

BUSINESS RELATIONSHIPS: Exploring Collaborative Law



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situation

In today's technology outsourcing marketplace, contracts between clients and service providers are complex and reflect the parties' respective objectives, business needs, roles and responsibilities in connection with outsourcing of technology functions to the service provider. Even so, contracts must operate as an evolving roadmap to the parties' business relationship, with the contractual obligations of each party being re-examined from time to time and, where appropriate, revamped through change control and other mechanisms.

in-house counsel challenge

What a client needs today may not be what it needs tomorrow. The contract may not cover the changed circumstances, or the parties may not be able to agree on what changes need to be made or how to scope or price them. Contract provisions that seemed clear may end up being unhelpful, contradictory or subject to differing interpretations. As a result, the relationship between client and service provider may be put in jeopardy if the issues that have arisen under the contract are not resolved efficiently and effectively.

approach adopted

Our litigation group is exploring a non-adversarial dispute escalation and resolution process known as "collaborative law." Although we still use informal dispute escalation/resolution, mediation and arbitration provisions because they are well understood by clients and are common in the outsourcing industry, we are in the process of determining how and in what context to incorporate a collaborative law process into our contracts. Its use would be voluntary and, if chosen, it would be the initial dispute escalation/resolution vehicle, to be followed by mediation and/or arbitration only if unsuccessful.

Potential benefits of a collaborative law approach include:

- Having representatives of the parties (rather than their lawyers) drive the process and be actively involved in negotiations that take place through a series of meetings with jointly prepared agendas;

implementation steps

Although this effort is in its infancy at EDS, we view education as the first, and most important, step in utilizing this concept. Our litigators are educating our commercial contracting lawyers and legal professionals about collaborative law. From there, it's a matter of educating our internal deal teams and our external clients.

- Conducting interest-based negotiations focused on each party's business goals, objectives and interests rather than positional bargaining based on legal and contractual rights, duties, liabilities and claims;
- Reducing expenses associated with pre-trial discovery, motion practice and "battles of the experts" by focusing on what is necessary to resolve the dispute and by jointly engaging experts and consultants as needed;
- Having flexibility in conducting the process and in exploring resolution options that are not available to courts and arbitrators, including non-monetary options; and
- Restoring and maintaining relationships based on transparent, honest, confidential, face-to-face, respectful and good faith negotiations.

measuring success

As we continue to explore this approach, we will measure the effectiveness of our efforts by reviewing (i) how often we are able to include a collaborative law provision in our contracts, (ii) how often that provision is used and (iii) when used, whether the process brought about a resolution that the parties deemed to be a "win-win" result.

future issues to consider

As for the future of collaborative law in business settings, only time will tell. Even mediation and arbitration are still not universally accepted. Our litigators want EDS to be a pioneer in this area by resolving disputes in a way that maintains and hopefully strengthens the business relationships that are key to successful outsourcing arrangements.