Drafting Dispute Resolution Clauses

A PRACTICAL GUIDE

Amended and Effective September 1, 2007

Polimaster Ltd. v. RAE Systems, Inc.
No. 08-15708 archived on November 26, 2010

American Arbitration Association

Dispute Resolution Services Worldwide

www.adr.org

This booklet is intended to assist parties in drafting alternative dispute resolution (ADR) clauses. With that in mind, and in addition to the suggested clauses, the committee compiled a checklist of considerations for the drafter, as well as examples of supplemental language which go beyond the basic clauses. Users will benefit from the commentary throughout the text which helps to identify points of interest. Parties with questions regarding drafting an AAA clause should contact their local AAA office. Offices are listed on the AAA's website, www.adr.org.

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Drafting Dispute Resolution Clauses – A Practical Guide

Introduction

Every year, 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. AAA services are available through offices located in major cities throughout the United States and Dublin, Ireland, as well as through arrangements with other institutions worldwide. Hearings may be held at locations convenient for the parties. 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 under the mediation or arbitration rules of the American Arbitration Association.

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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.

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, and 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.

I. A Checklist for the Drafter

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.

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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.

> The drafter should keep in mind that the AAA has specialized rules for arbitration in the construction, patent, securities 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. 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

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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 award. It is used for a wide variety of disputes – from commercial disagreements involving construction, securities transactions, computers or real estate (to name just a few), to insurance claims and labor-union grievances. When an agreement to arbitrate is included in a contract, it might expedite peaceful settlement without the necessity of going to arbitration at all. Thus, an arbitration clause is a form of insurance against loss of good will.

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 relatively simple: 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 may be no 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.

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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.

III. Clauses Approved By the AAA for General Commercial Use

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.

The standard arbitration clause also may include reference to the AAA's Optional Rules for Emergency Measures of Protection (before an arbitrator is selected) and for expedited arbitration.

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.

Arbitration

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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 [including the Optional Rules for Emergency Measures of Protection], 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.

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> 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. If the clause provides for AAA rules, a preliminary hearing can be arranged in commercial 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. 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 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.

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> 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 of a 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.

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Mediation

The parties may wish to attempt mediation before submitting their dispute to arbitration. This can be accomplished by making reference to mediation (which may be terminated at any time by either party) in the arbitration clause.

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].

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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.

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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.

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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.

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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 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.

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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.

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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 more than 110 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.

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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.

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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 National Rules for the Resolution of Employment Disputes. 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 National Rules for the Resolution of Employment Disputes 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 National Rules for the Resolution of Employment Disputes 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.

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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 National Rules for the Resolution of Employment Disputes 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 National Rules for the Resolution of Employment Disputes, 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 National Rules for the Resolution of Employment Disputes, before resorting to arbitration, litigation or some other dispute resolution procedure.

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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 National Rules for the Resolution of Employment Disputes (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 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.

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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.

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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 increases the cost). If parties do not agree on the number of arbitrator(s), it will be left to the discretion of the case manager.

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.

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The Commercial Arbitration Rules and the Construction Industry Arbitration 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. 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 ten 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 15 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 ten 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.

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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 ten years.

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

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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].

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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].

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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 permitted under the AAA's commercial 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 Optional Rules for Emergency Measures of Protection 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.

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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.

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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.

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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 opportu-

nity 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.

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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.

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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.

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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].

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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 $5 and $10. If the award is less than $5, then it is raised to $5 pursuant to the agreement; if the award is more than $10, then it is lowered to $10 pursuant to the agreement; if the award is within the $5-10 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. Some typical language dealing with fees and expenses follow.

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.

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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 not write a reasoned opinion explaining their award unless 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.

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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. Providing a mechanism for such an appeal assures that the losing party will use it. While parties can attempt to provide for an appeal in the court system pursuant to traditional standards of court review, the authority is mixed as to whether courts will accept appeals from arbitration on such a basis. Another approach is to provide for an appeal to another panel of arbitrators who would apply whatever standard of review the parties might specify. Set forth below is an example of arbitration clause language providing for this latter type of appeal.

APP 1 Within 30 days of receipt of any award (which shall not be binding if an appeal is taken), any party may notify the AAA of an intention to appeal to a second arbitral tribunal, constituted in the same manner as the initial tribunal. The appeal tribunal shall be entitled to adopt the initial award as its own, modify the initial award or substitute its own award for the initial award. The appeal tribunal shall not modify or replace the initial award except [for manifest disregard of law or facts] [for clear errors of law or because of clear and convincing factual errors]. The award of the appeal tribunal shall be final and binding, and judgment may be entered by a court having jurisdiction thereof.

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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. A sample of a med-arb clause follows.

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.

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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.

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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.

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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.

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AAA197-2.5M-7/07