Which agreement types are more or less conducive to a prevailing party clause?

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Anon member

10 Aug 20

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Some agreements might be better than others for inclusion of a mutual prevailing party clause, in which the party that prevails in any litigation or arbitration between the parties is awarded that party's attorneys fees. My sense is that agreements that call for one party to pay the other party for goods or services commonly contain prevailing party clauses. But what about more complex agreements, such as, for example, a manufacturing license and services agreement?

Is it always a good idea to include such a clause in any agreement? What are the downsides?

Maybe our English colleagues can offer some perspective, based on the fact that in England the loser pays the winner as a matter of default, I'm told.

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I suppose the simpler the agreement--that is, the fewer the issues that would have to be decided--the more amenable it is to a prevailing-party clause. However, those agreements are probably the least likely to end up in litigation. In a more complex agreement, the big issue will be what is meant by the prevailing party? Do you limit it to being granted judgment? That leaves out settlements. Do you talk about substantial recovery? That becomes so vague that the court would have to decide it in any case. Do you talk about net recovery (in the case of counterclaims)? That risks unfairness when the two sides recover nearly equal amounts. Even Ken Adams threw up his hands on this one. Whatever you deicide, it's going to generate a fair amount of discussion for a boilerplate provision, and probably some intricate drafting.

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I'm writing from atop my in-house soapbox, so please take the following with as large a grain of salt as needed.

There are often legal reasons for resisting prevailing party attorney's fees clauses (there is case law about, for example, what prevailing means), at least as proposed. These clauses may be neutral in principle, but in practice, they are often one-sided. If you are responding to other side's proposed language, revisions are typically required.

The real issue is that these clauses create an incentive to litigate disputes, and as such, they are usually inconsistent with what clients expect from us, even if they don't say so. If you are negotiating an agreement, it's because your client seeks, in addition to the express benefits of the agreement, an amicable, efficient business relationship with the counterparty. Part of our job is delivering agreements that permit the business relationship our clients want to succeed and grow.

When disputes arise, the efficient, business-like way to deal with them is to sit down across a conference room table (ok, during pandemics, on a video call) and work it out. That process allows the parties to resolve disputes while preserving and perhaps strengthening their relationship --as in theory, each party sees the other work compromise and work for consensus. A negotiated resolution is less likely if either party thinks, usually unrealistically, that the best alternative to such a resolution is litigation at the other party's expense.

Business people may be too intent on doing business to focus on how the agreement deals with dispute resolution. One way to give the issue a higher profile is, subject to authority from the client, to strike the counterparty's proposed fee clause and wait for its counsel ask for an explanation. The explanation is simple: Without the clause, both parties can litigate as their interests require, but they will bear the expense of doing so. The prospect of indeterminate and uncompensated legal expense creates uncertainty, otherwise known as incentive to negotiate. That's cheaper and faster dispute resolution for your client and often, for the counterparty as well.

The discussion that follows benefits your client regardless of how it turns out. If the clause stays in the agreement, your client will learn why the counterparty thinks it is important. That can be revelatory as to how the counterparty sees your client and how it intends to conduct itself under the agreement. If the counterparty agrees to the deletion, it's out of the agreement and that is usually better.

Another approach is to limit the prevailing party fee clause to apply, not based on the type of agreement, but on the type of claim. You might think about having the clause apply only to claims litigated after reasonable negotiations or mediation fail or to claims for injunctive relief or involving knowing or reckless conduct – something other than garden variety contract disputes.

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> Thoughtful comments; appreciate the insights. I have not given enough thought to the incentives that a prevailing party clause brings. I will say that when a dispute arises, that's the first thing that gets checked -- is there a prevailing party clause? If yes, then "let's go!" is often the first response from the client.
>
> [redacted] 29 Aug 20

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Although I can accept some of the arguments for excluding a prevailing party clause, these arguments do not make as much sense when the parties have unequal financial capability. For example, in cases involving employment relationships, the employer always has significantly greater leverage due to its financial position and if the employee does not have the financial wherewithal to litigate, the employee is left without any leverage. Thus, employees should normally insist on prevailing party clauses while employers may resist. It has been my experience that such clauses force the employer to the bargaining table and that the absence of such clauses force the employee to capitulate to what may be unjust breaches of contract.

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> Fair point. One situation in which a prevailing party clause might not be in the employee's interest is when the employee is an engineer under strict confidentiality and non-compete clauses. In that case there's a bit more of a chance that the employer would be the one suing.
>
> Anon member 10 Sep 20

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I, for one, do not believe that it is a good practice to punish the wrongdoer. If the client understands his/her non-compete/confidentiality agreement, he/she will always (in my humble experience) opt to protect against an unfair enforcement by the employer and will rightfully believe that he/she will not violate it. If the agreement is so stringent that it will be impossible to adhere to it, then under the case law, in most jurisdictions, it will be found to be against public policy and unenforceable.

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