



DRAFTING/NEGOTIATING A DISPUTE RESOLUTION CLAUSE WITH CUSTOMERS/SUPPLIERS

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DRAFTING/NEGOTIATING A DISPUTE RESOLUTION CLAUSE

- Overarching Factors to Consider in Drafting a Dispute Resolution Clause Include...
 - Buyer verses Seller context
 - Domestic transaction verses International transaction
 - Purchase of Goods verses Services
 - Applicable Law—Local Commercial Law, UCC, CISG, etc.
 - Multi-Step Resolution Process with Binding Arbitration verses Litigation
 - Other Significant Factors...

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- Recent Studies that may Assist in Determining the Approach in Negotiating a Dispute Resolution Clause...
 - AAA 2003 Study on Dispute-Wise Companies builds upon earlier Cornell University
 - Stronger Relationships through Alternative Dispute Resolution (ADR) process
 - Mediation and Arbitration
 - Consistency in use of ADR

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- Recent Studies that may Assist in Determining the Approach in Negotiating a Dispute Resolution Clause...
 - Litigation Trends Survey in 2006 by major law firm
 - International litigation/arbitration costs--the same.
 - Time to resolution through litigation and arbitration--same.
 - “Ease” of enforcing an arbitration award--same as a court judgment.
 - Arbitral Provider: AAA/International Centre for Dispute Resolution preferred.
 - Formal multi-step (ADR) resolution processes increased with significant savings noted by using same.

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- Recent Studies that may Assist in Determining the Approach in Negotiating a Dispute Resolution Clause...
 - PriceWaterhouseCooper Survey in 2006.
 - Finding that multinational companies are using arbitration rather than litigation in resolving international disputes and citing “greater flexibility, finality and confidentiality.”

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- PriceWaterhouseCooper Study. Key items...
 - Majority (73%) of corporations prefer arbitration for international contract disputes.
 - Advantages of international arbitration (flexibility, NY Convention, etc.) “clearly” outweigh the disadvantages (e.g. expenses).
 - Having a corporate dispute resolution policy provides several strategic advantages.

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- PriceWaterhouseCooper Study. Key items...
 - Well-drafted contractual arbitration clauses provide tactical advantages (escalating clauses, venue, selection of arbitrators, etc.).
 - Institutional arbitration (e.g. ICC, London Court, and AAA) versus *ad hoc* versus regional arbitration institutions are analyzed.

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- PriceWaterhouseCooper Study. Key items...
 - Why arbitration venue is a crucial factor (procedural law, etc.) and which venues are the most popular (England, Switzerland/US, and then France).
 - Corporations overwhelmingly favor the finality of arbitration awards (limited grounds to appeal, etc.).

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- PriceWaterhouseCooper Study. Key items...
 - Cost of international arbitrations may be “more” expensive.
 - Why the outlook for international arbitration is positive (95% of corporations currently using arbitration will continue to use).

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- Overall Conclusion of Studies/Surveys:

An ADR Approach to Resolution Dispute—Especially in An International Context

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- Standard AAA Clause:

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

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- Expanded ADR Clause Drafting Considerations:

- Scope of arbitration clause: Broad versus Narrow
- Should all disputes be arbitrable?
- Clause “self-enforcing”?

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- Expanded ADR Clause Drafting Considerations:

- Any clause enforcement issues? Will it be enforced as drafted?
- Does the clause clearly state applicable arbitral rules?
- Number/composition of the arbitration panel? Use of “Party-Appointed” arbitrators

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- Expanded ADR Clause Drafting Considerations:

- “Significant” procedural issues that should/not be addressed in clause?
- Importance of arbitration location—venue
- Choice of law issues

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- Expanded ADR Clause Drafting Considerations:

- Will the award be confirmed?
- Fees, Costs, Attorney Fees Recovered?
- Special “Negotiation Techniques Desired, e.g. “**Baseball Arbitration**” or...

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- References Include...

- AAA Study--<http://www.adr.org/si.asp?id=2423>

- Litigation Trends Survey--

<http://www.fulbright.com/mediaroom/files/2006/FulbrightsThirdAnnualLitigationTrendsSurveyFindings.pdf>.

- PriceWaterhouseCooper Survey--

<http://www.pwc.com/extweb/pwcpublications.nsf/docid/0B3FD76A8551573E85257168005122C8>

- AAA Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes) located at <http://www.adr.org/sp.asp?id=22440>

- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) located at <http://www.adr.org/sp.asp?id=22096>

- “Having Trouble Getting to the Negotiation Table? Try Baseball Arbitration,” a two-part series on incentivizing parties to negotiate is available at www.Rumbaugh.net

- “Preliminary Hearings,” a three-part series on the preliminary hearing process that is associated with the introductory stages of commercial arbitrations is available at www.Rumbaugh.net

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