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Refresh Your Dispute Resolution Roadmap

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A. Introduction

Business leaders value a closer who can proactively manage disputes to quickly achieve cost-effective and business oriented outcomes. The following roadmap outlines many of the available options and tools to enable you to achieve such a resolution and prove you are a valued closer.

B. Roadmap to Choose Your Dispute Resolution Path

1. Choose Your Path

The first decision to make when drafting dispute resolution provisions is to choose your path. Variables to consider include:

- If there is a dispute, then will the dispute first proceed to pre-litigation mediation or go straight to an adversarial process?
- If the first step is an adversarial process or if pre-litigation mediation is unsuccessful, then will the dispute proceed to a court or an arbitration for determination?
- If the dispute is escalated to an adversarial process, then will mediation be required post-litigation?
- If the relationship is long running or the economics of any dispute could vary materially, then is a tiered system warranted? A tiered system is when disputes below a certain economic threshold follow one path, while disputes above the threshold follow a different path.

When choosing your path, consider things such as economic parameters, time constraints, and the nature of the relationship. For example, pre-litigation mediation can be particularly valuable in long-term relationships or when small amounts are in dispute, whereas arbitration can be particularly valuable if time is of the essence or confidentiality is essential.

2. Build Your Road

Alternative dispute resolution (or “ADR”) provisions can be tailored to the needs of each situation. While you may want to start with a boilerplate provision,

consider reviewing and tailoring your provision to serve the unique needs of each situation.

In addition to the basics of establishing governing law and venue, consider addressing forum, procedures and timelines. For example, in the context of mediation, consider addressing how and when a mediator will be selected, who will pay the mediator's fees, and where the mediation will be held. While in the context of arbitration, consider defining parameters to expedite the process or control costs.

C. Roadmap to Structure Your Arbitration

1. When to Choose This Path

Arbitration may be the preferred path to resolution for international disputes, commercially sensitive matters, time sensitive matters, disputes between parties seeking to preserve an ongoing relationship, and consumer disputes. Arbitration can be faster and more cost effective than litigation. Arbitration is also a confidential process in contrast to the public nature of the courthouse.

2. The Clause is the Key

The arbitration clause is the key to structuring any future arbitration. Through the arbitration clause, the parties can implement measures to control costs and structure the process to reduce time delays. To achieve these ends consider addressing the following in your arbitration clause:

- Location: Where will the arbitration hearing be held?
- Selection of the Arbitrator(s): Will there be a sole arbitrator or a panel of three arbitrators? What is the selection process for the arbitrator(s)? Are there any qualification requirements for the arbitrator(s)? Are there deadlines for selection and appointment of the arbitrator(s)? What happens if the deadline(s) are missed?
- Governing Law: What law governs the subject matter of the dispute? What law or rules govern the procedures for the arbitration?

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