

Memorandum

Re: Model Dispute Prevention and Resolution Provisions¹

I. Introduction

Despite the general acceptance of alternative dispute *resolution* provisions in contractual arrangements, to date, there has been little attention given to contractual dispute *prevention* protocols. In an effort to shift the paradigm, the International Institute for Conflict Prevention & Resolution (“CPR”), with the assistance of outside and inside counsel from highly respected firms and corporations, has developed a “Term Sheet” and Model Dispute Prevention and Resolution provisions (the “Model Provisions”). The primary goals of the Term Sheet and Model Provisions are to establish a framework to identify potential conflicts early and to offer a solution for dispute avoidance over the life of a contractual relationship, with binding arbitration (or, if the parties prefer, litigation), as a last resort.

II. General Overview of the Model Provisions

CPR has provided a Term Sheet as a summary of key concepts parties might consider including when drafting Dispute Prevention and Resolution Provisions to include in any variety of transactional documents from joint ventures to licensing arrangements to long-term supply agreements. These concepts can be tailored based on each party’s needs and the circumstances. Furthermore, parties need not take an “all or nothing” approach to these concepts and may decide that only certain concepts would be beneficial for their particular contractual arrangement. CPR also has provided Model Provisions to accompany the Term Sheet, which propose language that can be included in transaction documents to operationalize a solution for dispute prevention and avoidance. The Model Provisions envision the appointment of an independent third-party expert in the subject matter of the business relationship (a “Relationship Facilitator”) who would assist the parties with identifying and resolving business conflicts before they ripen into full-blown disputes that result in litigation or binding arbitration. The provisions allow the parties to decide whether the Relationship Facilitator, at the outset of the contractual relationship, takes an active role assisting the parties in managing their relationship and resolving any potential conflicts (*i.e.*, the “Standing Neutral” provisions), or the Relationship Facilitator becomes involved only when a legal dispute arises and the parties need the assistance of the Relationship Facilitator to resolve that legal dispute (*i.e.*, the “Standby Neutral” provisions).

¹ Please note that neither this memorandum nor the accompanying Term Sheet and sample contractual language are or should be construed or interpreted as legal advice.

Parties may choose which model is appropriate for their needs based on factors such as the length of the contemplated relationship, the value of the contract and the size and capacity of their organizations. Further, parties can choose to modify terms to fit the particular relationship or to align with needs of the relevant industry.

III. Value of Implementing the Model Provisions

CPR believes the accompanying Term Sheet and Model Provisions will provide counsel the necessary tools to implement dispute prevention provisions in their key contractual arrangements and educate their clients on the value of utilizing such provisions. In this regard, CPR believes business professionals and counsel should incorporate dispute prevention provisions similar to the Model Provisions in their key contractual agreements for the following reasons:

A. Cost-Savings

While parties may question the cost of utilizing a Relationship Facilitator to help them manage their relationship, the relatively modest costs involved far outweigh the costs that would be incurred in the event a business conflict results in arbitration or litigation proceedings, not to mention the business disruption impact of such a conflict. Additionally, a small proactive investment made equally by the parties to maintain their mutually beneficial relationship at the outset of the contract will demonstrate that the parties are serious about dispute prevention and sends a strong message of collaboration to each party's staff.

B. Recognition of the Importance of a Cooperative Working Relationship

The beginning of the relationship is the optimal time for the parties to establish a mutual commitment for dispute prevention and to implement contractual provisions that will help them prevent, identify, reduce and resolve conflicts. In this regard, the model provisions articulate the parties' clear intention to maximize the mutual benefits associated with the underlying contractual arrangement and include a mutual pledge to maintain open communication channels, work constructively and honestly with each other and approach the resolution of conflicts in good faith.

C. Business Continuity

By committing to work through conflicts collectively, constructively and in good faith, the parties are more likely to maintain business continuity and avoid the disruptive effects, costs and expenses that arise from full-blown business legal disputes. Even in instances where the parties are unable to prevent a conflict from ripening into a full-blown legal dispute, the model provisions include an acknowledgement that fulfilling each party's underlying contractual obligations is critical to the operations of all parties and a corresponding commitment by each party to continue performance

of their respective contractual obligations during the pendency of any unresolved disputed matter.

IV. Potential Objections to the Model Provisions

Notwithstanding the benefits of the model provisions described above, we recognize that counsel and business professionals may object to or question the use of these provisions. The following are objections that may be raised by clients or opposing parties in respect of the model provisions and our responses:

A. These Provisions Won't Really Prevent Disputes

We acknowledge that no contractual provisions will prevent all legal disputes. However, including the model provisions in a contract and making an investment in the parties' relationship by engaging a Relationship Facilitator sets the expectation that conflicts will be addressed in a constructive and proactive manner, with an emphasis on dispute prevention. In fact, companies that have implemented similar provisions in their contracts have found that these types of provisions have actually prevented business conflicts from escalating into full-blown arbitration or litigation.² If the parties choose a Relationship Facilitator who is an expert in their industry and respected by the parties, the fact that this expert will play an active role in the business relationship or simply be readily available to address each and every conflict that arises during the term of the contract will often cause the parties to engage with each other in a timely and constructive manner, without gamesmanship or behavior intended to increase pressure or leverage.

B. These Provisions Could Result in Delay and Increase the Time and Costs for Resolving a Dispute

We recognize that issues which may arise during the term of an important contract will vary in size, complexity and importance and that the escalation procedures embedded in the model provisions result in additional procedures which may not be the desired approach for resolving every potential dispute. As noted in the attached Term Sheet, parties can choose which of the procedures they wish to incorporate into their arrangements. But, even within the model provisions, we have provided for the flexibility for any party to shorten or entirely bypass any step in the process and, if necessary, begin arbitration or litigation proceedings without engaging in any of the dispute resolution steps. We believe that the likelihood that a party would short-circuit the dispute prevention and resolution process is low because of the commitment of the parties to work together to avoid these types of business disputes in the first place. However, in an effort to

² For example, Intel reports having successfully avoided arbitration and litigation proceedings through the use of dispute prevention provisions.

ensure that a party who would like to bypass the dispute prevention procedures thinks twice before doing so, we have included a provision that provides the arbitrator or judge the discretion to award payment of the other party's attorneys' fees in the event the party who bypassed the dispute prevention procedures loses the arbitration or litigation.

C. These Provisions are "Not Market"

While these provisions may not be market today, we believe they are best and next practices and that, more broadly, dispute prevention is an issue that needs to be addressed. We recognize that typically the focus of negotiations does not include conversations about legal disputes and how the parties might prevent them. After all, who wants to talk about legal disputes when you are negotiating what the parties expect will be a mutually beneficial contractual relationship. But as the saying goes, an ounce of prevention is worth a pound of cure and our hope is that, over time, these provisions will become widely adopted and utilized such that they become "market." So, in these early days, we encourage those who see the benefits in these model provisions to socialize them with their counterparties early on in negotiations so as to give the other side sufficient time to digest and consider them. We believe the proposed language and the flexibility for parties to amend the provisions to their needs will result in more efficient business relationships for the provisions' first adopters, which benefits all parties.

V. Conclusion

We encourage you to review the accompanying Term Sheet and Model Provisions and consider incorporating them into your key contractual agreements, whether in the context of commercial arrangements, joint ventures or even M&A transactions. We believe that when parties commit to work collaboratively to prevent conflicts and, if appropriate, engage an independent third-party Relationship Facilitator to help them manage their relationship, they will materially increase the likelihood that they achieve the intended results of their contractual commitments and **prevent** costly and damaging legal disputes. At the end of the day, we believe that the cost of implementing these arrangements will be outweighed by the benefit to the parties and their working relationship with each other.

Finally, we welcome your input and insights based on your experience in implementing frameworks such as those described in this memo and your perspectives regarding the results of such arrangements.

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