Management of Supplier Relationships Through an Effective Dispute Resolution Process

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Abstract. The evolving methods of resolving, and mitigating, supplier conflicts will be explored including an overview of Alternative Dispute Resolution (ADR) methods used in drafting cost-effective subcontract “Arbitration” clauses. Specifically, the concerns/pitfalls in drafting subcontract dispute resolution terms and conditions will be presented and discussed in this interactive session.

Opportunities. Managing effective supplier relationships requires Supply Professionals appreciate and understand the importance of drafting relevant terms and conditions for the topic of “dispute resolution.” This session is envisioned to provide that Professional with the requisite tools in drafting such a clause. Focus will be on (i) the drafting of an arbitration clause as the ADR method of choice to resolving disputes in the business environment and (ii) how “proper” drafting can enhance and further the negotiation process—or how the supplier can be “required” to dance-the-negotiation-dance utilizing BATNA (Best Alternative To a Negotiated Agreement).

Guide in drafting business related ADR clauses:

• Which is better a broad or narrow clause? What are the benefits of each? A typical clause is as follows:

  “Any controversy or claim arising out of or relating to this contract/purchase order, or the breach thereof, shall be settled by arbitration administered by the ________ (Arbitral) Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.”

  ➢ Why is “relating to” the contract/purchase order much broader than merely “arising out of” the contract/purchase order?
  ➢ “Risks/benefits” of self-administered arbitrations
  ➢ Is a multi-step clause with mediation then arbitration more desirable for the relationship?

• Should all disputes be arbitrable?
  ➢ What, if anything, should be excluded?
  ➢ Injunctive/Provisional relief for federal issues?
Who decides arbitrability issues?
Will court action be necessary to “clarify” scope of what is arbitrable?

- Will the clause be self-enforcing?
  - Is it merely an “Agreement to Agree?”
  - Participation in the proceedings constitute a waiver of non-self-enforcing clause?

- Will the clause clearly state what arbitral rules will apply?
  - Are all the rules appropriate for “your” dispute?
  - Specialized rules of the arbitral provider?
  - Should the rules be tailored?

- How/who will decide the number and composition of the arbitration panel?
  - Pro/Cons of using/providing a “named” arbitrator in the clause—sunset/unavailability provision?
  - Do “you” only want 1 arbitrator?
  - Subject matter expertise important?
  - Due-Diligence on arbitrator selection?
  - Party-Appointed Arbitrators?
    - Neutral verses non-neutral arbitrators

- Any “significant” procedural issues that should/not be addressed in clause?
  - Class Actions, additional parties, or consolidation of separate proceedings?
  - Discovery permitted and, if so, permitted scope?
  - Who can/should sign/issue subpoenas for discovery?

- Where will the arbitration take place—venue?
  - Will the specified venue control?
  - Will/should the arbitral association make a binding decision on locale?
    - Will enforceability of venue provision be an issue?
  - Will any State statute “control” venue question notwithstanding contract provision providing for venue? See, e.g. Cal. B&P Code §20040.5
    - Role of Federal Arbitration Act (FAA)?

- Fees, Costs, Attorney Fees Recovered?
  - See Leamon v. Krajkiewcz, (F038025, Calif. Ct. of Appeals, Fifth District, filed 2/24/2003), compliance with contractual pre-arbitration provision, i.e. mediation, required in order to obtain attorney fees?

- Choice of law for contract verses choice of law for arbitration provision

- Should/does the clause “require” the arbitrator to “follow the law?”
  - “Manifest Disregard of the Law” standard?
  - Grounds for appeal in contract?
• Other drafting concerns.
  ➢ Bar punitive damages?
  ➢ Prohibit joinder of parties?
  ➢ Reasoned award required from arbitrator(s)?
  ➢ Limitation of Remedies?

• Any clause enforcement issues?
  ➢ Unconscionability—Fairness
  ➢ Applicability of Contract defenses
  ➢ Severability of clauses desired if some unenforceable?
  ➢ Preemption of local/state rules by Federal Arbitration Act?
    Does the California Judicial Council Arbitration related rules on
disclosure/disqualification, etc. “trump” the FAA? (See Jevne v. Cal. Superior Court (JB Oxford Holdings, Inc.) - filed November 19, 2003, Second District, Div. Seven and
"Stock Answer to Ethics Spat,” ABA Journal, March 2003, page 14, and US Supreme Court decision in The Citizens Bank v. Alabanco, Inc. et al. (No. 02-1295, 6/2/03)

• Specific concerns in drafting that are unique to the nature/business of dispute?
  ➢ Baseball Arbitration desired to “ensure” negotiated/mediated solution—BATNA,
or Best Alternative To Negotiated Agreement?

ADR ARTICLES/ITEMS OF INTEREST:

See American Arbitration Association “Drafting Dispute Resolution Clauses—A Practical Guide.” Also, visit the AAA website at http://www adr.org/

Visit the ISM Federal Acquisition and Subcontract Management Group website at http://www fasmg.org/

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