DISPUTE AVOIDANCE IN TRANSACTION DOCUMENT NEGOTIATION AND DRAFTING

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by Mark Vorder-Bruegge, Jr.
Wyatt, Tarrant & Combs
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Introduction.

The United States legal system, and particularly its judicial system, has many unique and indispensable qualities. At the same time, in this writer's view, one of the great difficulties facing lawyers in this era is the inability of the legal system to predictably, consistently, and efficiently enforce the original intentions of transacting parties when one or both parties later see benefit in alleging different terms or seek extraordinary damages based on sympathy or as a subterfuge for income-redistribution or other social engineering. Good client service in all kinds of transactions arguably entails thorough consideration of potential future disputes and alternatives to the traditional litigation system for confining or resolving such disputes. The uncertainty, delay, cost, and unpredictability of litigation usually constitute enormous leverage for a transaction party with any motivation to depart from the spirit of agreed terms or expectations.

A common benchmark for judging the success of a transactional document in litigation is whether the client can be assured of obtaining a *summary judgment* encompassing the desired result. If the client must win a "swearing-match" in a trial in order to prevail, then even an ultimate victory may be hollow in light of the extreme delay and expense incurred in reaching that point. "Nightmare" lawsuits are complained of with increasing frequency and, arguably, increasing justification.

"Alternative Dispute Resolution" or "ADR" is an increasingly popular concept which, in a narrow sense, posits arbitration or mediation as a process superior to the civil action for the grant or extinguishment of a legal claim for relief. But why not build dispute "resolution" or "avoidance" into a transaction from the inception?

A lawyer who takes the time to foresee the problems that can arise when opposing litigators aggressively seek escapes or unintended meanings in transactional documents and events, and "fault-tests" language and conduct for those weaknesses, can save the client geometrically larger sums in unnecessary litigation or at least reduce the risk of unjust outcomes. The casebooks in law libraries are full of decisions where the voracious dissection of words and conduct that occur when opposing litigators do their work created issues that a court decided

based on tightly controlled, crafted, and in some cases fabricated evidence materially at odds with reality. Many fewer of these cases would have arisen if the transacting parties and/or counsel had given more thought to what those opposing litigators could do with their language and behavior. Counseling a client in a transaction, and negotiating and drafting transaction documents, is fundamentally similar to manufacturing a product: It is not enough to see if units coming off the assembly line appear to conform to good design specs. The finished products must be subjected to tests, misuse, and even torture beyond normal operating environments. In a lawsuit, your documents and your client's actions are going to be put to tests analogous to extreme torture!

Dispute avoidance is most effective when implemented in a binding fashion at the inception of a legal relationship. Thus, business and consumer transactions, typically with contractual elements, are primary contexts for most of the dispute avoidance tools covered in this paper. Yet litigators as well may benefit from this discussion, both in analyzing issues and in their routine negotiation of one of society's most vital types of transactions, the settlement agreement.

This seminar paper is not undertaken as a "scholarly" article but more a practical, reasonably short checklist of risks and issues which you can keep handy and consider in negotiating, drafting, or analyzing transaction terms. I have included sample language for certain types of terms – some taken from actual documents (now public record), so please pardon the obscure proper names.

1. Proving Assent. In recent years, courts have proven less reliable in enforcing the traditional doctrine that a party is deemed to have read and understood a document he or she signed. The best-drafted exculpatory, arbitration, or other agreement is virtually worthless if a counter-party is entitled to discovery, a jury trial, and an appeal before it is determined what agreements were reached. For all transaction documents today, I recommend having the signatory initial a separate sentence at the end of the document reading, in substance, "I have read, and understand, the foregoing document." Many users of extensive form documents, like car leasing and consumer finance companies, are exploiting this device currently. You may be able to get a summary ruling that the signer is estopped to deny the truth of the recital. A claim that the initials were forged may be warded off by having the initials witnessed and a standard business record of the signing put in the transaction file (in case the witness isn't available to testify later).

2. Avoid Other Formation Escapes. In drafting transaction documents, review traditional elements of contract formation and traditional grounds for rescission. Many of these can be foreclosed through careful drafting. In Tennessee, for example, contracts can be rescinded based upon both parties' assumption of erroneous factual information ("mutual mistake of fact"), or upon an intentional or negligent misrepresentation by one party. There is also some authority and risk that a unilateral mistake of fact, particularly if caused by a misrepresentation — even an innocent one — can provide grounds for escape. Most of the underlying doctrine, however, recognizes limitations on such escape avenues, where as a factual matter, the challenging party did not predicate his or her assent upon any particular information, or any information outside the documents, or any information provided by the counter-party, etc.

Thus, in many transactional contexts, this particular risk may be substantially diminished and perhaps eliminated by the use of language like the following:

> "The undersigned acknowledges and warrants that he (she, it) has not predicated his assent to this agreement upon any representation by or disclosure obligation of [client], or any factual assumptions outside of those explicitly set forth in the recitals herein."

3. Duty Modification & Liability Exculpation. Courts have often said in contract cases that the parties are free to create their own "private law" which will be enforced subject only to public policy boundaries. This freedom is frequently overlooked, underutilized, or used in an ineffective way. Here are a few suggestions. First, in drafting, think and draft conceptually. Don't write result-oriented language like "X shall not be liable for Y" (a litigator's dream). If you want to eliminate a duty entirely, write the language that way. As a very crude example just to stimulate your thought: "The parties agree that all legal duties of X in connection with the subject of this agreement are hereby modified to exclude Duty Y." If you are trying to exculpate the client from certain potential liability, say that directly. Again, a crude illustration: "Party A hereby exculpates Party B from any liability for Y."

4. Avoid Scope Limitations. In the context of this discussion, a contract in a transaction is at least two different things. It creates a set of duties and related conditions; and it can also provide "ADR" by creating the kind of "private law" discussed in this outline. A key mistake litigators see frequently is overlooking the distinction between these two functions. Many types of liabilities are predicated upon breaches of duties arising because of a contractual relationship, but the duties are extra-contractual. As a simple example, a contract to build a house can provide the circumstances for the contractor to incur tort liability for the death or injury of someone on the premises. Duty exclusions, liability exculpations, and other "remedial" or "ADR" provisions in a contract *may* be limited to obligations arising directly under the contract, but they do not *need* to be so limited. Thus, exploit every appropriate opportunity for your contract or other transactional document to deal with duties, liabilities, damages, consequences, and other legal matters arising not only under the contract itself but also arising in any manner, either directly or indirectly, under any legal doctrine, from activities relating to the contract. Say specifically that the exculpatory or other relevant provisions of the contract are not limited to performance of the contract itself but are intended to deal with the broader range of situations.

5. Avoid Implied Conditions. An argument frequently used in litigation to avoid exculpatory or similar contract provisions is that the relevant provision cannot be enforced because the party seeking enforcement committed some prior breach himself. This is a potent weapon because a particular traditional contract law principle is often forgotten. The traditional rule is that except in certain contracts dealing with real property, like leases, the law presumes, in the absence of a contrary provision, that the respective covenants of the parties are inter-dependent, and that the performance of each party is a condition precedent to the obligations of the other party. If you hire someone to paint your house and he doesn't show up, you don't have to keep paying him. Reasonable enough, but this same doctrine can produce some severe unintended consequences. Say a settlement agreement and release provide that the parties won't publicize its terms. One party breaches by disclosing terms. Is the other party then free to re-file a lawsuit asserting the released claim? Solution: Use the "contrary provision" exception. Make the obligations independent of each other, unless there are situations where you actually *want*

two things to be cross-conditional. Here is a typical clause from a settlement agreement, where it is particularly important that releases not be evaded later by a claim that some secondary performance (e.g. destruction of documents) was rendered defectively:

> "Except to the extent that performance of specified warranties and covenants are conditions for CLOSING, each obligation of each party under THIS AGREEMENT is independent, and a breach by one party shall not excuse any other party from performing the latter's own obligations hereunder."

6. Protect Third Parties. Duty modification, liability exculpation, and similar contractual provisions are fine when the person needing protection is a named party. But creatively used agreements frequently release, protect, or limit the liability of third persons who are not parties, e.g. directors, officers, and employees of a corporation, members of a partnership or LLC, etc. Such persons may find their protection removed or delayed, or dependent on the outcome of a contract interpretation suit. Remember your third-party beneficiary law: Third parties who are merely "incidental" beneficiaries generally have no standing to enforce the contract. Unless a named party is in a position to promptly obtain enforcement, incidental status will be no protection at all. Only "intended" third-party beneficiaries may sue to enforce. Many courts look no further than the contract to determine this status, if adequate language is used. Here is some sample language, again from a settlement agreement where numerous people needed to be able to enforce releases:

> "Each release and/or covenant not-to-sue in THIS AGREEMENT shall operate in favor of both the named beneficiary, all subsidiaries of each corporate beneficiary, and all of each beneficiary's past and present directors, officers, employees, attorneys, and other agents; and the heirs, successors, and assigns of them all. Each person or entity within any of those classes is an intended third-party beneficiary of the related terms of THIS AGREEMENT and shall be entitled to enforce such terms in the same manner as a named party. THIS AGREEMENT also shall be binding upon the heirs, successors and assigns of the parties. Otherwise, no other third party is intended to have any rights hereunder."

7. Clarify Effects of Cancellation or Termination. When dealing with contracts that serve multiple purposes including any of the "ADR" functions discussed here, think clearly about the effect of provisions describing the term or duration of the contract or the effect of a termination or cancellation triggered by particular events. Some of the effects of the contract may actually need to be perpetual, but a party seeking to evade such effects may have a good litigation issue later if termination language is not crafted carefully. Often, an appropriate technique is language that specified provisions shall survive perpetually notwithstanding any circumstance which causes other provisions to lose effect. Here again, at least from a litigation standpoint, the direct, explicit, "nobody could have misunderstood this" approach is best. Here is a litigation settlement agreement clause that dealt with a complex situation where the client *wanted* everything to terminate in some circumstances, but wanted everything perpetual in other circumstances:

> "The obligation not to oppose class decertification imposed upon GAC, WILSON, and COTTER in sub-paragraph (c) above in the event of cancellation of THIS AGREEMENT

shall survive and remain in force notwithstanding such cancellation, until such class decertification occurs. The representations and stipulations contained in THIS AGREEMENT shall be deemed made at the EXECUTION of THIS AGREEMENT, and any subsequent cancellation of THIS AGREEMENT shall not be construed to preclude recognition that those actions occurred. Otherwise, upon cancellation of THIS AGREEMENT, none of its provisions shall have any further force or effect. Conversely, upon CLOSING of THIS AGREEMENT, each obligation of each party prescribed at CLOSING shall survive CLOSING and exist perpetually thereafter."

8. Avoid Failure-Of-Consideration Issues. Another after-the-fact escape from a helpful exculpatory or similar contract may be that no consideration was received by the evading party, or that consideration received was technically allocable to some other performance, and not the performance in question at the time of challenge. It is often helpful to include a mutual acknowledgement not only that each party has received adequate consideration but also that each element of consideration has served as an inducement for every covenant of the receiving party.

9. Bankruptcy. Preservation of an ADR-type agreement in bankruptcy is never certain and raises many issues outside the scope of this short paper. However, certain risks — such as treatment of selected covenants as preferences — may be lessened, or made easier to defeat in litigation, by appropriate language. Here is some language, again from a comprehensive settlement agreement, and also dealing with some of the "rescission" issues discussed earlier:

"Each party stipulates and warrants that THIS AGREEMENT constitutes a compromise and settlement of disputed claims and matters which have been in controversy since 1988; that such party has negotiated THIS AGREEMENT with the assistance and advice of independent legal counsel and the benefit of all information, investigation, legal research, and/or other action which that party and/or its counsel has deemed desirable before commencing or concluding such negotiations; and that, due to the nature of THIS AGREEMENT and the adversary litigation being settled hereby, such party has not relied or predicated its assent hereto upon any representation by any other party made otherwise than in THIS AGREEMENT or any duty of such other party to disclose any facts. Each party further unconditionally and irrevocably represents to and stipulates with each other party that:

"(I) the settlement of each party's claim and/or defense prescribed by THIS AGREEMENT is reasonable, taking into account all the benefits received and rights given up by that party, and all other relevant factors;

"(II) the formation and CLOSING of THIS AGREEMENT each constitutes a contemporaneous exchange of the considerations prescribed, for new value in each case; and

"(III) the values exchanged by each party with each other party, and with all other parties, in both the formation and CLOSING of THIS AGREEMENT, are reasonably equivalent."

10. Avoid The "Short End" Of Ambiguity Fights. Your document may be great, but not perfect, and if an adversary launches an attempt to evade some covenant in litigation, your drafting may backfire on you through the rule that ambiguities are resolved against the drafter on the theory that he or she could have avoided the problem. Most courts seem to recognize a nullification of this rule by agreement, at least where neutrality is prescribed. Here is some sample language, again from an agreement whose purpose was to settle litigation:

> "THIS AGREEMENT shall be construed objectively in light of its overall purpose, which is to terminate existing legal controversy and prescribe certain future conduct with minimal further controversy. Neither the source nor authorship of THIS AGREEMENT nor the contents of any non-final drafts shall cause any other bias or presumption in the construction or interpretation of THIS AGREEMENT."

11. Use Statutory Escapes From Oral Waivers. I recommend assuming that the parol evidence rule will be an unreliable *mess* in litigation. At least in Tennessee, even where the parties say in their document that an agreement is fully integrated and cannot be amended orally, an evading party can still frequently create a trial issue over an asserted oral modification. Some courts have explained that the non-amendment clause itself can be amended orally. On the other hand, again in Tennessee, there is definitive help on at least one issue from the Legislature, dealing with *waivers*. A statute says that if an agreement provides that a waiver of a right must be in writing to be effective, then it must be in writing. T.C.A. 47-50-112(c). Take advantage of this by expressly providing that no waiver will be effective unless in writing. Draft your language to cut off other evasion issues, such as the apparent authority of a low-level signatory, etc. Here's a sample:

> "Any waiver of any right under THIS AGREEMENT, in order to be effective, must be specifically expressed in a written document manually executed by a representative of the waiving party who has actual authority to make such waiver; and otherwise, such purported waiver shall not be effective."

12. Limits on Exculpation. In addition to the generic issues with exculpatory covenants discussed earlier, these clauses present unique substantive problems. There are two major areas to be careful about. First, in certain *professional*-client relationships, exculpation is deemed incompatible with the inherently unequal nature of the relation.[1] A second trouble area is special drafting challenges. Tennessee allows a party to exculpate himself from liability for his own negligence or similar fault, but the coverage of one's own negligence in the scope of the exculpation must be explicitly expressed. The numerous cases in which various clauses have been contested demonstrate the litigation difficulties that can result from all but the most careful and explicit drafting.[2] Note also that a different rule is prescribed by statute in certain circumstances. T.C.A. 62-6-123 (building construction, etc.).

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[1] *See Olson v. Molzen*, 558 S.W.2d 429 (Tenn. 1977).

[2] *See, e.g., Empress Health and Beauty Spa, Inc. v. Turner*, 503 S.W.2d 188 (Tenn. 1973); *Moss v. Fortune*, 340 S.W.2d 902 (Tenn. 1960); *Dixon v. Manier*, 545 S.W.2d 948 (Tenn. App. (continued…)

13. Indemnification. Often it is desirable not only to provide that counter-parties to a contract cannot make certain types of claims, but also that if *anyone*, including non-contract parties, asserts certain types of claims, the counter-party will afford certain relief. Indemnification of some type is particularly appropriate where there is exposure to claims by third parties who, as non-signatories, simply cannot be bound by duty-modification or exculpatory provisions. While fundamentals are sometimes forgotten, there are two general types of indemnity: indemnity against "loss," and indemnity against "liability." The obligation to indemnify against loss does not arise until a loss of the defined type has been sustained. Thus, indemnification provisions of this type do not trigger any kind of duty to defend litigation, and may be appropriate where it is important to keep the indemnitor *out* of the litigation until it is over (though this can be accomplished in other ways). Conversely, the obligation to indemnify against *liability* generally arises as soon as the defined liability is asserted, whether or not the indemnitee is "guilty." Also, generally, only this kind of indemnity is readily interpreted to include litigation defense costs such as attorney fees, and even in this area, it is best to reference attorney fees specifically as a type of expense encompassed by the indemnity covenant..

14. Indemnity Issues. You can develop a good check-list of issues arising in drafting indemnity clauses by looking at most any liability insurance policy — the classic indemnity against liability. What liability is covered? What about liability for things that are unknown, or haven't happened yet? How is control over the defense apportioned? Who has control over settlement? A major issue that frequently frustrates enforcement of indemnity covenants in litigation is the impact of fault on the part of the indemnitee himself. In this field, as with exculpation, Tennessee law allows indemnification for liability arising from a person's own negligence, but that must be clearly expressed. There are public policy limits on indemnification which periodically shift and which are not well understood by trial courts. For example, intentional fraud is not indemnifiable. When it is alleged in a lawsuit that the indemnitee has been guilty of such a degree of fault, indemnitors frequently repudiate their obligations. This issue and the others mentioned can be dealt with in drafting. Here is the text of one particular

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(…continued)

1976); *Trailmobile, Inc. v. Chazen*, 370 S.W.2d 840 (Tenn. 1963); *Kroger Co. v. Giem*, 387 S.W.2d 620 (1964); *Wajtasiak v. Morgan County*, 633 S.W.2d 488 (Tenn. App. 1982); *Robinson v. Tate*, 236 S.W.2d 445 (Tenn. 1950); *Gilson v. Gillia*, 45 Tenn. App. 193, 321 S.W.2d 855 (1959); *Ressler Leather Co. v. Ailor*, 7 Tenn. 132 (1927); *Michigan Mutual Ins. Co. v. Royal Indemnity Co.*, 313 F.2d 467 (6th Cir. 1963); *Crum v. Coleman-Cocker Textile Machinery Co.*, 467 F. Supp. 6 (E.D. Tenn. 1978); *Jones Truck Lines, Inc. v. Ryder Truck Lines, Inc.*, 507 F.2d 100 (6th Cir. 1974); *Brogdon v. Southern Railway Co.*, 384 F.2d 220 (6th Cir. 1967); *Lewis v. Seaboard Coastline Railroad Co.*, 429 F. Supp. 73 (E.D. Tenn. 1975), *aff'd.*, 549 F.2d 801 (6th Cir. 1976); *Buckeye Cotton Oil Co. v. L&N Railroad Co.*, 24 F.2d 347 (6th Cir. 1928); *General Accident Fire and Life Assurance Corp., Ltd. v. Smith and Oby Co.*, 272 F.2d 581 (6th Cir. 1959); *Eades v. Union Railway Co.*, 396 F.2d 798 (6th Cir. 1968). This is probably not even an exhaustive list of the relevant Tennessee cases!

contract which integrates attempted solutions to several of these issues. Notice that this is a *unilateral* contract in which the indemnitee does not covenant to do anything:[3]

> "The undersigned hereby covenants to indemnify [CLIENT NAME] ("CLIENT") for and against all liability, loss, and expense (including without limitation attorney fees), whether or not presently known, discovered, or contemplated, which CLIENT has incurred or hereafter incurs directly, indirectly, wholly, and/or partly by reason of any investment or activity of [RELATED ENTITY] (including without limitation the civil action styled [NAME DELETED].
>
> "CLIENT may at his sole option, at any time, tender to and/or withdraw from the undersigned the defense of any claim indemnified hereunder; shall at all times have total and exclusive control over counsel defending him; and shall in all events be indemnified against the expense of such counsel as provided herein.
>
> "No indemnity obligation of the undersigned to CLIENT shall be excused, diminished, or postponed on the basis of any fault, conduct, or circumstance of or imputable to CLIENT (including without limitation negligence or fraud) unless and until a final judicial judgment should specifically find CLIENT guilty of conduct for which the public policy of Tennessee definitively prohibits indemnification; in which case the undersigned's indemnity obligation shall be reduced in proportion to the loss, if any, directly caused by such non-indemnifiable conduct.
>
> "The relief obtainable by CLIENT for any actual or anticipatory breach of this agreement shall, at CLIENT's sole option, include prohibitory and/or mandatory injunctive measures, regardless of the adequacy of any other remedy; and shall in all events include all attorney fees and other legal expense caused by and/or incurred in redressing such breach.
>
> "All remedies provided or referred to herein shall be cumulative of and with any and all other remedies. Should any provision of this agreement be adjudicated void or unenforceable, such provision may at CLIENT's option be severed and the remainder shall be enforced as fully as possible. Any ambiguity in this agreement, including any revision created by severance, shall be resolved in favor of CLIENT. The undersigned acknowledges and warrants that this instrument is the sole and complete memorandum of its agreement, and that the undersigned has not predicated its assent to this agreement upon any representation by or disclosure obligation of CLIENT."

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[3] I mention the unilateral nature of this agreement only to illuminate this structural option as a separate issue. Of course, any time you consider using such a unilateral structure for a contract, be mindful of the risk of a failure-of-consideration argument and consider having the promisor acknowledge the occurrence and legal sufficiency of the conduct or condition that has served as consideration for the unilateral promise.

15. Other Pre-Claim Limitations. Litigation leverage may be reduced in additional ways by contract. Here is a non-comprehensive list of thoughts:

(a) Certain consequences may be excluded from normal causation rules. For example, the agreement may provide that no "consequential damages" shall be recoverable. Better than that, because it avoids a definitional dispute, is a specific delineation of what damages will be recoverable and an exclusion of everything else. For example, a purchaser of goods or services may agree that his sole remedy on any claim arising in connection with the purchase shall be the recovery of the purchase price. On these issues in particular, remember to consult the Uniform Commercial Code when dealing with agreements for the sale of goods. The UCC often injects additional issues — for example, the requirement that an exclusion of liability for consequential loss not be "unconscionable." T.C.A. 47-2-719.

(b) Parties may agree upon a shorter time period for assertion of a claim than is allowed by applicable statutes of limitation. Also, problematic (fact-specific) issues that arise under statues of limitation can be eliminated. For example, parties may agree that any action asserting any claim arising in any manner out of the subject of an agreement must be commenced within six months from the completion of services under the agreement or, even better, a date defined in the agreement itself, thereby eliminating the postponement of a claim under a "discovery rule."

(c) Even in a formal litigation context, the method of deciding a dispute may be pre-determined. For example, the right to jury trial may be waived. At least under some authority, the right of appeal is waivable. While I have not had occasion to research this point, it may be worth considering whether pre-dispute limits on discovery, or an exclusion of discovery altogether, may be agreed upon.

(d) Closely related to issue "a" above, certain types of damages, e.g. punitive damages, may be excluded.

16. Liquidated Damages. Parties sometimes agree that in the event of certain claims, a finding of liability will automatically result in an award of damages in a pre-determined amount. Of all the "ADR" options considered in this paper, I personally consider this the *least* desirable. General contract law provides a set of analytical rules governing the circumstances in which this kind of clause will be enforced, and from a pure litigation standpoint, even entering this thicket is a no-win situation. The analysis depends in part upon whether and how easily the actual damages caused by the breach, etc., can be calculated. Too frequently, the opposing litigant can credibly assert that this is fact-intensive, thereby precluding any prompt resolution of the issue and thereby defeating a major purpose of the provision.

17. Venue Selection Clauses. There has been a great deal of litigation over these and in many cases, the disappointed party could have avoided the result with tighter drafting. This is unfortunate because the trend of modern cases is to enforce covenants of this type where they are

drafted properly.[4] It is frequent for scriveners to write something like "the parties agree that any dispute under this agreement may be litigated in Shelby County, Tennessee." The major problem with this type of language is that it is merely permissive — it does not explicitly foreclose other venues, and in the absence of explicit language, judicial reaction is fairly predictable. It is very difficult to address all the other problems that can arise without running through a complete "what if" analysis in the particular situation. What if the claim must be asserted as a compulsory counterclaim in another suit in another venue? What if there is no court in the selected venue that has jurisdiction over a particular matter? And don't forget that venue selection alone is meaningless unless the chosen court has the power to exercise *personal jurisdiction* over, and issue *process* against, the unwilling litigant. Finally, be aware that no matter what you write, at least in U.S. district courts, each court still retains discretionary power to transfer any action to a more convenient venue under 28 U.S.C. 1404(a).

18. Contractually-Mandated Arbitration. Arbitration, the oldest and most widely-recognized ADR method, is often far preferable to litigation for the transactional participant if a dispute arises and the adversary cannot be persuaded that the documents preclude any good faith argument. Agreements to arbitrate are widely enforceable and most of the disputes that arise, again, result from scope disputes caused by hasty drafting. While many differ, I do not recommend traditional arbitration under the rules of the American Arbitration Association because I feel their procedures, while less elaborate than litigation, are still too cumbersome and expensive. I generally prefer an agreement submitting any dispute, in the most binding fashion possible, to decision by a single expert in the relevant area with a minimum of litigation-type sideshows (e.g. discovery). An excellent appendix of arbitration and other ADR agreement forms is contained in the publication *Branton & Lovett, Alternative Dispute Resolution (Knowles 1996).*

19. Orient Technical Service Covenants Toward Results, Not Process. With the increasingly service-oriented economy and the onslaught of technology products, an increasing number of transactions and agreements entail the provision of technical services by vendors. For multiple reasons outside the scope of this paper, technology vendors have resisted traditional contract accountability and have largely succeeded in this effort. Perhaps the majority of technology service contracts in effect today obligate the vendor to perform procedures, but if the end result is not satisfactory, both the attitude and the contract often say, in effect, "too bad." There is no inherent reason for this bargaining outcome. Technology is complex, but customers go to expert vendors for that exact reason. The holder of a promissory note advances funds and bargains not for "efforts" to pay, but for receipt of the payment. A purchaser of goods isn't interested in efforts to satisfy warranties, only in receiving merchantable items. Consistent with this orientation, it is my practice and strong recommendation to insist that contractual descriptions of performance undertaken by technical service vendors be written in terms of concrete results. If the results are not obtained (and the promisee has not created a defense like

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[4] *See generally M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907 (1972). In the federal courts, enforcement of a venue selection clause still may not foreclose the power to transfer an action to another permissible forum based on convenience factors under 28 U.S.C. 1404.

contributory breach or impossibility of performance), the vendor has not performed its covenants. There is little more infuriating or unjust than a website that doesn't work and a vendor who says "Shucks, I performed the steps required in my contract, so it's your problem and you have to pay me."

Best wishes with your negotiation and drafting!