UPDATING ADR CONTRACT PROVISIONS

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Nearly every contract written today contains one common provision notwithstanding the nature of the contract: the method (note that is singular) to be used in resolving future disputes. Since litigating disputes is time consuming and expensive, the alternative method turned to is often binding arbitration pursuant to boilerplate language stored in a lawyer's document management system and used repeatedly without great thought.

Contracts typically mandate binding arbitration as the “only” method to be employed in resolving any dispute, and most broadly require all arbitrations be conducted pursuant to specified rules under the auspices of a specified ADR provider. Each of these can be BIG MISTAKES. Such traditional dispute resolution clauses are often inadequate, inappropriate or entirely overblown in the context of a specific dispute, and they often fail to offer parties the most practical method for resolution of a particular dispute.

MEDIATION - THE COURTS HAVE OFFERED GUIDANCE:

It is hard to identify a court that does not promote the use of voluntary, non-binding mediation. The success rate for voluntary mediation is so high it is difficult, if not impossible, to argue against it except in extreme circumstances. Mediation succeeds for a variety of good and valid reasons. It is highly cost effective by comparison, and the success rate is high primarily because the parties are forced to examine and able to determine their own destiny. It is also efficient from the standpoint of time and in most cases, the resulting settlement agreement can provide for confidentiality. For these reasons and perhaps others, courts frequently encourage parties to attempt resolution of their dispute through mediation. Yet disappointingly, it is extremely rare to see a mediation provision in contractual dispute resolution clauses.

ARBITRATION FLEXIBILITY:

Binding arbitration is admittedly preferable to court litigation in many cases. That does not mandate, however, that the parties should bind themselves inflexibly to a specific arbitration process. Disputes come in all shapes and sizes. If parties must arbitrate, they should allow themselves the opportunity to determine the manner in which the arbitration will proceed. For example, they should be able to determine if they will need a panel of three arbitrators or a single arbitrator. How will the panel be selected? Will rules of evidence be followed and how will witnesses be managed? Will general court rules apply or shall a modification be made to increase efficiency in the process? Will there be time constraints imposed, discovery limitations or other rules that will ensure a fair and equitable outcome with the least amount of formality? Most, if not all, of these questions are dealt with currently in discussion with the chosen arbitrator(s), so building such flexibility into the contractual dispute resolution provision is not a radical suggestion.

CRAFTING ALTERNATIVE DISPUTE RESOLUTION (ADR) PROVISIONS:

Non-binding mediation should always be a first consideration before proceeding to arbitration or litigation. Contract provisions may require mediation before arbitration or make it optional, subject to mutual agreement of the parties. In all cases, mediation is non-binding. The parties will jointly select a qualified neutral mediator, either on their own or through reference to lists of qualified mediators maintained by specialized ADR providers or the courts. Most mediators offer services on an hourly rate or per diem basis, and the costs of mediation are typically shared equally between the parties.

Arbitration provisions then follow. The provisions should assign responsibility to the parties to develop rules and procedures that fit the nature and scope of the dispute. The contract should not lock the parties into using a specific dispute resolution service and should, to the greatest extent possible, avoid payment of burdensome administrative fees which often do little, if anything, to enhance the arbitration process. Whether the parties can agree on the arbitrator(s) or must select through an ADR provider, it becomes fairly straightforward to develop the rules that will guide the process. If the parties cannot develop the process themselves, they may rely on their chosen neutral to assist them bridge their differences and put together the overall process. With this in mind, it is important the parties' contract language regarding arbitration not be limiting and provide the parties both flexibility and latitude.

MODIFYING TRADITIONAL ADR TERMS:

We are in a new era for dispute resolution with more qualified experts available than ever before. Mediation has matured to a level where it is often the most successful and economical process available to resolve disputes in an adequate, equitable and reasonable manner. Arbitration has also matured beyond the traditional approaches of using multiple panelists, rigid rules and organizations that require steep administrative fees for access to their services. There are a growing number of sophisticated and cost-effective ADR organizations that offer highly qualified, talented neutrals who can cut through the maze of disputed issues and zero in on the process that will most effectively bring an end to the parties' dispute.

All parties to a contract should look closely to the dispute resolution provisions and make certain they offer the practical flexibility that will enable fair resolution of any dispute without the encumbrance of one-dimensional thinking. Major corporations, financial institutions and others who rely upon boiler plate language are well advised to consider the breadth and diversity of past disputes and explore the benefits of modifying such boilerplate dispute resolution language. Every contract incorporating ADR should offer mediation as a “first ditch” resolution process, followed by a flexible and sensible “second ditch” arbitration option adaptable to the nature and scope of the particular dispute. Great opportunities exist to deal with disputes like never before. The key is to give yourself a chance to resolve your differences in a manner that is proportional to whatever disputes might take place.

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