

ADR clauses: generic vs. custom

Ones that work right for *you*

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With the developing use of alternative dispute resolution in contracts, boilerplate ADR clauses may create unanticipated problems for the unwary drafter who fails to think through potential issues and concerns. Surely, attorneys who insert ADR clauses in agreements to avoid litigation do not want to later find themselves litigating over the interpretation of a stock clause. Accordingly, the inclusion and construction of ADR contractual clauses should be given serious consideration. Such thoughtful reflection in advance ultimately saves a client time, money and aggravation. Moreover, careful drafting can preserve and foster the underlying business relationship between the companies and also between the attorney and client.

In the increasingly competitive and complex marketplace of the 21st century, businesses can ill afford the time and costs of traditional litigation. Litigation inevitably results in the termination of what was, presumably, a good and profitable business relationship. In recent years, companies have increasingly turned to alternatives to resolve conflicts that can and do

occur in commercial business transactions. ADR is recognized as a less costly, more efficient and satisfactory way to resolve business disputes. Using ADR, the parties can create a business-driven solution, preserving that valuable relationship. Moreover, companies appreciate the privacy and confidentiality of the ADR setting.

The best time for parties to agree on ways to resolve potential contract disputes is when they are negotiating the contract — well before any dispute arises. A rational and fair conflict resolution process can then be built into the contract itself.

Stock clauses

In recommending pre-planning for possible future problems, transactional attorneys traditionally have utilized boilerplate language such as that suggested by the American Arbitration Association (AAA), the National Arbitration Forum (NAF) or The Center for Public Resources (CPR). For example, the AAA standard pre-dispute arbitration clause states:

Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in accordance with the [applicable] Arbitra-

tion Rules of the American Arbitration Association and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

NAF recommends the following paragraph as one “used successfully by businesses worldwide to resolve disputes fairly and efficiently,” and further suggests this paragraph “can be included in every commercial contract and every form and documents used to reflect commercial agreements”:

The Parties agree that any claim or dispute between them or against any agent, employee, successor, or assign of the other, whether related to this agreement or otherwise, and any claim or dispute related to this agreement or the relationship or duties contemplated under this contract, including the validity of this arbitration clause, shall be resolved by binding arbitration by the National Arbitration Forum, under the Code of Procedure then in effect. [Optional: Business may add terms here that provide for judicial remedies for repossession, replevin or other actions

where property would be subject to reclamation after a court order.] Any award of the arbitrator(s) may be entered as a judgment in any court having jurisdiction. In the event a court having jurisdiction finds any portion of this agreement unenforceable, that portion shall not be effective and the remainder of the agreement shall remain effective. Information may be obtained and claims may be filed at any office of the National Arbitration Forum. ... This agreement shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. Sections 1-16.

CPR provides its own series of model ADR clauses and procedures and likewise promotes itself as the organization to handle matters. CPR does “encourage” drafters to adapt clauses to fit particular case needs.

Reliance on convenient stock phrases is understandable. However, transactional attorneys ought to reflect more on tailoring ADR clauses to meet the needs of their individual clients. Drafting such clauses requires legal skills, practical knowledge, an understanding of the client’s goals, and much

thought. The drafter must be prepared to review the pros and cons of various ADR options with the client, including how each option could potentially impact the projected business relationship.

The objective is to create an ADR process, or a series of interconnected processes, which the parties control and which can occur quickly, with as little disruption to the underlying business arrangement as possible. The design must be creative and flexible. The careful drafter must anticipate a multitude of variables and plan for many contingencies.

Understand the processes

Mediation, arbitration and other related forms of dispute resolution can all work effectively in the resolution of commercial disputes. Before advising a client which process may be best suited for the client's business dealings, attorneys need some basic understanding of each process.

1. Negotiation: The clients agree to attempt to resolve a dispute by making a commitment to work together for a period of time without resorting to court. It may be appropriate to designate certain higher-level executives to negotiate.

2. Early Neutral Evaluation (ENE) is similar to what judges do in settlement conferences. The evaluator hears from the parties, considers the information and provides parties an assessment of the case.

3. An Advisory Opinion is similar to ENE and non-binding arbitra-

tion, but is in written form. Once again, the neutral meets with the parties and witnesses, considers the proofs and assesses the strengths and weaknesses of each party's position in written form.

4. Mediation is a form of dispute resolution most unlike adversarial proceedings. It is confidential, non-binding and usually voluntary. Acting as a third party neutral, the mediator typically facilitates discussion between the parties and assists them in resolving their dispute. By developing a realistic assessment of the strengths and weaknesses of each side, the mediator acts as the agent of *reality*. The mediator works with the parties to formulate options to meet their interests and needs.

5. Arbitration is essentially private litigation with a bit less formality than court proceedings and more formality than other types of ADR. The parties present information and testimony before the arbitrator. There are often three arbitrators. Ultimately, the arbitrators make a binding or non-binding decision. Most arbitrations are binding, with the parties having limited ability to overturn the determination on appeal.

Attorneys have traditionally turned to binding arbitration as the ADR process of choice by incorporating standard arbitration clauses into contracts. However, arbitration today is subject to debate and criticism by those who perceive it as becoming too much like litigation — taking too long,

costing too much and sometimes producing poor results likely to be upheld on appeal. Therefore, the wary drafter will be careful not to automatically include arbitration as the ADR contractual process of choice.

6. "Med/Arb" combines mediation and arbitration. The parties agree to mediation first and if they are unable to resolve all or part of the dispute, they proceed to binding arbitration on the remaining issues. It is preferable if the mediator and the arbitrator are not one and the same.

After considering these ADR options, the attorney and the client must decide which process or processes to use. Frequently, ADR clauses contain a multi-step approach where it is contemplated that more than one process may be used. For example, if a dispute occurs the parties agree to first attempt to negotiate, then to mediate. Finally, if the mediation is not fully successful, they agree to submit the matter to binding arbitration, ENE or proceed directly to court.

Other issues

Once the ADR process is in place, there are other issues to address. The first concerns details regarding the mediator or other neutral. One must ask how the neutral will be chosen? What qualifications should the neutral have? Does the neutral need to have substantive knowledge of the matter in dispute or will experience and training in process be of

paramount importance? Do the parties wish to name a specific person? If so, will an alternate choice also be designated?

Mediators and other neutrals may be found through ADR organizations, the courts and word-of-mouth. There is no certification for neutrals (the federal district court does "certify" its mediators). The Association for Conflict Resolution has a list of practitioners and advanced practitioners who have met certain requirements, including senior mediators (acrnet.org). The New Jersey Association of Professional Mediators accredits mediators as divorce, family and business and commercial mediators with the designation of Accredited Professional Mediator (njapm.org). New Jersey courts also have a list of mediators approved under Rule 1:40, which can be accessed at njcourtsonline.com.

Another issue attorneys need to consider is anticipating the types of disputes their clients may encounter and which would be submitted to ADR. Specific language can be inserted into an ADR clause acknowledging that ADR will be used for particular situations. It should be noted that where a dispute threatens the very core relationship between the parties, speedy access to the court in the form of injunctive relief might still be desirable.

Additionally, in preparing an ADR clause, the drafter should recognize some informal factual exchange might be required before

a dispute can be resolved. Consideration should be given to who has access to the information, how long it will take to produce, and who can evaluate it. At times, an expert may be needed for this last task. A well-written ADR clause should anticipate this need by providing for the selection of one neutral expert.

Lastly, in any ADR process, clients should decide in advance on responsibility for dividing costs, including payment of the neutral's fees and costs and payment for any experts.

In planning for frequently occurring disputes in business relationships, ADR offers clients practical ways to resolve their problems. A carefully constructed ADR clause in the underlying business agreement will provide valuable guidance and help the parties resolve their differences in a better, less disruptive, quicker and more satisfactory manner.

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