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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

A Home Run For Outsourcing Relationships

Law360, New York (March 08, 2012, 1:24 PM ET) -- Resolving disputes is daily fare for people who govern complex business relationships arising from outsourcing agreements, technology development agreements, franchise agreements, construction contracts and other complex, long-term commercial contracts.

In the best relationships, it proceeds well, with each party feeling comfortable that they are being treated fairly. However, in other relationships, small disputes remain unresolved and fester. In some cases, a party will find itself forced to accept an unfair resolution in order to obtain critical products or services. For example, a customer might agree that a task is out of scope, despite being described in the statement of work, because there is less business harm in paying twice for that task than in not having the task performed.

The Problem

The problem, we believe, is the lack of a quick, fair and reasonably inexpensive way to resolve small disputes. Escalation to higher-level executives uses valuable management time to perform tasks that those executives may not be well suited to perform, and can increase the number of people who are unhappy instead of actually resolving a dispute. Also, escalation often favors one party as an expert in the particular type of contract.

Courts provide neutral dispute resolution, providing an outcome that even the losing party can see as fair, but lawsuits are generally slow and expensive. Traditional arbitration may be somewhat faster, but the cost and time requirements are often out of proportion to the value of small disputes.

The Solution

A solution, we believe, is a form of what is sometimes called “daytime baseball arbitration.” This solution provides the benefit of a neutral third party at a cost suitable for small disputes at speeds reflecting the business imperatives to quickly arrive at a decision. This solution would work as follows:

Initiation

A party having a claim within the defined scope (say $250,000 or less for illustrative purposes) would have the right to initiate the process by sending a written statement to the other party describing the basis of the claim and making a monetary demand. The written statement would be subject to a strict word limit (say 3,000 words).

Response

Within a short time frame (say five business days), the other party must respond with a written statement of its position within the same word limit and make a written settlement offer. There is no formal discovery, although each side could demand information under the terms of the outsourcing contract before or after the process is commenced and may comment in its brief if it does not receive what it has requested.

The arbitrator may consider unreasonable responses to discovery requests as a factor in reaching his/her decision in the dispute.

Arbitration

The parties then would have a short period (say five business days) to attempt to settle the dispute without arbitration. If they fail to do so, a single arbitrator would be selected by the parties or a predetermined alternative dispute resolution service to resolve the dispute.

The arbitrator must pick either the initiating party's demand or the other party's offer as set forth in their written submissions, whichever number the arbitrator concludes is more reasonable based upon the written submissions and oral argument. The hearing would be short (say one hour per side).

Resolution

The arbitrator would be required to issue the award within a short period (say five business days). The arbitrator would not have to issue a written opinion supporting the award unless both parties request a reasoned opinion by the conclusion of the hearing. The award is final and nonappealable. The losing party pays the arbitrator's fees and costs and the prevailing party's attorneys' fees and costs.

Conclusion

Why do we think this process will be effective? First, since the arbitrator can award only one of the two figures presented by the parties at the outset of the dispute, there will be substantial pressure on the initiating party to present a reasonable demand and the responding party to present a reasonable offer. Often these numbers will be relatively close, which will facilitate reaching a negotiated resolution before arbitration begins.

Second, since the parties understand that they will have limited opportunities to present their case and the arbitrator will simply choose whichever figure appears to be more reasonable, the parties will want to control their destinies and reach a settlement on their own before arbitration begins.

Third, the "loser-pays-all" aspect of the procedure imposes additional pressure to settle. Although the cost of the proceeding should not be great, the symbolic significance of losing and paying all costs will encourage settlements. Finally, strict limits on schedule, length of briefs and duration of the hearing will expedite the process and control costs.

Baseball arbitration has worked in a number of settings, including, of course, baseball salary disputes, where it originated. We believe that it can work equally well for resolving this fundamental problem in outsourcing relationships, resulting in better relationships and better business outcomes. In most cases it should result in the parties reaching a settlement without arbitration. If the parties are unable to settle, it will resolve disputes before they can accumulate and become a bigger problem for the relationship.

--By Robert J. Kriss and Brad L. Peterson, Mayer Brown LLP

Robert Kriss and Brad Peterson are partners in Mayer Brown's Chicago office.