voluntarily).

11. *Id.*

12. *Id.* at 888.

13. See e.g., *In re Atl. Pipe Corp.*, 304 F.3d at 144 (stating that a “summary jury trial (like a non-binding mediation) does not require any disclosures beyond what would be required in the ordinary course of discovery”).

14. *Id.* (stating that because trial by ambush is no longer in vogue, the court no longer has an interest in protecting the litigants’ ability to surprise the other party at trial).

15. Robert N. Dobbins, Practice Guide: *The Layered Dispute Resolution Clause: From Boilerplate to Business Opportunity*, 1 HASTINGS BUS. L.J. 161, 167 (2005) (discussing the enforcement of mediation clauses).

16. 2002 U.S. Dist. LEXIS 1962 (D. Me. 2002).

17. *Id.* at *3.

18. *Id.* at *3–4 (The clause in full states as follows: “Except as set forth below, if any dispute between Distributor and Coors shall occur . . . such dispute shall be submitted by Distributor for informal mediation (“Mediation”) of the dispute by the president of Coors (or his designee) within 60 days of the date the dispute shall first arise. Coors, but not Distributor, shall be bound by the decision of the president of Coors (or his designee) concerning the dispute. Mediation shall be a condition precedent to Distributor’s right to pursue any other remedy available under this Agreement or otherwise available under law. Any and all disputes between Distributor and Coors, . . . which disputes are not resolved by Mediation, shall be submitted to binding arbitration in the city nearest to Distributor in which there is a regional office of the American Arbitration Association, before a single arbitrator, in accordance with the Commercial Arbitration Rules and procedures of the American Arbitration Association.”). The “mediation” provision in this case actually sounds a bit more like a negotiation provision as the mediation did not involve a neutral third party but rather the president of one of the parties.

19. *Id.*

20. *Id.*

21. *Id.* at *10.

22. *Id.* at *11.

23. *Id.* at *12.

24. *Id.* at *11.

25. 147 F. Supp. 2d 648 (S.D. Tex. 2001).

26. *Id.* at 650 (The clause in full states as follows: “[I]f a controversy or claim should arise, the project managers for each party would ‘meet at least once.’ Either party’s project manager could request that this meeting take place within fourteen (14) days. If a problem could not be resolved at the project manager level ‘within twenty (20) days of the [the project managers’] first meeting . . . the project managers shall refer the matter to senior executives.’ The executives must then meet within fourteen (14) days of the referral to attempt to settle the dispute. The executives thereafter have thirty (30) days to resolve the dispute before the next resolution effect may begin.”).

27. *Id.*

28. *Id.* at 652.

29. *Id.* at 649, 653.

30. *Id.* at 652–53.

31. *Id.* at 652.

32. *Id.*

33. *Id.*

34. *Id.*

35. 290 F.3d 1287 (11th Cir. 2002).

36. *Id.* at 1289 (The clause in full states as follows: “*In the event that a dispute cannot be settled between the parties, the matter shall be mediated within fifteen (15) days after receipt of notice by either party that the other party requests the mediation of a dispute pursuant to this paragraph. . . . In the event that the dispute cannot be settled through mediation, the parties shall submit the matter to arbitration within ten (10) days after receipt of notice by either party.*” (emphasis in original)).

37. *Id.*

38. *Id.* at 1290.

39. *Id.* at 1291.

40. 317 F.3d 41 (1st Cir. 2003).

41. *Id.* at 42 (The clause in full states as follows: “*Claims, disputes and other matters in question arising out of or relating to this Contract, including those alleging an error or omission by the Architect but excluding those arising under Paragraph 15.2 [Hazardous Materials], shall be referred initially to the Architect for decision. Such matters, except those relating to aesthetic effect and except those waived as provided for in Paragraph 9.11 [Consequential Damages] and Subparagraphs 14.5.3 and 14.5.4 [making or acceptance of final payment constitutes waiver], shall, after initial decision by the Architect, or 30 days after submission of the matter to the Architect, be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.*” (emphasis in original)).

42. *Id.*

43. *Id.* at 43–44.

44. *Id.* at 44.

45. *Id.* at 44 n.1.

46. 2008 U.S. Dist. LEXIS 44678 (N.D. Cal. 2008).

47. *Id.* at *1; see also *Willis Corroon Corp.*, 1998 U.S. Dist. LEXIS 23226 at *19–24 (granting motion to dismiss for filing action one day premature based on prelitigation dispute mediation clause calling for a thirty-day “standstill” after mediation).

48. *Brosnan*, 2008 U.S. Dist. LEXIS 44678, at *2 (The clause in full states as follows: “Except to the extent that the Company

believes it is necessary to seek equitable relief as permitted in Section 20.1, or to recover royalties or other amounts owed to it by the Franchisee, the Company and the Franchisee each agree to enter into mediation of all disputes involving this Agreement or any other aspect of the relationship, for a minimum of four (4) hours, prior to initiating any legal action against the other.”).

49. *Id.* at *1–2.

50. *Id.* at *2.

51. *Id.*; *see also* Union Elec. Co. v. Energy Ins. Mut. Ltd., 2011 U.S. Dist. LEXIS 1789 (E.D. Mo. 2011) (dismissing action for failure to hold prelitigation minitrial required by parties’ contract and rejecting plaintiff’s argument that the minitrial would be futile); 3-J Hospitality, LLC v. Big Time Design, Inc., 2009 U.S. Dist. LEXIS 100601 (S.D. Fla. 2009) (citing *Brosnan* and dismissing action for failing to mediate pursuant to express condition precedent in contract before initiating litigation).

52. *Brosnan*, 2008 U.S. Dist. LEXIS 44678, at *4. It is of note that the franchise agreement also called for the award of attorneys’ fees and costs when an action was dismissed if the action was commenced before mediation. The court, however, refrained from ruling on this issue and held that the fee award may be premature as the dismissal was without prejudice.

53. 711 F. Supp. 2d 645 (E.D. Va. 2010).

54. *Id.* (The clause in full states as follows: “In the event of any dispute arising from this Agreement, the parties agree to submit the dispute to mediation in Virginia Beach, Virginia, prior to filing any action to enforce this Agreement. In the event that Licensee refuses mediation or mediation is unsuccessful, Licensee consents and agrees to in personam jurisdiction and venue in the United States District Court for the Eastern District of Virginia, located in Norfolk, Virginia, provided such court has jurisdiction of such a dispute, otherwise Licensee consents and agrees to in personam jurisdiction and venue exclusively in the Circuit Court for the City of Virginia Beach, Virginia.”).

55. *Id.* at 648.

56. *Id.* at 649.

57. *Id.* at 649–52.

58. 811 F.2d 326 (7th Cir. 1986).

59. *Id.*

60. *Id.* at 335 (The clause in full states as follows: “Any protest, controversy or claim by the Dealer (whether for damages, stay of action or otherwise) with respect to any termination or nonrenewal of this agreement by the Company or the settlement of the accounts of the Dealer with the Company after any termination or nonrenewal of this agreement by the Company or the Dealer has become effective, shall be appealed by the Dealer to the Policy Board within fifteen (15) days after the Dealer’s receipt of notice of termination or nonrenewal, or, as to settlement of accounts after termination or nonrenewal, within one year after the termination or nonrenewal has become effective. Appeal to the Policy Board shall be a condition precedent to the Dealer’s right to pursue any other remedy available under this agreement or otherwise available under law.” (emphasis in original)).

61. *Id.*

62. *Id.*

63. *Id.* at 329.

64. *Id.*

65. *Id.* at 328.

66. *Id.* at 335.

67. *Id.* at 336.

68. 2010 U.S. Dist. LEXIS 14130 (S.D. Ala. 2010).

69. *Id.* at *12–13 (The clause in full states as follows: “The parties will attempt in good faith to resolve any dispute arising out of Member’s membership in the Program by negotiations between representatives who have authority to settle the controversy. If unsuccessful, the parties further will attempt in good faith to settle the dispute by non-binding third-party mediation, with fees and expenses of such mediation apportioned equally to each side. Any dispute not so resolved by negotiation or mediation may then be submitted to a court of competent jurisdiction in accordance with the terms of this MoM [Memorandum of Membership]. These procedures are the exclusive procedures for the resolution of all such disputes between the parties.”); *see also* Composite Mat Solutions, LLC v. Big Red Events, Inc., 2007 U.S. Dist. LEXIS 22003 (E.D. La. 2007) (staying action for six months to allow parties to mediate two of three counts as required under parties’ agreement).

70. *Id.* at *3–4, *13.

71. *Id.* at *3–4, *12.

72. *Id.* at *10.

73. *Id.* at *15–16.

74. *Id.* at *30–36.

75. *Id.* at *35. Additionally, the court found that a stay was merited because only two of the four claims of relief were subject to the dispute resolution provision.

76. *See* Swartz v. Westminster Servs., Inc., 2010 U.S. Dist. LEXIS 93107 (M.D. Fla. 2010) (staying action for mediation pursuant to motion to dismiss action for failure to comply with contractual mediation requirement in parties’ contract).

77. 124 Cal. App. 4th 1506, 1508 (2004).

78. *Id.* (The clause in full states as follows: “MEDIATION: Buyer and Seller agree to mediate any dispute or claim arising between them out of this Agreement or any resulting transaction, before resorting to arbitration or court action, subject to paragraphs 17C and D below. . . . If, for any dispute or claim to which this paragraph applies, any party commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney’s fees even if they would otherwise be available to that party in any such action.”).

79. *Id.* at 1510.

80. *Id.* at 1512.

81. *Id.*; *see also* Lange v. Schilling, 163 Cal. App. 4th 1412 (2008) (reversing attorney fees award because party failed to mediate before filing litigation as required by contract); Leamon v. Herrera, 107 Cal. App. 4th 424, 433 (2003) (similar decision as *Frei*, stating that “the public policy of promoting mediation as a preferable alternative to judicial proceedings is served by requiring the party commencing litigation to seek mediation as a condition precedent to the recovery of attorney fees”).

82. *DeValk Lincoln Mercury, Inc.*, 811 F.2d at 355.

83. *Id.*; *see also* Kemiron Atl., Inc., 290 F.3d at 1291 (holding that the clause specifically stated that mediation was a condition to arbitration and, thus, the parties must engage in mediation prior to arbitration); *HIM Portland, LLC*, 317 F.3d at 44 (stating

that the parties plainly made mediation a condition precedent to arbitration, and, thus, the arbitration provision was not triggered until one party requested mediation); 13 WILLISTON ON CONTRACTS, *Literal Compliance with Express Conditions* § 38:6 (4th ed. 1993) (explaining that as a general rule, expressed conditions must be literally met or exactly fulfilled or no liability can arise on the agreement qualified by such conditions).

84. *See* *Bombardier Corp. v. Nat'l R.R. Passenger Corp.*, 298 F. Supp. 2d 1, 4 (D.D.C. 2002) (denying motion to dismiss for failure to comply with dispute resolution provision on ground that it was not a condition precedent to litigation as it was not unambiguously stated to be such a condition).

85. *Cumberland & York Distribs.*, 2002 U.S. Dist. LEXIS 1962, at *11–12.

86. *Brosnan*, 2008 U.S. Dist. LEXIS 44678, at *2.

87. *Frei*, 124 Cal. App. 4th at 1508 (reversing award of attorneys' fees because the party did not mediate before litigation, which was a contractual condition to obtaining fees); *see also* *Leamon*, 107 Cal. App. 4th at 433 (similar decision as *Frei*, referring to "the public policy of promoting mediation as a preferable alternative to judicial proceedings").

88. *N-Tron Corp.*, 2010 U.S. Dist. LEXIS 14130, at *35–36 (stating that a stay is more appropriate than a dismissal when the dismissal will effectively bar the parties from ever litigating the issues due to an expired statute of limitations).

2011 Nominating Committee Report

I am pleased to let you know that Edward Wood Dunham, Chair of the Nominating Committee, has reported the results of the Committee's deliberations.

The nominees for the Governing Committee (3-year terms starting in August 2012) are:

Deborah S. Coldwell

Haynes and Boone, LLP
Dallas, Texas

Natalma M. McKnew

Smith Moore Leatherwood, LLP
Greenville, South Carolina

Karen B. Satterlee

Hilton Worldwide, Inc.
McLean, Virginia

William K. Woods

Baker Botts LLP
Dallas, Texas

Forum members will vote on these nominations during our annual business meeting on Friday, October 21, 2011, in Baltimore.