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ANATOMY OF A CONTRACT DISPUTE

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Agenda

- Contract problems are inevitable
- What options are available when one party fails to perform or breaks the terms of a contract?
- Pre-suit solutions
- Trial
- Arbitration

Contracts Generally

- Types of Contracts
  - Written
  - Oral
  - Intent of parties
  - Contract language controls

Using Contract Language to Preempt Potential Problems

- Contract language can be used to:
  - Articulate exit strategies
  - Narrow potential litigation issues
  - Impose or limit damages
  - Help avoid litigation entirely

Exit Strategies

- Contract Term and Renewal
  - How long will contract be in effect?
  - How will it renew?
  - How can it expire?
- Contract Termination
  - How can you get out?
  - Immediately
  - On notice
  - Chance to cure breach

Exit Strategies

- Buy/Sell provisions
  - Shareholder Agreements
  - LLC Operating Agreements
- Can set an agreed-upon method to value stake
- Can set agreed-upon payment (and repayment) terms

Narrowing Issues

- Contract should address key potential pressure points and resolve them upfront
- Examples
  - Deliverables
  - Intellectual property ownership
  - Specifications for custom projects
  - Progress milestones
  - Performance metrics or milestones
  - Payment schedules

Narrowing Issues

- Boilerplate Terms are not just mumbo-jumbo
- "Miscellaneous" provisions provide parties a way to agree to certain less contentious things beforehand to avoid having to litigate common issues later
- Choice of law and forum
- Others:

Notices	Modification	Survival
Counterparts	Severability	Integration
Assignments		

Damages

- Liquidated damages
- Valuation
- Limitations on Liability
- Recovery of attorney fees

Avoid Litigation (almost) Entirely

- Arbitration provisions
- Mediation provisions
  - Prerequisite to suit?
  - Binding or Non-Binding
  - Choice of Forum

Can you guess the two most frequently asked questions regarding a lawsuit?

- How long is this going to last?
- How much money is this going to cost?

How much and how long?

- Cost and length of the lawsuit directly depends on how much (or how little) the other side makes you do
  - Experienced opposing counsel
  - Pitbull litigators
  - Pro-se litigators

Overview of the Stages of a Lawsuit

Stages of a Lawsuit	Cost
• Stage 1 – Pleadings	• $$
• Stage 2 – Discovery	• $$$$
• Stage 3 – Dispositive Motions	• $
• Stage 4 – ADR	• $
• Stage 5 – Trial	• $$$$$$$$$$
• Stage 6 -- Appeal	• $$

Stage 1 – The Pleadings

- Complaint/Answer/Counter-Claim
- Default
- Motion to Dismiss
  - Personal Jurisdiction
  - Failure to State a Cause of Action
- Court schedules

Cost

- $$
- $ (but how to get paid)
- $$

Stage 2 - Discovery

- Written Discovery
  - Requests to Produce
  - Requests for Interrogatories
  - Requests for Admissions
- Depositions
- Third Party Subpoenas
- Goal is to gather all facts needed to prove/defend case

Cost

- $
- $$$$
- $

Stage 3 - Dispositive Motions

- Motion for Summary Judgment
  - Device to terminate lawsuit if there are no genuine issues of material fact
  - Standards

Cost

- $$

Stage 4 -- Alternative Dispute Resolution (ADR) Mediation or Arbitration

- Fla. Stat Chapter 683 – Arbitration Code
- Fla. Stat Chapter 44 – Mediation Alternatives to Judicial Action

What is Mediation?

- A negotiation facilitated by a neutral third party ("mediator") to resolve the dispute
- Mediator facilitates the resolution by supervising the exchange of information and the bargaining process
- Mediator helps the parties find common ground and deal with unrealistic expectations

Benefits of Mediation

- **Informal** - flexible, no formal rules of evidence, no witnesses
- **Confidential** - confidential process; mediators will not disclose any information revealed during mediation
- **Quick and inexpensive** - when you want to get on with their business and lives, mediation is an option to consider
  - Less time to complete, earlier solution than going through trial

Benefits of Mediation

- **Greater control** - parties who negotiate their own settlements have more control over the outcome
- **Preserve relationships** - Many disputes occur in the context of ongoing work relationships; mediated settlements that address all parties' interests often preserve working relationships in ways that would not be possible in a "win or lose" decision-making procedure

Benefits of Mediation

- **Comprehensive and Customized Agreements** - Mediated agreements often resolve procedural and interpersonal issues that are not necessarily susceptible to legal determination
  - Parties can tailor their settlement to their particular situation and attend to the fine details of implementation

Mediation - Confidentiality

- Mediators are obligated to maintain confidentiality of all information revealed during mediation except where disclosure is required or permitted by law or is agreed to by all parties
- Documents or other materials produced during mediation are not admissible as evidence

Mediation Settlement – Get it in Writing!

- Agreement is not binding unless in writing and signed by all parties
- Rule 1.730(b) Fla. R. Civ. P. requires a mediation agreement to ***"...be reduced to writing and signed by the parties and their counsel, if any.***"
- If not written and signed, the court will probably not enforce it
- Make sure **all** the terms agreed to are included

Binding Arbitration

- Usually contractual
- Arbitrators' decision is final (with limited exceptions)
  - Fla. Stat. §44.104, Fla. R. Civ. P. 1.830
- Converting binding Arbitration award into judgment

Non-Binding Arbitration

- Usually court ordered
  - *Contractor's Management Systems of NH, Inc. v. Acree Air Conditioning, Inc.,* 799 So. 2d 320, 321 (2d DCA 2001)
- Many cases (depending on size and complexity of the case) are referred to non-binding arbitration before you can get a trial date set
  - Fla. Stat. §44.103, Fla. R. Civ. P. 1.820
- Trial De Novo following non-binding arbitration
  - Attorney's fees

Stage 5 - Trial

- Witness Preparation
- Exhibit Preparation
- Direct/Cross-Examination
- Motions in Limine
- Jury Instructions

Cost

Stage 6 - Appeals

- Right to Appeal
- Appeals of Money Judgments
- Disposition of Appeal
  - Reverse
  - Remand
  - New Trial

Cost

Stage 8 – Collection and Beyond

- Enforcement and collection of judgments
- Florida and federal exemptions from claims of creditors
- Asset protection efforts
- Fraudulent transfers

Cost

- $

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