

Tips for Managing Risk on Your Way to Success: A Litigator's Perspective

Presented by:

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Goals for Today

- Provide tips to help you avoid disputes
- Give advice to ensure you are in a position of strength if a dispute arises
- Introduce contractual dispute provisions



Business Disputes

- Disputes are a fact of life
 - Disputes do not necessarily mean a lawsuit
- Lawsuits often should be avoided
 - Expensive
 - Harder to raise money
 - Distraction
- Day-to-day decisions should help establish a position of strength for:
 - Negotiated resolutions
 - Legal action (if necessary)



Smart Contracting – The Litigator’s Perspective

- Plain language of a contract controls
 - Make sure the agreement:
 - Says what you think it says
 - Memorializes ALL of the agreed upon terms
 - Confusion/ambiguity makes asserting your rights more difficult and adds expense

- Consider whether to get legal advice
 - Materiality/value of contract
 - Potential risk
 - Who you’re negotiating with



Smart Contracting – The Litigator’s Perspective

- If contracting on your own:
 - Commit the final deal to a written, signed agreement
 - Read it carefully
 - Oral negotiation or earlier promises may not matter
 - Best practice:
 - Designate one or two individuals with authority to sign contracts
 - Ask someone who was not involved in negotiations to review the written agreement and “second-eye” the terms
- **GOAL**: Clear document that “speaks for itself”



Contractual Dispute Provisions

11.08 Governing Law. Except as otherwise provided in Article X, this Agreement is governed by and shall be construed in accordance with the law of the State of Delaware, exclusive of its conflict-of-laws principles. In the event of a conflict between the provisions of this Agreement and any provision of the Certificate or the Act, the applicable provision of this Agreement shall control, to the extent permitted by law.

Choice of Law

11.09 Dispute Arbitration. Except as provided by Section 10.04, all disputes arising under or relating to the interpretation of this Agreement shall be resolved by binding arbitration in accordance with the applicable rules of the American Arbitration Association. The arbitration shall be held in the Commonwealth of Massachusetts before a single arbitrator selected in accordance with Section 12 of the American Arbitration Association Commercial Arbitration Rules who shall have substantial business experience in the investment advisory industry, and shall otherwise be conducted in accordance with the American Arbitration Association Commercial Arbitration Rules. The arbitration shall be governed by the United States Arbitration Act, 9 U.S.C. §§1-16, and judgment upon the award rendered by the arbitrators may be entered by any court having jurisdiction thereof.

Arbitration

The parties covenant and agree that they will participate in any such arbitration in good faith. This Section 11.09 applies equally (but not exclusively) to requests for temporary, preliminary or permanent injunctive relief, and shall not be deemed to be waived by any action by any Director, any Member or the LLC to seek temporary or preliminary injunctive relief by court proceedings.

Jurisdiction

11.10 Consent to Jurisdiction. To the extent that any court action is permitted consistent with or to enforce the provisions of this Agreement, the parties hereby consent to the jurisdiction of the courts of the Commonwealth of Massachusetts and the United States District Court for the District of Massachusetts. Accordingly, with respect to any such court action, the Member (i)



Contractual Dispute Provisions

- **Alternative Dispute Provisions**
 - Executive consultation (good faith negotiations)
 - Mediation (third-party facilitated negotiations/non-binding)
 - Arbitration (binding)
 - Not in court
 - Decided by arbitrator, not judge or jury
 - Often faster, may be cheaper
 - Parties' select arbitrators

- **Limitations on Liability**
 - Limits monetary recovery
 - Generally upheld by courts and arbitrators



Contractual Dispute Provisions

- **Loser Pays and Indemnification**
 - Loser pays – alters the general rule that each side is responsible for its own costs and legal fees
 - Indemnification – one party agrees to cover claims by a third party, can include legal fees and costs
- **Choice of Forum and Law**
 - Parties may select law and location of any suit
 - Generally upheld by courts
 - Can impact burden/expense of dispute



Good Housekeeping Tips

- Know your rights/obligations and act accordingly
 - Hold up your end of the bargain
 - Know what you are entitled to

- If the other side breaches, as a general matter, speak-up
 - Opportunity for other side to correct the action/inaction
 - May help protect business relationship
 - Establishes a factual record, if dispute persists
 - Key to avoiding a waiver argument



Good Housekeeping Tips

- “Speaking-up” short of litigation
 - Cease and desist letter
 - Demand letter
 - Termination of contract or relationship
- If terminating a relationship, check and follow contract requirements
- Get amendments and modifications in writing



Good Housekeeping Tips

- Be disciplined in email
 - Substantial player in litigation
 - Caution with content and tone
 - Avoid embarrassment
 - Be professional, internally and externally
 - Learn from others' mistakes



Questions?

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