



Beware the midnight clause: Hold the champagne?

By Hon. Nancy Holtz (Ret.)
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Is it time to celebrate?

It's midnight. The champagne is on ice. It was a tough negotiation but your attorney got all the key terms you wanted. With a few finishing touches on the contract, the deal will be done and the celebration can begin.

But then, as an afterthought, someone raises the possible need for an arbitration clause. To expedite the closing of the deal, boilerplate language from another unrelated contract is lifted and inserted in the deal contract. Just like that, a hastily added alternative dispute resolution (ADR) provision has been added to what is an otherwise meticulously drafted document.

This scenario, which can cost companies in the long run, is not unusual. Often, attorneys address the need for a dispute resolution clause only when memorializing the final terms of the deal in a contract.

Because the dispute resolution clause can sometimes be an afterthought when the ma-

ior points of negotiation have been addressed and the deal is considered done, it is frequently referred to as a "midnight" or "champagne" clause. But the ADR clause should not be an afterthought. It should be carefully thought-out and well-drafted.

Why have a dispute resolution provision at all?

Anyone who has been involved in litigation knows the answer. Litigation is expensive, time consuming and unpredictable. It's also risky: trade secrets or other confidential information can become public in litigation. In addition, litigation can harm business relationships.

But all of these headaches can disappear with a well-drafted ADR provision calling for arbitration.

Even better, a so-called "multi-step dispute resolution clause" can be included in a contract. Multi-step clauses require parties

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to first negotiate and/or mediate in a quick and cost-effective manner before proceeding to arbitration. Properly drafted, these clauses can resolve disputes quickly, saving time, money and preserving business relationships. But these clauses must be drafted with care.

Why draft an ADR clause now when there is no deal at hand?

When your focus is on the substantive elements of a business transaction, it is not practical to divert attention towards a dispute resolution clause. This is why it is so easy to give into the temptation of simply using boilerplate language. By drafting an ADR provision now, before it is necessary, you can ensure it contains the features you want. Far too often, when a dispute arises, everyone rushes to the contract only to learn to their dismay it does not contain the provisions they want.

What terms are important?

All of them! When an ADR clause is added simply as a midnight or champagne clause, key features can be absent.

The ADR clause should contain language clearly stating the process that will be followed. For example, does it call for a multi-step process: mediation first, then arbitration? Does it designate the location where the mediation or arbitration will be conducted? Does it designate a particular ADR provider to ensure an orderly, fair and economical process? It is

crucial to ensure that a well-qualified neutral be the one to decide your dispute. You do not want to leave this to chance, so care should be taken in mapping out the process.

How do I create an ADR clause that works for my company?

The good news is your legal team no doubt has access to sample clauses. These clauses should serve as the model upon which to build an alternative dispute process that works best for your company. Most major dispute resolution providers, such as JAMS or AAA, also provide sample clauses on their websites for your consideration. But the most important thing is that the ADR clause be tailored to the needs of your company.

Time to celebrate.

Once your legal team has crafted a clear, comprehensive dispute resolution clause, ensuring that any disputes will be decided fairly, economically and expeditiously, you can keep it “on ice.” Then, the next time you are closing a deal at midnight, you can crack open your new ADR clause, along with the champagne! •

Hon. Nancy Holtz (Ret.) is a JAMS neutral, based in Boston. She can be reached at nholtz@jamsadr.com.

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