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Boilerplate Blues:

Draft an *Appropriate* Dispute Resolution Clause

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"*All disputes shall be resolved by arbitration.*" Agree or disagree? Blink. Faster than you think (or faster than you think you think), you have already had an immediate reaction to this modest proposal. Now *stop to think*. If you use a boilerplate arbitration clause, it is worth taking a moment to reflect on the case against it. This article identifies some concerns from a routine and uncritical embrace of arbitration as *the solution*. Beware! There may be dangers there. The second task of this article is to identify safeguards to minimize those dangers and to tailor an *appropriate* dispute resolution clause.

There is a long-standing federal policy favoring arbitration. A series of recent Supreme Court decisions subjects all statutory rights and remedies to arbitration. The trade-off in permitting all such disputes to be arbitrated was the requirement that the arbitration process provide all remedies that would otherwise be available in a civil action. At this point, the law of unintended consequences came into play. Attorneys are now surprised to discover that a routine, boilerplate arbitration clause may result in their clients being exposed to punitive damages, attorneys fees, preliminary injunctions and other equitable remedies, including class action arbitration. These complexities and increases in discovery and motion practice can make illusory the promises of arbitration. Lack of controls can result in runaway arbitrations that create arbitration horror stories like the one you may now be remembering.

Talk about a difficult conversation! *Hello, client. I am calling about the demand for arbitration you received. I know that the attorneys drafting this clause in the contract thought it would provide a speedy, inexpensive and just resolution of this dispute as an alternative to traditional litigation, but that may not happen in this case. Yes, the demand is for a class action. Yes, the arbitrator has the power to award multiple damages and attorney's fees. Yes, you might have to pay for all the costs of the arbitration, including the fees and expenses of the arbitrator. Who will be the arbitrator? It is not yet determined. No, there is no requirement of any particular expertise. No, the arbitrator does not have to be a lawyer or even know the law. No, there is no requirement that the arbitrator follow the law of this jurisdiction or any other particular jurisdiction. No, rules of evidence do not apply. You think it is like playing tennis without the net? Well, not that bad, but . … Discovery? We will have to discuss—only what the arbitrator allows. Appeals? Not really, unless the arbitrator is corrupt. Final and binding and enforceable in any court —, yes, that's the law.*

To avoid having such a difficult conversation, attorneys must focus on drafting appropriate dispute resolution clauses, tailored to meet the needs of the parties in light of the current statutory and case law. Whether you are a business lawyer or a litigator, ask yourself: when last did I review our boilerplate ADR clause? Does our firm even have such a clause? Appoint yourself a committee of one to undertake that review process.

There are two basic approaches to tailoring a dispute resolution clause to meet the needs of the parties: (1) enumeration of rights, remedies, and safeguards in the dispute resolution clause; and (2)

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incorporation of procedural rules of a dispute resolution provider organization. Some provide specialized rules or specialized procedures like an optional appeals procedure.

Some topics to consider in drafting a dispute resolution clause include: scope of dispute resolution clause (all disputes; all contract disputes; other); step clauses (negotiate, mediate, litigate or negotiate, mediate, arbitrate); provisional remedies (e.g., permitting preliminary court relief without waiver of arbitration process); choice of law; location of arbitration; discovery (amount and duration); award of fees and expenses, including attorney fees; commencement/completion dates for arbitration process; limitations on remedies (statutory or punitive damages); limitations on consolidation or class action treatment; qualifications and selection of arbitrator(s); number of arbitrators (1 v. 3); and if 3, then special questions on party-appointed arbitrators and presumptions of neutrality; whether and how to provide for an appeal from the arbitration award.

The second approach is to incorporate pre-existing procedural rules of a provider organization. The default provisions of such procedural rules may meet the needs of the parties. Which approach is best depends upon the interests and needs of the clients.

The market for dispute resolution services permits you and your clients to be sophisticated consumers. The case *for* arbitration has been made by sophisticated consumers who know what they want and demand it. The case *against* arbitration is made when attorneys default to a boilerplate arbitration clause without reflecting on how to tailor the process to serve their client's interests. ■