The Layered Dispute Resolution Clause: From Boilerplate to Business Opportunity

Robert N. Dobbins
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I. INTRODUCTION

It can be said that every lawyer-drafted contract must have some form of a dispute resolution clause. Failing to include this type of clause arguably brings one perilously close to committing malpractice. While most will concur on the importance of these clauses, we as practitioners often spend little time on them when drafting a contract. We forget to consider such questions as: does our standard venue/jurisdiction language suffice? Is the usual arbitration clause really the best approach? Put another way, are we sacrificing our client’s business opportunity by relying on our boilerplate contract language? This article proposes that the drafter...

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1. “Boilerplate: n., adj. slang for provisions in a contract, form or legal pleading which are apparently routine and often preprinted. The term comes from an old method of printing. Today “boilerplate” is commonly stored in computer memory to be retrieved and copied when needed. A layperson should beware that the party supplying the boilerplate form usually has developed supposedly “standard” terms (some of which may not apply to every situation) to favor and/or protect the provider.” Gerald N. Hill & Kathleen Thompson Hill, The Real Life Dictionary of the Law, Law.com Dictionary, at http://dictionary.law.com (last visited Mar. 14, 2005).
should exercise her creativity by crafting a tailored clause that serves her client's objectives, such as a "layered" dispute resolution clause ("Layered Clause").

In the following pages, this article will explore the language and use of a Layered Clause. The philosophical foundation behind the Layered Clause is to preserve business relationships while pursuing appropriate conflict resolution. The Layered Clause provides process stages that will guide the contracting parties through their inevitable future conflict. This article dissects the segments of the Layered Clause one layer at a time; discusses policy considerations; and, where appropriate, refers to case law influences on the drafter. Timing and party-principal participation contribute to the effectiveness of the process and will be seen as common themes in each layer. The clause in its entirety is appended at the end of the article.

Although the Layered Clause only includes "traditional" ADR processes, one of many hybrid processes known as med-arb/arb-med will be briefly discussed. These hybrid processes are growing in popularity. They can be very effective in the right circumstances and can offer clients another alternative to conventional dispute resolution approaches.

The proposed clause is offered not as the answer to the drafter's quest for stellar language. Rather, the clause and relevant discussion with clients should be a starting point. It should lead to a deeper examination of the often far too habitual prose we as practitioners use to document our clients' business relationships.²

II. THE CONTEXT: WHY THE FANCY CLAUSE?

The first step is to set the context. The Layered Clause is intended for use in a commercial milieu, from the simple two-party contract to the complex multi-party (frequently voluminous) contract. Similarly, the subject matter runs the gamut of transactions involving the basic widget to real property development and intellectual property.³ Though we often feel trapped by tradition, contract drafting affords the chance to exercise some

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² For example, beyond the case law that will be discussed below, consider researching your specific jurisdiction's approach to enforcement of the agreement to mediate. Your client's arbitration provision may require an exception to the expedited process for certain disputes that require more discovery, a tribunal rather than a single arbitrator or other changes because of the complexity of the issues or the amount in controversy.

³ The layered clause is useful in other contexts, including family law, litigation settlement agreements, in-house corporate dispute resolution process design, and beyond.
creativity *ab initio*, laying the foundation for the later exploration of creative solutions when conflict arises.

On another contextual level, the Layered Clause channels the parties into first non-adjudicatory and ultimately non-judicial dispute resolution processes⁴. We know that use of alternative dispute resolution (“ADR”) processes, especially arbitration and more recently mediation, has become accepted in the court system and the business environment over time.⁵ Recognizing the budgetary strain, business executives have been motivated to find a better way than litigation. They seek to disembark from the runaway litigation train, opting instead for a path that leads to preserved business relationships. As the American Arbitration Association (“AAA”) study explains,

The growth of ADR has been spurred by the rising burden of U.S. civil litigation, a bill that now approaches $200 to $300 billion annually. A stream of evidence has long suggested that there is real business value to the rapid, comparatively inexpensive, and easily-accessed alternative to the judicial system . . . . ⁶

The Layered Clause specifically addresses the concerns for relationship preservation and the need for process economy by maximizing collaborative efforts as the primary tool. The Clause has the added benefit of providing a schematic for well-defined ADR process features. Inherently, these features promote what the AAA study calls a “portfolio approach” to dispute resolution.⁷ Certainly, settlement achieved by party-principle negotiations lessens relationship risks and dispute expense, particularly when compared with the contentious, expensive, and laborious

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⁴. The distinctions drawn here are more than semantics. When we examine how people respond to conflict, the dispute resolution continuum is divided first based upon who controls the decisions leading to the outcome and secondly based upon who controls the process. The former refers to whether the parties retain or relinquish control over the outcome. The latter suggests that one side of the continuum brings about results through judicial procedure (adjudicated), the other outside of the courthouse. Mediation falls comfortably on the party-controlled, non-judicial side of the continuum; save for the control exercised in selecting it, arbitration inches perilously close to a judicial process. (Witness the colloquialism “rent-a-judge” often used to refer to arbitration.) Except for the fact that the person issuing the decision is not a sitting judge, the outcome of the dispute is determined by that person – namely the arbitrator – and the procedures used to get there are derived from judicial processes.


⁶. *Id.*

⁷. *Id.*
court system. The layered approach at least provides the opportunity to maintain if not enhance customer, supplier, and employee relationships, which can be costly to establish, difficult to keep, and deadly to lose.\textsuperscript{8}

The goal of the Layered Clause is to maximize the opportunities to continue party-controlled and party-determinative resolution processes. It sets out distinct, time-triggered phases, with regular reminders that the contracting parties truly want to maintain their business relationship. The parties approach the precipice of the adjudicatory side of the dispute resolution continuum only after exhausting all other efforts to find their own solution; they cross the divide into quasi-judicial process only as a last resort.\textsuperscript{9}

III. THE LAYERED CLAUSE EXPLAINED

Having discussed the underlying principles for revising our approach to drafting dispute resolution clauses, the article examines the Layered Clause section by section, with particular attention given to mediation and arbitration. As will be discussed, with increasing frequency, courts find a way to enforce the mediation selection clause.

The arbitration section will explore the scope of the arbitrator’s authority, particularly the power to issue interim measures of protection. The arbitration section will also discuss the question of whether arbitration has become so much like litigation as to dilute its value as an alternative. The wording in the Layered Clause is designed to return the process to its origins as a faster, less expensive and more efficient process. We will talk as well about drafting considerations dictated in part by the context and jurisdiction in which the drafter finds herself.

A. LAYER ONE: THE NEGOTIATION STAGE

(a) Good Faith Negotiation. The Parties agree that, before resorting to any formal dispute resolution process concerning any dispute arising from or in any way relating to this Agreement (a “Dispute”), they will first attempt to engage in good faith negotiations in an effort to find a solution that serves their respective and mutual interests, including their continuing

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\textsuperscript{8} The layered clause should not be \textit{viewed} as an isolated means of dealing with disputes. Rather, it should be but one spoke of your client’s dispute resolution policies and practices.

\textsuperscript{9} Perhaps as somewhat of an aside, anecdotally we know that often even at arbitration the first question raised by the arbitrator is whether she can help with settlement. Building on the non-adjudicative process foundations, often introduction of another third party view can rejuvenate negotiations.
business/professional relationship. Party-principals agree to participate
directly in the negotiations. Unless otherwise agreed in writing, the
Parties shall have five (5) business days from the date the questioning
party gives Notice (defined below) of the particular issue to begin these
negotiations and 15 business days from the Notice date to complete these
negotiations concerning the Dispute.

The first layer places the contracting/disputing parties into the
negotiation arena. It specifically addresses the parties’ guiding philosophy:
to maximize their individual and mutual interests, and to preserve their
business relationship. Among the redrafting considerations is tailoring the
definition of “Dispute,” which will govern the subsequent process layers
and dictate the scope of subject-matter and equitable jurisdiction in later
proceedings. Similarly, the phrase “good faith negotiations” is a potential
minefield: is it ambiguous; who will have jurisdiction (the arbitrator or a
judge) to determine the good faith or its absence?

As noted, part of the frustration with the court-supervised processes is
they take far too long. The Layered Clause confronts this problem in this
opening paragraph by setting short deadlines for giving notice of the
dispute, commencing and concluding the negotiations. The Clause builds
in continued party autonomy. It gives the parties sole power to extend the
deadlines as may be dictated by the complexity of the Dispute, logistics, or
other circumstances that the parties might face.

Party-principal participation in the negotiation furthers the goals of
party control and the commitment to preserving the relationship. Thus, by
design, the process places the parties in an environment of collaboration,

10. See case law discussion below regarding issues the court will determine are within
the purview of arbitral authority.
11. Review case law in the governing jurisdictions – where the parties are located,
where the contract is to be performed, and based upon the governing law provision in the
contract – which should provide guidance on whether, and if so how, to modify this
language.
12. Mediators often refer to finality as one of the many pluses to mediation. Once a
resolution is found and documented, unlike litigation, there is no awaiting the dropping of
the other shoe that comes with an appeal. Also, because of the direct involvement of party
principles in the party-determined process, ownership of the solution leads to the likelihood
of full performance under its terms. CHRISTOPHER W. MOORE, THE MEDIATION PROCESS:
13. Here too there is drafting flexibility. Timing of the triggering events can and should
be part of the initial contract drafting negotiations, with direct input from the parties who are
most familiar with their business, what can potentially land them in a dispute, and how long
they want to devote to this phase of the process. Your familiarity with the ADR process will
greatly add to these drafting negotiations.
rather than sending them spinning into positional entrenchment by resorting to the adjudicative side of the resolution continuum.\textsuperscript{14}

B. LAYER TWO: THE MEDIATION STAGE

(b) Mediation. If the negotiations do not take place within the time provided in “a” above, or if the negotiations do not conclude with a mutually agreed upon solution within that time frame (or its agreed upon extension), the Parties agree to mediate any Dispute. If the Parties cannot agree upon a mediator, each shall select one name from a list of mediators maintained by any bona fide dispute resolution provider or other private mediator; the two selected shall then choose a third person who will serve as mediator. The Parties agree to have the principals participate in the mediation process, including being present throughout the mediation session(s). The Parties shall have 45 days within which to commence the first mediation session following the conclusion of their good faith negotiations or expiration of the time within which to negotiate (as stated in “a” above). The Parties agree that any mediated settlement agreement may be converted to an arbitration award or judgment (or both) and enforced according to the governing rules of civil procedure.\textsuperscript{15} The Parties further confirm their motivating purpose in selecting mediation is to find a solution that serves their respective and mutual interests, including their continuing business/professional relationship.\textsuperscript{16}

1. Foundational Question: Enforceability

The advantages of the mediation clause are not derived from the likelihood of court enforcement. Rather, the benefits flow from the expectation of higher rates of settlement in mediation since the parties’

\textsuperscript{14} Kathleen M. Scanlon & Harpreet K. Mann, \textit{A Guide to Multistep Dispute Resolution Clauses}, ALTERNATIVES TO THE HIGH COSTS OF LITIGATION, Sept. 2002, at 1. There are added benefits. Involving the Party-principals affords the opportunity to bring in decision-makers other than those directly involved in the dispute (for example a sales manager and a customer, the former perhaps being influenced by how the outcome of the dispute will impact his commission). It enables the Parties to bring in the person most skilled in dealing with the particular dispute, recognizing that the personality of the effective negotiator is quite distinct from that of the advocate in the arbitral or court forum. This approach increases the likelihood that resolution can be reached faster and cheaper than when the battle lines are drawn by proceeding from dispute directly to arbitration or court.

\textsuperscript{15} Settlement agreement enforcement is particularly important when dealing with transnational commercial disputes. Consider using a mechanism by which an arbitrator converts the agreement to an award that can then be enforced under the New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

\textsuperscript{16} The drafter should also consider stating where the mediation is to be held. This is especially important in the international commercial context, a subject worthy of a wholly separate article.
voluntary implementation of the mediation clause suggests a willingness to work together to find a solution to their dispute.\textsuperscript{17}

The analysis of this section of the Layered Clause must begin with the question of enforceability. Mediation contract clauses were once viewed skeptically by most courts as providing nothing more than an unenforceable agreement to agree. More recently, in a growing number of jurisdictions, courts have affixed their imprimatur by enforcing mediation contract clauses.\textsuperscript{18} Although on the international level, case law authority enforcing these clauses is not abundant.\textsuperscript{19}

In a Pennsylvania case, the state court rejected a request to enforce the mediation clause because the requesting party could not establish that it was the beneficiary of the contractor’s and subcontractor’s mediation contract clause.\textsuperscript{20} A Maryland court based its denial of the enforcement request on its view that the requesting party failed to show that there were contractual issues in need of mediation.\textsuperscript{21} Neither court, however, rejected the notion that the mandatory mediation clause should be enforceable.

What the Layered Clause tries to create is unambiguous language which mandates, as conditions precedent, that the parties participate in each stage. In two cases involving disputes between auto manufacturers and

\textsuperscript{17} Often, your Mediator will remind the parties that they began their relationship with agreement and continue to believe in it by agreeing to come to the table. Mediators always want to find even a small thread from which the fabric of resolution can be woven.

\textsuperscript{18} 5A OHIO JUR. 3D Alternative Dispute Resolution § 165 (2004). As pointed out in section 165, courts have enforced mediation clauses even in the absence of statutory authority.

\textsuperscript{19} Curiously given the near embryonic stage of mediation internationally, mediation clause enforcement has been the subject of academic and judicial discussions. Tanya Melnyk, The Enforceability of Multi-Tiered Dispute Resolution Clauses; The English Law Position, 5 INT’L. ARB. L. REV. 113, 113-118 (2002); Michael Pryles, Multi-tiered Dispute Resolution Clauses, 18 J. INT’L. ARB. 159, 159-176 (2001); Cable & Wireless Plc v. IBM U.K. Ltd, 2 All E.R. (Comm) 1041 (Q.B. 2002). For an interesting discussion of this U.K. Commercial Court decision, see Herbert Smith, Commercial Court Enforces ADR Clause, Consilio: The Online Law Student Journal, at http://www.spr-consilio.com/artcommercial1.htm (Nov. 5, 2002).

\textsuperscript{20} A. T. Chadwick Co. v. PFI Constr. Corp., No. 01998, 2004 WL 2451372, at *3 (Pa. Com. Pl. 2004). While this court did not deny the enforceability of mediation clauses, there is no mention of its endorsement of these provisions. \textit{Id.}

\textsuperscript{21} Hillock v. Wyman, No. CV-01-303, 2003 WL 21212014, at *2 (Me. Super. Ct. 2003). This court’s approach does not bode well for mediation clause enforcement. “As a matter of fairness and practicality,” it surmised, “the court cannot retrospectively enforce a mediation clause after determining, with the benefit of hindsight, that mediation would have been futile.” \textit{Id.}
franchisees, two different courts showed us that the mediation-first approach can determine the outcome of the case.

In the first case, the Seventh Circuit upheld a summary judgment motion against the franchisee.\(^{22}\) The franchisee had argued that it had complied with the mediation provision because it had given Ford Motors, the manufacturer, *an opportunity to settle*, though it did not follow the compulsory mediation provision in the contract.\(^{23}\) The court flatly rejected the franchisee’s “substantial compliance argument,” holding that the contract unambiguously established that mediation was “a condition precedent to litigation” and since the time limits in the contract had long passed, the failure to follow the contract’s procedural path was the death knell for the franchisee’s claim.\(^{24}\)

A federal district court in Ohio reached a similar result in the second case involving the same Ford-franchisee contract language.\(^{25}\) The court granted Ford summary judgment because the mandatory mediation clause was unambiguous and enforceable under basic rules of contract interpretation, and the dealer acknowledged its failure to comply.\(^{26}\)

Courts have also found refuge for mediation clauses in the Federal Arbitration Act (“FAA”) and similar state laws. For example, in FAA cases, courts typically begin with a careful analysis of whether the contract meets the FAA interstate commerce requirements, and from there the court and the parties treat mediation as but another form of arbitration that would be subject to the FAA.\(^{27}\) The same approach is found in cases governed by state laws.\(^{28}\)

\(^{22}\) DeValk Lincoln Mercury, Inc. v. Ford Motor Co., 811 F.2d 326, 328 (7th Cir. 1987).

\(^{23}\) *Id.* at 328-29.

\(^{24}\) *Id.* at 335-36 (“The mediation clause here states that it is a condition precedent to any litigation. . . . Because the mediation clause demands strict compliance with its requirement . . . before the parties can litigate, plaintiffs’ substantial performance arguments must fail.”).


\(^{26}\) *Id.* at 1053.

\(^{27}\) See, e.g., CB Richard Ellis, Inc. v. Am. Envtl. Waste Mgmt., No. 98-CV-4183 (JG), 1998 U.S. Dist. LEXIS 20064, at *2 (E.D.N.Y. Dec. 4, 1998) (Defendant’s motion to stay proceedings and compel mediation under the contract granted; broad wording of the clause, without exclusions, covered all disputes; FAA as mediation would “settle the controversy.”).

\(^{28}\) See generally Cecala v. Moore, 982 F. Supp. 609, 612 (N.D. Ill. 1997); Mortimer v. First Mount Vernon Indus. Loan Assn., No. AMD 03-1051, 2003 U.S. Dist. LEXIS 24698, at *5 (Md. May 19, 2003) (Under Maryland Arbitration Act, the claim for title to real property arose out of or from the contract and was unquestionably encompassed by the mediation clause.); Lee v. YES of Russellville, Inc., 784 So. 2d. 1022, 1026 (Ala. 2000) (Alabama Supreme Court held that FAA controls in Alabama and mediation/arbitration
Although perhaps disturbing to a mediation "purist," a district court's view in one FAA case is also instructive. In *Fisher v. GE Medical Systems*, the court endorsed the concept gleaned from a line of cases that endorse the notion that mediation is akin to arbitration as a process "that falls under the preference for non-judicial dispute resolution." Expressing federal policy favoring arbitration in its broadest sense and applying it to mediation, the court found that, under the FAA, the plaintiff was bound by her agreement to mediate her claim before pursuing that claim in court.

What can be surmised from these authorities is that state and federal courts are willing to recognize the strong public policy favoring alternative dispute resolution proceedings. Though sometimes via curious means, it appears the courts are willing to enforce properly crafted mandatory mediation clauses.

2. Mediator Selection

The subjects of how to select a mediator and mediator qualifications must be left to another discussion. For our purposes now, we look to the mechanisms contained in the Layered Clause by which the parties select their mediator.

Given that party autonomy is a fundamental principle of mediation, the contract should allow the parties to select their mediator. A mediator's effectiveness often begins with the parties' trust and confidence in her skills. The Layered Clause recognizes, however, that when the parties invoke the clause they will be in the thick of their dispute, making agreement on a mediator an elusive target at best and perhaps impractical at the very least.

Thus the Layered Clause sets in motion a simple process by which the parties make the front line decision: if they cannot agree on a mediator, each selects someone and the selected two pick the actual mediator. This circumvents the disabling problem of being unable to agree on a mediator and avoids often-seen complicated formulae for selection of a mediator.

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provisions in valid contracts would be enforced except for situations where such provisions "could make other provisions of a contract inapplicable.").

30. *Id.* at 892.
32. The drafter should consider negotiating for a designated mediator at the drafting stage and inserting the mediator's name into the contract. For example, "The Parties agree
3. The Importance of Timing

Getting stalled by protracted dispute resolution processes often brings about deadly short- and long-term economic consequences. Studies show that the business community bemoans the snail's pace of the over-crowded court proceedings.\textsuperscript{33}

The longer the problem festers without progress toward solution, the more entrenched the parties become. The more entrenched the parties become, the more hurdles appear and the more difficult finding solutions becomes. Thus, by design, the mediation stage quickly moves the parties from recognition of the dispute directly to the mediation table.

In many contracts, time may truly be of the essence. The drafter should consider adding a carve-out provision under which the parties can avail themselves of injunctive and other expedited relief (writs of attachment and possession, specific performance, appointment of a receiver). Acting under a properly crafted carve-out, the party would thus not be faced with a Hobson's choice between seeking interim relief and sacrificing that important remedy to avoid waiving the right to mediate.

4. Reaffirming the Goal

As discussed regarding the negotiation phase, the parties again reaffirm their goal: to find a solution that meets their individual and joint interests, guided by the desire to maintain their business relationship.\textsuperscript{34} Naturally, resolution of some disputes will require terminating the relationship; yet even relationship-ending disputes can be effectively managed in the creative environment of mediation.\textsuperscript{35} The Layered Clause eliminates the stigma of asking for mediation when the dispute arises – the fear of appearing weak in one's position – by providing for the process at the inception of the contractual relationship.

We must anticipate that not every negotiation and mediation will successfully conclude with an agreement. The Layered Clause thus moves that Robert N. Dobbins, LL.M., shall act as mediator in any mediation arising under this Dispute Resolution section.”

\textsuperscript{33} AMERICAN ARBITRATION ASSOCIATION, supra note 5, at 9, 10.

\textsuperscript{34} Party-principal participation bolsters the reaffirmed goal. See discussion under the Negotiation section.

\textsuperscript{35} What disputes are appropriate for mediation? View the answer broadly: “As a general rule, the only cases that might be totally inappropriate for mediation are cases where parties need a legal precedent established. . . . [C]onsider mediation as the next logical step if negotiations themselves have failed to achieve resolution.” KARL A. SLAIKEU, WHEN PUSH COMES TO SHOVE: A PRACTICAL GUIDE TO MEDIATING DISPUTES 15 (1996).
the parties forward and into the adjudicative side of the continuum. It moves them “promptly and efficiently,” so that the parties can “avail themselves of their rights and remedies.”

C. LAYER THREE: THE ARBITRATION STAGE

(c) Arbitration. If the mediation provided for in “b” above does not conclude with an agreement between the Parties resolving the Dispute, the Parties agree to submit the Dispute to binding arbitration. If the Parties cannot agree on an arbitrator, the person who served as mediator shall select the person to serve as arbitrator from a list compiled by the Parties or, where the Parties do not compile a list, from a list maintained by a bona fide dispute resolution service provider or private arbitrator. The arbitrator’s award prepared by the arbitrator shall be final, binding and may be converted to a judgment by a court of competent jurisdiction upon application by either party. The arbitrator’s award shall be a written, reasoned opinion (unless the reasoned opinion is waived by the Parties). The Parties shall have ten (10) days from the termination of the mediation to appoint the Arbitrator and shall complete the arbitration hearing within six (6) months from the termination of the mediation. The arbitrator shall have the authority to control and limit discovery sought by either party. The arbitrator shall have the same authority as a court of competent jurisdiction to grant equitable relief, and to issue interim measures of protection, including granting an injunction, upon the written request with notice to the other party and after opposition and opportunity to be heard. The arbitrator shall take into consideration the Parties’ intent to limit the cost of and the time it takes to complete dispute resolution processes by agreeing to arbitrate any Dispute.

Our analysis of the arbitration phase will focus first on the foundational question of the arbitrator’s authority. We will discuss the extent to which the arbitrator has jurisdiction to walk in the halls of equity and to issue interim measures of protection. As we will see, courts look to the contract for guidance when determining the extent of the arbitrator’s authority. Also, because of a growing skepticism about arbitration, we must discuss


37. As a practitioner, one must carefully consider whether to make binding arbitration the final stop on the dispute resolution trail. Your client may be predisposed to seeking judicial remedies rather than placing himself in the private adjudicative arena of arbitration. In those instances, consider supplementing or replacing the arbitration clause with language setting the final dispute resolution stop at the courthouse.
some of the concerns about arbitration and balance those concerns against the advantages of the arbitration process. Then, we will highlight the hybrid processes of med-arb/arb-med.

What we will not revisit in any detail in this section are the provisions in the Layered Clause regarding the timing for setting and completing the arbitration nor the selection of the arbitrator. Our earlier analysis of these two important parts of the Layered Clause is equally applicable here.

1. The Arbitrator’s Authority

There are almost as many different ways of describing the scope of the arbitrator’s authority as there are courts that have written on the subject. Stated simply, the arbitrator derives her authority from the arbitration agreement. According to at least one court, “[t]he broader the wording of the arbitration clause in a contract [is], the greater the scope of the arbitrator’s powers.”

Determining the scope of the arbitrator’s authority under our Layered Clause begins with the word “Dispute.” Defined in the first paragraph of the Clause, the substantive issues over which the arbitrator has decisional authority are intentionally quite broad, covering any matter “arising from or in any way relating to this Agreement.” The careful drafter may expand or limit the arbitrator’s substantive authority through appropriate wording tailored to the context of the parties’ contract.

The discretion conferred on the arbitrator, however, is not unlimited in some jurisdictions and “must be exercised for purposes reasonably within the contemplation of the contracting parties.” While the result is intended

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39. Health Plan of Nevada Inc. v. Rainbow Medical LLC, 100 P.3d 172, 178 (Nev. 2004); see, e.g., Conn. State Police Union v. Dep’t of Public Safety, 863 A.2d 344, 347 n.7 (Conn. Super. Ct. 2004) (“A submission to arbitration is unrestricted if there is no express language restricting the breadth of issues, reserving explicit rights or conditioning the award on court review.”) (quoting Wachter v. UDV N. Am., Inc., 816 A.2d 668, 673 n.9 (Conn. App. Ct. 2003)).

40. See Nussbaum v. Kimberly Timbers, Ltd., 856 A.2d 364, 369 (Conn. 2004) (“[I]t is the province of the parties to set the limits of the authority of the arbitrators, and the parties will be bound by the limits they have fixed.”) (quoting Success Ctrs., Inc. v. Huntington Learning Ctrs., Inc., 613 A.2d 1320, 1326 (Conn. 1992)). Furthermore, the parties can also specify the arbitrator’s authority in a written submission, the terms of which will modify the broad scope of the Layered Clause by agreement of the parties.

41. Economos v. Liljedahl Bros. Inc, 862 A.2d 312, 317 (Conn. App. Ct. 2004) (“[A]lthough the discretion conferred on the arbitrator by the contracting parties is exceedingly broad, modern contract principles of good faith and fair dealing recognize that
to be binding upon the parties, thus hastening finality, a party can ask a reviewing court to examine whether the arbitrator exceeded the scope of her authority.  

The Layered Clause grants power to the arbitrator beyond substantive issues, including discovery matters and interim measures. Since one of the advantages of ADR is purported to be enhanced efficiency, the Clause is designed to provide essentially a “one stop shop” for the parties’ adjudicative dispute resolution needs. The question then becomes, can the parties confer on the arbitrator equitable powers, including the authority to grant interim protection?

According to Professor Williston, the answer is an unequivocal yes. For the purposes of our discussion, a contract containing the Layered Clause embodies the submission that would be made to the arbitrator. The Clause gives the arbitrator equitable powers and under these circumstances the arbitrator may issue an injunction. “In fact,” the Williston treatise states, “whether a court of equity could issue [these orders] is beside the point.” At the same time, an arbitrator can exceed her powers by issuing an award that includes relief that the parties never specified. Thus the guidepost for the drafter is: if it is intended that the arbitrator shall have the authority, the contract should include languages that specifically confer the authority upon the arbitration.

even contractual discretion must be exercised for purposes reasonably within the contemplation of the contracting parties.”).  

42. We will discuss this further in the section on the growth of unfavorable views of arbitration. See Stack v. Karavan Trailers Inc., 864 A.2d 551, 555 (Pa. Super. Ct. 2004).

43. Samuel Williston, A Treatise on the Law of Contracts, § 57:114 (Richard A. Lord ed., 4th ed. 2001) (“Clearly,” Prof. Williston explains, “where the submission provides for equitable relief, arbitrators may issue an injunction, or order specific performance, as the power of an arbitrator to order specific performance in an appropriate case has been recognized from early times.”).

44. Id.

45. Id.

46. Superadio Ltd. P’ship v. Walt “Baby” Love Prods. Inc., 818 N.E.2d 589, 592 (Mass. App. Ct. 2004) (The triggering event for the court here was the arbitrator’s award that assessed monetary sanctions for failure to comply with discovery orders. Here neither the submission nor state statutes authorized the arbitration panel to issue sanctions. The court treated the discovery sanctions as a dispute that arose from the conduct of the arbitration itself and not a dispute that arose under the contract.).
2. Arbitration – The Good

First, to give some perspective, we will review the claimed benefits of arbitration. As we will see, it is a process that, like the color change in a chameleon, has become more like the court system to which it was touted as a rescuing alternative. The Layered Clause is designed to restore confidence in this embattled ADR process by returning it to its roots as a process that is faster, cheaper and final.

Commentaries informing the reader of our court system’s inadequacies are legion. The overburdened system is not designed for accurate, efficient dispute resolution, particularly involving major disputes. Former Chief Justice Warren E. Burger, who helped spawn the burgeoning rise in ADR, explained in 1984 that we needed to correct our erroneous dependence on adversarial processes as the primary means of resolving disputes.47 “[T]rials by the adversarial contest,” the Chief Justice commented, “must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people.”48 With the proverbial word from on high, came the almost meteoric rise in arbitration as the alternative to the courts.

In its infancy and until recently, arbitration was touted as having superior attributes compared with litigation. It was supposed to be faster and more economical. It had (and largely still has) the advantage of being held in a private setting. Arbitration was billed as being more convenient for the parties, less formal, and less harmful to continuing business relationships. Procedural rules were intended to be simpler, evidentiary rules less restrictive, and both were (and are today) somewhat within the control of the parties to create. The party-chosen arbitrator can be an expert familiar with the substantive dispute.49

The arbitrator’s award is final and binding upon the parties. It can be modified or vacated only in limited circumstances:50 where the award was procured by fraud, corruption or undue means; in cases of arbitrator partiality, corruption, or misconduct; where the award exceeded the

48. Id.
49. Michael Hunter Schwartz, From Star to Supernova to Dark, Cold Neutron Star: The Early Life, the Explosion and the Collapse of Arbitration, 22 W. St. U. L. Rev. 1 (1994). In this most interesting article published 11 years ago, Prof. Schwartz reviews the history of arbitration, its claimed benefits, and he predicts its demise resulting from the expectation of it morphing into a process almost indistinguishable from litigation.
arbitrator’s powers; or, the catchall, based upon other public policy concerns. The arbitrator’s substantive findings are beyond appellate scrutiny.\(^5\)

3. Arbitration’s Shortcomings

Many commentators – scholars, jurists, practitioners – have written on the shortcomings of the arbitral process. Their focus has been on problems arising from potential bias of the arbitrator; a lack of due process, either perceived, real or both; limited or no discovery, impeding and complicating the parties’ ability to know the basis of the claims against them; the lack of judicial review; the relaxing of evidentiary rules; and, among others, the arbitrator’s power to go outside the law in reaching a decision.\(^5\) Yet, these are among the features that first attracted us to the arbitration process as an alternative to litigation. An interesting and troubling extension of these criticisms is that the alternative has begun to look, smell and feel like the litigation process it was designed to remedy.

That being said, for our purposes here we will look at two of arbitration’s practical shortcomings – efficiency and finality. Our discussion here derives from anecdotal rather than published authority.\(^5\) It begins with the identified problems and ends with how our Layered Clause attempts to deal with the problems.

Litigators frequently bemoan the increased complexity, cost and uncertainty in today’s arbitration world. Forgetting how they complained about the litigation process when arbitration began its rise, they long for the proverbial good old days when the process offered a simpler, faster and cheaper alternative to the courthouse. Reality, however, can often be ugly.

\(^{51}\) Commonw. Coatings Corp. v. Cont’l Cas. Co., 393 U.S. 145, 149 (1968) ("[The arbitrators have] completely free rein to decide the law as well as the facts and are not subject to appellate review.").


\(^{53}\) Before dismissing outright the validity of this approach, as a practitioner, talk with your colleagues who are in the litigation trenches about their current views on the practical benefits of arbitration.
The fact is arbitration has become as, if not more, expensive as its adjudicative cousin – court-supervised litigation. Practitioners and their clients tell us that attorneys’ fees in arbitration frequently equal and often exceed the cost to litigate through to trial. It takes nearly as long, sometimes longer to get through the arbitration hearing to award, especially now with the “rocket docket” court rules adopted in many jurisdictions. Processing the arbitral claim has become just as complex as litigation with discovery, discovery battles, and frequent visits to the court. The decision-maker, who is the arbitrator, can be very expensive, especially compared with the judge who is “free.”

Furthermore, court review of arbitral awards has become more frequent, diluting the virtue of finality to have been found in arbitration. Understandably, the creative litigator must find a means to satisfy the disgruntled client who has fallen victim to an unreasoned arbitral award. Reviewing courts, however, sometimes provide little solace. A recent Rhode Island Supreme Court decision illustrates this point.54

The award might be founded on a manifest disregard, the Rhode Island Court opines, where the arbitrator understands the law (because she correctly states it) but apparently chooses to disregard the law. Not to worry; the court will find finality: “[A]s long as the award draws its essence from the contract and is based upon a passably plausible interpretation of the contract, it is within the arbitrator’s authority and our review must end.”55 This approach would seemingly add to one’s uncertainty-borne discomfort with the arbitration process.

Additionally, having to resort to judicial review of the arbitrator’s award seems to defeat the purpose of arbitration as an alternative forum. Speed and finality are lost as the customarily unsatisfied losing party partakes of both the arbitral and litigation processes.56

4. The Layered Clause Approach: A Return to Time/Cost Efficiency

The Layered Clause attempts to remedy the litigator’s and client’s concerns about the current arbitration process. First, by design, the clause accelerates the process. From the end of the unsuccessful mediation to award is six months (plus ten days), unless extended by mutual agreement. Secondly, while allowing discovery, the Clause vests control in the

55. Id. at 1195 (italics added) (internal quotes omitted).
arbitrator, with specific power to limit discovery. Thirdly, our Layered Clause helps to alleviate the parties’ concern about the basis of the award by requiring a reasoned award. While one may not be happy with the result, comfort may be found in knowing that it was not distilled from some mystical concoction. The Layered Clause alerts the arbitrator to the parties’ concern about efficiency and cost, and instructs the arbitrator to take this into consideration throughout the process.  

The drafter must be sensitive to the client-specific nature of anticipated disputes. It may be difficult to predict the type and complexity of prospective disputes. Some are well-suited to the fast track approach taken in our Layered Clause. Trying to create a carve-out that exempts certain disputes from the expedited process could lead to protracted skirmishes concerning the interpretation about whether a dispute is eligible for or exempt from expedited treatment.

5. The Hybrid Process – Med-Arb/Arb-Med

There are many other ADR processes that the drafter may wish to include in her client-specific dispute resolution clause. None has been included in the Layered Clause. We have nonetheless chosen to discuss two of these other processes because of their hybrid nature. What follows is a brief discussion of the two processes and a glance at some potential process landmines.

As their nicknames imply, we speak here “explicitly and unabashedly” of combining mediation and arbitration. Though the subject of these hybrid processes differ quite widely, here we categorize them generally based upon the sequence in which these intertwined procedures unfold.

57. Undoubtedly the creative drafter can craft more and different provisions in an effort to maintain the quality of the process, its efficiency and effectiveness, and to assure that it truly offers an alternative to litigation through the courts. The intent here is to provide a workable process and stimulate the proverbial creative juices.


59. For example, the importance, number, and complexity of the issues and the amount in controversy provide suitable topics to consider when drafting a carve-out provision.

For the purposes of this article, we accept the opinion of many that these hybrids are best suited for complex, multi-issue conflicts.

With apologies for stating the obvious, “med-arb” suggests that the quest for resolution begins with mediation and is conducted in the shadow of arbitration. The process contemplates the appointment of both a mediator and arbitrator, the latter being brought in only after the parties and the mediator agree that further mediation will not bring an agreement.61

“Arb-med” on the other hand, reverses the process. One accepted view of this process allows the arbitration to conclude but seals the award. The parties then mediate, equally uncertain about the outcome risk looming in the arbitrator’s envelope. The parties benefit from having seen how the dispute plays out in an adjudicatory process. The approach gives yet another tool to the mediator by which she can help the parties consider the risks of relinquishing final outcome control to the arbitrator. The drafter should consider providing for whether the arbitrator’s award will be revealed at the end of the successful mediation. Keep in mind when making this drafting decision that the specter of frustration lurks within the sealed envelope. Another process decision lies in whether the mediator is present throughout the arbitration. While having her there may increase the cost, it reduces the time required to educate the mediator about the underlying dispute. The parties and the mediator will thus have participatory knowledge of what went on in the arbitration.

For both hybrids, issues arise for the drafter’s consideration concerning the arbitrator and mediator, including whether the same person can don both hats. Candid, confidential communication is a pillar of mediation. It facilitates the free and open discussion of factual, legal, emotional and other matters designed to foster the creative search for resolution. Often these communications involve matters that are inadmissible in the adjudicative arena. Many times, honest disclosures reveal admitted weaknesses in a party’s case. These considerations make it risky, perhaps impossible, and potentially dangerous for one person to serve as both mediator and arbitrator.

A good portion of that risk is eliminated when the process design adopts the arb-med approach. Disputants do battle in the arbitration first.

61. Note, however, that the parties may be able to resolve many issues in mediation but not the entire dispute. Using this hybrid process brings the best of both worlds: the unresolved issues can be submitted to arbitration, which in turn will be more streamlined because of the mediation-shortened controversy. Kevin M. Lemley, I’ll Make Him an Offer He Can’t Refuse: A Proposed Model for Alternative Dispute Resolution in Intellectual Property Disputes, 37 Akron L. Rev. 287, 307-08 (2004).
The decision is entered and not subject to change. Then, leaving their sabers at the door, the parties are off to mediate.

The party willing to talk freely in a straight mediation is likely to act similarly in the arb-med. For the reluctant party, the arb-med process provides greater motivation for candor as disclosure poses little threat and greater potential for gain through settlement. The discussions will not influence the arbitral award or the arbitrator who becomes mediator, affording a possible economic benefit by not needing to retain two people to serve their respective roles. Of lesser concern, though not to be ignored, is the extent to which testimony in an arbitration hearing may impact the mediator's view of a party or his position.

D. THE REMAINING LAYERS: NOTICE, COSTS, ATTORNEYS' FEES CLAUSES

These provisions are important parts of the process design, though given less prominence in this piece. Costs of ADR processes, while comparatively little when laid next to litigation, can be considerable. Our Layered Clause has each party bearing its own costs initially and ultimately gives the arbitrator the discretion to award costs. The Clause similarly treats allocation of attorneys' fees, vesting that determination within the arbitrator's discretion.

The Notice provisions are intended to cure many ills. Many complain that ADR processes do not afford the party receiving the notice with much information about the claim upon which the dispute is based. In our Layered Clause, the party giving notice is expected to provide details sufficient to apprise the receiving party of the nature of the claim. Our provision also specifies the effective date, a factor critical to the time deadlines which are an integral part of the process created by the Layered Clause.

62. Id.
IV. CLOSING THOUGHTS

In today’s business world, we are often painfully aware that conflict has become so commonplace as to be viewed as a natural component of commercial relationships.\footnote{Eric D. Green, \textit{International Commercial Dispute Resolution: Courts, Arbitration, and Mediation – Introduction}, 15 B.U. Int'l L.J. 175, 175 (1997).} Claims, disputes, and disagreements appear in the transnational, comprehensive infrastructure project, extensive development project and multiparty trading relationship. They occur with equal frequency in the single issue, “mom-and-pop” transaction. Parties seek to vindicate rights, allocate responsibilities, determine power structures, and ask for monetary awards.

Conflict “is” and so it will “be” always; but, it is not inherently a bad thing. Conflict can provide the catalyst for creativity. Trouble looms when conflict is not managed and systems are not in place for resolution, bringing potentially serious consequences to the disputants.

The Layered Clause provides one alternative. It takes into consideration the concerns raised by those who find themselves in the clutches of the unsatisfying and unsatisfactory adjudicatory litigation system. It expedites the journey from dispute to resolution. Its scheme seeks to control costs. While keeping the parties focused on the business relationship that first brought them together, the Clause keeps the parties moving forward through the various layers towards resolution. Party control provides a common thread, continuing its presence even in the adjudicative arena, especially where the Layered Clause includes the hybrid processes.

The underlying reasoning to the Layered Clause is similar to the logic supporting Congress’s enactment of the “Alternative Dispute Resolution Act.”\footnote{Alternative Dispute Resolution Act of 1988, 28 U.S.C. §§ 651-58 (2005).} Parties who commence the search for resolution through processes that allow them to control outcome and avoid huge litigation costs are more likely to reach an agreement than the battle-weary, “ego-bruised litigants.”\footnote{Lemley, \textit{supra} note 60, at 309.}
APPENDIX

LAYERED DISPUTE RESOLUTION CLAUSE

(a) **Good Faith Negotiation.** The Parties agree that, before resorting to any formal dispute resolution process concerning any dispute arising from or in any way relating to this Agreement (a “Dispute”), they will first attempt to engage in good faith negotiations in an effort to find a solution that serves their respective and mutual interests, including their continuing business/professional relationship. Party-principals agree to participate directly in the negotiations. Unless otherwise agreed in writing, the Parties shall have five (5) business days from the date the questioning party gives Notice (defined below) of the particular issue to begin these negotiations and 15 business days from the Notice date to complete these negotiations concerning the Dispute.

(b) **Mediation.** If the negotiations do not take place within the time provided in “a” above, or if the negotiations do not conclude with a mutually agreed upon solution within that time frame (or its agreed upon extension), the Parties agree to mediate any Dispute. If the Parties cannot agree upon a mediator, each shall select one name from a list of mediators maintained by any bona fide dispute resolution provider or other private mediator; the two selected shall then choose a third person who will serve as mediator. The Parties agree to have the principals participate in the mediation process, including being present throughout the mediation session(s). The Parties shall have 45 calendar days within which to commence the first mediation session following the conclusion of their good faith negotiations or expiration of the time within which to negotiate (as stated in “a” above). The Parties agree that any mediated settlement agreement may be converted to an arbitration award or judgment (or both) and enforced according to the governing rules of civil procedure. The Parties further confirm their motivating purpose in selecting mediation is to find a solution that serves their respective and mutual interests, including their continuing business/professional relationship.

(c) **Arbitration.** If the mediation provided for in “b” above does not conclude with an agreement between the Parties resolving the Dispute, the Parties agree to submit the Dispute to binding arbitration. If the Parties cannot agree on an arbitrator, the person who served as mediator shall select the person to serve as arbitrator from a list compiled by the Parties or, where the Parties do not compile a list, from a list maintained by a bona
fide dispute resolution service provider or private arbitrator. The arbitrator’s award prepared by the arbitrator shall be final, binding and may be converted to a judgment by a court of competent jurisdiction upon application by either party. The arbitrator’s award shall be a written, reasoned opinion (unless the reasoned opinion is waived by the Parties). The Parties shall have ten (10) business days from the termination of the mediation to appoint the Arbitrator and shall complete the arbitration hearing within six (6) months from the termination of the mediation. The arbitrator shall have the authority to control and limit discovery sought by either party. The arbitrator shall have the same authority as a court of competent jurisdiction to grant equitable relief, and to issue interim measures of protection, including granting an injunction, upon the written request with notice to the other party and after opposition and opportunity to be heard. The arbitrator shall take into consideration the Parties’ intent to limit the cost of and the time it takes to complete dispute resolution processes by agreeing to arbitrate any Dispute.

(d) Costs. The Parties agree to share the mediator’s and arbitrator’s fees equally. If the Dispute is arbitrated, the arbitrator may include in any award the right to recover mediator and arbitrator fees, along with any other recoverable costs.

(e) Attorney’s Fees. The prevailing party in any arbitration may, in the arbitrator’s discretion, be entitled to an award of attorney’s fees incurred in arbitrating the Dispute.

(f) Notice of Dispute: The Notice required under this section shall be in writing. It shall provide sufficient details of the Dispute to apprise the other party of the basis of the disputant’s claims. The Notice should include the invitation to begin negotiation, and where unsuccessful, mediation. The date of delivery of the Notice shall be the triggering date upon which the time deadlines in this section will be calculated.