Negotiation
&
Mediation

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LEXOLOGY®

Why businesses should include dispute prevention and de-escalation clauses in their agreements

Eversheds Sutherland (US) LLP

USA February 22 2019

Every business relationship carries with it the potential for disputes. Common experience has demonstrated that problems, difficulties, differences of opinion, disagreements, and disputes can occur at any time, even in the best of families and businesses. Given this reality, at the time parties enter into a business relationship, they have a unique opportunity to decide that when future problems occur, they will proactively fix the problem, rather than reactively fixing the blame.

Unfortunately, in today's business climate, when parties enter into a relationship, most fail to make such a choice at all; and later, when problems do arise, many of them instinctively and reactively decide to fix the blame. This choice initiates a process in which the solution to the problem is postponed, and the parties engage in an adversarial dance of confrontation and blame. The problem then escalates into a difference of opinion, then an argument, and ultimately an intractable dispute that has to be referred to the conventional dispute resolution system for ultimate resolution in some form of mediation, arbitration, or litigation.

The inevitable result of this adversarial dance is an escalating state of confrontation that can lead to the expenditure of what the professor and barrister Richard Susskind describes in his book The End of Lawyers? as the "wildly excessive and disproportionate amounts of time, energy, and cash dispensed on dispute resolution."

There IS a better way.

A common-sense approach to preventing and resolving disputes

In 1975, Sutherland Asbill & Brennan LLP published the first edition of its Manual for Using Private Dispute Resolution Clauses in Business Agreements. The thesis of that Manual was that when parties are first entering into a business relationship, they have a unique opportunity to exercise control over any future problems or disputes. It recommended that the parties specify in their agreement that any problems that arise would be dealt with through a creative series of contract clauses that would assure that any problems that arise would be addressed and dealt with in an orderly way at the earliest possible time.

Set out below is an updated version of the introductory chapter of the Manual for Using Private Dispute Resolution Clauses in Business Agreements, which closely follows the text of the original edition.

Reasons for incorporating dispute prevention and resolution clauses into business agreements

1. Recognize the disadvantages of adversarial confrontation:

Resolution of a business problem through the adversarial processes of litigation, arbitration, or even mediation, has many obvious disadvantages:

It means loss of control of the dispute. Control has shifted to strangers to the dispute: lawyers, mediators, arbitrators, or a court.

It takes too long. It will take at least several months (and in some jurisdictions several years) to get a litigated case to trial; appeals can lengthen the process by a year or more. Arbitration can generally be somewhat quicker, but it inevitably involves delays before resolution can be achieved. While mediation can, if both parties and their lawyers agree, be conducted on an expedited basis, it can be concluded only if and when the parties have reached a final agreement. These delays can create uncertainty in business planning, adversely affect cash flow, and have other disruptive effects on the business.

It's too expensive. It costs a lot to bring even the simplest business dispute to mediation, arbitration, or trial-- in the transaction costs of lawyers' fees, discovery, costs of experts and consultants, and the time and energy of the business people who are involved in processing the dispute.

It's too uncertain. Litigation, and even arbitration before expert arbitrators, is a very blunt instrument. It is often very difficult to predict how a judge, appellate court, or arbitrator will ultimately resolve a case. Even mediation, although generally voluntary, will have uncertain results that cannot be accurately predicted.

It can lack expertise. The resolution of business and technical disputes requires expertise and sophistication. It is difficult to find judges, and even arbitrators or mediators, with the qualifications to resolve complex business issues.

It can be very public. Court filings and proceedings are matters of public record. They are valuable sources of information for business competitors; they are routinely reported in trade publications; and, if they are juicy enough or it's a slow news day, they can be reported in the popular media. Even arbitrated cases can sometimes garner publicity.

It's too disruptive of business relationships. The hostility engendered by confrontation in litigation, arbitration, and even mediation makes it difficult for business people to continue to carry on normal valuable business relationships and activities with each other.

2. Recognize the disadvantages of postponing a decision about how to deal with disagreements until after a problem or dispute has arisen:

Delaying decisions about how disputes will be dealt with reduces a party's options. Once a dispute has developed, it can often be difficult to get the participants to agree on the time of day, let alone discuss rationally the optimum method for resolving the dispute. At this point, the parties are likely to have different agendas and preferences as to how they would prefer to resolve the dispute. One party may want to emphasize the facts and equities, or sophisticated business realities; the other side may prefer to be in a court of law. One party may want a quick resolution; the other party may prefer delay. One party may want to avoid publicity; the other party might prefer public exposure of the controversy. If the parties are unable to agree on a method of dispute resolution, the only available dispute resolution system is litigation.

Agreeing at the very beginning of a relationship on a method for prevention, quick processing, de-escalating, and final resolution of any future problems or disputes that may arise has many advantages.

3. Recognize the advantages of proactively agreeing early on to a dispute prevention and resolution system:

Agreeing at the very beginning of a relationship on a method for prevention, quick processing, de-escalating, and final resolution of any future problems or disputes that may arise has many advantages.

Responsible business managers are accustomed to controlling costs, quality, and other aspects of their business relationships. Using private dispute prevention, de-escalation, and resolution techniques gives them an opportunity to control conflict and disputes as well.

The beginning of the relationship, when there is an atmosphere of businesslike cooperation, and before any disputes have arisen, is the time when the parties can most rationally discuss the optimum method for dealing with any disputes.

Including the subject of dispute prevention and resolution as an element in the negotiations leading to the establishment of the relationship helps to define an important aspect of the relationship. For example, if you learn that the other party does not want to agree to have an efficient dispute prevention and resolution system, this knowledge can affect how you negotiate other terms of the agreement or whether you want to enter into the relationship at all.

Responsible businesses entering into a relationship should consider including in their agreement a system for preventing and processing disagreements as promptly and efficiently as possible.

Business people often have a real fear of a foreign legal system. Exhibiting a willingness during the negotiations to set up a rational, fair, and prompt dispute resolution system should have special relevance in an international transaction.

Agreeing early on a method for dealing with potential problems can lead to creative business-oriented results, be a cooperative and satisfying experience, and is likely to help to create and preserve a healthy and continuing business relationship.

The special importance of having a dispute prevention and resolution process already in place is often overlooked. An existing process will absorb the shock of unexpected events and problems. It channels them constructively, so they can be dealt with promptly, realistically, and ultimately be solved. In the absence of a process, the parties are left to flounder without direction, which can lead to confusion, chaos, and opportunities for mischief.

The ready availability of a fair, efficient, trusted, and quick method for preventing and processing disputes tends to discourage game-playing, posturing, and delaying tactics; may well encourage the parties to cooperate and deal realistically with each other; and should in most cases result in the parties resolving the problem by themselves, without having to resort to a dispute resolution procedure at all.

4. Overcome resistance to the use of dispute prevention techniques:

Despite the acceptance of mediation and arbitration as dispute resolution alternatives to litigation in many areas of business, there is still considerable resistance to the techniques for preventing and controlling disputes. However, knowledgeable business professionals should recognize and overcome the kinds of obstacles and attitudes that can discourage parties from agreeing in advance on a system for preventing and controlling disputes. Some of these sources of resistance are:

Not wanting to spoil the euphoria. Some people may fear that addressing the subject of dispute resolution during the early stages of a relationship is akin to suggesting to a happy engaged couple that they should enter into a pre-nuptial agreement. Business should not be an emotional relationship, however; and ignoring the fact that problems and disputes can routinely occur even between the nicest people is simply a triumph of hope over reality.

Traditional resistance to change. There is often a built-in resistance to any new idea. Given the relative newness of dispute prevention and de-escalation techniques, many contract and legal professionals have never before included these processes as a subject in their negotiation agendas and checklists. (Indeed, when alternative dispute resolution (ADR) processes were first introduced, many lawyers considered the acronym ADR to represent "Alarming Drop in Revenue"!) However, now that the successes, first of the conventional private dispute resolution process, and more recently of prevention and de-escalation processes, have become better known, that resistance has diminished. An important argument for overcoming resistance is that the principal impetus for preventing disputes comes from business people who have learned that preventing disputes can save money, so contract and legal professionals would be well advised to keep up with their business clients.

A perception that multi-level dispute resolution slows down the process. Some people may feel that specifying more than one level of dispute prevention and resolution, such as partnering or standing neutral before resorting to mediation or arbitration, imposes an unnecessary and delaying process that will hinder the ultimate resolution of a dispute. However, sophisticated business people and lawyers know that the earlier the parties address a problem or dispute and deal with it realistically,

the more likely they are to resolve it amicably; and that every dispute prevention and resolution system should contain a final and binding backstop resolution method of some kind, such as arbitration.

A perception by a party that it will benefit from an inefficient method of resolving disputes. A party that thinks that it has or is seeking superior bargaining power may think that it will benefit by denying the other party an opportunity to have a problem or dispute resolved promptly and efficiently. For example, a party that is obligated to pay money may, if the other party has no ready recourse, think that it can obtain leverage simply by withholding payment. Ordinarily, such a strategy only works once, because once it is exercised, the other party won't be tricked again. And if such an intended strategy is revealed during contract negotiations, the other party can increase its pricing to offset the risk that it may be deprived of the use of its money for an extended period of time, or it may refuse to enter into the business relationship.

Bottom line: In short, there is no rational excuse for responsible businesses which are entering into a relationship not to include in their agreement a system for preventing and processing disagreements as promptly and efficiently as possible.

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Inn of Court Alternative Dispute Resolution

March 19, 2019

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TYPES OF DISPUTE RESOLUTION

- Non-adjudicative
  - Negotiations
  - Mediation
- Adjudicative
  - Arbitration
  - Litigation

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ADR Provisions Included In:

- Business contracts;
- Employment agreements;
- Settlement agreements;
- Credit cards applications, purchase orders/invoices, terms and agreements on websites, etc.

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Why Consider An ADR Provision?

- Efficiency;
- Cost;
- De-escalation;
- Control/Knowledge

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DRAFTING AN ALTERNATIVE DISPUTE RESOLUTION PROVISION

- ❑ Types of disputes it governs;
- ❑ Methods of dispute resolution;
- ❑ The forum for resolution;
- ❑ The law to be applied

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ADR UPDATE

Class and Collective Action Waivers

- ❑ ***Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1632, 200 L.Ed.2d 889 (2018).**
- ❑ ***Gaffers v. Kelly Servs.*, 2018 U.S. App. LEXIS 22613 (6th Cir. Aug. 15, 2018).**

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Arbitration in Kentucky

- ***Northern Kentucky Area Development District v.*** **Snyder, No. 2017-SC-000277-DG, 2018 Ky. LEXIS 363 (Ky. Sept. 27, 2018).**
- **Senate Bill 7**

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QUESTIONS/COMMENTS

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A Primer on Dispute Resolution Clauses in Business Agreements– Key Drafting Considerations

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Phil Cutler is a principal in the Seattle law firm Cutler Nylander & Hayton, P.S., where his practice emphasizes trial and appellate practice and dispute resolution, including mediation and arbitration, primarily in commercial and business matters, including antitrust and product distribution; corporate and complex commercial matters; intra-corporate disputes; employment; government relations; and licensing and protection of intellectual property. As principal outside general counsel for a major manufacturer of consumer electronics goods during the 1980s and into the 90s, Mr. Cutler was responsible for advising the client on issues relating to the national and international distribution of its products and for drafting and annually updating the client's distributor and rep agreements as well as the sales force's employment agreements.

He has been active for many years in the ADR activities of the Federal Bar Association of the Western District of Washington, serving as chair or co-chair of the FBA's ADR Committee from 1985-1998; Mr. Cutler is a charter member of the WSBA and KCBA ADR Sections; he was 1998-99 chair of the WSBA ADR Section and 2002-2003 chair of the KCBA ADR Section; from 2003-2008 he served as Membership Chair of the ABA Dispute Resolution Section and a member of the Section's Council from 2005-2008. Mr. Cutler is a Fellow of the College of Commercial Arbitrators (www.thecca.net) and a member of the American Arbitration Association's Commercial Arbitration, Mediation and Large

Complex Case panels and serves frequently as arbitrator or mediator in complex commercial cases. He has been presenter at, or authored or contributed to, a variety of seminars and publications in the field of alternative dispute resolution and authored the chapter on Alternative Dispute Resolution for *Doing Business in Washington State* (WSBA Int'l Practice Sec., 1996, 2003 and 2010 eds.). Mr. Cutler ained his undergraduate degree from Georgetown University (1970) and graduated with honors from Northwestern University School of Law in 1973.

These materials were prepared for an April 2011 presentation at the annual meeting of NALS (the Association of Legal Professionals) of Washington.

A PRIMER ON DISPUTE RESOLUTION CLAUSES

IN BUSINESS AGREEMENTS –

KEY DRAFTING CONSIDERATIONS

I. OVERVIEW OF THE MOST POPULAR DISPUTE RESOLUTION METHODS

Resolving disputes efficiently and effectively is a key consideration of business people everywhere. Counsel's role is to assist the client in determining the most *appropriate* dispute resolution method for the types of disputes likely to arise.

B. Dispute resolution methods are either *adjudicative*....the parties vest a third party with the responsibility and power to resolve their disputes....or *non-adjudicative*....the parties negotiate a resolution themselves, either directly or with the assistance of an intermediary or facilitator. Regardless of which type of dispute resolution is utilized, it is critical that all parties have confidence in the method of dispute resolution, in the institutional forum under whose auspices the method of dispute resolution is to be supervised, and in the person or persons directly involved in the dispute resolution process.

C. Methods of dispute resolution can be depicted as a series of alternatives on a continuum ranging from *negotiation* to *litigation*. As one moves across the continuum, the dispute resolution method becomes more adversarial and adjudicative, *i.e.*, the parties surrender to a third party more power, and in arbitration and litigation, *all* power, to resolve the dispute. [1]

Negotiation..... is a process whereby disputants communicate directly with each other about the issues in disagreement in order to reach a settlement of their differences.

Mediation..... is a process whereby an impartial third party (the mediator) facilitates communication between negotiating parties which may enable the parties to reach a settlement.

ENE..... early neutral evaluation is a process whereby a person experienced in evaluating disputes of the type presented is chosen by the parties to evaluate the case, narrow the issues, assist in case planning and management and, if appropriate, assisting in settlement discussions.

Med-Arb..... mediation-arbitration is a process whereby an impartial third party facilitates communication between negotiating parties and, failing settlement, receives evidence and issues a binding decision.

Arbitration..... is a process whereby one or more impartial third parties hear and consider the evidence and testimony of the disputants and issue a decision (the "award") which is usually binding and not appealable on the merits.

Litigation/Trial..... is a process whereby an impartial judge or jury receives evidence presented by the disputants and issues a binding, enforceable court order.

D. It is critical that counsel and the client thoroughly understand the nature of the business relationship to be created, the types of disputes which may arise and the considerations important to each party in resolving them, the cultural differences which may be important to both the client and the foreign trading partner, and the dispute resolution options available both domestically and in the foreign country. The relative advantages and disadvantages of each method of dispute resolution must be carefully evaluated and the method, or series of methods, that most appropriately addresses the needs of not only the client but the foreign trading partner should be selected.

II. WHAT ARE DISPUTE RESOLUTION CLAUSES...AND WHY THEY ARE IMPORTANT

A. The effective dispute resolution clause (or section) describes in general terms the types of disputes that it governs, provides for one or more methods to resolve disputes, identifies the forum for resolution of disputes and the law to be applied in resolving disputes, and subjects all parties to the personal jurisdiction of the identified dispute resolver.

B. It is a reality of business life that disputes will arise. If the agreement is silent on dispute resolution, the parties' only enforceable option is litigation...which can be expensive, the forum may be subject to selection by only one party, and jurisdiction may be dependent on a complicated legal and factual analysis.

III. WHERE YOU COMMONLY FIND DISPUTE RESOLUTION CLAUSES

Credit Card applications/statements

- Stock brokerage firm applications/agreements
- Domestic business contracts
- International business contracts
- Law office fee agreements and engagement letters

- Settlement agreements
- Purchase orders and invoices
- Terms and agreements on websites for services – the box that you must check that you have read to get to the purchase point
- License agreements

IV. DRAFTING THE DISPUTE RESOLUTION SECTION

A. Dispute resolution deserves a *section* – rather than merely a clause – in the agreement. Counsel should resist the temptation to simply copy the dispute resolution clause from a prior contract. Instead, think about:

- The types of disputes which might arise between the parties,
- Who and what are likely to be involved in any dispute,
- Where these people and things are likely to be located, and
- How such disputes might best be resolved...from your client's perspective ...from the other party's perspective...from the standpoint of what's best for the "deal".

B. To ensure a workable dispute resolution process, enlist the help of an experienced litigator or ADR practitioner.

While a *negotiated* resolution of any dispute is almost always preferable to submission of the dispute to a third party for resolution, the dispute resolution section should always provide for an *adjudicative* dispute resolution process. Both your client and your client's business partner want and need finality, to be able to definitively close the book on any dispute. In drafting the dispute resolution section, and in providing for particular dispute resolution procedures, it is critical that key issues be adequately addressed. A good dispute resolution section will, either textually or by reference to a known and identified set of rules and procedures:

- *What* disputes are covered? *What* disputes, if any, are outside the scope of the selected procedure? *Who* decides disputes over the existence of a contract (in the U.S., generally the court[2]) and over "gateway" issues such as whether there is a valid arbitration agreement or the scope of the dispute resolution clause (again, in the U.S., generally the court[3] unless the arbitrator is expressly assigned that task[4])?
- *Who* are likely to be necessary parties to the dispute resolution process? Are they subject to an appropriate court's jurisdiction? Can they be compelled to participate in an arbitration?
- *What* law governs interpretation of the contract?[5] Enforcement of any adjudicative decision or negotiated settlement? *What* law or rules govern the dispute resolution process?[6] In adjudicative dispute resolution, do those rules provide that the process is self-effectuating and self-enforcing (*i.e.*, the selected process can continue despite an objection from a party or a party's failure to appear or refusal to participate, unless the proceedings are stayed by court order or agreement)?
- *What* are the costs involved? *Who* pays?[7]
  Who is in the pool of neutrals? *What* qualifications should they possess? *Who* selects the neutral involved in the proceeding? *Who* resolves any disputes over selection? *How* "neutral" is the neutral?[8] *How* is the neutral insulated from partiality?
- *Where* is the dispute to be resolved?[9] *Who* resolves any disputes on this subject?[10]

- *How* does the process work? Should there be a time limit on completion of the dispute resolution process? In adjudicative dispute resolution, *what* discovery is available? *What* language will be used for the proceeding?
- In adjudicative dispute resolution, *how* is the arbitral award or judgment enforced? *Where*?

There are many resources to assist counsel in drafting an appropriate dispute resolution section. A good place to start is the American Arbitration Association's "Drafting Dispute Resolution Clauses – A Practical Guide". It is available in hard copy from any AAA office or can be downloaded from the AAA's website: **www.adr.org.**

V. CHOOSE AN *APPROPRIATE* METHOD OF DISPUTE RESOLUTION

A. It is a reality of business life (indeed, any human endeavor), that disagreements are likely to arise during the course of any business relationship. Thus, counsel will *always* provide contractually for an adjudicative method of dispute resolution. Wise counsel will also consider and – if appropriate – provide for – one or more non-adjudicative methods of dispute resolution, either as a separate stage in the dispute resolution process or as an adjunct to the chosen adjudicative dispute resolution process.

B. In assessing what dispute resolution mechanism(s) to specify in the contract, it is critical that counsel

thoroughly understand
the *nature of the business relationship* to be created;
- the *types of disputes which may arise and the considerations important to each party* in resolving them; and
- the *dispute resolution options available and the relative advantages and disadvantages of each*;
- *carefully evaluate dispute resolution options* against the foregoing factors; and
- *select the method, or series of methods, that most appropriately addresses the needs of the client.*

C. As the dispute resolution section is frequently the last item to be negotiated in a contract, the temptation is to turn back to and adopt verbatim the dispute resolution section from a prior business contract. Counsel should resist that temptation: it is ***never*** wise to do so.

VI. ADJUDICATIVE DISPUTE RESOLUTION – OPTIONS ARE LITIGATION AND ARBITRATION

A. Litigation

All lawyers are familiar with traditional litigation, at least as practiced in their jurisdiction. While it has ıses and minuses, it is predictable even in its unpredictability: lawyer and client know that a judge, generally randomly selected by the court, will preside over and decide the dispute (or preside over a jury which will decide the dispute) using well-established evidentiary rules at a trial generally conducted many months, or even years, after the dispute has erupted. Although the cost of invoking the court's jurisdiction is nominal, as court filing fees are rarely more than a few hundred dollars, savvy

trial counsel can wear down her opponent's resolve (and deplete its bank account) by aggressive motions practice and burdensome discovery in U.S. courts. Finally, the court's judgment or the jury's verdict is rarely the last word as appeals to ever-higher courts can consume years – and thousands more dollars. Nonetheless, litigation is a tried and true method of dispute resolution and, indeed, may be the method of choice in particular circumstances. If it is the choice, it should be made knowledgeably and with due regard to the consequences of having chosen it.

B. Arbitration[11]

1. Like litigation, the purpose of arbitration is to *decide a dispute.* While it shares some characteristics with litigation, there are also important differences.

- While arbitration is voluntary in the sense that parties must have agreed at some point to submit a dispute to arbitration, once arbitration has been selected as the dispute resolution mechanism, no party may ordinarily unilaterally withdraw from the process without consequence.
- Although the arbitrator is not a judge, he or she functions in much the same manner as does a judge and determines whether or not a claim should be allowed and, if so, in what amount or under what circumstances. The arbitrator receives evidence, albeit not necessarily constrained by strict evidentiary rules, and decides the facts and the law, ultimately making an "award." As in litigation, there is a "winner" and a "loser", oftentimes with attendant publicity about, and financial or other consequences to, who won and who lost. Unlike litigation, the arbitrator's award is most often final and binding – traditional appellate review is unavailable in the United States and the grounds for vacating an arbitral award are extremely limited.[12] Appellate options for foreign arbitral awards may be similarly limited.
  The arbitration process is generally more confidential than a court proceeding. However, while almost all arbitration hearings are "closed" (members of the public are not admitted, nor is any public record kept of the proceeding), the arbitration award, once filed, becomes a matter of public record.
- An arbitration award may generally be filed in court and, once confirmed by the court, becomes a judgment with the same force and effect as a judgment which results from a trial.

2. While arbitration is frequently used as a stand-alone method of resolving disputes – whether internationally or in domestic situations – it may be used either as the last stage in dispute resolution (with mediation or some similar ADR method preceding it) or as an aid to settlement negotiations (when the arbitral result is non-binding or binding only if a trial *de novo* is not timely demanded).

3. Parties choosing arbitration over traditional litigation generally place a high priority on the following characteristics of arbitration:

- ***More-neutral forum***.....not generally of concern in domestic disputes, but of tremendous concern in international disputes where national courts may well favor, consciously or unconsciously, the "native" party – to the concurrent disadvantage of the U.S. party;
- ***Opportunity to select the decision-maker(s)***.....under the rules or procedures of most institutional ADR providers the parties are provided with a list (with biographies) of potential arbitrators, from which the parties are free to stipulate to an arbitrator or arbitration panel.....or the parties can strike some names and the institution makes a selection from among those names which have not been stricken;
- ***Confidentiality***.....the parties and the arbitrator(s) control access to the arbitration proceeding; the general public is not ordinarily admitted; arbitration papers are not "public" documents;
- ***Reduced legal expenses***.....parties need not have a lawyer; "discovery" is generally much more limited than in litigation; "motions practice" is discouraged;
- ***An early opportunity to present evidence***.....case backlogs in state and federal courts may mean a trial date is a year or more after filing the papers initiating the case; if there is significant

delay in arbitration, it is most often caused by (or at the request of) the parties as the arbitrator(s) are generally willing to schedule a hearing within a few months at most;

- ***An expeditious decision***.....the rules of most institutional ADR providers require an award within 30 days after the hearing-as-a-whole is closed; and

Finality.....the grounds for vacating an arbitral award are extremely limited in the U.S. (9 U.S.C. §10; RCW 7.04A.230; Section 23 of the Revised Uniform Arbitration Act in states which have adopted it); traditional appellate review is unavailable under either state or federal law.[13] While the disappointed party may appeal a U.S. trial court's confirmation of an award, appeal prospects are generally dim; with respect to international arbitrations, recognition and enforcement of arbitral awards is (with respect to signatory nations) governed by the New York or Panama Conventions (*see* note 12, above).

4. While arbitration is frequently used as a stand-alone method of resolving disputes – whether internationally or in domestic situations – it may be used either as the last stage in dispute resolution (with mediation or some similar ADR method preceding it) or as an aid to settlement negotiations (when the arbitral result is non-binding or binding only if a trial *de novo* is not timely demanded). ***Especially in the context of international business transactions and relationships, arbitration is the adjudicative dispute resolution mechanism of choice.***

5. Arbitration is often a preferable method of dispute resolution.[14] Too, if appropriate resolution of business disputes is likely to require a decision-maker with specialized experience, or where privacy and confidentiality of the proceedings is desired, arbitration may be the option of choice.

- **Note:** Any form of adjudicative dispute resolution is an expensive process and, because the parties have vested a third party or parties with authority to decide the dispute, an uncertain process as well. It is costly to clients not only directly, in terms of the money expended on lawyers' fees and litigation or arbitration costs, but also indirectly: clients must devote significant time and energy to prosecution (or defense) of the case. In the business context, this diversion of effort from "the business" of the business is expensive. In all contexts, litigation or arbitration is often emotionally draining as the parties must relive the dispute, even tedious details of it – and, due to the breadth of discovery available (and almost always pursued) in traditional U.S. litigation, with unrelenting frequency as well. Too, what a judge (or arbitrator or panel of arbitrators) or jury may do with a dispute is often uncertain: the client may win, but it also may lose – or not "win" as much as it hoped for. Moreover, court proceedings, and their outcomes, are public; even arbitration awards become public when proceedings are begun to enforce the award. Finally, litigation or arbitration is often an unsatisfactory way to resolve a dispute and achieve closure to it.
- ***Consider***, therefore, ***requiring some form of non-adjudicative ADR process*** (*e.g.*, negotiation, mediation), either as a separate stage in the dispute resolution process or as an adjunct to the chosen adjudicative process. While these consensual methods of dispute resolution are always available to the parties, even after a dispute has ripened to the point of a party seeking an adjudicative solution, expressly providing for such processes in the dispute resolution section may show the foreign trading partner the U.S. company's good faith and commitment to attempting to resolve any disputes by way of negotiation.

C. Why Not Automatically Opt For Arbitration?

Obviously, to the extent the foregoing factors are high on the client's priority list; counsel should seriously consider arbitration as the alternative to litigation. The benefits of arbitration do not come without cost, however. Among issues counsel and the client should consider are:

Higher filing fees.....all institutional ADR providers require payment of a filing fee in excess of state or federal court filing fees[15] (*e.g.*, AAA filing and case service fees range from $975 (for cases in which the claim is for $10,000 or less) to $11,450 (for cases in which the claim is for $1 million – $5 million), to $14,200 (for claims between $5 million and $10 million)). Fees for arbitrations administered by foreign arbitral institutions such as the International Chamber of Commerce Court

of Arbitration can be considerably higher. Filing fees are generally a non-issue for consensual arbitration under a federal court-annexed arbitration program such as that in the Eastern (ED WA LR 16.2(g)) and Western Districts of Washington (WD WA LR 39.1(d)).

- ***The parties compensate the decision-maker, the "system" does not***.....arbitrators are paid for their services, generally at their normal billing rates (most U.S. arbitrators charge, like lawyers, by the hour; many non-U.S. arbitrators charge by the day); for complex cases involving several days (or weeks) of hearings-on-the-merits or numerous discovery spats, this cost can be substantial, particularly if the case is heard by a three-member arbitration panel.[16] Be aware that some ADR provider organizations (such as, in the international context, the International Chamber of Commerce Court of Arbitration) set the compensation of arbitrators based on a sliding scale determined by the amount in controversy. Too, foreign-based arbitrators' fees are commonly higher than U.S.-based neutrals, particularly those in the Pacific Northwest.
- ***Discovery may be more limited than in litigation***.....one of the key differences between arbitration and traditional litigation is the breadth of "discovery" available in arbitrations, a difference which can be a boon or a curse. In traditional litigation, once the case is commenced the parties begin, as they have every right to do under federal or state rules of civil procedure, what is known as the "discovery" process – each side sends the other many sets of detailed questions to which they want answers (interrogatories) and requests for many, many categories of documents (requests for production), then subjects both party-witnesses and non-parties to lengthy question-and-answer sessions (depositions). By contrast, in arbitration the parties get whatever "discovery" they've contracted for in their arbitration clause (either specifically or by incorporation of an ADR-provider organization's rules) and whatever the arbitrator decides is appropriate under the circumstances. It is essential that counsel think through the types of discovery the client is likely to require and to expressly provide for it in the dispute resolution section. Obviously, the more the provided-for discovery resembles the full-blown discovery available in traditional U.S. litigation, the less benefit the client will realize in cost-savings and the greater the potential for delay in finally resolving the dispute through hearing. Foreign trading partners are generally wary of – and resistant to – the sort of wide-ranging discovery commonly permitted in U.S. courts. The rules of foreign arbitral institutions generally provide significantly less discovery – if any is permitted at all – than U.S. institutions such as the AAA and its international counterpart the International Centre for Dispute Resolution.
- ***Opportunities to reverse an adverse arbitration decision are exceedingly limited***.....generally, only arbitrator misconduct is ground for a U.S. court to vacate or refuse to confirm an award – errors of law or fact are not, as a general rule, grounds for vacating an arbitral award.[17] If the client's business is such that an adverse result in an arbitration proceeding could have serious consequences with respect to the client's disputes with others similarly situated, counsel will want to balance the benefits of arbitration against the possibility that principles of collateral estoppel will be used offensively in other situations. Special rules (namely the New York or Panama Conventions) apply with respect to recognition and enforcement of international arbitration awards. *See* note 5, above.
- ***Washington's statutes of limitation do not apply in arbitration***..... *Broom v. Morgan Stanley*, 169 Wn.2d 231, 240-245, – P.3d – (2010). Faced with this decision, the Washington Legislature may correct the anomaly that SOLs apply only in court proceedings.

D. The dispute resolution section should cover the *whats*, the *whos*, the *wheres*, the *hows* (see pp. 5-6, above). Drafting suggestions:

General preamble

All disputes arising under or related to this Agreement, [including without limitation the formation thereof,[18]] or the performance of any party, shall be resolved by . . .

gation is sole option for any disputes

. . . the [insert court[19]] and all parties irrevocably consent to the jurisdiction of [that court] [those courts]. [Add: Choice of law provision]

Litigation is option for certain disputes, arbitration for other disputes – substitute the following for the general preamble

All disputes related to [describe – *e.g.*, the enforcement or validity of copyright, trademark or patent rights] shall be resolved by the United States District Court for the Western District of Washington, and all parties irrevocably consent to the jurisdiction of that court. All other disputes arising under or related to this Agreement,[including without limitation the formation thereof,] or the performance of any party, shall be resolved by arbitration [insert arbitration clause . . . below]. [Add: general choice of law provision]

Arbitration – begin with general preamble, and then follow with

. arbitration under the Commercial Rules of the American Arbitration Association ("AAA") in effect at e time this Agreement is executed or, with the consent of all parties, the Rules in effect at the time arbitration is commenced. The location of the arbitration shall be such city in the State of Washington determined by the AAA or, if the AAA declines or fails to determine the city, by the arbitrator(s).[20] Any award entered by the arbitrator(s) may be confirmed, modified or vacated, and judgment entered, by the Whatcom County Superior Court or, if the United States District Court for the Western District of Washington has diversity jurisdiction, by that court, and all parties irrevocably consent to the jurisdiction of those courts. The provisions of the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and the Washington Uniform Arbitration Act (RCW Chapter 7.04A), to the extent applicable, shall govern the arbitration. [Add: general choice of law provision]

VII. NON-ADJUDICATIVE DISPUTE RESOLUTION — MEDIATION

A. Mediation is not, of course, the only non-adjudicative method of dispute resolution. It is, however, the most popular such method and is therefore treated in more detail here.

B. In mediation[21] , the services of an independent neutral...the mediator...are employed to assist the parties in *negotiating settlement of a dispute.*

- The mediator attempts to facilitate an out-of-court settlement between the parties by identifying key considerations and interests of the parties, by building upon areas of common agreement and by challenging the parties and their lawyers to think critically about the case, potential outcomes, and the business and other risks which attend continued pursuit of the dispute (or the lawsuit, if one has been filed).

- In most states in the United States the mediation process is confidential, either by statute or court rule[22]; no information disclosed to the mediator during the mediation process may be revealed outside the mediation setting (or even to the opposing side without consent).
- Although all parties are expected to come to the mediation prepared to negotiate in good faith, mediation is an entirely voluntary undertaking; no party is required to agree to a settlement. The terms of any settlement reached are decided and agreed-upon by the parties (most often with advice and counsel of their attorneys), not the mediator.
- The mediator is not a judge and does not function like a judge. Nor is the mediator the lawyer for any party. While the mediator may, in the course of the mediation, give the parties and their lawyers his or her opinion or best judgment, based on experience, as to a matter in dispute, the mediator does not decide who is right and who is wrong, nor does the mediator "decide" any of the issues in the dispute. There is no "loser" in a mediation.
- If a settlement of the dispute results, it is because the parties decided that a settlement on the terms agreed-to was more advantageous, overall, than the continued expense and uncertainty of litigation. Unless the parties decide to publicize the terms of the settlement, those terms remain confidential.

C. While mediation can be used as a stand-alone ADR method, it is commonly used either as the first stage in dispute resolution (with either litigation or arbitration following) or as an adjunct to either a pending lawsuit or arbitration proceeding. Mediation (or conciliation, as it is frequently known internationally) is an especially attractive method of dispute resolution in countries in which businesses are not especially litigious or in which the adversarial system of dispute resolution is disfavored.

D. In some countries mediation is required as an initial step in the dispute resolution process. Additionally, some countries display an historical antipathy toward non-consensual adjudicative ;pute resolution. Consider adding mediation or some other form of informal, direct party-to-party dispute resolution as a prerequisite to adjudicative dispute resolution. Pre-arbitration conciliation can be either informal (the dispute is referred first to senior management, then to the parties' respective chief executive officers) or formal (using a mediator). Some possible clauses:

Drafting suggestions:

General

Before [proceeding to invoke adjudicative dispute resolution of any dispute covered by] [demanding arbitration of any dispute under] this section, the parties shall first....

Negotiation

In the event of any dispute, claim, question, or disagreement arising from or relating to this Agreement or any party's performance or alleged breach thereof, the parties shall [each designate a senior executive, who shall] use their best efforts to settle the dispute, claim, question or disagreement. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such a solution within a period of 60 days, then, upon notice by either party to the other, all disputes, ıims, questions, or differences shall be finally settled by arbitration.....

Mediation

If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by [mediation] [conciliation] administered by ... before resorting to [arbitration under this section][, litigation, or some other dispute resolution procedure].

E. When including a pre-arbitration negotiation or mediation clause, consider whether the parties should be required to continue to perform the contract pending negotiation or mediation. Also, consider tolling applicable statutes of limitation during the negotiation or mediation phase – or expressly providing that such statutes are *not* tolled. If negotiation or mediation prior to entering into an adjudicative dispute resolution proceeding is contractually required, be careful to follow the dictates of the clause before seeking adjudicative dispute resolution so as not to impair your client's ability to proceed with arbitration or litigation.

F. Mediation clauses can address qualifications of the mediator, how the mediator is selected, how mediation fees and expenses are allocated, locale of the mediation or negotiation, time limits to complete the mediation or negotiation, and similar ministerial – but nonetheless important – concerns.

G. Mediation can ordinarily be begun on a "submission" basis, even in the absence of a clause requiring it. In "submitted" mediations, all parties agree to submit a particular dispute to mediation under the rules of a particular provider (*e.g.*, AAA Mediation Rules) or on terms described in the submission agreement.

H. Finally, whether or not to submit a dispute to mediation requires an analysis of the parties' interests, not just their rights. The same is true when, having submitted a dispute to mediation, the parties engage in mediation proceedings.

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1 The following description of the various procedures along the dispute resolution continuum is adapted from *Manual on Alternative Dispute Resolution*, prepared by the ADR Committee of the Colorado State Bar Association.

2 *See, e.g., Granite Rock Co. v. Int'l Brotherhood of Teamsters*, – U.S. –, 130 S. Ct. 2847 (2010). While the rules of the administering arbitration provider (*see* Rule R-7(b), AAA Commercial Rules) may give the authority to determine the validity or existence of a contract to the arbitrator, it may be best to explicitly assign that authority to the arbitrator in the arbitration agreement if that is what the client desires. *See* note 15 below.

3 *See Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257 (9th Cir. 2006).

4 *See Rent-a-Center West, Inc. v. Jackson*, – U.S. –, 130 S. Ct. 2772 (2010). That the rules of the administering arbitration provider (*see* Rule R-7(a), AAA Commercial Rules) give the authority to the arbitrator is not sufficient; the parties' arbitration agreement must specifically grant to the arbitrator the authority to decide arbitrability issues.

5 Pay special attention to the contract's provisions regarding choice of law. Note that in the U.S. the forum-state's conflict-of-law rules generally govern whether to give effect to the contract's choice of law. *See Bridge Fund Capital Corp. v. Fastbucks Frachise Corp.*, – F.3d – (9th Cir. 2010), for a discussion of how this played out in a dispute between a California franchisee and a Texas-headquartered franchisor where the contract specified Texas law as governing.

6 Regardless of whether the arbitration is "administered", there should be a clear understanding of what rules govern the proceeding. The major U.S. provider-organizations have well-established rules. *See, e.g.*, www.adr.org (AAA), www.jamsadr.com (JAMS). The CPR Institute doesn't normally administer arbitrations, but it does have a set of rules for use in non-administered arbitrations. ww.cpradr.org. There are a number of international organizations that administer arbitrations; many have their own rules.

7 Excessive costs to commence an arbitration or proceed in arbitration can be the basis for a U.S. court to refuse to compel arbitration as unconscionable. *See, e.g., Mendez v. Palm Harbor Homes*, 111 Wn.App. 446, 45 P.3d 594 (2002).

8 Neither an arbitration-provider organization nor its neutrals should be tied to one of the parties, as that tie may render the arbitration clause unconscionable and unenforceable. *See, e.g., Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 623 P.2d 165, 171 Cal. Rptr. 604 (1990).

9 *Bridge Fund Capital Corp., supra* note 5, held that the arbitration agreement's requirement that the arbitration take place in Texas was unconscionable and therefore unenforceable – defeating the franchisor's choice of arbitration as the dispute resolution mechanism. Many foreign countries will not recognize a location-selection clause specifying a hearing location outside its borders, particularly where its resident objects.

10 The rules of most arbitration-provider organizations provide that either it or the arbitrator(s) decide location in the event of a dispute between the parties on that subject.

11 The description of arbitration which follows is also generic and not intended to reflect how arbitration is considered or handled in foreign countries or in all states.

12 *See, e.g.*, RCW 7.04A.230; 9 U.S.C. § 10. With respect to enforcement of *foreign* arbitral awards ıder the U.N. Convention on the Recognition and Enforcement of Foreign Judgments (the "New York ɔnvention") or the Inter-American Convention on International Arbitration (the "Panama Convention"), *see* Article V of the New York Convention, Article 5 of the Panama Convention (grounds for declining to recognize or enforce such awards differ and should be carefully analyzed. The conventions are reproduced after 9 U.S.C.A. § 201 (New York Convention) and 9 U.S.C.A. § 301 (Panama Convention). U.S. courts asked to recognize and enforce such awards will apply the conventions' stated standards. 9 U.S.C. § 207; 9 U.S.C. § 302.

13 *See* note 12, above.

14 Even where arbitration is not specified, parties may generally agree to submit any pending dispute to arbitration. In such cases, counsel will want to incorporate in the "submission agreement" many of the clauses discussed below and confirm that the law of the trading partner's state or country will recognize the choices made.

15 Parties can, of course, contractually provide for private (*i.e.*, "non-administered") arbitration, or agree to do so post-dispute, but by doing so will run up arbitration costs, since the arbitrator will handle (and the parties will pay for) case administration, and the parties may not achieve the benefits of having a trained case administrator/manager handle administration of the case in a manner likely to ensure that procedural niceties are followed.....thus insulating the award from direct or collateral attack. ***Private (i.e., "non-administered") arbitration should <u>not</u> be used in international arbitrations; <u>always</u> use an ADR service provider. The presence of a neutral administering organization (and rules) will give your client's business partner – and ıur client – added comfort.***

16 This is potentially a non-issue for consensual arbitration under a federal court-annexed arbitration program such as that in the Western District of Washington (WD WA LR 39.1(d)), as all

cases are heard by a single arbitrator and some federal arbitrators may be willing to serve at the statutory rate (currently $250/day) as a *pro bono* service.

17 Federal courts almost uniformly reject an arbitrator's error of law as a ground for vacating the award. The rule in state court varies by state. Washington follows the "error of law/face of the award" doctrine: if an error of law appears on the face of the award or on some paper delivered with it, the award is subject to *vacatur*. *See Broom v. Morgan Stanley*, 169 Wn. 2d 231, 236-240, – P.3d – (2010), for the most recent expression of the doctrine, which is now frequently grounded on the "exceeding powers" provision (an express ground for *vacatur* under the Washington Uniform Arbitration Act). Justice Utter's concurring opinion in *Boyd v. Davis*, 127 Wn.2d 256 at 266-270, 897 P.2d 1239 (1995), gives a good history of the development of the rule under what became RCW chapter 7.04 (now repealed and replaced with RCW Chapter 7.04A). The vitality of "manifest disregard of the law" as a ground for *vacatur* in cases subject to the U.S. Arbitration Act is in question following the Supreme Court's decision in *Hall Street Assocs. LLC v. Mattel, Inc.*, – U.S. –, 128 S. Ct. 1396 (2008).

18 Note that some courts will not require the parties to arbitrate fraud-in-the-inducement claims unless the arbitration agreement specifically covers such claims.

19 Note that in order for a federal court to have jurisdiction, either a federal law claim must be stated or there must be diversity (and the amount-in-controversy threshold met).

20 If additional requirements are desired (*e.g.*, number of arbitrators higher or lower than the ADR-provider's general rules, application of provider's supplemental rules (e.g., AAA's Large Complex Case or Expedited rules (for small dollar value cases)), only arbitrators with industry- specific or length-of-practice experience or substantive-law experience, limits on (or expanded) discovery, expedited hearing, etc.), here is the place to insert them. Be careful, however, of making the arbitration too complex or cumbersome . . . or unwittingly making the arbitration more expensive.

The description of mediation which follows is generic and not intended to reflect how mediation is considered or handled in foreign countries or in all states. Moreover, the term *mediation* is used throughout these materials to describe a facilitated resolution of a dispute. Counsel should be aware that in the international context, mediation is often referred to as *conciliation*. The processes are similar, but may not be identical in all respects. Careful counsel will ensure that all parties to the international business agreement have the same understanding of whatever term is used.

22 In Washington, *see* RCW 5.60.070 (Uniform Mediation Act). Many other states have adopted the uniform act. In Washington, *see also* Local Rule CR 39.1(c)(5), Local Rules for the U.S. District Court, Western District of Washington; Local Rule 16.2(d)(3), Local Rules for the U.S. District Court, Eastern District of Washington. The Alternative Dispute Resolution Act of 1998, enacted by Congress in October 1998 provides for confidentiality of mediation proceedings in all federal courts. *See* 28 U.S.C. § 652(d).

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Drafting Dispute Resolution Clauses

A Practical Guide

AMERICAN ARBITRATION ASSOCIATION®

Available online at **adr.org**

This *Drafting Dispute Resolution Clauses - A Practical Guide* is intended to assist parties in drafting alternative dispute resolution (ADR) clauses for domestic and international cases. This Guide has been updated to correspond with the AAA®'s Commercial Arbitration Rules in effect on October 1, 2013. For a more complete discussion of the international clauses, a *Guide To Drafting Clauses for International Cases* may be found at **www.icdr.org.**

In addition to the suggested standard clauses and optional language, the AAA has compiled a checklist of considerations for the drafter, as well as examples of supplemental language which go beyond the basic clauses. Useful commentary that helps to identify points of interest is provided throughout the Guide. Parties with questions regarding drafting an AAA clause should contact their local AAA/ICDR® office or visit the AAA's clause drafting tool **www.clausebuilder.org.** Contact information for AAA offices is listed on the AAA's website, **www.adr.org.**

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Drafting Dispute Resolution Clauses
A Practical Guide

Introduction

Millions of business contracts provide for mediation and arbitration as ways of resolving disputes. A large number of these contracts provide for administration by the American Arbitration Association® (AAA), a public-service, not-for-profit organization offering a broad range of conflict management procedures.

The agreement to arbitrate or mediate can empower the parties with a great deal of control—over the process and the arbitrator who hears the case, or the mediator who assists the parties in settlement efforts. A well-constructed AAA dispute resolution clause can provide certainty by defining the process prior to a dispute, after which agreement becomes more problematic. This Guide is designed to assist drafters in constructing basic clauses for negotiation, mediation, and arbitration, as well as more comprehensive clauses that address a variety of issues.

The first section of this booklet contains a brief checklist of some of the more important elements a practitioner should keep in mind when drafting or adopting any dispute resolution clause, no matter how basic. The second section describes the major features of arbitration. The third section provides a series of clauses that the AAA feels are appropriate for use in a general commercial setting and which meet different needs and concerns in such a context. The fourth section contains a series of clauses that the AAA deems appropriate for use in the particular contexts of international disputes, construction disputes, employment disputes, and patent disputes. The final section consists of examples of supplemental language which go beyond the basic dispute resolution clauses in Sections III and IV. While the AAA does not necessarily recommend such expanded provisions, it recognizes that such additions are used from time to time to meet specific wishes or needs of the parties. Explanatory text sets forth factors one might take into account when considering whether to include such supplemental language.

AAA services are available through offices located in major cities throughout the United States, in addition to Mexico, Singapore, and Bahrain, as well as through arrangements with other institutions worldwide. Hearings may be held at locations convenient for the parties and AAA offices in most major cities offer hearing rooms. In addition, the AAA provides education and training, produces specialized publications and conducts research on out-of-court dispute settlement. Typically, the parties' agreement to mediate or arbitrate is contained in a future-disputes clause in their contract; the clause may provide that any disagreement will be resolved by AAA Administration under the mediation or arbitration rules of the American Arbitration Association.

The American Arbitration Association is known for the high quality of its panels of mediators and arbitrators, including a Large, Complex Case Panel. A special AAA international center, the International Centre for Dispute Resolution®, administers cases around the globe and anywhere in the U.S.

I. A Checklist for the Drafter of ADR Clauses

Drafting clear, unambiguous clauses contributes to the efficiency of the ADR process. For example, arbitration agreements require a clear intent to arbitrate. It is not enough to state that "disputes arising under the agreement shall be settled by arbitration." While that language indicates the parties' intention to arbitrate and may authorize a court to enforce the clause, it leaves many issues unresolved. Issues such as when, where, how and before whom a dispute will be arbitrated are subject to disagreement once a controversy has arisen, with no way to resolve them except to go to court.

Some of the more important elements a practitioner should keep in mind when drafting, adopting or recommending a dispute resolution clause follow.

- The clause might cover all disputes that may arise, or only certain types.
- It could specify only arbitration – which yields a binding decision – or also provide an opportunity for non-binding negotiation or mediation.
- The arbitration clause should be signed by as many potential parties to a future dispute as possible.
- To be fully effective, "entry of judgment" language in domestic cases is important.
- It is normally a good idea to state whether a panel of one or three arbitrator(s) is to be selected, and to include the place where the arbitration will occur.
- If the contract includes a general choice of law clause, it may govern the arbitration proceeding. The consequences should be considered.
- Consideration should be given to incorporating the AAA's Procedures for Large, Complex Commercial Disputes for potentially substantial or complicated cases. For smaller, simpler cases the drafter may want to call for the Expedited Procedures that limit the extent of the process.
- The drafter should keep in mind that the AAA has specialized rules for arbitration in the construction, patent, payor provider (healthcare), and certain other fields. If anticipated disputes fall into any of these areas, the specialized rules should be considered for incorporation in the arbitration clause. A panel with specialized subject matter expertise and an experienced AAA administrative staff manages the processing of cases under AAA rules.
- The parties are free to customize and refine the basic arbitration procedures to meet their particular needs. If the parties agree on a procedure that conflicts with otherwise applicable AAA rules, the AAA will almost always respect the wishes of the parties.

II. Major Features of Arbitration

Arbitration is a private, informal process by which all parties agree, in writing, to submit their disputes to one or more impartial persons authorized to resolve the controversy by rendering a final and binding decision called an Award. Arbitration is used for a wide variety of disputes – from commercial disagreements involving construction and real estate, financial services, healthcare providers, computers or intellectual property and life sciences (to name just a few), to insurance claims and labor-union grievances. When an agreement to arbitrate is included in a contract, it can serve to expedite peaceful settlement without the necessity of going through the arbitration. Arbitration clauses can act as a form of insurance against loss of good will and business relationships.

The major features of arbitration are:

1. *A Written Agreement to Resolve Disputes by the Use of Impartial Arbitration.*
   Such a provision may be inserted in a contract for resolution of future disputes or may be an agreement to submit to arbitration an existing dispute.
2. *Informal Procedures.*
   Under the AAA rules, the procedure is efficient and straightforward: courtroom rules of evidence are not strictly applicable; there usually is no motion practice or formal discovery; and there is no requirement for transcripts of the proceedings or for written opinions of the arbitrators. Though there is often little formal discovery, the AAA's various commercial rules allow the arbitrator to require production of relevant information and documents. The AAA's rules are flexible and may be varied by mutual agreement of the parties.
3. *Impartial and Knowledgeable Neutrals to Serve as Arbitrators.*
   Arbitrators are selected for specific cases because of their knowledge of the subject matter. Based on that experience, arbitrators can render an award grounded on thoughtful and informed analysis.
4. *Final and Binding Awards that are Enforceable in a Court.*
   Court intervention and review is limited by applicable state or federal arbitration laws and award enforcement is facilitated by those same laws.

During its many years of existence, the AAA has refined its standard arbitration clause. That clause, when linked to AAA case management, offers the parties a simple, time-tested means of resolving disputes. Occasionally, parties or their counsel desire additional provisions. This booklet has been prepared as a general guide for drafting dispute resolution clauses. It contains examples of clauses and portions of clauses that have been used by parties in cases filed with the AAA. Readers should feel free to contact their local AAA office for further information.

The AAA's Commercial Arbitration Rules and Mediation Procedures provide for a streamlined, cost-effective arbitration process, and include a mediation step (subject to the authority of any party to unilaterally opt-out) for cases with claims greater than $75,000; access to dispositive motions; greater clarity concerning the exchange of information between the parties; the inclusion of emergency relief to allow for temporary injunctions; an increased emphasis on arbitrators effectively managing the process with additional tools, authority and specific enforcement powers; and the right for parties to seek sanctions for abusive conduct and for arbitrators to deal with non-paying parties.

III. Clauses Approved by the AAA for General Commercial Use

Arbitration

The standard arbitration clause suggested by the American Arbitration Association addresses many basic drafting questions by incorporating AAA rules. This simple approach has proven highly effective in hundreds of thousands of disputes. Additional language, which parties may wish to add in specific contexts, is discussed in Section IV of this booklet.

If the parties wish, standard clauses also may be used for negotiation and mediation. There are also standard clauses for use in large, complex cases.

The parties can provide for arbitration of future disputes by inserting the following clause into their contracts (the language in the brackets suggests possible alternatives or additions).

STD 1 Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Arbitration of existing disputes may be accomplished by use of the following.

STD 2 We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial [or other] Arbitration Rules the following controversy: [describe briefly]. We further agree that a judgment of any court having jurisdiction may be entered upon the award.

The preceding clauses, which refer to the time-tested rules of the AAA, have consistently received judicial support. The standard clause is often the best to include in a contract. By invoking the AAA's rules, such a clause meets the following requirements of an effective arbitration clause:

- It makes clear that all disputes are arbitrable. Thus, it minimizes dilatory court actions to avoid the arbitration process.
- It is self-enforcing. Arbitration can continue despite an objection from a party, unless the proceedings are stayed by court order or by agreement of the parties.
- It provides a complete set of rules and procedures. This eliminates the need to spell out dozens of procedural matters in the parties' agreement.

- It provides for the selection of a specialized, impartial panel. Arbitrators are selected by the parties from a screened and trained pool of available experts. Under the AAA rules, a procedure is available to disqualify an arbitrator for bias.
- It settles disputes over the locale of proceedings. When the parties disagree, locale determinations are made by the AAA as the administrator, precluding the need for intervention by a court.
- It makes possible administrative conferences. If the clause incorporates the AAA commercial, construction industry or related arbitration rules, an administrative conference with the parties' representatives and AAA case management to expedite the arbitration proceedings is available when appropriate.
- It makes available preliminary hearings in all but the simplest cases and provides arbitrators with a checklist of items to be discussed at the conference if the clause provides for AAA Commercial Rules. A preliminary hearing can be arranged in cases of any size to specify the issues to be resolved, clarify claims and counterclaims, provide for a pre-hearing exchange of information, and consider other matters that will expedite the arbitration proceedings.
- It also makes mediation available. The AAA Commercial Arbitration Rules and Mediation Procedures require parties to mediate or opt-out of the process. If the clause provides for any of the AAA's various commercial arbitration rules, mediation conferences can be arranged to facilitate a voluntary settlement, without additional administrative cost to the parties.
- It establishes time limits to ensure prompt resolution for all disputes. An additional feature of the various AAA rules is a special expedited procedure, which may be used to resolve smaller claims and other disputes that need more speedy resolutions.
- It provides for AAA administrative assistance to the arbitrator and the parties. To protect neutrality and avoid unilateral contact, most rules provide for the AAA to channel communications between the parties and the arbitrator. An AAA case manager may also provide guidance to help ensure the prompt conclusion of a proceeding.
- It establishes a procedure for serving notices. Depending on the rules used and the type of the case, notices may be served by regular mail, addressed to the party or its representative at the last known address. Under the rules, the AAA and the parties may use facsimile transmission or other written forms of electronic communication to give the notices required by the rules.
- Unless otherwise provided, it gives the arbitrator the power to decide matters equitably and to fashion appropriate relief. The AAA commercial rules allow the arbitrator to grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including specific performance.
- It allows *ex parte* hearings. A hearing may be held in the absence of a party who has been given due notice. Thus, a party cannot avoid an award by refusing to appear.
- It provides for enforcement of the award. The award can be enforced in any court having jurisdiction, with only limited statutory grounds for resisting the award. If, in a domestic transaction, as distinguished from an international one, the parties desire

that the arbitration clause be final, binding and enforceable, it is essential that the clause contain an "entry of judgment" provision such as that found in the standard arbitration clause ("and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof").

Negotiation

The parties may wish to attempt to resolve their disputes through negotiation prior to arbitration. A sample clause which provides for negotiation follows.

NEG 1

In the event of any dispute, claim, question, or disagreement arising from or relating to this agreement or the breach thereof, the parties hereto shall use their best efforts to settle the dispute, claim, question, or disagreement. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such solution within a period of 60 days, then, upon notice by either party to the other, all disputes, claims, questions, or differences shall be finally settled by arbitration administered by the American Arbitration Association in accordance with the provisions of its Commercial Arbitration Rules.

Mediation

The parties may wish to attempt mediation before submitting their dispute to arbitration. This can be accomplished by agreeing to mediation, a voluntary process that may be entered into either by a standalone agreement or incorporated into an arbitration clause as a first step and may be terminated at any time by either party.

The AAA Commercial Rules call for mediation to take place as part of the arbitration with parties given the choice to unilaterally opt out of the mediation step. Parties may desire to customize their mediation step in their agreement. Example Mediation 1 can be used for a customized clause and example Mediation 2 can be used to submit a dispute to mediation.

MED 1

If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.

MED 2 The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Commercial Mediation Procedures [the clause may also provide for the qualifications of the mediator(s), the method for allocating fees and expenses, the locale of meetings, time limits, or any other item of concern to the parties].

An AAA administrator can assist the parties regarding selection of the mediator, scheduling, pre-mediation information exchange and attendance of appropriate parties at the mediation conference.

It is prudent to include time limits on steps prior to arbitration. Under a broad arbitration clause, the question of whether a claim has been asserted within an applicable time limit is generally regarded as an arbitrable issue, suitable for resolution by the arbitrator.

Large, Complex Cases

The large, complex case framework offered by the AAA is designed primarily for business disputes involving claims of at least $500,000, although parties are free to provide for use of the LCC Rules in other disputes. The key elements of the program are (1) selection of arbitrators who satisfy rigorous criteria to insure that the panel is an extremely select one; (2) training, orientation, and coordination of those arbitrators in a manner designed to facilitate the program; (3) establishment of procedures for administration of those cases that elect to be included in the program; (4) flexibility of those procedures so that parties can more speedily and efficiently resolve their disputes; and (5) administration of large, complex cases by specially trained, experienced AAA staff.

The procedures provide for an early administrative conference with the AAA, and a preliminary hearing with the arbitrators. Documentary exchanges and other essential exchanges of information are facilitated. The procedures also provide that a statement of reasons may accompany the award, if requested by the parties. The procedures are meant to supplement the applicable rules that the parties have agreed to use. They include the possibility of the use of mediation to resolve some or all issues at an early stage.

The parties can provide for future application of the procedures by including the following arbitration clause in their contract.

LCCP 1 Any controversy or claim arising from or relating to this contract or the breach thereof shall be settled by arbitration administered by the American Arbitration Association under its [applicable] Procedures for Large, Complex Commercial Disputes, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

A pending dispute can be referred to the program by the completion of a Submission to Dispute Resolution form if the underlying contract documents do not provide for AAA administration.

LCCP 2 We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its [applicable] Procedures for Large, Complex Commercial Disputes the following controversy [describe briefly]. Judgment of any court having jurisdiction may be entered on the award.

IV. Clauses for Use in Specific Contexts

The following clauses, which also can provide for periods of negotiation and/or mediation prior to arbitration, may be considered for use in specific contexts. The checklist of considerations in Section I above also should be consulted.

A. Clauses for Use in International Disputes

The International Centre for Dispute Resolution (ICDR), the international division of the American Arbitration Association, administers international commercial cases under various arbitration rules worldwide. The ICDR administers cases under its own International Dispute Resolution Procedures, various AAA rules, the Commercial Arbitration and Mediation Center for the Americas (CAMCA) Rules, the Rules of the Inter-American Commercial Arbitration Commission (IACAC) and the UNCITRAL Arbitration Rules. Under Article 1 of the International Arbitration Rules, parties may designate either the ICDR or the AAA in the arbitration clause for the purposes of naming an administrative agency and conferring proper jurisdiction to the ICDR or the AAA. Following are samples of arbitration clauses pertinent to international disputes.

INTL 1 Any controversy or claim arising out of or relating to this contract shall be determined by arbitration in accordance with the International Arbitration Rules of the International Centre for Dispute Resolution.

INTL 2 Any dispute, controversy, or claim arising out of or relating to this contract, or the breach thereof, shall be finally settled by arbitration administered by the Commercial Arbitration and Mediation Center for the Americas in accordance with its rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

INTL 3 Any dispute, controversy, or claim arising from or relating to this contract, or the breach, termination, or invalidity thereof, shall be settled by arbitration in accordance with the Rules of Procedure of the Inter-American Commercial Arbitration Commission in effect on the date of this agreement.

INTL 4 Any dispute, controversy, or claim arising out of or relating to this contract, or the breach, termination, or invalidity thereof, shall be settled by arbitration under the UNCITRAL Arbitration Rules in effect on the date of this contract. The appointing authority shall be the International Centre for Dispute Resolution. The case shall be administered by the International Centre for Dispute Resolution under its Procedures for Cases under the UNCITRAL Arbitration Rules.

The parties should consider adding a requirement regarding the number of arbitrators appointed to the dispute and designating the place and language of the arbitration. The parties may also submit an international dispute under the AAA's commercial and other specialized arbitration rules. Those procedures do not supersede any provision of the applicable rules but merely codify various procedures customarily used in international arbitration. Included among them are provisions specifying the neutrality of arbitrators, consecutive hearing days, the language of hearings, and opinions. The thrust of the procedures is to expedite international proceedings and keep them as economical as possible.

For strategic or long-term commercial international contracts, the parties may wish to provide a "step" dispute resolution process encouraging negotiated solutions, or mediation in advance of arbitration or litigation. A model step clause and mediation clause follow.

INTL 5 In the event of any controversy or claim arising out of or relating to this contract, the parties hereto shall consult and negotiate with each other and, recognizing their mutual interests, attempt to reach a solution satisfactory to both parties. If they do not reach settlement within a period of 60 days, then either party may, by notice to the other party and the International Centre for Dispute Resolution, demand mediation under the International Mediation Procedures of the International Centre for Dispute Resolution. If settlement is not reached within 60 days after service of a written demand for mediation, any unresolved controversy or claim arising out of or relating to this contract shall be settled by arbitration in accordance with the International Arbitration Rules of the International Centre for Dispute Resolution.

INTL 6 In the event of any controversy or claim arising out of or relating to this contract, the parties hereto agree first to try and settle the dispute by mediation administered by the International Centre for Dispute Resolution under its rules before resorting to arbitration, litigation, or some other dispute resolution technique.

Usually, the effective management of time and expense in arbitration is best left in the hands of experienced case managers and arbitrators. Occasionally, however, parties wish to ensure that matters are resolved in a minimum of time and without recourse to the expense and time necessitated by common law methods of pre-hearing information exchange. The clauses that follow limit the time frame of arbitration (clauses presented in the alternative) and the amount of pre-hearing information exchange available to the parties. One word of caution: once entered into, these clauses will limit the arbitrator's authority to mold the process to the specific dictates of the case.

INTL 7 The award shall be rendered within nine months of the commencement of the arbitration, unless such time limit is extended by the arbitrator.

Alternative

It is the intent of the Parties that, barring extraordinary circumstances, arbitration proceedings will be concluded within 60 days from the date the arbitrator(s) are appointed. The arbitral tribunal may extend this time limit in the interests of justice. Failure to adhere to this time limit shall not constitute a basis for challenging the award.

INTL 8 Consistent with the expedited nature of arbitration, pre-hearing information exchange shall be limited to the reasonable production of relevant, non-privileged documents, carried out expeditiously.

Enforcement of international awards is facilitated by the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), which has been ratified by approximately 150 nations, and facilitated in this hemisphere by the Inter-American Convention on International Commercial Arbitration (the "Panama Convention").

B. Clauses for Use in Construction Disputes

The AAA Construction Industry Arbitration Rules and Mediation Procedures are designed to expedite the dispute resolution process and help the AAA be more responsive to the needs of the construction industry. The rules contain a "fast track" arbitration system for cases involving claims of less than $75,000; enhancements to the "regular track" rules; and a Large, Complex Construction case track for use in cases involving claims of at least $500,000. The parties can provide for arbitration of future disputes by inserting the following clause into their contracts.

CONST 1 Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

CONST 2 We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules the following controversy: (cite briefly). We further agree that the controversy be submitted to (one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, and that a judgment of any court having jurisdiction may be entered on the award.

If parties wish to adopt mediation as part of their contractual dispute settlement procedure, they can insert the following mediation clause in conjunction with a standard arbitration provision, and may also provide that the requirement of filing a notice of claim with respect to the dispute submitted to mediation shall be suspended until the conclusion of the mediation process.

CONST 3 If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Construction Industry Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution technique.

Parties also have the option of inserting a "step" mediation-arbitration clause into their contracts. A dispute resolution hybrid, the clause provides first for mediation and then, if the dispute is not resolved within a specified time frame, arbitration.

CONST 4 Any controversy or claim arising out of or relating to this contract or breach thereof, shall be settled by mediation under the Construction Industry Mediation Procedures of the American Arbitration Association. If within 30 days after service of a written demand for mediation, the mediation does not result in settlement of the dispute, then any unresolved controversy or claim arising from or relating to this contract or breach thereof shall be settled by arbitration administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

If the parties want to use a mediator to resolve an existing dispute, they can enter into the following submission.

CONST 5 The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Construction Industry Mediation Procedures (the clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, the tolling of the statute of limitations, pre-arbitration step clause with time frames and any other item of concern to the parties).

C. Clauses for Use in Employment Disputes

Conflicts which arise during the course of employment, such as wrongful termination, sexual harassment and discrimination based on race, color, religion, sex, national origin, age and disability, have redefined responsible corporate

practice and employee relations. The AAA therefore has developed special rules called the Employment Arbitration Rules and Mediation Procedures. The AAA's policy on employment ADR is guided by the state of existing law, as well as its obligation to act in an impartial manner. In following the law, and in the interest of providing an appropriate forum for the resolution of employment disputes, the Association administers dispute resolution programs which meet the due process standards as outlined in its Employment Arbitration Rules and Mediation Procedures and the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship. If the Association determines that a dispute resolution program on its face substantially and materially deviates from the minimum due process standards of the Employment Arbitration Rules and Mediation Procedures and the protocol, the Association will decline to administer cases under that program. Other issues will be presented to the arbitrator for determination.

An employer intending to incorporate these rules or to refer to the dispute resolution services of the AAA in an employment ADR plan, shall, at least 30 days prior to the planned effective date of the program, (1) notify and (2) provide the Association with a copy of the employment dispute resolution plan. If an employer does not comply with this requirement, the Association reserves the right to decline its administrative services.

Parties can provide for arbitration of future disputes by inserting the following clause into their employment contracts, personnel manuals or policy statements, employment applications, or other agreements.

EMPL 1 Any controversy or claim arising out of or relating to this [employment application; employment ADR program; employment contract] shall be settled by arbitration administered by the American Arbitration Association under its Employment Arbitration Rules and Mediation Procedures and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Arbitration of existing disputes can be accomplished by use of the following clause.

EMPL 2 We, the undersigned parties, hereby agree to submit to arbitration, administered by the American Arbitration Association under its Employment Arbitration Rules and Mediation Procedures, the following controversy: (describe briefly). We further agree that the above controversy be submitted to (one) (three) arbitrator(s) selected from the roster of arbitrators of the American Arbitration Association, and that a judgment of any court having jurisdiction may be entered on the award.

Parties may agree to use mediation on an informal basis for selected disputes, or mediation may be designated in a personnel manual as a step prior to arbitration, litigation, or some other dispute resolution technique. If the parties want to adopt mediation as a part of their contractual dispute-settlement procedure, they can add the following mediation clause to their contract.

EMPL 3 If a dispute arises out of or relates to this [employment application; employment ADR program; employment contract] or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Employment Arbitration Rules and Mediation Procedures, before resorting to arbitration, litigation, or some other dispute resolution procedure.

If the parties want to use a mediator to resolve an existing dispute, they can enter into the following submission.

EMPL 4 The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Employment Arbitration Rules and Mediation Procedures (the clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, and any other item of concern to the parties).

D. Clauses for Use in Patent Disputes

The suitability of arbitration as a prompt and effective means of resolving intellectual property disputes has been well recognized in recent years. Those who use and support arbitration as a way of resolving intellectual property and licensing disputes have acknowledged the following advantages of arbitration over litigation in this technical field: relative speed and economy, privacy, convenience, informality, reduced likelihood of damage to ongoing business relationships, greater suitability to international problems, and, especially important, the ability of the parties to select arbitrators who are experts and familiar with the subject matter of the dispute.

The award is binding only on the parties to the arbitration, and the parties may agree that the award will be modified if the patent that is the subject of the arbitration is subsequently determined to be invalid or unenforceable. If parties foresee the possibility of needing emergency relief akin to a temporary restraining order, they might incorporate the Emergency Measures of Protection (Rule 38) of the AAA Commercial Arbitration Rules (effective October 1, 2013), or specify an

arbitrator by name for that purpose in their arbitration clause, or authorize the AAA to name a preliminary relief arbitrator; for sample clauses, consult Section V, discussion of Preliminary Relief. Parties can provide for arbitration of future disputes by inserting the following clause into their contracts.

PATENT 1 Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Patent Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof.

Arbitration of existing disputes may be accomplished by use of the following clause.

PATENT 2 We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Patent Arbitration Rules the following controversy: (describe briefly). We further agree that the above controversy be submitted to (one) (three) arbitrator(s), and that a judgment of any court having jurisdiction may be entered on the award.

If parties want to adopt mediation as a part of their contractual dispute settlement procedure, they can insert the following mediation clause in conjunction with a standard arbitration provision.

PATENT 3 If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.

If the parties want to use a mediator to resolve an existing dispute, they can enter into the following submission.

PATENT 4 The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Commercial Mediation Procedures (the clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, and any other item of concern to the parties).

V. Other Provisions That Might be Considered

This section contains various provisions which expand upon and are supplemental to the basic dispute resolution clauses set forth in Sections III and IV. The listing of such provisions is not intended to be all-inclusive and does not necessarily indicate that the AAA endorses the use of such additional language. The AAA recognizes, however, that some drafters choose to expand their dispute resolution clauses to reflect at least some of these ideas. Since it is important that practitioners be well informed when making choices in drafting, the section also sets forth, where appropriate, certain of the pros and cons of adopting the various supplemental provisions.

A. Specifying a Method of Selection and the Number of Arbitrators

Under the AAA's arbitration rules, arbitrators are generally selected using a listing process. The AAA case manager provides each party with a list of proposed arbitrators who are generally familiar with the subject matter involved in the dispute. Each side is provided a number of days to strike any unacceptable names, number the remaining names in order of preference, and return the list to the AAA. The case manager then invites persons to serve from the names remaining on the list, in the designated order of mutual preference. The parties may agree to have one arbitrator or three (which significantly increases the cost). If parties do not agree on the number of arbitrator(s), it will be left to the discretion of the AAA to decide the appropriate number of arbitrators.

The parties may use other arbitrator appointment systems, such as the party-appointed method in which each side designates one arbitrator and the two thus selected appoint the chair of the panel.

The Commercial Arbitration Rules, Construction Industry Arbitration Rules, Employment Arbitration Rules along with other domestic specialty rules provide that unless the parties specifically agree in writing that the party-appointed arbitrators are to be non-neutral, arbitrators appointed by the parties must meet the impartiality and independence standards set forth within the rules. The AAA's International Arbitration Rules indicate that all arbitrators acting under their rules shall be impartial and independent.

If parties intend that their party-appointed arbitrators serve in a non-neutral capacity, this should be clearly stated within their clause.

The arbitration clause can also specify by name the individual whom the parties want as their arbitrator. However, the potential unavailability of the named individual in the future may pose a risk.

All of these issues and others can be dealt with in the arbitration clause. Some illustrative provisions follow.

ARBSEL 1 The arbitrator selected by the claimant and the arbitrator selected by respondent shall, within 10 days of their appointment, select a third neutral arbitrator. In the event that they are unable to do so, the parties or their attorneys may request the American Arbitration Association to appoint the third neutral arbitrator. Prior to the commencement of hearings, each of the arbitrators appointed shall provide an oath or undertaking of impartiality.

ARBSEL 2 Within 14 days after the commencement of arbitration, each party shall select one person to act as arbitrator and the two selected shall select a third arbitrator within 10 days of their appointment. [The party-selected arbitrators will serve in a non-neutral capacity.] If the arbitrators selected by the parties are unable or fail to agree upon the third arbitrator, the third arbitrator shall be selected by the American Arbitration Association.

ARBSEL 3 In the event that arbitration is necessary, [name of specific arbitrator] shall act as the arbitrator.

When providing for direct appointment of the arbitrator(s) by the parties, it is best to specify a time frame within which it must be accomplished. Also, in many jurisdictions, the law permits the court to appoint arbitrators where privately-agreed means fail. Such a result may be time consuming, costly, and unpredictable. Parties who seek to establish an ad-hoc method of arbitrator appointment might be well advised to provide a fallback, such as, should the particular procedure fail for any reason, "arbitrators shall be appointed as provided in the AAA Commercial Arbitration Rules."

B. Arbitrator Qualifications

The parties may wish that one or more of the arbitrators be a lawyer or an accountant or an expert in computer technology, etc. In some instances, it makes more sense to specify that one of three arbitrators be an accountant, for example, than to turn the entire proceeding over to three accountants. Sample clauses providing for specific qualifications of arbitrators are set forth below.

QUAL 1 The arbitrator shall be a certified public accountant.

QUAL 2 The arbitrator shall be a practicing attorney [or a retired judge] of the [[specify]] [Court].

QUAL 3 The arbitration proceedings shall be conducted before a panel of three neutral arbitrators, all of whom shall be members of the bar of the state of [specify], actively engaged in the practice of law for at least 10 years.

QUAL 4 The panel of three arbitrators shall consist of one contractor, one architect, and one construction attorney.

QUAL 5 The arbitrators will be selected from a panel of persons having experience with and knowledge of electronic computers and the computer business, and at least one of the arbitrators selected will be an attorney.

QUAL 6 In the event that any party's claim exceeds $1 million, exclusive of interest and attorneys' fees, the dispute shall be heard and determined by three arbitrators.

Parties might wish to specify that the arbitrator should or should not be a national or citizen of a particular country. The following examples can be added to the arbitration clause to deal with this concern.

NATLY 1 The arbitrator shall be a national of [country].

NATLY 2 The arbitrator shall not be a national of either [country A] or [country B].

NATLY 3 The arbitrator shall not be of the nationality of either of the parties.

C. Locale Provisions

Parties might want to add language specifying the place of the arbitration. The choice of the proper place to arbitrate is most important because the place of arbitration implies generally a choice of the applicable procedural law, which in turn affects questions of arbitrability, procedure, court intervention and enforcement.

In specifying a locale, parties should consider (1) the convenience of the location (e.g., availability of witnesses, local counsel, transportation, hotels, meeting facilities, court reporters, etc.); (2) the available pool of qualified arbitrators within the geographical area; and (3) the applicable procedural and substantive law. Of particular importance in international cases is the applicability of a convention providing for recognition and enforcement of arbitral agreements and awards and the arbitration regime at the chosen site.

An example of locale provisions that might appear in an arbitration clause follows.

LOC 1 The place of arbitration shall be [city], [state], or [country].

D. Language

In matters involving multilingual parties, the arbitration agreement often specifies the language in which the arbitration will be conducted. Examples of such language follow.

LANG 1 The language(s) of the arbitration shall be [specify].

LANG 2 The arbitration shall be conducted in the language in which the contract was written.

Such arbitration clauses could also deal with selection and cost allocation of an interpreter.

E. Governing Law

It is common for parties to specify the law that will govern the contract and/or the arbitration proceedings. Some examples follow.

GOV 1 This agreement shall be governed by and interpreted in accordance with the laws of the State of [specify]. The parties acknowledge that this agreement evidences a transaction involving interstate commerce. The United States Arbitration Act shall govern the interpretation, enforcement, and proceedings pursuant to the arbitration clause in this agreement.

GOV 2 Disputes under this clause shall be resolved by arbitration in accordance with Title 9 of the US Code (United States Arbitration Act) and the Commercial Arbitration Rules of the American Arbitration Association.

GOV 3 This contract shall be governed by the laws of the state of [specify].

In international cases, where the parties have not provided for the law applicable to the substance of the dispute, the AAA's International Arbitration Rules contain specific guidelines for arbitrators regarding applicable law. See the discussion concerning International Disputes.

F. Conditions Precedent to Arbitration

Under an agreement of the parties, satisfaction of specified conditions may be required before a dispute is ready for arbitration. Examples of such conditions precedent include written notification of claims within a fixed period of time and exhaustion of other contractually established procedures, such as submission of claims to an architect or engineer. These kinds of provisions may, however, be

a source of delay and may require linkage with a statute of limitations waiver (see below). An example of a "condition precedent" clause follows.

CONPRE 1 If a dispute arises from or relates to this contract, the parties agree that upon request of either party they will seek the advice of [a mutually selected engineer] and try in good faith to settle the dispute within 30 days of that request, following which either party may submit the matter to mediation under the Commercial Mediation Procedures of the American Arbitration Association. If the matter is not resolved within 60 days after initiation of mediation, either party may demand arbitration administered by the American Arbitration Association under its [applicable] rules.

G. Preliminary Relief

While preliminary relief is provided for in the AAA's Commercial Rules, when a clause calls for other rules it is appropriate to provide specifically for it if a need for an interim remedy is anticipated. One way to do so is to incorporate the Emergency Measures of Protection (R-38) of the AAA Commercial Arbitration Rules and Mediation Procedures, discussed above. Alternatively, if the parties foresee the possibility of needing emergency relief akin to a temporary restraining order, they might specify an arbitrator by name for that purpose in their arbitration clause or authorize the AAA to name a preliminary relief arbitrator to ensure an arbitrator is in place in sufficient time to address appropriate issues.

Specific clauses providing for preliminary relief are set forth below.

PRELIM 1 Either party may apply to the arbitrator seeking injunctive relief until the arbitration award is rendered or the controversy is otherwise resolved. Either party also may, without waiving any remedy under this agreement, seek from any court having jurisdiction any interim or provisional relief that is necessary to protect the rights or property of that party, pending the establishment of the arbitral tribunal (or pending the arbitral tribunal's determination of the merits of the controversy).

Note that the AAA's rules provide for interim relief by the arbitrator upon application of a party.

Pending the outcome of the arbitration, parties may agree to hold in escrow money, a letter of credit, goods, or the subject matter of the arbitration. A sample of a clause providing for such escrow follows.

ESCROW 1 Pending the outcome of the arbitration [name of party] shall place in escrow with [law firm, institution, or AAA] as the escrow agent, [the sum of _____, a letter of credit, goods, or the subject matter in dispute]. The escrow agent shall be entitled to release the [funds, letter of credit, goods, or subject matter in dispute] as directed by the arbitrator(s) in the award, unless the parties agree otherwise in writing.

H. Consolidation

Where there are multiple parties with disputes arising from the same transaction, complications can often be reduced by the consolidation of all disputes. Since arbitration is a process based on voluntary contractual participation, parties may not be required to arbitrate a dispute without their consent. However, parties can provide for the consolidation of two or more separate arbitrations into a single proceeding or permit the joinder of a third party into an arbitration. In a construction dispute, consolidated proceedings may eliminate the need for duplicative presentations of claims and avoid the possibility of conflicting rulings from different panels of arbitrators. However, consolidating claims might be a source of delay and expense. An example of language that can be included in an arbitration clause follows.

CONSOL 1 The owner, the contractor, and all subcontractors, specialty contractors, material suppliers, engineers, designers, architects, construction lenders, bonding companies, and other parties concerned with the construction of the structure are bound, each to each other, by this arbitration clause, provided that they have signed this contract or a contract that incorporates this contract by reference or signed any other agreement to be bound by this arbitration clause. Each such party agrees that it may be joined as an additional party to an arbitration involving other parties under any such agreement. If more than one arbitration is begun under any such agreement and any party contends that two or more arbitrations are substantially related and that the issues should be heard in one proceeding, the arbitrator(s) selected in the first-filed of such proceedings shall determine whether, in the interests of justice and efficiency, the proceedings should be consolidated before that (those) arbitrator(s).

I. Document Discovery

Under the AAA rules, arbitrators are authorized to direct a prehearing exchange of documents. The parties typically discuss such an exchange and seek to agree on its scope. In most (but not all) instances, arbitrators will order prompt production of limited numbers of documents which are directly relevant to the issues involved. In some instances, parties might want to ensure that such production will in fact occur and thus provide for it in their arbitration clause.

In doing so, however, they should be mindful of what scope of document production they desire. This may be difficult to decide at the outset. If the parties address discovery in the clause, they might include time limitations as to when all discovery should be completed and might specify that the arbitrator shall resolve outstanding discovery issues. Sample language is set forth below.

DOC 1 Consistent with the expedited nature of arbitration, each party will, upon the written request of the other party, promptly provide the other with copies of documents [relevant to the issues raised by any claim or counterclaim] [on which the producing party may rely in support of or in opposition to any claim or defense]. Any dispute regarding discovery, or the relevance or scope thereof, shall be determined by the [arbitrator(s)] [chair of the arbitration panel], which determination shall be conclusive. All discovery shall be completed within [45] [60] days following the appointment of the arbitrator(s).

The AAA's various commercial arbitration rules provide an opportunity for an administrative conference with the AAA staff and/or a preliminary hearing with the arbitrator. The purposes of such meetings include establishing the extent of and a schedule for production of relevant documents and other information.

J. Depositions

Generally, arbitrators prefer to hear and be able to question witnesses at a hearing rather than rely on deposition testimony. However, parties are free to provide in their arbitration clause for a tailored discovery program, preferably to be managed by the arbitrator. This might occur, for example, if the parties anticipate the need for distant witnesses who would not be able to testify except through depositions or, in the alternative, by the arbitrator holding a hearing where the witness is located and subject to subpoena. In most cases where parties provide for depositions, they do so in very limited fashion, i.e., they might specify a 30-day deposition period, with each side permitted three depositions, none of which would last more than three hours. All objections would be reserved for the arbitration hearing and would not even be noted at the deposition except for objections based on privilege or extreme confidentiality. Sample language providing for such depositions is set forth below.

DEP 1 At the request of a party, the arbitrator(s) shall have the discretion to order examination by deposition of witnesses to the extent the arbitrator deems such additional discovery relevant and appropriate. Depositions shall be limited to a maximum of [three] [insert number] per party and shall be held within 30 days of the making of a request. Additional depositions may be scheduled only with the permission of the

[arbitrator(s)] [chair of the arbitration panel], and for good cause shown. Each deposition shall be limited to a maximum of [three hours] [six hours] [one day's] duration. All objections are reserved for the arbitration hearing except for objections based on privilege and proprietary or confidential information.

K. Duration of Arbitration Proceeding

While AAA Commercial Arbitration Rules normally provide for an award within 30 days of the closing of the hearing, parties sometimes underscore their wish for an expedited result by providing in the arbitration clause, for example, that there will be an award within a specified number of months of the notice of intention to arbitrate and that the arbitrator(s) must agree to the time constraints before accepting appointment. Before adopting such language, however, the parties should consider whether the deadline is realistic and what would happen if the deadline were not met under circumstances where the parties had not mutually agreed to extend it (e.g., whether the award would be enforceable). It thus may be helpful to allow the arbitrator to extend time limits in appropriate circumstances. Sample language is set forth below.

TIME 1 The award shall be made within nine months of the filing of the notice of intention to arbitrate (demand), and the arbitrator(s) shall agree to comply with this schedule before accepting appointment. However, this time limit may be extended by agreement of the parties or by the arbitrator(s) if necessary.

L. Remedies

Under a broad arbitration clause and most AAA rules, the arbitrator may grant "any remedy or relief that the arbitrator deems just and equitable" within the scope of the parties' agreement. Sometimes parties want to include or exclude certain specific remedies. Examples of clauses dealing with remedies follow.

REM 1 The arbitrators will have no authority to award punitive or other damages not measured by the prevailing party's actual damages, except as may be required by statute.

REM 2 In no event shall an award in an arbitration initiated under this clause exceed $_____.

REM 3 In no event shall an award in an arbitration initiated under this clause exceed $_____ for any claimant.

REM 4 The arbitrator(s) shall not award consequential damages in any arbitration initiated under this section.

REM 5 Any award in an arbitration initiated under this clause shall be limited to monetary damages and shall include no injunction or direction to any party other than the direction to pay a monetary amount.

REM 6 If the arbitrator(s) find liability in any arbitration initiated under this clause, they shall award liquidated damages in the amount of $_____.

REM 7 Any monetary award in an arbitration initiated under this clause shall include pre-award interest at the rate of ____% from the time of the act or acts giving rise to the award.

M. "Baseball" Arbitration

"Baseball" arbitration is a methodology used in many different contexts in addition to baseball players' salary disputes, and is particularly effective when parties have a long-term relationship.

- The procedure involves each party submitting a number to the arbitrator(s) and
- serving the number on his or her adversary on the understanding that,
- following a hearing, the arbitrator(s) will pick one of the submitted numbers, nothing else.

A key aspect of this approach is that there is incentive for a party to submit a highly reasonable number, since this increases the likelihood that the arbitrator(s) will select that number. In some instances, the process of submitting the numbers moves the parties so close together that the dispute is settled without a hearing. Sample language providing for "baseball" arbitration is set forth below.

BASEBALL 1 Each party shall submit to the arbitrator and exchange with each other in advance of the hearing their last, best offers. The arbitrator shall be limited to awarding only one or the other of the two figures submitted.

N. Arbitration Within Monetary Limits

Parties are often able to negotiate to a point but are then unable to close the remaining gap between their respective positions. By setting up an arbitration that must result in an award within the gap that remains between the parties, the parties are able to eliminate extreme risk, while gaining the benefit of the extent to which their negotiations were successful.

There are two commonly-used approaches. The first involves informing the arbitrator(s) that the award should be somewhere within a specified monetary range. Sample contract language providing for this methodology is set forth below.

LIMITS 1 Any award of the arbitrator in favor of [specify party] and against [specify party] shall be at least [specify a dollar amount] but shall not exceed [specify a dollar amount]. [Specify a party] expressly waives any claim in excess of [specify a dollar amount] and agrees that its recovery shall not exceed that amount. Any such award shall be in satisfaction of all claims by [specify a party] against [specify a party].

A second approach is for the parties to agree but not tell the arbitrator(s) that the amount of recovery will, for example, be somewhere between $500 and $1,000. If the award is less than $500, then it is raised to $500 pursuant to the agreement; if the award is more than $1,000, then it is lowered to $1,000 pursuant to the agreement; if the award is within the $500-1,000 range, then the amount awarded by the arbitrator(s) is unchanged. Sample contract language providing for this methodology is set forth below.

LIMITS 2 In the event that the arbitrator denies the claim or awards an amount less than the minimum amount of [specify], then this minimum amount shall be paid to the claimant. Should the arbitrator's award exceed the maximum amount of [specify], then only this maximum amount shall be paid to the claimant. It is further understood between the parties that, if the arbitrator awards an amount between the minimum and the maximum stipulated range, then the exact awarded amount will be paid to the claimant. The parties further agree that this agreement is private between them and will not be disclosed to the arbitrator.

O. Assessment of Attorneys' Fees

The AAA rules generally provide that the administrative fees be borne as incurred and that the arbitrators' compensation be allocated equally between the parties and, except for international rules, are silent concerning attorneys' fees; but this can be modified by agreement of the parties. Fees and expenses of the arbitration, including attorneys' fees, can be dealt with in the arbitration clause. Defining the term 'prevailing party' within the contract is recommended to avoid misunderstanding. Some typical language dealing with fees and expenses follows.

FEE 1 The prevailing party shall be entitled to an award of reasonable attorney fees.

FEE 2 The arbitrators shall award to the prevailing party, if any, as determined by the arbitrators, all of its costs and fees. "Costs and fees" mean all reasonable pre-award expenses of the arbitration, including the arbitrators' fees, administrative fees, travel expenses, out-of-pocket expenses such as copying and telephone, court costs, witness fees, and attorneys' fees.

FEE 3 Each party shall bear its own costs and expenses and an equal share of the arbitrators' and administrative fees of arbitration.

FEE 4 The arbitrators may determine how the costs and expenses of the arbitration shall be allocated between the parties, but they shall not award attorneys' fees.

P. Reasoned Opinion Accompanying the Award

In domestic commercial cases, arbitrators usually will write a reasoned opinion explaining their award if such an opinion is requested by all parties. While some take the position that reasoned opinions detract from finality if they facilitate post-arbitration resort to the courts, parties sometimes desire such opinions, particularly in large, complex cases or as already provided by most applicable rules in international disputes. If the parties want such an opinion, they can include language such as the following in their arbitration clause.

OPIN 1 The award of the arbitrators shall be accompanied by a reasoned opinion.

OPIN 2 The award shall be in writing, shall be signed by a majority of the arbitrators, and shall include a statement setting forth the reasons for the disposition of any claim.

OPIN 3 The award shall include findings of fact [and conclusions of law].

OPIN 4 The award shall include a breakdown as to specific claims.

Q. Confidentiality

While the AAA and arbitrators adhere to certain standards concerning the privacy or confidentiality of the hearings (see the AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes, Canon VI), parties might also wish to impose limits on themselves as to how much information regarding the dispute may be disclosed outside the hearing. The following language might help serve this purpose.

CONF 1 Except as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.

The preceding language could also be modified to restrict only disclosure of certain information (e.g., trade secrets).

R. Appeal

The basic objective of arbitration is a fair, fast and expert result, achieved economically. Consistent with this goal, an arbitration award traditionally will be set aside only in egregious circumstances such as demonstrable bias of an arbitrator. Sometimes, however, the parties desire a more comprehensive appeal, most often in the setting of legally complex cases. Parties may include the AAA Appellate Rules in their agreement by including the following clause.

APP 1 "Notwithstanding any language to the contrary in the contract documents, the parties hereby agree: that the Underlying Award may be appealed pursuant to the AAA's Optional Appellate Arbitration Rules ("Appellate Rules"); that the Underlying Award rendered by the arbitrator(s) shall, at a minimum, be a reasoned award; and that the Underlying Award shall not be considered final until after the time for filing the notice of appeal pursuant to the Appellate Rules has expired. Appeals must be initiated within thirty (30) days of receipt of an Underlying Award, as defined by Rule A-3 of the Appellate Rules, by filing a Notice of Appeal with any AAA office. Following the appeal process the decision rendered by the appeal tribunal may be entered in any court having jurisdiction thereof..."

S. Mediation-Arbitration

A clause may provide first for mediation under the AAA's mediation procedures. If the mediation is unsuccessful, the mediator could be authorized to resolve the dispute under the AAA's arbitration rules. This process is sometimes referred to as "Med-Arb." Except in unusual circumstances, a procedure whereby the same individual who has been serving as a mediator becomes an arbitrator when the mediation fails is not recommended, because it could inhibit the candor which should characterize the mediation process and/or it could convey evidence, legal points or settlement positions ex parte, improperly influencing the arbitrator. The AAA Commercial Arbitration Rules and Mediation Procedures (effective October 1, 2013) provide for a mediation/arbitration process that runs concurrently. A sample of a med-arb clause follows that runs sequentially can be used to submit a present dispute or to vary the revised AAA Commercial Rules in a dispute resolution clause.

MEDARB 1 If a dispute arises from or relates to this contract or the breach thereof, and if the dispute cannot be settled through direct discussions, the parties agree to endeavor first to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration. Any

unresolved controversy or claim arising from or relating to this contract or breach thereof shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. If all parties to the dispute agree, a mediator involved in the parties' mediation may be asked to serve as the arbitrator.

T. Statute of Limitations

Parties may wish to consider whether the applicable statute of limitations will be tolled for the duration of mediation proceedings, and can refer to the following language.

STATLIM 1 The requirements of filing a notice of claim with respect to the dispute submitted to mediation shall be suspended until the conclusion of the mediation process.

U. Dispute Resolution Boards

A Dispute Resolution Board (DRB) provides a prompt, rational, impartial review of disputes by mutually accepted experts, which frequently results in substantial cost savings and can eliminate years of wasted time and energy in litigation. DRB procedures may be made a part of construction contract documents.

The contract should contain a paragraph reflecting the agreement to establish the DRB. The text of the actual procedures also should be physically incorporated into the general conditions or supplementary conditions of the contract for construction wherever possible and practical, and such documents as the invitation to bidders or the request for proposals should mention that the formation of a DRB is contemplated. The DRB procedures should be coordinated with the other dispute resolution procedures required by the contract documents.

Suggested language for incorporation in the contract follows.

DRB 1 The parties shall impanel a Dispute Resolution Board of one or three members in accordance with the Dispute Resolution Board Guide Specifications of the American Arbitration Association. The DRB, in close consultation with all interested parties, will assist and recommend the resolution of any disputes, claims, and other controversies that might arise among the parties.

V. Mass Torts

ADR techniques can be employed privately by parties facing the prospect of mass tort litigation to explore in a nonbinding fashion the options for management, evaluation, and/or resolution of the dispute. A wide range of binding and nonbinding techniques, including neutral evaluation, mediation, and arbitration can be used to explore the potential for resolution of a dispute and/or to develop a basic framework for discussions. Although these options have limitations and may not be a substitute for litigation with possible full evidentiary trials, they can provide a useful framework for early discussion of the issues. The parties should be able to formulate procedures to assure confidentiality and to protect against the inappropriate use of information.

Conclusion

A dispute resolution clause should address the special needs of the parties involved. An inadequate ADR clause can produce as much delay, expense, and inconvenience as a traditional lawsuit. When writing a dispute resolution clause, keep in mind that its purpose is to resolve disputes, not create them. If disagreements arise over the meaning of the clause, it is often because it failed to address the particular needs of the parties. Use of standard, simple AAA language may avoid difficulties. Drafting an effective ADR agreement is the first step on the road to successful dispute resolution.

After a dispute arises, parties can request an administrative conference with a AAA case manager to assist them in establishing appropriate procedures necessary for their unique case. This can be done before or after mediator or arbitrator selection. Such conferences can expedite the proceedings in many cases.

This brochure describes ways in which some parties have modified the AAA's time-tested standard clause to deal with specific concerns. Given that commercial transactions vary greatly, its purpose is not to urge use of the provisions cited, but rather to suggest the range of possible options. To arrive at the most suitable and effective ADR clause, parties should consult legal counsel for guidance and advice.

Rules, forms, procedures and guides, as well as information about applying for a fee reduction or deferral, are subject to periodic change and updating.

To ensure that you have the most current information, see our website at **www.adr.org.** Also, for assisted clause drafting, please visit the AAA's clause building tool at **www.clausebuilder.org.**

WELCOME TO COMMON PLEAS MEDIATION SERVICE

Attached is a packet of materials for attorneys and parties to mediation. First is a diagram showing the location of all our mediation rooms and the restrooms. Please note whether you are in a room within Mediation Suite 450 or one of our satellite rooms (411, 409 and 466). Second in the packet are evaluation forms to be completed by all attorneys and parties at the end of the mediation. Leave the evaluations on the table of your mediation room at the end of the mediation. Your completion of the evaluation forms will help us to continue to effectively serve you. Thank you for taking the time to complete them.

Process of Mediation

The purpose of mediation is to attempt to reach a mutually acceptable resolution of the dispute between the parties in a cooperative and informal manner, rather than through a legal and formal manner.

The mediator may have private, confidential conversations (caucuses) with the participants to develop information about the parties' cases and objectives. To facilitate a resolution, the mediator, the parties and their attorneys should work to ensure that every party appreciates the strengths and weaknesses of each side's factual and legal arguments. In the exchange of information and opinions, and in the evaluation of that information, each party will have the opportunity and responsibility to candidly disclose to the mediator the facts, theories, and opinions relied upon concerning the matters in dispute. In addition, the process will focus on the interests and objectives of the parties and possible solutions the parties believe would be fair, equitable and mutually beneficial. Each party will be asked to work with the mediator in considering and evaluating solutions that would satisfy their own interest and those of the other parties to the dispute.

Mediation is a voluntary process. The parties should agree to participate in good faith in the process. Any party may terminate their participation for any reason at any time. It is not required that the parties reach resolution of their dispute. Termination of the mediation without a settlement will send the case back to the appropriate Judge or Magistrate in Common Pleas Court.

Privilege and Confidentiality

The process of mediation is a compromise negotiation. All offers, promises, conduct and statements made in the course of the mediation are confidential. Such offers, promises, conduct and statements are privileged and inadmissible for any purpose under Rule 408 of the Ohio Rules of Evidence. Mediation privilege and confidentiality are also protected under Ohio Revised Code §2710.01 to §2710.10 (the Uniform Mediation Act). Evidence that is otherwise admissible or discoverable is not rendered inadmissible or not discoverable as a result of its use in mediation.

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