

Professional Perspective

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**Bloomberg
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Plaintiff claims that he has an enforceable trademark action due to a tattoo of the name of the cannabis company. Plaintiff develops an app to facilitate payment for cannabis-related products and wants to collect on his contract. Foreclosure defendants plant 100 acres of hemp just as the trial is set to begin. Law school exam questions?

No. These are actual cases that involved real litigants in the Circuit Court of Cook County. What do all these matters have in common? They are all commercial in nature—and the court may not have been the best forum for resolving them.

After a brief overview of the evolving cannabis industry, this article will explain why alternative dispute resolution (ADR) is frequently better than litigation for cannabis-related disputes.

Overview

Most issues that can arise in the cannabis industry are commercial matters. A cannabis start-up may need to negotiate funding, leases, and purchasing goods; the entities that provide funding, goods, etc., may wish to assert Uniform Commercial Code (UCC) liens and other security agreements to minimize their risks.

Overarching all of this is a question of whether an assertion of illegality will void any agreement made between parties or whether an exception can be found to maintain the enforceability of the agreement. See, *Ginsburg v. ICC Holdings, LLC*, No. 3:16-CV-2311-D, 2017 BL 406883 (N.D. Tex. Nov. 13, 2017). Simultaneously, legal complications and business risks remain for those involved in the cannabis industry.

Since January 1, 2020, the Cannabis Regulation and Tax Act has permitted recreational use of cannabis by adults 21 or older in Illinois. Likewise, the Compassionate Use of Medical Cannabis Pilot Program Act permits cannabis use for medicinal purposes. At the same time, however, cannabis remains a Schedule I controlled substance at the federal level under the Controlled Substances Act (CSA)—although various efforts to change this are pending in Congress.

The cannabis industry is also an expensive one, especially as a start-up. Finding property owners willing to lease may be difficult and more expensive than a typical commercial lease given the illegality of cannabis at the federal level. The type of structure required may demand additional utility services due to the growth of a live crop, leading to increased costs. As the growing and harvesting of cannabis is highly regulated, that fact will also lead to increased expense.

While only a few of the possible increased costs of operating in the cannabis industry are highlighted here, they all point to a need for a swift, nimble means of resolving potential business disputes. ADR delivers on both and provides other benefits to parties.

ADR Advantages

Speed

One of the many advantages of utilizing ADR, such as mediation and arbitration, to resolve disputes in cannabis contracts is that it allows for a speedy resolution. Parties can organize and schedule a mediation session within weeks and, in an emergency, usually within a day or two. Most disputes can be resolved in a single session.

Parties can even resolve their disputes expeditiously in arbitration by using accelerated arbitration rules for commercial matters. Whether parties choose mediation or arbitration, the expediency to resolution is a useful benefit for parties who need to quickly resolve their disputes to maintain the viability of their businesses.

Flexibility

Mediation, whether non-binding or binding, can assist parties in resolving disputes that may inhibit the success of their venture. A mediation may address the entire relationship of the parties or resolve a narrow issue that permits each side to continue with the business relationship once resolved. Furthermore, parties retain control of the mediation. This nimble process allows parties to choose their mediator, structure the mediation process to align with their needs, and find the most efficient path to settlement with the help of the mediator.

Arbitration lends itself to a more controlled—and enforceable—resolution of cannabis disputes, but still a customizable and expeditious one. While arbitration is adjudicative, parties can choose their arbitrator, the rules, and how they will tailor the process.

Including mediation and arbitration provisions in contracts can provide the greatest likelihood that cannabis industry participants can take advantage of these benefits of ADR. Drafters have a tremendous opportunity to include language that enumerates the forum, choice of law, a waiver of any claim of illegality under the CSA, and other issues. Additionally, drafters can even provide for specific rules for the arbitration proceeding.

The more matters addressed at the outset, the more likely it is that the agreement can facilitate the resolution of potential disputes. Significantly, it is well-established that the courts will enforce an arbitration award even when the underlying dispute is illegal as the arbitration award itself is valid and enforceable. See, *Buckeye Check Cashing, Inc. v. Carlegna*, 546 U.S. 440 (2006).

Receivership

Given the sensitive nature of the crop and the products created from cannabis, a receiver can protect assets while the dispute works towards a swift resolution. Whether parties appoint a receiver in an ADR setting would depend on the parties' agreement. To that end, drafters may wish to include a provision allowing a mediator or arbitrator to appoint a receiver with specifically defined authority to address the assets so that value is not lost due to any dispute.

Confidentiality

Mediation does not involve publicly available filings, unlike cases filed in the courts. Additionally, the mediator keeps the confidences of the parties and the clients. The proceedings are not public, the results are not public, and the parties can agree to disclose as little or much as they want.

In arbitration, however, confidentiality is not a given and must be pursued by the agreement of the parties. Privacy is the dominant feature of arbitration that distinguishes it from an open court proceeding; however, privacy is not the same as confidentiality. While confidentiality clauses are standard in arbitration agreements, to say that arbitration proceedings are as confidential as a mediation, for example, would be incorrect. Nevertheless, parties can agree to confidentiality and ask the arbitral tribunal to issue a protective order to enhance confidentiality.

Whether parties choose mediation or arbitration, their dispute can be resolved while staying out of the spotlight of the public court system.

Looking Forward

The cannabis industry is ripe with opportunity. As more states open the industry to both medicinal and recreational use of cannabis, it will need to adapt and evolve. While the cannabis industry will continue to deal with significant regulation and uncertainty, one area where it can gain some control is through the drafting of contracts that provide for dispute resolution through ADR. Additionally, using mediation and arbitration to resolve disputes gives parties much more control over the resolution of their matter. ADR offers parties a proven and effective alternative to litigation for cannabis industry disputes.