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Alternate Dispute Resolution Provisions With Early Intervention

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Almost no one disputes that litigation is expensive and time consuming. Clients recognize that litigation expends bottom line dollars and consumes executive time; lawyers recognize that litigation, regardless of how efficiently it is conducted or how successfully it ends, is often viewed as being conducted for the benefit of the lawyers; and, judges always want to know why the matter is consuming court time and effort when it should be settled. Notwithstanding this seeming census on the importance of alternate dispute resolution, almost all efforts to resolve a dispute come into focus after the commencement of litigation. In many instances, the alternate resolution efforts come well into the litigation and after the completion of fact discovery. This typically results in increased party hostility and a desire by both parties to recover the sunk cost as part of any settlement.

The upside down logic of the current approach can be seen in a sampling of federal statues addressing alternate dispute resolution. The general federal arbitration statute is Title 9 of the U.S. Code. While Title 9 provides for arbitration, court enforcement of the obligation to arbitrate, and for enforcement of awards, it does not address any mechanism for getting the parties together in the first instance. Likewise, 28 U.S. Code Section 651—Authorization of Alternative Dispute Resolution—definition Section (a) states, "For purposes of this chapter, an alternative dispute resolution process includes any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, mini trial, and arbitration as provided in Sections 654 through 658."

However, a reading of the full statute reveals that it is focused on court activity and does not provide any mechanism for getting the parties together in the first instance. The federal statute addressing Voluntary Patent Arbitration, 35 U.S. Code Section 294, is an instance where getting the parties into arbitration is addressed up front in paragraph (a) which states, "A contract involving a patent or any right under a patent may contain a provision requiring arbitration of any dispute relating to patent validity or infringement arising under the contract. In the absence of such a provision, the parties to an existing patent validity or infringement dispute may agree in writing to settle such dispute by arbitration. Any such provision or agreement shall be valid, irrevocable, and enforceable, except for any grounds that exist at law or in equity for revocation of a contract."

The patent statute addresses two important points for early dispute resolution through arbitration. One, the decision must be voluntary; two, the provision requiring arbitration of any

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dispute relating to patent validity or infringement must arise under the contract. This statutory provision is a step forward but the limitation of the ADR to arbitration, which can become as complex as litigation, missed an opportunity to encourage a broader array of dispute resolution processes through creative contract drafting.

If we accept that almost every contract has a provision addressing dispute resolution, that the provision is often an afterthought or boilerplate; and that the parties are more likely to dispute the proposed dispute resolution venue, how do we create a provision with a defined mechanism that is activated before either party launches a suit? The answer starts where it always starts—your client.

You client needs to educate you about the relevant industry, its place in the industry and the competitor's place in the industry. Do your client and the competitor service the same customer base and will that customer base be disturbed by its suppliers litigating against each other? Is it possible that litigation will expose internal information to public disclosure, or, worse will litigation ultimately involve the customer in document discovery or depositions? Who are the competitor's likely decision makers? How and where are conflicts likely to arise? Much of this data mining will take place in drafting the agreement, but it is important to dig deeper with the specific thought of addressing and controlling possible disputes before they lead to litigation and all bets are off.

Once the information gathering is complete, customizing for the specific situation can start with something like the following.

Voluntary Dispute Resolution

The parties shall make their best efforts to settle amicably, promptly and by mutual consent all disputes, controversies or differences that arise between them out of or in relation to or in connection with this agreement, or any breach thereof. Each party shall designate a representative with the full authority to settle the controversy and the appointed representatives shall confer or meet as may be reasonable under the circumstances. If any dispute, controversy or difference cannot be settled between the party representatives within 90 days after its occurrence, either party may request to have the dispute, controversy or difference referred to mediation before a mutually agreed mediator within 60 days after the request. If the dispute, controversy or difference remains unresolved the parties may agree to have the dispute, controversy or difference referred to by binding arbitration administered by the American Arbitration Association (AAA) under its Commercial Arbitration Rules (or Patent Arbitration Rules if applicable). The arbitration shall be conducted in English in Philadelphia, (unless the parties agree in writing otherwise) under the law of the Pennsylvania before three arbitrators who shall follow applicable rules of Pennsylvania's substantive law in deciding the dispute and render a reasoned award. The arbitrators may make an award of reasonable attorney fees to the prevailing party. If not mutually agreed upon, the arbitrators shall be selected according to AAA rules from among arbitrators having experience in matters concerning patents. The parties may exercise reasonable discovery rights in any such arbitration.

The arbitration award(s) shall be final and binding upon both parties, and judgment upon the award(s) may be entered in and enforced by any court of competent jurisdiction.

Engaging in this voluntary dispute resolution shall automatically toll any statutory filing period for so long as the parties are engaging in frank and reasonable discussions and any applicable statutory filing period shall be extended by an equal number of days. Neither party shall file any suit until 10 business days after giving the other party written notice that it was withdrawing from voluntary dispute resolution.

If the terms in the exemplary provisions are tailored to the specific parties, industry and agreement, it may be possible to name the party representatives or their respective positions within the companies and to add more detail to how the process will work. While it is admittedly difficult to work out every detail and anticipate every dispute, the exercise of thinking about early intervention helps to focus the parties and the document drafters on the topic of resolving disputes without litigation. It also helps to overcome the honeymoon atmosphere that can cause a party to believe that everything will work out fine and such detailed provisions are overthinking of the possibility of a dispute.

In summary, it is never too early in the drafting process to begin the consideration of the dispute resolution provision and building in early intervention will have the parties talking before a suit is filed and positions become hardened. •