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Planning for Disputes in Cross-Border Commercial Contracts

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Negotiating the dispute resolution clauses to be included in a commercial agreement has often been described as discussing the divorce before getting married. However, for the parties' legal teams it is important to remove as much uncertainty as possible before the ink is dry in the signature blocks. For cross-border agreements there are many things to consider such as governing law, governing language, and so forth. Amongst all considerations, three major issues always stand out when discussing agreements where the parties are separated by national borders.

Choice of Court: Many parties with more bargaining power prefer to specify their own courts for resolution of disputes. However, even the stronger party should consider specifying the courts of its country on a non-exclusive basis. There can always be challenges to enforcement of one court's judgment in the courts of another country. In addition to this problem is the fact that both parties are unlikely to have assets in the same country. Thus, a non-exclusive choice of court allows a party the option to file suit in its own country, but the flexibility to commence litigation where there are assets.

Arbitration: Thanks to the New York Convention, arbitral awards are often easier to enforce between countries. However, arbitration is really more cost effective for disputes involving very limited facts, such as money owed, the quality of goods, or other routine commercial issues. For more complicated disputes, arbitration can often become as expensive as the courts. Historically, even complicated disputes were arbitrated to avoid publicity, but many countries' courts now allow for non-public litigation of sensitive topics like trade secrets.

Tiered Dispute Resolution: To help avoid formal arbitration or litigation in the first place, it can help to force the parties to work out their differences informally, and perhaps resort to mediation, before seeking more binding dispute resolution. Contracts that actually set deadlines for meeting and conferring between the parties can be helpful in forcing discussions that may resolve a dispute. Mediation, although not binding, often helps the parties focus their arguments and take the evidence more seriously. Even if the parties do not achieve settlement, alternative dispute resolution procedures, as a condition to litigation or arbitration, can help to avoid the need for more formal dispute resolution.

While businesspeople do not usually like to discuss dispute resolution when agreeing on deal points, businesses should consider the three main topics of choice of court, the possibility of using arbitration, and the

possibility of using other less formal dispute resolution, in order to try to control and streamline the handling of disputes. The last thing a business wants to do is unnecessarily waste resources on the resolution of a dispute.