

## Drafting the Ultimate Arbitration Clause

With the Navy recently taking the lead in adopting the use of Arbitration (to the detriment of the other Services?) a program addressing the significant facets of drafting/negotiating an Arbitration clause for government subcontracts and commercial contracts will be presented. Specifically, the seminar will focus on the use of a “standard” arbitration clause, the various options or considerations in drafting a clause, discussion of the various aspects in a broad clause, the benefits and disadvantage of certain approaches, etc.

In particular the session will cover the following:

### **DRAFTING/NEGOTIATING A DISPUTE RESOLUTION CLAUSE**

- Overarching Factors to Consider in Drafting a Dispute Resolution Clause Include...

- Buyer versus Seller context
- Domestic transaction versus International transaction
- Purchase of Goods versus Services
- Applicable Law—Local Commercial Law, UCC, CISG, etc.
- Multi-Step Resolution Process with Binding Arbitration versus Litigation
- Other Significant Factors...

- 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.”

- Expanded ADR Clause Drafting Considerations:

- Scope of arbitration clause: Broad versus Narrow
- Should all disputes be arbitrable? Any “carve-outs”?
- Clause “self-enforcing”?
- Does the clause clearly state applicable arbitral rules?
- Number/composition of the arbitration panel? Use of “Party-Appointed” arbitrators
- “Significant” procedural issues that should/not be addressed in clause?
- Importance of arbitration location—venue

- Choice of law issues
  - Confidentiality provision
  - Will the award be confirmed?
  - Fees, Costs, Attorney Fees Recovered?
- Concluding Comments and Questions/Answers

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References Discussed Include...

- Fulbright 2007 Survey, "Litigation Trends" [www.fulbright.com/litigationtrends](http://www.fulbright.com/litigationtrends)
- American Arbitration Association Study--<http://www.adr.org/si.asp?id=2423>
- 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>
- Federal Arbitration Act (FAA): 9 USC § 1 et seq.
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention) located at <http://www.adr.org/sp.asp?id=29564>
- International Institute for Conflict Resolution & Resolution: [www.cpradr.org](http://www.cpradr.org)
- Drafting ADR clause guides: [www.adr.org](http://www.adr.org) and [www.arbforum.com](http://www.arbforum.com)
- Noted/Discussed cases include: Buckeye Check Cashing v. Cardegna 126 SCt 1204 (2006), Dynegy Midstream Services v. Trammochem, 451 F3d 89 (2006—2<sup>nd</sup> Cir.), and Harbert International v. Hercules Steel, 441 F3d 905 (2006--11th Cir.)
- Additional Resource Material available at [www.Rumbaugh.net](http://www.Rumbaugh.net)

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