How to Draft an Effective Arbitration Clause

September 2, 2020

6:15 p.m. – 7:15 p.m.

CT Bar Association

Webinar

CT Bar Institute, Inc.

CT: 1.0 CLE Credit (General)
NY: 1.0 CLE Credit (AOP)

Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging I acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994

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25 min	Arbitration provisions for a smoother case **Roy L. DeBarbieri**, Zangari Cohn Cuthbertson Duhl & Grello PC, New Haven **Houston Putnam Lowry**, Polivy Lowry & Clayton LLC, Hartford
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Faculty Biographies

Atty. Roy L. De Barbieri of New Haven, Connecticut is Of Counsel to the Firm of Zangari Cohn Cuthbertson Duhl & Grello P.C. with offices in New Haven, Hartford and Providence.

Roy is a distinguished dispute resolution neutral, and continues to perform his independent services as an arbitrator and mediator throughout Connecticut and across the country. He has distinguished himself as a Fellow of the College of Commercial Arbitrators, where he also served as the Chair of the Law Firm CLE Education Committee, and a Director. He is a member of the Executive Committee of the Dispute Resolution Section of the Connecticut Bar Association, and a Past Chair. Roy has 25 years of experience as an arbitrator and mediator of domestic and international commercial disputes. He has served as presiding arbitrator, co-arbitrator and sole arbitrator in approximately 450 arbitrations, and has authored dozens of reasoned awards. He has also mediated approximately 100 domestic and international commercial disputes.

He is a Member of the American Arbitration Association Large Complex Case Panel of Arbitrators, the American Arbitration Association Mediation Panel, and Chartered Institute of Arbitrators. He has served as an ADR Center instructor for many programs on arbitration best practices and mediation advocacy. He testifies as an expert on dispute resolution and lectures to Bar Associations and law firms on the topic of dispute resolution theory and practice. Roy also conducts ad hoc mediations and arbitrations.

BIOGRAPHY
OF
HOUSTON PUTNAM LOWRY

Houston Putnam Lowry is a member of Polivy, Lowry & Clayton, LLC of Hartford, Connecticut. He has been a member of the Connecticut Bar since 1980.

He does an extensive amount of commercial litigation, including domestic and international arbitration. He participated in the drafting of the Restatement of The U.S. Law of International Commercial and Investor-State Arbitration for twelve years and is a life member of the American Law Institute.

He is a fellow of the Chartered Institute of Arbitrators in London, a Chartered Arbitrator, a Liveryman of the Worshipful Company of Arbitrators (London) and a former chair of the CBA Section of Alternative Dispute Resolution.

He has testified before the Connecticut General Assembly and the Congress on ADR issues. He remains active in the United Nations on both topics, primarily in the United Nations Commission on International Trade Law (UNCITRAL). He is a member of the Secretary of State's Advisory Committee on Private international Law (which includes arbitration and mediation).

GETTING THE ARBITRATION PROCESS PARTIES WANT AND NEED

I. Basic clause

a. Broad
b. Narrow
c. Tort claims
d. Statutory claims
e. Conditions precedent
    i. Mediation
    ii. Negotiation
f. Non-signatories
    i. Obligations
        (a) Fail Safe
    ii. Bound (theories)
g. Limit on motions
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i. International
    i. Language to be used
    ii. Provider
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II. Arbitrators

a. Number
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    i. Arbitrability

III. Venue

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b. Must be aware of law
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IX. Remedies

a. Broad
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X. Expenses

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a. Basic
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    i. Cost
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XII. Appeal

a. Limit
b. No Limit
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DRAFTING AN ARBITRATION CLAUSE

Connecticut Bar Association
Alternative Dispute Reposition Section
By: Houston Putnam Lowry
September 2, 2020

1. Why do you care?

    a. Well, if you do it right, arbitration can be:

        i. Faster.

        ii. Cheaper.

        iii. Confidential.

        iv. More final than litigation.

        v. Procedurally more flexible.

        vi. The arbitrators can build up a subject matter expertise.

    b. Arbitration is often used for large classes of disputes that need to be addressed but are large enough that individual adjudication is just not possible (sometimes in conjunction with the Bankruptcy Code because the potential claims are so numerous and large that it makes the company insolvent). For example:

        i. Asbestos claims (such as the WR Grace asbestos claims and the Owens Corning asbestos claims).

        ii. Life insurance claims (such as the Prudential Life claims when it went public).

        iii. Opioid claims.

    c. Clients with regular small litigation often want it to keep the process controllable, such as:

i. Franchise terminations.

ii. Dealer disputes.

iii. Some types of unusual financial transactions, such as factoring.

iv. Ancillary divorce matters (not child custody, in particular).

2. There is a distinction between commercial matters (the subject of this outline) and other kinds of matters.

   a. The parties are generally free to reach any arbitration agreement they desire (party autonomy) and the parties have roughly equal bargaining power.

      i. However, there must be an agreement to arbitrate. The procedure cannot be secret to one party, see *Kenneth Votre v. Patricia Masiano-Votre*, FA-12-4017418-S (May 4, 2015).

      ii. If the parties have very disparate bargaining power, the arbitration agreement may be subject to a contract of adhesion analysis.

   b. The arbitration agreement between the parties will generally be enforced as written (*pacta sunt servanda*). Commercial parties generally expect their written agreement will be followed by the courts.

   c. Don’t write something so restrictive that it is the same as (or worse than!) the court.

      i. Do your really need to incorporate the Practice Book by reference?

      ii. Do you really need to incorporate the rules of evidence by reference?

      iii. Do you really need to specify a hard deadline for the delivery of an arbitral award?

      iv. Do you really need an arbitrator who is a JD-CPA with a doctorate in medieval philosophy who

speaks Basque fluently? You may not be able to find one.

3. Why is there a preference for arbitration in commercial matters?

   a. Traditionally courts would not enforce agreements to arbitrate because it was felt the courts could not (or should not) surrender their jurisdiction to decide disputes to the parties. This was substantially overruled by the Federal Arbitration Act (1925) and Uniform Arbitration Act (1955, amended in 2000). This was done against the backdrop of labor unrest where the courts were not delivering impartial justice.

   b. The parties can structure the dispute resolution process to fit their dispute. The process is "scalable."

      i. There will be a lot of procedural protections for a big dispute (which makes the dispute resolution process slower and more expensive).

      ii. There will be very few procedural protections for a small dispute (which makes the dispute resolution process faster and less expensive).

   c. The parties can pick a decision maker who knows something about the subject of the dispute. For example, the parties may want to pick someone with an engineering background to decide an engineering dispute.

   d. The dispute resolution process can be quicker if managed correctly. Most people do not manage it well. Therefore, you will likely want your arbitrator to have at least some experience.

   e. The decision maker may be insulated from political concerns, especially in states where judges are elected and your subject matter may be controversial.

   f. Sometimes having special provisions for particular industries makes sense (for instance, baseball arbitration requires the arbitrator to pick only one of the parties' last, best offers). One side clearly

wins and one side clearly loses, but it encourages the parties to make a reasonable last offer.

i. The United States is not a party to any international agreement to enforce judgments (either bilateral or multilateral).

ii. However, the United States has signed the Hague Convention of Choice of Courts Agreements (which came into force on October 1, 2015, but not for the United States, People's Republic of China and Ukraine who have not yet ratified their signatures).

4. Most people have a firm conviction that their preconception is the only rational way to proceed. Arbitration is very flexible … probably a lot more flexible than the parties' preconventions.

5. First big question: Do you want to have an administered or an *ad hoc* arbitration? It depends.

   a. Do you have a stable of trained arbitrators to pick from? If not, pick an arbitral institution. They have a stable of trained arbitrators (and probably do arbitrator training).

   b. Have you ever administered an arbitration before? If not, pick an arbitral institution. They have done this before and it is different than arbitration.

   c. Do you know enough about the law of arbitrations that you are comfortable drafting an arbitration clause? If not, pick an arbitral institution. The law which governs the contract is not necessarily the law that governs the arbitration. Unless otherwise specified, the governing law for the arbitration is the law of the arbitral seat (excluding the conflict of law rules).

      i. Some laws regulate how the panel can arbitrate, such as Connecticut General Statutes §42-158m, which provides:

         "Any provision in a construction contract for the performance of work on a construction site

located in this state that purports to require that any dispute arising under the construction contract be mediated, arbitrated or otherwise adjudicated in or under the laws of a state other than Connecticut shall be void and of no effect, regardless of whether the construction contract was executed in this state."

The question is whether or not this is preempted by the Federal Arbitration Act.

ii. There are standard "off the shelf" arbitration clauses from arbitral institutions that offer a good place to start:

1. American Arbitration Association[1]

Standard arbitration clause:

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

2. UNCITRAL[2] recommended arbitration clause:

Any dispute, controversy or claim arising out of or relating to this agreement, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.

[1] This is the "standard" arbitral body within the United States. However, you may want to think about their due process protocol if you are doing consumer disputes.

[2] Every major arbitral institution will administer the UNCITRAL arbitration rules. They all have their own minor implementing rules.

the appointing authority shall be [name of institution or person];

the number of arbitrators shall be [one or three];

the place of arbitration shall be [location]; and

the language to be used in the arbitration proceedings shall be [language].

3. American Dispute Resolution Center:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Dispute Resolution Center, Inc., and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The arbitration shall be conducted in the English language in Hartford County, Connecticut. The seat of the arbitration shall be deemed to be Connecticut and the arbitration shall be governed by Connecticut law. The arbitrator(s) shall have exclusive jurisdiction to determine his jurisdiction. Unless the parties otherwise agree, there will be (i) no discovery and (ii) no mediation.

4. International Chamber of Commerce:[3]

All disputes arising in connection with this Agreement shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one (1) or more arbitrators, appointed in accordance with the said rules. The parties to this Agreement shall have recourse, if necessary,

[3] They tend to set the arbitrator fees by the amount of dispute, regardless of the amount of time the arbitrators spend working on the matter.

to the International Centre for Technical Expertise of the International Chamber of Commerce in accordance with the International Chamber of Commerce's Rules for Technical Expertise. The seat of the arbitration shall be deemed to be Connecticut and the arbitration shall be governed by Connecticut law.

iii. How comfortable are you going to court to fill in the gaps if there is no arbitral institution? If not, use an arbitral institution.

6. The next big question is whether the dispute exists now (a *compromis*) or the clause governs future disputes (arbitration clause).

   a. Most arbitration clauses govern future disputes.

      i. The European Union disfavors *compromis* for consumers.

   b. Very few “off the shelf” arbitration clauses govern existing disputes.

7. The arbitration clause should generally be scalable.

   a. It makes send to pay more to resolve larger disputes.

   b. It doesn’t make a lot of sense to pay a lot to resolve tiny disputes.

   c. Most arbitral institutions have their own rules. They will administer arbitrations under:

      i. Their rules; and

      ii. The UNCITRAL rules.

   d. Arbitral institutions will almost never administer arbitrations under another arbitral intuition’s rules. For example, the American Arbitration Association will not generally administer an arbitration under the International Chamber of Commerce’s rules.

e. By and large, you will generally not understand the implications of an arbitral institution's rules unless you have a lot of experience with them.

f. The kind of things you can control range from:

i. Whether or not "small claims" sized disputes should go to small claims courts. The small claims amount varies between states. Connecticut's limit remains at $5,000.

ii. Whether or not the arbitration should proceed without an oral hearing (a "documents only" arbitration). The consumer protocol of the American Arbitration Association always gives the consumer the right to request a hearing, no matter what the arbitral clause says.

iii. The number of arbitrators. The administrative expense of a three person arbitral panel are FIVE times the administrative expenses of a single arbitrator.

iv. The time period to do things. When the time periods are shortened, it is generally called an "expedited" arbitration.

v. Many arbitration rules give an absolute right to mediation, even if the amount of the case does not justify it. You can "opt out" explicitly if you want to.

vi. Will telephonic or video conferenced arbitrations be allowed? This is common in the age of the COVID-19 pandemic. Zoom hearings are getting more commonplace. Hearings assisted by technology have been common in large classes of disputes (such as telephone hearings in the Prudential life insurance disputes) and Zoom hearing in the asbestos disputes.

8. What are the standard elements of an arbitration clause?

a. There must be an agreement to arbitrate. This means the parties have indicated their intention to be bound by the decision of a third party. "Non-binding

arbitration" is an oxymoron (but sometime people say it anyway).

i. There will be no arbitration if the parties have not contracted for it, *A. Dubreuil & Sons, Inc. v. Lisbon*, 215 Conn. 604 (1990), Connecticut General Statutes §52-408 (repealed for agreements effective October 1, 2018), Connecticut General Statutes §52-407dd (effective for agreements effective October 1, 2018), Connecticut General Statutes §50a-107 and 9 U.S.C. §2.

ii. The consent must be in writing, *Morganti v. Boehringer*, 20 Conn. App. 67 (1989), Connecticut General Statutes §52-408 (repealed for arbitration agreements effective October 1, 2018), Connecticut General Statutes §52-407ff (effective for agreements effective October 1, 2018), Connecticut General Statutes §50a-107 and 9 U.S.C. §2. Writing includes emails and faxes.

iii. The writing must be signed, except under Connecticut General Statutes §50a-107(2). Electronic signatures are generally enforceable.

b. The scope of the dispute being arbitrated must be specified, *Gary Excavating v. North Haven*, 164 Conn. 119 (1972).

i. Contrary to many arbitration rules, the courts have jurisdiction to determine the jurisdiction of the arbitral tribunal, *Welch Group, Inc. v. Creative Drywall, Inc*., 215 Conn. 464, 467 (1990); *Flynn v. Newington*, 2 Conn. App. 230 (1984), and *M&L Building Corporation v. CNF Industries, Inc*., 7 Conn. L. Rptr. 31 (1992). This is contrary to Connecticut General Statutes §50a-116(1). The parties may change this default because Connecticut adopted the Revised Uniform Arbitration Act (effective for arbitration clauses effective after October 1, 2018).

c. The procedure cannot be secret to one party, *see Kenneth Votre v. Patricia Masiano-Votre*, FA-12-4017418-S (May 4, 2015). If there is no agreement to arbitrate, there will be no arbitration.

d. The parties can pick a decision maker who knows something about the subject of the dispute. For example, the parties may want to pick someone with an engineering background to decide an engineering dispute. Be careful you don't pick such specialized criteria that you end up with a null set of potential arbitrators.

e. The dispute resolution process can be quicker if managed correctly. Most people do not manage it well. Therefore, you will likely want your arbitrator to have at least some experience. With a three person panel, an attorney with trial experience is often picked as the chair.

    i. Will the parties each appoint their own arbitrator? This is very common in labor contracts.

    ii. Will the parties be selected using a list procedure (only possible if the arbitration is supervised by an arbitral institution).

f. Sometimes having special provisions for particular industries makes sense (for instance, baseball arbitration requires the arbitrator to pick only one of the parties' last, best offers). One side clearly wins and one side clearly loses, but it encourages the parties to make a reasonable last offer.

g. Arbitration clauses will be liberally construed, *Middletown v. Police Local No. 1361*, 187 Conn. 228 (1982).

h. Pre-conditions to instituting arbitration, such as mediation. Perhaps you will require the company president to sign the arbitration demand…

i. Whether or not the arbitrator has the power of an *amiable compositeur* (almost never done).

    i. There is some doubt some United States jurisdictions will enforce *amiable compositeur* awards.

        1. There is some concern such a choice might not be respected because it functionally

prevents challenging an award for manifest disregard of the law and parties are not generally allowed to contractually change the standard for reviewing awards.

ii. The parties should be very wary about appointing such an arbitrator unless:

1. They know the arbitrator VERY well, and;

2. They implicitly trust the arbitrator's personal judgment to "do the right thing."

Having a replacement arbitrator would be a disaster under such circumstances.

j. Whether or not provisional relief or interim measures of protection may be granted.

i. Is a bond required?

ii. Are attachments allowed?

iii. Are only conservatory measures allowed?

iv. When is it necessary to go to a court, either to get the interim measures of protection or to enforce them?

v. Explicitly allowed in the Revised Uniform Arbitron Act, Connecticut General Statutes §52-407hh (for agreements effective after October 1, 2018).

1. RUAA §8(a) allows the court to grant "provisional remedies" (not a defined term) before the arbitrator is appointed.

2. RUAA §8(b) allows either the court or the arbitrator to act once the arbitrator is appointed.

vi. The updated UNCITRAL arbitration rules have detailed provisions regarding interim measures of protection.

vii. The updated UNCITRAL Model Law on International Commercial arbitration has a lot of provisions on

this topic.

k. May arbitrations be consolidated? Conversely, should consolidation be prohibited?

i. When between the same parties?

ii. When between differing parties, but relating to the same dispute?

iii. Which arbitral tribunal survives?

iv. Revised Uniform Arbitration Act Connecticut General Statutes §52-407jj explicitly allows consolidation to be ordered by a court (for agreements effective October 1, 2018).

v. No consolidation will be allowed if the arbitration clause prohibits it.

9. More "exotic" types of clauses that people are increasingly considering:

a. **Med-Arb**: where a mediation is conducted first, then followed by an arbitration conducted by the same neutral.

i. **Advantage:** The neutral will know a lot more about the case because they will be spending more time with the parties.

ii. **Disadvantage:** There is a risk the neutral will learn something in an *ex-parte* mediation session that will affect the arbitration award that was unknown to the other party.

b. **Arb-Med**: Where an arbitration is conducted first (and the arbitration award is put in the arbitrator's vest pocket), followed by a mediation by the same neutral.

i. **Advantage:** The binding decision was done first, before there was ex-parte contact with the neutral.

ii. **Disadvantage:** It will take more time. There is some question about what happens if the

mediated settlement is breached. Will the arbitration award be revived? What happens if the dispute is considered non-arbitral? Will that affect the mediated settlement?

10. Should there be any preconditions to invoking the arbitration clause?

    a. Is there a mandatory negotiation period?

    b. Is there mandatory mediation? For how long?

11. What kind of award do you want?

    a. A basic award.

    b. A reasoned award (which takes more time and therefore increases the arbitrator cost). According to *Leeward Const. Co., Ltd. v. Am. Univ. of Antigua-College of Medicine,* 826 F.3d 634, 640 (2d Cir. 2016), this means "something more than a line or two of unexplained conclusions, but something less than full findings of fact and conclusions of law on each issue raised before the panel."

    c. Findings of facts and conclusions of law (usually more thorough than even a reasoned award).

    d. The specific arbitration rules may have something to say in this regard, such as the AAA Commercial Arbitration Rule 46(b).

12. There are additional issues in international cases:

    a. The United States is not a party to any international agreement to enforce judgments (either bilateral or multilateral).

        i. The United States has not signed the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. Only Ukraine and Uruguay have signed it and neither party has ratified its signature.

b. The United States has signed the Hague Convention of Choice of Courts Agreements (which came into force on October 1, 2015, but not for the United States, People's Republic of China and Ukraine; none of whom have yet ratified their signatures).

c. Parties are concerned nationals will be treated better than foreigners in international cases heard by domestic courts.

d. In investor-state arbitrations, private parties are concerned about litigating in a foreign party's courts. A sovereign will not willingly submit itself to the courts of another country. That is why this kind of arbitration exists (and has a lot of peculiarities). The current hot topic is whether or not such disputes should be exclusively heard by standing bodies.

e. Where will the arbitral award be enforced? You should ensure the seat's arbitral awards will be enforced where the defendant's assets are located when you draft the arbitration clause.

    i. 1958 New York Convention on the Recognition and Enforcement Of Foreign Arbitral Awards. (www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf)

        1. There are 165 state parties to this convention as of Wednesday, August 26, 2020.

    ii. 1975 Panama Convention on International Commercial Arbitration (http://www.oas.org/juridico/english/treaties/b-35.html).

        1. There are 19 state parties to this convention as of Tuesday, July 28, 2020.

f. Language of the arbitration proceedings. If it is not specified, it may end up the language of the arbitration agreement or the arbitrators' mother tongue. The law of the seat of the arbitration may require an official state language be used.

g. You may want to consult the American Law Institute's Restatement on International Commercial Arbitration, which is expected to be published soon.

13. Pathological Arbitration Clauses: The arbitration clause does not work.

a. Do the parties mean to arbitrate?

i. Example - In the case of dispute, the parties undertake to submit to arbitration but in the case of litigation, the Connecticut Superior Court shall have exclusive jurisdiction.[4]

ii. Example - All disputes arising out of this contract will be submitted in first instance to an arbitral tribunal of the American Arbitration Association. If the decision is not acceptable to either party, an ordinary court of law, to be designated by the claimant, shall be competent.[5]

iii. Example - In the event of any unresolved dispute, the matter shall be referred to the American Arbitration Association.[6]

b. Choosing the wrong or non-existent arbitral institution. Verify the arbitral institution you select in the clause exists and handles cases of this type.

1. Example - The appointing authority shall be the American Arbitration Association in Bloomfield, Connecticut.[7]

2. Example - Any arbitration shall be

[4] Do the parties go to arbitration or litigation? It is unclear.

[5] There is no indication of an intention to be bound by the decision of the arbitral panel.

[6] It is uncertain whether this dispute is being submitted to arbitration or to mediation.

[7] There is no office of the American Arbitration Association in Bloomfield, Connecticut.

administered by the arbitration rules of the Connecticut Bar Association's Alternate Dispute Resolution Committee.[8]

3. Example - Any arbitration shall take place in accordance with the rules of the New England Arbitration Association.[9]

c. Beware of drafting compromises which make the arbitration difficult.

i. Example - the arbitration shall be conducted in accordance with the rules of the United States Arbitration and Mediation Association of Connecticut, Inc. and shall be administered by the American Arbitration Association.[10] Arbitral institutions usually will administer only their arbitral rules (although almost all will administer arbitrations under the UNCITRAL arbitration rules).

ii. Example - In case of any dispute concerning the merchandise, the parties agree to have recourse to the procedure of conciliation foreseen in the Rules of Conciliation and Arbitration of the International Chamber of Commerce.[11]

iii. Disputes other than those cited above will be finally settled according to the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with these Rules.[12]

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[8] This committee does not have any arbitration rules and does not supervise arbitrations. It is no longer a committee and but is a section.

[9] Needless to say, there is no New England Arbitration Association.

[10] A similar clause created great difficulties for the American Arbitration Association when it was tried.

[11] The parties have agreed to conciliation. Did they also agree to arbitration?

[12] The parties will disagree about which clause is applicable to this particular dispute. Does the dispute involve merchandise or

d. Who names the arbitrators?

i. Example - In the event that a dispute is submitted to arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, the arbitration will be submitted to three arbitrators appointed in accordance with the said Rules and will take place in Swiss Romande: the arbitrators will be nominated by the Swiss Court of Geneva and Lausanne.[13]

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not? Was there ever a valid business reason for using more than one dispute resolution mechanism?

[13] So who appoints the arbitrators in case of a conflict? Do the parties have to apply to the first court before they apply to the second court? How long does any applying party have to wait for a response from the first court before applying to the second court?

Drafting Dispute Resolution Clauses

A Practical Guide

AMERICAN ARBITRATION ASSOCIATION®

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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.**

CONTRACT

Drafting the Arbitration Clause:

A Primer on the Opportunities and the Pitfalls

By Edna Sussman
and Victoria A. Kummer

A review of some of the crucial issues that should be considered in order to draft an effective arbitration clause.

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The arbitration clause is often thrown into the contract at the last minute as the parties toast the conclusion of their negotiations. Usually little more than an afterthought, it deserves considerably more attention from the careful lawyer. Because the arbitration clause can become highly significant down the road if the parties' relationship deteriorates, arbitration practitioners have recognized that the clause should be shaped in a thoughtful and careful way to the transaction and the parties' needs for an economical and efficient dispute resolution process. The opportunity to do this is before the heat of battle. It is during the drafting of the contract.

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The ability to choose the terms of the arbitration clause is one of the signal advantages of arbitration, and it is this ability that differentiates arbitration from court litigation, where parties are bound by local court rules and the civil procedure laws of the jurisdiction in which the court sits. Drafters have the opportunity to streamline the resolution of any subsequent dispute, to ensure that it is heard by appropriate decision makers, and to maximize the chances of enforcing the ultimate decision. Conversely, carelessness in drafting can lead to "pathological clauses" that are not enforceable, procedural requirements that are impossible to satisfy, and provisions that endanger the enforceability of the final award.[1]

While length constraints and the vagaries of the many kinds of contracts containing arbitration clauses preclude an exhaustive review of all of the considerations that should go into drafting an arbitration clause, we review some of the most crucial issues that should be considered. The "boilerplate" arbitration clause and the arbitration provision used in the last deal are not sufficiently tailored to be inserted automatically in all contracts.

Litigation over the arbitration clause is the last thing parties want, but that is precisely what will occur when arbitration is demanded against an unwilling respondent under a poorly drafted arbitration clause.

Do No Harm

Litigation over the arbitration clause is the last thing parties want when a dispute arises and a party demands arbitration, but that is precisely what will occur when arbitration is demanded against an unwilling respondent under a poorly drafted arbitration agreement. Such agreements can prompt litigation of fundamental issues, such as whether there is an agreement to arbitrate and, if there is, what its scope is. To avoid making drafting mistakes, practitioners who are unfamiliar with the nuances of arbitration clauses should use established arbitration clause phraseology. There are excellent resources to assist in the drafting of the dispute resolution clause, for example, the American Arbitration Association's (AAA) *Drafting Dispute Resolution Clauses*[2] and the International Bar Association's (IBA) *Guidelines for Drafting International Arbitration Clauses*,[3] both of which provide detailed guidance on the subject.

The AAA Commercial Arbitration Rules (AAA commercial rules) contain the following straightforward, broad arbitration clause, which has been tested in court:

> 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 Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.[4]

First Steps in the Analysis

The first step the drafter should take is to raise a number of questions with the client, such as: What kinds of disputes are likely to arise? Is the client likely to be a claimant or respondent? Will there be a need for prompt resolution from a business perspective? Will there be a need to assert extra-contractual claims (i.e., claims that are beyond the subject of the contract containing the arbitration clause)? Is confidentiality important? Does the transaction have international ramifications? Answers to these and other questions will help the drafter craft an appropriate arbitration clause for the transaction. They will also alert the drafter to the need to consult, during the drafting process, with counsel in other jurisdictions, including those abroad, where the arbitration may be seated or enforcement may be sought.

Scope of the Arbitration Agreement

Based on the client's answer to the question about the nature of possible future disputes, the drafter can determine the appropriate scope of the arbitration clause. If the parties agree to limit arbitration to certain types of disputes (for example, only contract disputes, or only payment disputes, or disputes under a certain dollar value), the drafter can tailor the clause to cover just those disputes. But care should be taken in adopting this approach as it may lead to challenges to the arbitrator's jurisdiction with the consequent increased costs and risk of inconsistent results.

If the parties want a broad arbitration clause for the resolution of all disputes between them, it is important to use language that has been accepted by the courts of the applicable jurisdiction.

If they also desire to resolve claims in the arbitration that are not related to the subject of the contract, such as an unrelated offset, the contract must include a provision to that effect.

Selection of the Arbitral Forum and Rules

A properly drafted arbitration clause will serve to bind the parties to arbitrate the disputes specified, and will be enforceable, but the careful drafter should not stop there. Additional details specifying how, when, and where to conduct the arbitration should be addressed. Failing to specify these items could lead to procedural disputes that may require court intervention. Such skirmishing can be nipped in the bud by addressing these issues in the arbitration clause.

The first issue is whether to have *ad hoc* arbitration, or arbitration administered by a neutral arbitral institution. Some litigants think that *ad hoc* arbitration is cheaper because no payments need to be made to an administering institution. But that view may be shortsighted, since there are a great many advantages to administered arbitration, including the help of a case administrator assigned by the institution to help the arbitrator and the parties' attorneys move the proceedings along, and the use of the institution's arbitration rules and roster of neutrals. In addition, the institution serves as a neutral intermediary to deal with challenges to arbitrators and manage payments of the arbitrator's compensation. The presence of the arbitral institution may lessen the chances that court intervention will be needed to resolve procedural issues. In addition, it may improve the chances of enforcement and may even be required in some jurisdictions.

If administered arbitration is desired, thought should be given to the rules of the institution. The rules of the major arbitral institutions are similar in many ways, but they are by no means identical; they may differ significantly on such issues as the availability of punitive damages, confidentiality, and hybrid ADR processes, such as "med-arb." The AAA commercial rules and the international arbitration rules of the International Centre for Dispute Resolution (ICDR rules), the AAA's international division, provide that the selection of the AAA or ICDR to administer the arbitration is deemed a selection of the AAA and ICDR rules—and the selection of the AAA or ICDR rules constitutes a selection of the AAA or ICDR as the arbitration administrator.[5]

In addition, attention should be paid to the version of the rules the parties wish to govern their disputes. Many institutional arbitration rules are revised from time to time and provide that the rules in effect at the time of the filing of the arbitration govern, absent a contrary modification in the arbitration agreement.[6] Modifications of other provisions in the selected institution's rules should be approached with caution to avoid the possibility that the institution may conclude it cannot administer the dispute under the rules as amended by the parties.

If selecting an *ad hoc* proceeding, the selection of *ad hoc* arbitration rules is advisable to provide a framework for the conduct of the arbitration.

Selection of Arbitrators

Qualifications. The opportunity to select the arbitrators is one of the chief advantages of arbitration. The parties can choose the decision maker they believe is best suited to the dispute (rather than just being stuck with a judge randomly assigned to the case). Parties can make the most of this unique opportunity by having the drafter of the arbitration clause include arbitrator qualifications or other selection criteria.

The drafter can specify in the agreement the kind of experience, expertise, or other qualifications that the parties want the arbitrator to have. For example, the arbitration agreement could require the arbitrator to possess a specified amount of experience as an attorney or arbitrator, familiarity with the law of a specific jurisdiction, expertise in a particular legal field, or work experience in a particular industry. Care should be taken, however, to avoid making the arbitrator qualifications so constricting that it will be difficult or even impossible to find arbitrators who satisfy them.

Selection Method. The two most common methods for selecting arbitrators are the list method and the party-appointment method. Both methods allow the parties to select their decision maker. Under the list method, frequently used at the AAA and the ICDR, the case administrator, after input from the parties as to their preferences, usually provides a list of 10 to 15 names from the panel of arbitrators. The parties "strike" the names they don't want and "rank" the remaining names in order of preference (known as the "strike and rank" method).

Under the party-appointment system, one arbitrator is selected by each side and the chair is jointly selected by those two arbitrators, often in consultation with the parties. Under the AAA commercial rules, if the party-appointed mechanism is not specified in the arbitration clause, the list "strike and rank" method will be employed. This method is also utilized at the ICDR.

There has been considerable debate in recent years about the desirability and fairness of the party-appointed arbitrator system, but it remains popular, especially in international cases. The

AAA and ICDR will administer a party-appointed process if called for in the arbitration agreement.

Default methods of arbitrator selection are provided in the AAA rules in the event the parties' chosen process fails for some reason to result in the constitution of the panel. In an *ad hoc* proceeding, it is wise to provide in the arbitration agreement for a default appointing authority, to ensure the appointment of the arbitrator.

Number of arbitrators. The arbitration agreement may specify the number of arbitrators, but if it does not, the rules the parties have selected may make the choice for them. If the parties want to control the costs of their arbitration, specifying only one arbitrator in the arbitration agreement should be considered.

If the parties anticipate disputes that will not be especially significant (e.g., in terms of dollar amount, disruption, or impact on their respective businesses), a single arbitrator may do the trick. If larger disputes are possible, three arbitrators may be preferable, although the parties must recognize that three arbitrators will increase both the costs of resolving disputes, and the length of proceedings, due to difficulties in coordinating the arbitrators' schedules. Alternatively, the agreement can provide for one arbitrator for certain types of disputes (e.g., those under a certain dollar amount), and three for others.

When including arbitrator qualifications in the arbitration clause, avoid making them so constricting that it will be difficult or impossible to find arbitrators who satisfy them.

Selection of the Seat

The selection of the seat of the arbitration, which need not be the place where the arbitration is physically held, is a critical choice. The seat selected should be one that is friendly to arbitration. It is generally the procedural law of the seat that is applicable to the arbitration and sets the baseline requirements. It is the jurisdiction that will deal with issues relating to the appointment of arbitrators, challenges to arbitrators, and jurisdiction over a party or a claim. Another important fact is that, although other courts may, in very limited circumstances, refuse to recognize and enforce an arbitral award, the seat of the arbitration is the only forum that can vacate the award.

A seat should be selected that will recognize and enforce the agreement to arbitrate, not interfere in the arbitral process; assist the arbitration proceedings when necessary; and act expeditiously. In making this selection, the parties should also consider whether the law of the seat allows non-nationals to appear as counsel in an arbitration proceeding, specifies criteria for arbitrators to be qualified, determines the language of the arbitration, or requires any special procedures in the arbitration itself. The selection of an arbitration-friendly seat, versus one not-so-friendly, can make a huge difference in the efficiency of the arbitral proceedings and the enforceability of the award.

Another factor to be considered when selecting a seat is whether cross-border enforcement of the award is likely. The laws and procedures of the jurisdictions where enforcement might be sought (as well as requirements as to the conduct of the arbitration) should be researched to avoid problems later if an award from the seat will be the subject of enforcement proceedings. There are traps for the unwary here. An award might not be enforceable in some countries, depending on the seat from which it emanates. For example, although India is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, it will only recognize awards from the 44 countries that have been "notified" by India. Some important jurisdictions are not on that short list.

Arbitrability—Who Decides the Scope of Arbitral Jurisdiction?

The drafter should consider whether to include a provision stating that the arbitrators have the authority to determine their own jurisdiction. The precise application of this principle of "competence-competence" varies from country to country. In the United States the delegation to the arbitrator must be "clear and unmistakable."[7] The rules of most arbitral institutions specify that the arbitrators are empowered to determine their own jurisdiction, and several appellate courts in the United States have held that the adoption of these institutional rules in the arbitration agreement constitutes the requisite "clear and unmistakable" delegation of this power to the arbitrators. However, to provide clarity on this issue and avoid a potentially long and costly detour into the courts at the commencement of an arbitration, the drafter may consider incorporating

into the arbitration agreement language that expressly delegates this power to the arbitrators.

Streamlining the Arbitration

Another opportunity afforded by arbitration is the ability to tailor the process to the transaction and the parties' needs. As arbitration has increasingly been used in large-stakes disputes, it has become commonplace for some attorneys to treat arbitration proceedings like full-blown court litigation—dragging out the process by using expansive, time-consuming and expensive discovery. Arbitration is not litigation and using litigation procedures in arbitration runs counter to the purpose for which arbitration was originally conceived—as a swift and efficient alternative dispute resolution process.

To avoid falling victim to this trend, the parties should agree during the negotiation and drafting of their contract to an authentic arbitration process, one that will preclude litigation maneuvering and return arbitration to its roots as an expeditious and less costly mechanism for resolving disputes. Before such measures are added to the arbitration agreement, care must be taken to think through the nature, size, and complexity of the likely disputes and determine the procedures necessary to obtain a fair result.

One option could be for the drafter to incorporate into the arbitration clause the ICDR Guidelines for Arbitrators Concerning Exchanges of Information in international arbitration.[8] This can be done to streamline discovery in domestic arbitrations as well. Another helpful source of ideas for limiting pre-hearing procedures can be found in the Protocols developed by the College of Commercial Arbitrators.[9]

In order to circumscribe discovery, the parties' counsel should decide what forms of discovery they will need or want, and what methods of discovery they might want to avoid. For example, depositions can be expressly precluded, and a standard of need for document production can be set at a high bar. It also may be possible to agree on e-discovery limitations in the arbitration clause. It might even make sense to dispense with e-discovery altogether.

When limitations on discovery are practicable and can be agreed upon, putting them in the arbitration agreement will help defray (and even avoid) tremendous costs and business disruptions. When a dispute arises, if the parties find their agreement with regard to discovery to be too onerous, they can always agree to change it by mutual consent. The agreement can also provide for adjustments of the discovery limitations at the discretion of the arbitrator upon a requisite showing of need.

The parties can also provide for time limitations, whether because business considerations mandate an expeditious outcome, or because it will foster cost-savings in the arbitration. Typically, such provisions require that the arbitration conclude within a certain number of days from the filing of the demand, or from the appointment of the arbitrators, or require that the award be issued a certain number of days from the closing of the hearing. The drafter should be careful to make time limitations subject to adjustment at the discretion of the arbitrators, to avoid putting the award at risk if the time limits cannot be met.

Form of Award

Party autonomy extends to providing for the type of award to be rendered. The parties can provide for a "bare" award that merely states what relief is granted and to whom, a reasoned award, or a more detailed award with findings of fact and conclusions of law (which is rarely used). The parties may wish to have a reasoned award so they have the satisfaction of knowing the basis for the decision and/or to obtain guidance for future conduct. On the other hand, there may be circumstances in which the parties do not want a reasoned award because it might contain specific findings that could be harmful to them in some way in the future. In arbitration, unlike court, parties can prevent such findings by limiting the nature of the award to be issued in the arbitration agreement.

Under the AAA commercial rules, unless a request for a reasoned award is made in writing by the parties prior to the appointment of the arbitrators, the arbitrators need not render a reasoned award.[10] Parties rarely consider this point at the commencement of the arbitration, so if a reasoned award is desired, it is best to provide for it in the arbitration agreement.

In the past, many arbitrators felt that a reasoned award would provide grounds for a court to refuse to enforce it (despite the fact that a merits review is generally prohibited under the Federal Arbitration Act and most state laws). More recently, there has been a shift by many arbitrators towards providing at least some reasoning in their awards as a reaction to several court decisions that, while enforcing the awards, nevertheless criticized them for their lack of reasoning.

In the international context, it must be noted that some jurisdictions outside the United States require arbitral awards to be reasoned in order to be enforceable. The ICDR rules, like the rules of many institutions, require a reasoned award unless the parties have agreed that no reasons be given.[11]

Confidentiality

Another opportunity offered by arbitration is the ability to provide for confidentiality and avoid the public exposure attendant to court proceedings. Many practitioners wrongly assume that arbitration is "confidential." It is generally accepted that arbitrators and administering institutions have an obligation to keep arbitral proceedings confidential. But in many legal regimes and under many institutional rules, the parties have no such obligation, absent an express confidentiality agreement. Thus, although arbitration is "private," the confidentiality obligations of the parties depend on their express agreement, local law (which varies by jurisdiction), and the rules chosen to govern the arbitration.

If the confidentiality of future disputes is important, it is best to include in the arbitration agreement itself language binding the parties to confidentiality. The ability of the parties to agree on anything diminishes precipitously after a dispute arises and litigation tactics take over. Therefore, confidentiality, like virtually all of the procedural issues that arise in the course of an arbitration, is best addressed during the drafting of the arbitration clause while the parties are working harmoniously. Further, any contractual confidentiality agreement must contain exceptions, such as allowing disclosures required by law. It must also allow submissions to a court necessary for enforcement of the award. If court proceedings ensue, it may not be possible to maintain confidentiality.

Interim Measures

Interim measures, such as attachments or preliminary injunctions, can be as important in arbitration as in litigation. Jurisdictions vary as to whether the arbitrators or the courts have the authority to issue interim measures of protection. Most institutional arbitration rules authorize arbitrators to issue interim measures,[12] and parallel jurisdiction is available in many cases. The AAA commercial rules expressly provide: "A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate." Given the variability of local law on this point and certainly in *ad hoc* arbitration, the parties may wish to consider providing express authority for the courts to issue interim measures, or for the arbitrators to do so, and review the enforceability of such a provision in the relevant jurisdictions.

When the parties need interim relief prior to the appointment of the arbitrator, there could be a delay in obtaining relief because, unlike the courts, where such an application can be made at any time, there is no panel of arbitrators waiting to rule on such a request when the arbitration is first commenced. In addition, empanelling arbitrators takes time.

Rules providing for an emergency arbitrator to be appointed to hear a request for interim measures prior to the constitution of the tribunal are optional under the AAA commercial rules and therefore must be affirmatively elected in the arbitration clause.

The AAA was a leader in developing an emergency arbitrator procedure under which an arbitrator could be appointed to hear a request for interim measures of protection so that relief would be available before the panel is constituted. The emergency arbitrator rules are part of the ICDR international rules.[13] However, they are optional under the AAA commercial rules and therefore must be affirmatively elected in the arbitration clause. The drafter should consider electing the optional emergency arbitrator rules in the arbitration clause if the contracting parties have selected the AAA commercial rules to apply.[14]

Attorney Fees and Costs

Arbitration agreements often contain provisions addressing how attorney fees will be paid. Some provide that each party will bear his or her own attorney fees (known as the American rule), while others provide that the "prevailing party" shall recover its attorney fees and costs from the losing party (the loser pays rule). Arbitration agreements may provide that if an enforcement proceeding is necessary to obtain payment, the losing party will pay the attorney fees and costs of the enforcement proceeding. The purpose of this provision is to encourage voluntary compliance with the arbitral award. Likewise, an arbitration clause may provide that the party demanding arbitration must pay all filing and tribunal fees, subject to adjustment, if at all, in the final award. Alternatively, it may provide that a respondent

who fails to pay his or her share of the costs of the arbitration shall suffer specified consequences. Fee- and cost-shifting provisions are intended to deter frivolous arbitration demands and court challenges. In addition, they can help streamline the proceeding. However, their use should be carefully considered.

Arbitrators generally apply the American rule in U.S. arbitration proceedings conducted under the AAA commercial rules, absent a reason to do otherwise. Under these rules, the arbitrator is authorized to award attorney fees "if all parties have requested such an award or it is authorized by law or their arbitration agreement."[15] However, the ICDR rules, consistent with international practice, provide that the arbitrators "shall fix the costs of the arbitration in its award,"[16] leaving the arbitrators' discretion, if there is no provision in the arbitration agreement dictating the application of the American rule. It should be noted that some jurisdictions outside the United States do not enforce agreements to have each party bear its own attorney fees and costs unless that agreement is reached after the dispute has arisen.

Other Essential Terms

Under virtually all regimes, arbitration agreements must be in writing. In arbitration agreements involving a U.S. party, or where enforcement in the United States may be sought, it is important for the drafter to include an "entry of judgment" provision in order to avoid further litigation on issues of enforcement. The entry of judgment language in the AAA standard arbitration clause states: "Judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof."

To avoid later disputes as to where the arbitration hearing will take place, the drafter should identify with specificity the locale of the hearing. Absent such a provision, the choice may be made under the applicable rules.

If the transaction is international, the drafter should specify in the arbitration agreement the language in which the arbitration will be conducted and in which the submissions should be made. It may also be appropriate to specify the currency in which any damages awarded should be paid and, if a party is a government that would be entitled to sovereign immunity, include a waiver of such immunity and an agreement to submit to the jurisdiction of the court and to entry of judgment.

The law chosen by the parties to govern their contract will dictate the law governing claims that are asserted thereunder. But what about claims that do not arise under the contract but which the parties nevertheless agree may be arbitrated? Where the parties agree on arbitration of extra-contractual claims, the drafter should include the substantive law to govern those claims.

The applicability of the FAA can also be a puzzle unless the arbitration clause expressly says that the FAA applies. The FAA applies to transactions "involving commerce." The term "commerce" is broadly defined under the FAA. The breadth of the FAA has led many courts to hold that the FAA preempts many aspects of state law. Yet, because the applicability of the FAA is not always clear (and courts can be inconsistent in their understanding of its reach), the drafter should expressly provide in the arbitration clause for the FAA to govern, if this is what parties want, and most do. If the FAA governs, state law provisions will then be applicable only to the extent not in conflict with the FAA.

Contracts of adhesion (such as take-it-or-leave-it contracts between parties of unequal bargaining power, e.g., consumers) are always drafted by the stronger party. Since mandatory arbitration provisions in adhesion contracts could be challenged in court on unconscionability grounds, the drafter must be very familiar with state unconscionability law and adhesion contracts. This is necessary to avoid putting into the clause any provisions that may cause the courts to find the arbitration clause to be unconscionable and unenforceable.

There are a host of other issues that could be important in drafting an arbitration clause.[17] Addressing all of them is beyond the scope of this article, but that does not relieve careful practitioners from considering them and deciding whether it would be appropriate to include them in the arbitration clause.

Step Clauses

In recent years, "step clauses," which call for the parties to take certain preliminary steps before they can commence arbitration, are being used with greater frequency. Their popularity may be due to the fact that they give the parties an opportunity to resolve disputes in a less adversarial forum. The contract usually requires a "business persons only" negotiation first, followed by mediation to help the parties amicably resolve the matter before incurring the costs and expenses of arbitration. Requiring mediation first can make it easier for all parties to come to the table. There is no need for either side to "suggest" mediation, which often makes counsel worry that the suggestion alone shows weakness.

Some courts have held that a step clause cre-

ates a condition precedent that must be satisfied before the commencement of arbitration. Accordingly, it is important for the drafter of a step clause to include time limits for completing each step so that it is clear when the next step can be taken.

We do not recommend providing for "good faith" participation in a dispute resolution provision. The good faith requirement may sound nice, but it is a fuzzy, easily circumvented term that can lead to court fights over what constitutes "good faith" participation and whether it has been satisfied.

Additional considerations in drafting a step clause include whether the statute of limitations will be tolled during any of the preliminary processes, and whether to allow applications for interim relief during the mediation. If time is money, the step clause can be varied to have the mediation run concurrently with the arbitration.

Where mediation is used alone, or is part of a step clause, designating an administering institution in the mediation clause can help make the mediation proceed smoothly. The institution's rules provide the procedures for notice and selection of the mediator, and the case manager assigned to the case can help facilitate the initiation and management of the mediation. If the mediation is not administered, these procedures must be included in the mediation portion of the step clause.

Conclusion

The arbitration clause provides an opportunity to tailor the dispute resolution process in the manner desired by the contracting parties. This opportunity should not be squandered. The drafter must be careful to include in the arbitration agreement all provisions that will be needed to ensure its enforceability, as well as the enforceability of any awards that are issued, while still satisfying the parties' needs. The arbitration clause is an essential element in providing users with the kind of arbitration they say they want: one that resolves disputes with a minimum of time and business disruption and at lowest cost. ■

ENDNOTES

[1] Although pathological clauses may sometimes be saved by the courts, they may, in other instances, preclude enforcement of the arbitration agreement. Examples include: arbitration clauses that are unclear as to whether binding arbitration is intended; naming an institution that does not exist or is misnamed; providing too little time for the arbitration to take place with no safety valve for extensions; or providing too much specificity for the arbitrator's qualifications.

[2] This publication can be downloaded from the American Arbitration Association's Web site at www.adr.org (click on Education & Resources).

[3] International Bar Association, IBA Guidelines for Drafting International Arbitration Clauses, (2010), available on the IBA Web site at www.ibanet.org.

[4] The AAA's standard arbitration clause is in the introduction to the AAA Commercial Arbitration Rules (AAA commercial rules).

[5] AAA commercial rules, R-1 & R-2; ICDR international rules, art. 1. Other institutions have similar rules.

[6] This is true of the AAA and ICDR rules. See AAA commercial rule R-1(a) and ICDR rules, art. 1.

[7] See, *First Options of Chicago Inc. v. Kaplan*, 514 U.S. 938 (1995). See also *Rent-A-Center, West Inc. v. Jackson*, 130 S. Ct. 2772 (2010). Such a provision ensures that in the United States, as in the United Kingdom, the courts will only review jurisdiction after determination in the arbitration. See *Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Aff. Gov't of Pakistan*, [2010] UKSC 46.

[8] Available for downloading at www.adr.org (click on Education & Resources).

[9] The College of Commercial Arbitrators, Protocols for Expeditious, Cost-Effective Commercial Arbitration, 2010, available at www.thecca.net/CCA _Protocols.pdf.

[10] Rule R-42(b).

[11] ICDR rules, art. 27(2).

[12] AAA rules, R-34(a).

[13] ICDR rules, art. 37.

[14] AAA commercial rules, optional rule O-1-8.

[15] AAA commercial rules, R-43(d)(ii).

[16] See, e.g., ICDR rules, art. 31.

[17] Additional provisions that might be considered include whether to: (1) limit the types of damages that the arbitrator can award (e.g., by excluding punitive and consequential damages); (2) specify the interest rate to be applied; (3) limit specific issues for expert determinations; (4) permit summary disposition on written submissions; (5) waive the right to appeal (or, alternatively, allow appeals as permitted by law); (6) allow joinder and consolidation in certain circumstances; (7) include class action provisions; (8) empower the arbitrator to decide the case based on the equities (*ex aequo et bono*); (9) provide for a special type of arbitration (such as high-low or baseball arbitration); or (10) provide for online dispute resolution mechanisms.