
# 608 - Drafting & Negotiating an ADR Clause that Works

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# Faculty Biographies

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J. David Dantzler is a partner and the leader of the corporate and securities litigation practice group at Troutman Sanders LLP in Atlanta. He has represented businesses and individuals in a broad range of commercial disputes. He has significant experience representing parties in both mediation and arbitration proceedings.

**Monica Palko**

Monica Palko is associate corporate counsel - litigation at BearingPoint, Inc., where she manages large and complex commercial litigation and investigative matters, and also handles litigation-related compliance issues. BearingPoint is one of the world's leading consulting firms, providing strategic consulting, information technology solutions, and managed services to Global 2000 companies and government organizations worldwide.

For several years prior to joining BearingPoint, Monica was a trial attorney in the Commercial Litigation Branch of the Civil Division of the U.S. Department of Justice in Washington, D.C., where she was responsible for defending trial and appellate-level claims against the United States. Before joining the Department of Justice, Monica was an associate at Bracewell & Giuliani LLP (then Bracewell & Patterson LLP) where she handled civil litigation.

**Carla Swansburg**

Carla Swansburg is senior counsel with RBC Law Group, in Toronto, one of the largest in-house legal departments in Canada. She manages complex litigation involving the Royal Bank of Canada and many of its subsidiaries throughout the world, including RBC's network of Global Private Banking offices throughout the US, Europe, Asia, Latin America, and the Caribbean. She handles commercial claims and class actions relating to fraud, banking, securities, breach of contract, and trust, among other matters. Many of the disputes she deals with are cross-border in nature and involve parties in multiple countries or continents. In her practice with RBC, she frequently advises business partners on issues relating to mediation, arbitration, and other forms of ADR, and participates regularly in mediations and negotiations.

Ms. Swansburg practiced commercial litigation at two large Canadian law firms for several years. During this time she was involved in a number of significant class actions, complex commercial disputes and international arbitrations, and worked on a number of issues and cases involving the enforcement of international arbitration awards within the Canadian judicial system.

Ms. Swansburg recently co-chaired the Canadian Institute's advanced continuing education program on managing complex litigation, and has written and spoken on the topics of ADR, litigation management, and e-discovery. She recently participated as a member of the faculty at the International Arbitration Conference hosted by the International Centre for Dispute Resolution in Mexico City.

# DRAFTING ADR

# PROVISIONS THAT WORK

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**Drafting ADR Provisions that Work**

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As arbitration has become more prevalent as a way to resolve commercial disputes, lawyers and their clients have questioned whether "ADR" is, in fact, more effective than court-administered litigation. Originally believed to be a "better, cheaper, faster" way to litigate a whole host of issues and avoid the unpredictability of a jury, many businesses have learned that arbitration, in particular, can be very expensive, takes a long time to conclude and often lacks many of the procedural tools, rights and safeguards available in court proceedings. While alternative dispute resolution tools have generally proven to be effective in dealing with certain types of disputes, many clients who readily agreed to use "ADR" at the beginning of a relationship are disappointed when they find themselves in the midst of an ADR process that does not "fit" the actual dispute.

Even so, ADR provisions continue to be included in a broad range of commercial agreements. Apparently, clients and their counsel continue to believe that even a flawed "alternative" process is preferable to the cost of litigation and the unpredictability of a jury trial in the resolution of business disputes. In light of this reality and with the benefit of some history and experience, it seems that many of the concerns and disappointments with ADR can be addressed at the time that the controlling provisions are being negotiated, drafted and agreed to.[1] In reality, many of the problems encountered in ADR are the result of ineffective contractual provisions in the governing agreement. Why does this happen? While the authors are unaware

[1] The focus of this paper is the analytical process associated with drafting ADR provisions. It is not intended to be a collection of sample provisions or a drafting "primer." There are numerous excellent resources readily available that fully address these issues. A bibliography of resources that the authors have found to be useful are attached. The authors have developed a drafting checklist, which is also included. Hopefully, this tool will be useful in the process of analyzing and designing effective ADR agreements.

of any empirical studies regarding these issues, anecdotal evidence and practical experience indicates that there may be a few root causes of these problems:

- ADR is not limited to arbitration. There are other effective ADR tools that might be used by quarreling parties that are often not included in agreements.
- ADR provisions are often drafted by transactional lawyers who have very little, if any, experience with the processes of litigation and arbitration. Issues that may be critical to the outcome of a dispute may not be readily apparent to lawyers and clients who have limited litigation experience.
- In the context of negotiating an agreement, dispute resolution provisions often receive very little attention. The "details" regarding how disputes will be resolved may not seem as important as issues such as performance, price, payment terms, warranties or restrictive covenants. However, when a problem in the relationship arises with respect to one of these "substantive issues," the details of resolution are critical.

If these basic issues are considered and addressed *at the time that the controlling agreement is being entered into,* then the ADR process can almost certainly be improved and designed to meet the specific circumstances of the underlying relationship.

ADR is a creature of contract.

In general, parties can only be compelled to resolve their differences outside administrative or judicial processes if they have agreed to do so. However, agreements to resolve disputes by alternative means are overwhelmingly enforced even if one of the parties





later has a change of heart.[2] While there are federal and state statutes addressing the enforceability of arbitration awards,[3] there are virtually no restrictions on how an ADR process is structured. Hence, parties have an opportunity to design a process that is specifically tailored to their relationship.

While an agreement to employ ADR procedures may be entered into at any time, it is almost always easier to reach agreement regarding how disputes will be resolved at the outset of a relationship – i.e., before a dispute arises. When crafting ADR provisions, it is critically important to understand that in the context of ADR, "one size does *not* fit all." For ADR to be effective, the structure must address the circumstances of the relationship and take into account the nature of the disputes most likely to arise between the parties. An ADR provision that is incomplete or inapposite to the underlying relationship can be used by a recalcitrant party to avoid or delay a resolution and could lead to litigation over how the alternative process is to be implemented.

As with other contractual provisions, the terms providing for the use of alternative dispute resolution procedures should be as complete and as clear as possible. The parties' location, their underlying businesses and the specific nature of their relationship should be taken into account. But before the drafting begins, the client's dispute resolution objectives should be clearly defined. If the process is to be effective, it is imperative to identify and understand the

[2] *See* Federal Arbitration Act ("FAA"), 9 U.S.C. § 2; *see also e.g., Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 89 (2000) (stating that it was Congress' intention in enacting the FAA "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts."); *Doctor's Assocs. v. Casarotto,* 517 U.S. 681, 685 (1996) (FAA established a "broad principle of enforceability"); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (Congress established a strong federal policy in support of arbitration agreements, "requiring that [courts] 'rigorously enforce agreements to arbitrate.'"); *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1312 (11th Cir. 2002) ("Although previously disfavored by the courts, arbitration agreements to resolve disputes between parties have now received near universal approval."); *Richardson v. Palm Harbor Homes, Inc.*, 254 F.3d 1321, 1324 (11th Cir. 2001) (The FAA "explicitly makes predispute arbitration agreements presumptively enforceable").

[3] For a complete list of state ADR statutes (as updated through December 16, 2003), go to the AAA website at www.adr.org/laws_statutes.

client's reasons for wanting to engage in an ADR process rather than litigating in a court or other governmental tribunal. In many instances, the parties may have mutual goals and objectives in designing an ADR process; however, this will not always be the case. As with all negotiation, compromises may be necessary. However, a clearly spelled out compromise is almost always far better than silence on a difficult issue in the hope that it will be sorted out later. With respect to these issues, "later" means that a dispute has erupted, which almost certainly means that reaching agreement regarding process will be more difficult.

ADR is more than arbitration.

Arbitration is the most frequently used alternative dispute resolution process. However, it is not the only tool available to parties and their lawyers to aid in the resolution of a dispute. In designing an ADR procedure that addresses the specific circumstances of a relationship, the following may also be useful in certain circumstances (in addition to or instead of arbitration):

- Required meetings of the parties (with or without counsel) as a condition to commencing a proceeding
- Mediation, employing a third-party neutral to assist in exploring and achieving a resolution
- Summary trial, employing a "judge" to conduct a trial in accordance with rules agreed upon by the parties[4]

These tools are not mutually exclusive. Depending on the circumstance, they might be effectively combined to create an ADR process that provides for multiple opportunities for resolution.

[4] While summary trials can be an effective tool, they are most often used in complex cases by agreement of the parties during the course of discovery. Accordingly, the focus of this paper is informal and formal mediation and arbitration.





It is also appropriate to consider whether ADR really achieves the client's basic objectives and whether a process can be designed that will be satisfactory. In certain circumstances, the pre-trial procedures, rules of evidence and/or rights of appeal may be critically important to the client. If so, it may be that agreements regarding how a judicial proceeding will be conducted (e.g., waiver of jury trial; agreed upon venue) might provide for a more effective dispute resolution process.

Identify the reasons for using ADR.

If an agreement to resolve disputes by alternative means is to be effective, it is essential that the client's reason(s) for this decision are identified and addressed. There are myriad reasons that parties might prefer (or think they prefer) ADR to judicial or administrative proceedings. In the context of business relationships, the most common goals are:

- Avoiding the possibility of a "run away" jury
- Reducing the attorneys' fees and other costs inherent in conventional litigation
- Expediting the resolution process
- Having the ultimate adjudication made by an experienced/expert decision-maker

In all likelihood, clients have multiple objectives. However, the overarching priorities should be identified and discussed with the client, so that an effective process can be designed.

Even as these and other objectives are being identified, it is important for clients to understand certain "rights" may be diminished or extinguished in the ADR process. For example:

- As a practical matter, discovery may very well be limited to information exchanges between the parties. It may be difficult, if not impossible, to compel the production of information by third-parties.

- In general, the rules of various ADR service providers do not contemplate early termination of a proceeding by dismissal of a claim or summary judgment. Absent a settlement, the ADR process will result in a hearing and decision.
- Appeal rights are very limited. It is very difficult to have the result of arbitration or other summary proceeding reversed or modified.

If these issues are deemed to be especially important, then either: (1) the decision to agree to an ADR process should be reconsidered; and/or (2) these concerns should be addressed, to the extent possible, in the controlling ADR provisions.

Mediation

Mediation can be an effective tool in achieving resolution of any dispute. However, this method of dispute resolution can only be successful if the parties to the dispute are willing to explore compromise. While it is impossible to require a party to explore resolution in good faith, a skilled mediator can assist in this effort.

Parties often agree to engage in mediation after a proceeding has been commenced. However, an agreement might require that the parties engage in mediation prior to filing any proceeding (whether it is an arbitration demand or a lawsuit). The downside is that such a requirement necessarily delays the adjudicative process and might be subject to abuse by a party who simply seeks to avoid an ultimate determination on the merits.

A less formal, and likely more expeditious, mediation-like process that might be employed in the early stages of a dispute is a "meet and confer" requirement. It could be imposed as a pre-condition to filing a proceeding or a required step post-filing, but before discovery begins. This might be especially attractive in relationships between two sophisticated clients or clients willing to commit to an early meeting between senior level members of management, who have authority to resolve disputes.

Mediation, using a third-party neutral mediator, typically involves counsel for both parties and is conducted with a bit more formality than a simple meeting. A "meet and confer" provision should be clear about whether counsel will participate. Regardless, any provision providing for any meeting to explore settlement should be clear about the purpose of the meeting and that statements made during that process will not be used as evidence in any hearing on the merits of the dispute.

Injunctive and Other Equitable Relief

A number of courts have held that arbitrators may be authorized to grant broad equitable relief.[5] Accordingly, this is an issue that merits special attention when drafting an arbitration provision. Even if the parties do not intend for the arbitrators to have such powers at the time that the agreement is entered into, it is quite possible that a court would construe a very broad arbitration provision (e.g. – "any and all disputes") to include claims for injunctions and other equitable relief.

Ordinarily, the arbitration process is not well suited to deal with emergency matters such as temporary restraining orders. For example, it typically takes time to appoint arbitrators, so there is no one available to award such relief even if it is warranted. Conversely, courts are readily available and have specific procedures in place to address requests for emergency relief.

[5] *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991); *Brown v. Coleman Co.*, 220 F.3d 1180, 1183-84 (10th Cir. 2000); *Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co.*, 288 F. Supp. 2d 1033, 1037-38 (D. Ariz. 2003); *British Ins. Co. v. Water St. Ins. Co.*, 93 F. Supp. 2d 506, 516 (S.D.N.Y. 2000); *Scana Energy Mktg. v. Cobb Energy Mgmt. Corp.*, 259 Ga. App. 216, 220 (Ga. Ct. App. 2002); *see also* AAA COMMERCIAL ARBITRATION RULES AND MEDIATION (INCLUDING PROCEDURES FOR LARGE, COMPLEX COMMERCIAL DISPUTES), RULE 43.

In addition, most injunctions and other equitable remedies are extraordinary relief, even if they do not involve emergency matters. Their enforcement and sanction will likely be best administered by a court. Courts are also more experienced in deciding these issues and in fashioning appropriate equitable relief.

For all of these reasons, it is important to consider whether and how to address equitable relief when drafting an arbitration provision. If the parties do not intend to require that these types of claims be the subject of arbitration, then the prudent course is to expressly exclude them from the scope of the arbitration. Conversely, if the parties do intend for the arbitrators to deal with claims for equitable relief, a clear statement to this effect might avoid later procedural wrangling.

The biggest risk in bifurcating equitable and legal claims is that parties could find themselves involved in dual proceedings – i.e., a court proceeding dealing with claims for equitable relief and an arbitration focused on damages. Depending on the nature of the relationship, it might be prudent to be even more specific about which types of equitable claims are subject to arbitration and which are not. For example, claims for an accounting or specific performance of contractual terms (including payment) could be considered equitable in nature. Under certain circumstances, a party might find it strategically advantageous to avoid a well structured arbitration process by asserting that such "equitable claims" must be addressed to a court.

Arbitration Discovery and Pre-Hearing Procedures

While reducing the time and expense associated with discovery is often a fundamental reason for agreeing to engage in arbitration, some level of discovery is almost always appropriate. Therefore, it is important to address this issue in the arbitration agreement.



Most large ADR service providers have developed rules that, among other things, address how discovery will be conducted in an arbitration proceeding.[6] Parties may agree to use a specific service provider and to be bound by its rules throughout the proceeding. Conversely, parties can agree to a completely customized process designed to meet their specific circumstances. This might include "adopting" some or all of a published set of rules (even the Federal Rules of Civil Procedure) with specific limitations or modifications set forth in the agreement. Regardless, it is important to recognize that compelling discovery from third-parties is, at best, very difficult.[7] Accordingly, if third-party discovery is necessary for a dispute to be adjudicated, the decision to agree to arbitration should be given careful consideration.

Most rules provide for an exchange of "documents." With the proliferation of electronic records and data storage, this could be an enormous undertaking. In fact, in 2006, the Federal Rules of Civil Procedure were amended to address matters related to the preservation and production of electronic evidence in the course of civil litigation. Even in fairly simple and straightforward commercial cases, dealing with electronic evidence and complying with these rules can be very, very expensive. Because parties may write their own discovery rules in arbitration, this may be an issue that merits special attention in drafting an arbitration provision. While it is difficult to imagine completely excluding electronic evidence from the scope of discovery, it is possible that reasonable boundaries might be defined that allow for the parties to

[6] *See, e.g.,* AAA COMMERCIAL ARBITRATION RULES AND MEDIATION (INCLUDING PROCEDURES FOR LARGE, COMPLEX COMMERCIAL DISPUTES), RULE 21.

[7] *See* FAA, 9 U.S.C. § 7; FED. R. CIV. P. 45; *Amgen Inc. v. Kidney Ctr. of Del. County, Ltd.*, 879 F. Supp. 878, 881 (N.D. Ill. 1995) (holding that an arbitrator's subpoena duces tecum, issued to a third person not party to the arbitration proceeding and located outside the district in which the arbitrator sat or beyond 100 miles of the site of the arbitration, was valid and enforceable); *Trammochem, Div. of Transammonia, Indem. Ins. Co. of N. Am. v. A.P. Moller*, 2005 U.S. Dist. LEXIS 11544 (S.D.N.Y. 2005) (holding 9 U.S.C.S. § 7 provided authority for invoking the powers of the federal district court to assist the arbitrators in obtaining evidence from non-party witness in Texas for use in arbitration in New York).

exchange relevant information without engaging in extensive electronic evidence recovery and review.

Another issue that might merit special consideration is the use of expert witnesses and related discovery. Will experts be allowed to testify at the hearing? If so, may the adverse party obtain information from the expert prior to the hearing? Are experts required to issue a written report? As with discovery, there are external rules (e.g., Federal Rules of Civil Procedure) that might be adopted and/or modified by the parties to deal with these issues.

While various ADR rules address discovery, almost none address other pre-trial procedures. Motion practice is virtually non-existent in most arbitration proceedings. The result is that every issue is the subject of the evidentiary hearing and can only be disposed of as a result of the hearing. If the underlying relationship between the parties is complex or involves a large amount of money, it might be advisable to provide for the possibility of filing motions to terminate or narrow the proceeding. Again, the parties could simply adopt an existing rule (e.g., Fed. R. Civ. Pro. 56 – Summary Judgment) or develop a customized procedure better suited to their specific circumstance.

Appeal

As a practical matter, the decision of the arbitrator(s) is final. It is very difficult to have a decision overturned.[8] In general, a ruling will only be overturned by a court if there is a finding of corruption, fraud or other misconduct by the arbitrator.[9]

Despite these very limited grounds for appeal, certain proceedings may involve issues that are so significant that it is advisable to preserve that right. In these circumstances, it is important to focus on the record that will be made at the hearing, as well as the form of the ruling. A court or second ADR panel needs something specific to review, especially if it is being asked to reverse a ruling. In many arbitration proceedings, there is no transcript of the hearing and the ruling may be very short on detail. Therefore, if preserving an appeal right is important, then the arbitration provision should require that the final decision be in writing and provide substantial detail regarding the basis for the decision (e.g., require written findings of fact and conclusions of law).

Conclusion

When a dispute arises, the most important provisions in an agreement are those addressing how that dispute will be resolved. Dispute resolution provisions merit the same level of attention and analysis as the substantive terms of a commercial relationship. To be effective, ADR provisions should be tailored to the circumstances of the relationship. If parties and their counsel will take the time to focus on these issues at the outset of a relationship, the likelihood of an effective resolution in the future will almost certainly be increased.

[8] *See, e.g., Lew Lieberbaum & Co. v. Randle*, 85 F. Supp. 2d 123, 126 (E.D.N.Y. 2000) ("Where, as here, an arbitrator has not set forth the specific rationale supporting the decision, the Court may confirm an award if a ground for the arbitrator[s'] decision can be inferred from the facts of the case. If there is even a barely colorable justification for the outcome reached, or even if the award is tainted by errors of fact or law that do not rise to the level of manifest disregard, the court must confirm the arbitration award.")

[9] FAA, 9 U.S.C. § 10; *see, e.g., Lew Lieberbaum & Co. v. Randle*, 85 F. Supp. 2d 123, 126 (E.D.N.Y. 2000) ("A person seeking to vacate an award for manifest disregard must show that the error was obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it. Thus, to modify or vacate an award on this ground, a court must find both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the 'law ignored by the arbitrators … [was] well defined, explicit, and clearly applicable to the case.").

**EFFECTIVE ADR PROVISIONS**
**DRAFTING CHECKLIST**

1. Identify Client's Goals/Objectives – Why use ADR process?

- Limit fees and expenses?
  - Cost of resolution should be proportionate to amounts in dispute
  - No conditions to filing claims
  - Check fee structure of ADR administrators
  - Limit the number of neutrals. Will one arbitrator be sufficient?
  - Strict limitations on discovery and pre-hearing procedural options
  - Short time frames. Set hearing date in agreement.
  - Risks:
    - Relevant information may not be discovered.
    - Decision may be based on incomplete factual record.
    - May limit ability to fully adjudicate complex disputes.

- Prompt resolution?
  - "Prompt" should be defined in the context of the likely dispute.
  - Are rules of selected ADR administrator consistent with "prompt" resolution?
  - No conditions to filing claims.
  - Limit the number of neutrals. Will one arbitrator be sufficient?
  - Limit discovery and pre-hearing procedural options.
  - Clearly define time frames. Set hearing date in agreement.
  - Risks:
    - Relevant information may not be discovered.
    - Decision may be based on incomplete factual record.
    - May limit ability to fully adjudicate complex disputes.

- Need for experienced/expert decision-makers?
  - Arbitration will likely require 3 (vs. 1) decision-maker.
  - Qualifications of arbitrators should be defined.
  - Process for selection of arbitrators is critically important.
  - Subject matter likely requires significant discovery.
  - Provide for expert witnesses and related discovery?
  - Risks:
    - Scheduling difficulties
    - Likely to be expensive

- Avoid unpredictability of a jury?
  - Are there other ways to address this issue? E.g., jury trial waiver; limitation of damages.



  - Risks:
    - Arbitrators are people, too! They can be unpredictable.
    - Pre-trial processes and appeal rights forfeited.

- Confidentiality?
  - Does confidentiality apply to entire proceeding, including the ultimate outcome?
  - Define how information can be used and what will happen at the end.
  - Identify limitations on confidentiality – e.g. requirements of securities laws.
  - Neutrals should agree to confidential treatment at commencement of proceeding.
  - Risks:
    - Cannot use proceeding or outcome as "precedent" with others
    - Unable to publish result

2. Consider ADR Options

- Informal processes – "meet and confer"/management escalation
- Mediation
- Arbitration
- Summary trial
  - These may be used in combination with each other.
  - Tailor process to specific relationship/transaction.

- Consider use of ADR administrator.
  - Do administrator's rules meet goals and objectives?
  - What are the costs/benefits associated with administrator?
  - Does administrator have access to satisfactory neutrals?

- Make certain that client understands the "downside" of ADR:
  - Limited discovery
  - Limited/non-existent pre-trial motion practice (i.e., no early dismissal/narrowing of issues)
  - Limited appeal rights
  - Relaxed rules of evidence
  - No "binding precedent"

3. Informal Resolution Process – Client "meet and confer"

- Is this likely to be effective?
  - If not, do not include.

- Could result in delay of overall resolution process.

- Identify participants
  - Participants should have authority to decide/resolve issues.
  - Qualifications?
  - Will participants' involvement in underlying facts aid or hinder effectiveness?
  - Is "management escalation" appropriate?

- Timing
  - Specify date/timing of meeting.
  - Is meeting required before commencing more formal process?
  - Is meeting likely to be more effective after issues are formally joined? After some level of discovery has occurred?
  - What "triggers" process? Written notice of claim.

- Location
  - Identify location of meeting.

- Confidentiality
  - Meeting's purpose is to explore "settlement and compromise of disputed claims."
  - Substance of meeting and related communications are not to be used for any other purpose.

4. Mediation

- Mandatory or optional?
  - May one party compel mediation?

- Selection of mediator
  - Define selection process?
  - Identify ADR administrator, if appropriate.
  - Special qualifications required?

- Identify client participants in mediation hearing.
  - Participants should have authority to decide/resolve issues.
  - Qualifications?
  - Will participants' involvement in underlying facts aid or hinder effectiveness?



- Timing
  - Specify date/timing of mediation hearing.
  - Is mediation required before commencing more formal process?
  - Is mediation likely to be more effective after issues are formally joined? After some level of discovery has occurred?

- How will issues be defined?
  - What "triggers" process? Written notice of claim?
  - Is written mediation statement required?

- Location
  - Identify location of mediation hearing.

- Allocation of mediation fees and expenses
  - How will expenses be allocated between the parties?

- Confidentiality
  - Purpose of mediation is to explore "settlement and compromise of disputed claims."
  - Substance of mediation and related communications are not to be used for any other purpose.

5. Arbitration

a. Mandatory or optional?

b. Conditions/requirements for filing?
   - Informal processes or mediation?
   - Form of claim?
   - Notice requirements?

c. Use of ADR administrator?
   - Consider filing fees
   - Access to neutrals?
   - Rules – Are they sufficient? Do they work?

d. Scope
   - Specify the nature of claims subject to arbitration.

- Should emergency relief, injunctions and other equitable relief be carved out?
- Different rules/structure depending on amount/issues in dispute?

e. Number/Selection/Qualifications of Arbitrators

- Specify number of arbitrators (1 vs. 3).
  - Is one arbitrator sufficient?
  - Larger number increases cost and scheduling complexities.

- How will arbitrators be selected?
  - Are applicable rules sufficient?
  - Selection process should be clear. Create/modify rules, if necessary.

- Specify any required qualifications/experience/expertise of arbitrator(s).
  - Does preferred ADR administrator have access to "qualified" arbitrators?
  - Should panel include non-lawyers – e.g., accountant, engineer?
  - Except in rare circumstances, at least one arbitrator should be a lawyer.

- If three arbitrators will be used, identify how chair will be selected – e.g., by vote of the three arbitrators?
  - Specify responsibilities/authority of chair.

f. Timing

- Entire schedule – from filing of claim to decision – should be clearly stated.

- Establish time and timing of:

  Responsive pleadings
  Selection of arbitrator(s)
  Beginning and end of discovery
  Pre-hearing conferences/motions/submissions
  Hearing
  Issuance of decision

g. Discovery

- Applicable ADR administrator's rules?

- Specify which discovery tools will be available for use during proceeding?
  - Document requests – available in virtually every case





  - Depositions?
  - Interrogatories?
  - Requests for Admission?

- Mandatory disclosures may be used to limit discovery and/or expedite process. *See, e.g.* FED. R. CIV. P. 26(a).

- Specify limitations, if any, for use of tools – e.g., no more than 10 interrogatories; permitted number and length of depositions.

- Specify order (if appropriate) and timing of discovery.

- Is responding party required to provide a privilege log of documents/information withheld on the basis of privilege?

- Electronic evidence
  - Define "documents" to include or exclude electronic records.
  - Specify limitations/boundaries on electronic record search, retrieval and production.
  - Reminder – Electronic discovery process in court proceedings can be very broad and extremely expensive.

- Experts
  - Permitted (or not)?
  - Disclosure obligations/timing?
  - Written report required?
  - Deposition allowed?

- Is third-party discovery likely to be required for full adjudication?
  - How will this be accomplished?
  - Parties may agree to cooperate in compelling discovery from third-parties, even if judicial process is required.

- Discovery disputes
  - How will they be resolved?
  - Written motions required? (Expensive/time consuming)
  - Authorize chair of panel to decide alone?
  - Attorneys' fees awarded to prevailing party in discovery dispute?

h. Pre-hearing Procedures

- Applicable ADR administrator's rules?

- Motion to dismiss permitted?

- Summary judgment/"narrowing" motions permitted?

- Requirements/limitations on how motions are presented?
  - Written briefs permitted/required (or not)?
  - How will "record" be compiled/presented to arbitrator(s)?

- How will administrative matters be handled?
  - By chair or entire panel?
  - Personal attendance at pre-hearing conferences required?

*NOTE: If there is a perceived need for significant pre-hearing practice, the decision to submit to arbitration should be scrutinized carefully.*

i. Location of Hearing

- Specify location of hearing OR how location will be selected (e.g., by ADR administrator).

- Factors to consider: location of parties; location of witnesses and other sources of proof; location of arbitrator(s)

- Neutral site?

j. Hearing/Decision Requirements

- Specify information to be exchanged by parties prior to hearing *and when.*
  - Exhibits
  - Witnesses
  - Specific statement of claims/defenses?
  - Position statements/hearing briefs?

- Time and Timing
  - Specify date of hearing/outside time.
  - Limitation on length of hearing?
  - Require that hearing to be conducted on consecutive days?
  - Specify date by which decision must be rendered.

- Evidence
  - Arbitrators bound to follow any rules of evidence?
  - Any limitations on evidence or examination rights?
  - Will a transcript of the hearing be made/allowed? (Important if any appeal rights are contemplated.)

- Decision
  - Required to be in writing?
  - Required to explain basis of decision ("reasoned decision")?





  - Required to make findings of fact/conclusions of law? (Important if any appeal rights are contemplated.)
  - Require arbitrator(s) to follow/adhere to governing law?

6. Confidentiality concerns

- How will confidential information be identified/marked?

- How will confidential business information be handled during the proceeding?

- Who will have access to confidential information?

- What will happen to confidential information after the proceeding is concluded?

7. Other Considerations

- Controlling law

- Fee shifting
  - Is prevailing party entitled to recover fees and expenses?
  - Is award of fees and expenses mandatory or permissive?
  - What showing, if any, must be made to recover fees and expenses?

- Appeal
  - Is appeal right important?
  - Grounds for appeal – expanded by agreement?
  - Designate court of appeal
  - Define standard of review

## RESOURCES CONSULTED AND AVAILABLE RESOURCES

***Statutes***

- Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*
- State ADR statutes – available at the AAA website at www.adr.org/laws_statutes

***ADR Rules & Procedures***

- American Arbitration Association ("AAA")
  - Consumer Rules, available at www.adr.org/commercial_arbitration, and includes rules, procedures, and background materials for the following specific areas:
    - CLAIMS PROGRAMS
    - CLASS ARBITRATION
    - COMMERCIAL
    - COMMERCIAL FINANCE
    - CONSTRUCTION
    - ENERGY
    - HEALTHCARE
    - INSURANCE
    - INTELLECTUAL PROPERTY
    - INTERNATIONAL
    - INTERNET
    - OLYMPIC AND PROFESSIONAL SPORTS
    - REAL ESTATE
    - SECURITIES
    - WILLS AND TRUSTS
    - WIRELESS
    - ARCHIVED RULES
  - Consumer Procedures, available at www.adr.org/consumer_arbitration, and includes rules, procedures, and background materials for the following specific areas:
    - CONSUMER ARBITRATION COSTS AND ADMINISTRATIVE FEE WAIVERS
    - CONSUMER ARBITRATION STATISTICS
  - Employment Rules, available at www.adr.org/employment, and includes rules, procedures, and background materials for the following specific areas:



    - EMPLOYMENT ARBITRATION
    - EMPLOYMENT DUE PROCESS PROTOCOL
    - EMPLOYEE BENEFIT PLANS CLAIMS ARBITRATION
  - Labor Rules, available at www.adr.org/fc_labor, and includes rules, procedures, and background materials for the following specific areas:
    - LABOR ARBITRATION
    - PENSION PLAN ARBITRATION
    - EMPLOYEE BENEFIT PLAN ARBITRATION
    - UNION FEES ARBITRATION
    - GRIEVANCE MEDIATION
- JAMS, The Resolution Experts, available at www.jamsadr.com/rules/rules.asp, and includes rules, procedures, and background materials for the following specific areas:
  - Comprehensive Arbitration Rules
  - Streamlined Arbitration Rules
  - Employment Arbitration Guide
  - Sample Employment Clause Language
  - Minimum Standards of Procedural Fairness
  - Employment Arbitration Rules
  - Consumer Arbitration Minimum Standards
  - Class Action Procedures
  - International Mediation Rules
  - International Arbitration Rules
  - Suretyship Arbitration Rules
- CPR – International Institute for Conflict Prevention & Resolution, available at www.cpradr.org/Landing.asp?M=9.0, and includes rules, procedures, and background materials for the following specific areas:
  - ADR - Employment
  - Arbitration Rules
  - Arbitration Appeal Procedure
  - Challenge Protocol
  - Expedited Arbitration of Construction Disputes
  - Fast Track IT Rules (2006)
  - Franchise Rules
  - International Arbitration Rules & ADR Procedures
  - Int'l Reinsurance Industry Protocol
  - Mediation Procedure
  - Mediation Principles for Insurer-Insured Disputes
  - Minitrial Procedure Review (rev 1998): The CPR Minitrial Procedure

- Patent & Trade Secret Disputes

- ICC – International Chamber of Commerce, available at www.iccwbo.org/court/arbitration/id4424/index.html

***Standard/Sample Clauses***

- AAA Drafting Dispute Resolution Clauses – A Practical Guide, available at www.adr.org/sp.asp?id=29159

- JAMS Guide to Dispute Resolution Clauses for Commercial Contracts, available at www.jamsadr.com/rules/clauses.asp

- CPR Model Clauses, available at http://www.cpradr.org/adrscrn.asp?M=9.1

- ICC standard and suggested clauses for Dispute Resolution Services, available at www.iccwbo.org/court/arbitration/id4114/index.html

***Articles, Manuals & Background Materials***

(All of the following can be found at the AAA online library at www.adr.org/online_library)

- Drafting ADR Clauses
  - John M. Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, DISPUTE RESOLUTION JOURNAL, Vol. 58, No. 1, *available at* www.adr.org/sp.asp?id=29160 (AAA Feb-Apr. 2003).
  - *Drafting Dispute Resolution Clauses – A Practical Guide*, *available at* www.adr.org/sp.asp?id=29159 (AAA Jul. 2004).
- Mediation
  - *A Guide to Mediation and Arbitration for Business People*, *available at* www.adr.org/sp.asp?id=29195 (AAA Jul. 2003).
  - *Mediation: An Informal and Effective Approach to Settlement*, *available at* www.adr.org/sp.asp?id=29603 (AAA 2005).
- Other ADR Techniques
  - *Early Neutral Evaluation: Getting an Expert's Assessment*, *available at* www.adr.org/sp.asp?id=29619 (AAA 2005).
  - *Fact-Finding: An Independent Third-Party Investigation*, *available at* www.adr.org/sp.asp?id=29617 (AAA 2005).



  - *Mini-Trial: Involving Senior Management*, *available at* www.adr.org/sp.asp?id=29612 (AAA 2005)

(non-AAA resources)

- JAMES L. BRANTON AND JIM D. LOVETT, ALTERNATIVE DISPUTE RESOLUTION – TRIAL LAWYERS SERIES (Knowles Publ'g 1992 & Supp. 1993-2000).

- BUSINESS LAWS, INC., CORPORATE COUNSEL'S GUIDE TO ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES (Thomson/West 2006 & 2007).

- JAY E. GRENIG, ALTERNATIVE DISPUTE RESOLUTION (Thomson/West 3d ed. 2005 & Supp. 2007).

- MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION (3d ed. 2003 & Supp. 2007).

## Core Considerations

**David Dantzler**
Partner
Troutman Sanders LLP



# Resources

- Check List (ACC Website)
- Bibliography (ACC Website)
- PowerPoint (?To be added to ACC Website?)
- Agreements that have, in fact, worked.

## Problems with ADR Provisions

- Boiler-plate provisions
- Not tailored to relationship
- Not important to parties at the time of contract
- Drafted by "deal" lawyers
- Objectives often unclear
- Clients unaware/unfocused re: limitations



## One size does *not* fit all!

- Assess relationship
- Identify client's goals/objectives
- Advise client about limitations
- Consider complete array of ADR "tools"
- Consider existing rules of ADR administrators
- Be creative

# Identify ADR "Driver(s)"

- Professional fees and expenses?
- Speed?
- Qualifications of decision maker(s)?
- Runaway jury?
- Confidentiality?
- Other?



# ADR ≠ Arbitration

- Management meetings
- Mediation
- Arbitration
- Summary Trial/Case Evaluation

# Understand Limitations of ADR

- Not well-suited for emergency matters
- Discovery limits
- No early outs (e.g., summary judgment)
- Binding precedent is less "binding"
- Final – No Appeal

If these are important, reconsider use of ADR.



## A Practical Perspective

**Monica Palko**
Associate Corporate Counsel – Litigation
BearingPoint, Inc.

## ADR Clauses:

THE GOOD

THE BAD AND

THE UGLY!



Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall first be submitted to arbitration administered by the American Arbitration Association in accordance with applicable rules.

- What's good: It's short and sweet.





- What's good: It's short and sweet.

- What's bad: It's short and sweet.

- What's good: It's short and sweet.
- What's bad: It's short and sweet.
- What's ugly: No automatic process to ensure use; court is only resort.



Any Claim arising out of or relating to this Agreement that cannot be resolved by the parties through informal negotiation or mediation will be settled by final and binding arbitration in accordance with applicable JAMS rules. Unless otherwise agreed, the arbitration panel will consist of three (3) arbitrators selected by the parties from a list of candidates provided by JAMS. In the event that the parties cannot agree upon the arbitrators within 21 days of initiation of the arbitration, JAMS will select the arbitrators and such selection shall be final.

If BBQ corporation from Memphis initiates the arbitration, the arbitration shall take place in the San Francisco, California metropolitan area. If Golden Gate Corporation from San Francisco initiates the arbitration, the arbitration shall take place in the Memphis, Tennessee metropolitan area.

The arbitrators will have exclusive authority to resolve any and all disputes relating to procedural and substantive questions of arbitrability, including but not limited to, choice of law issues, and the formation, interpretation, applicability, scope, and enforceability of this agreement to arbitrate. Each party will bear its own arbitration costs, and the parties will equally share the arbitrators' fees. The arbitration and all related proceedings and discovery will take place pursuant to a protective order entered by the arbitrators that adequately protects the confidential nature of the parties' proprietary and confidential information. No arbitration award may provide a remedy beyond those permitted under this Agreement, and any award providing a remedy not permitted under this Agreement will not be valid and will be vacated. Judgment upon the award rendered by the arbitrator(s) may be entered by any court of competent jurisdiction.

- In the event that the parties cannot agree upon the arbitrators within 21 days of initiation of the arbitration, JAMS will select the arbitrators and such selection shall be final.



- The arbitration and all related proceedings and discovery will take place pursuant to a protective order entered by the arbitrators that adequately protects the confidential nature of the parties' proprietary and confidential information.

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- What's good: Sufficient detail; automatic process if opponent does not play ball; discourages formal disputes.



- What's good: Sufficient detail; automatic process if opponent does not play ball; discourages formal disputes.

- What's bad: no teeth to mediation; companies may suspect or resist convenience-shifting clauses.

- What's good: Sufficient detail; automatic process if opponent does not play ball; discourages formal disputes.

- What's bad: Companies may suspect or resist convenience-shifting clauses; no teeth to mediation.

- What's ugly: If necessary to initiate formal dispute, the inconvenience is yours.



**1. INFORMAL DISPUTE RESOLUTION**

This Deed carefully identifies each Party's obligations in an effort to minimize disputes and aid in mutually satisfactory resolution of such disputes.

(a) Consultation: The Parties agree to attempt in good faith to settle any dispute, controversy or claim, whether based on contract, tort, statute or other legal or equitable theory arising out of or related to this Agreement (collectively, a "Dispute"") by way of consultation between themselves. Consultation will be initiated upon written notice by either Party to the other and each party must be represented by the Project Manager or individual of commensurate authority.

(b) Escalation to Executive Management: If the Parties cannot come to a mutually agreeable resolution of a Dispute within ten (10) business days of written notice, then either party may refer the Dispute to members of the Parties' executive management (each such member a "Representative") for resolution, which referral will be evidenced by a written notice from either party to the other (the "Referral"). For purposes of the foregoing sentence, First Party's Representative will be Joe Grandude, CEO and Second Party's Representative will be Shees Soawesome, Vice-President. The parties' Representatives will make all reasonable efforts to meet within five (5) business days of a Referral to attempt to resolve the Dispute. By agreement of Mr. Grandude and Ms. Soawesome, additional meetings may be scheduled in an effort to resolve the Dispute, with the participation of additional individuals, at either Representative's request.

(c) Mediation: If the Representatives are unable to resolve the Dispute, then such Dispute may, by way of written notice from either Party, be submitted to Arbitration/Mediation ("Notice of Intention To Arb/Med").

- **ARBITRATION/MEDIATION**

(a) The arbitration/mediation shall take place in Paris, France.

(b) Each of the Parties shall bear its own costs of the arb/med; the fees and costs of the Arbitrator/Mediator ("A/M") shall be shared equally by the Parties.

(c) The arb/med will take place pursuant to the rules of, and will be administered by, the International Institute for Conflict Prevention and Resolution ("Governing Body"), except to the extent that such rules conflict with the Arb/Med Rules set forth herein, in which case the Arb/Med Rules govern.



3. ARB/MED RULES

ARBITRATION

(1) There shall be one A/M.
(2) The Parties shall make all reasonable efforts to agree upon the A/M; if the Parties do not reach agreement within 21 days of referral of the Dispute to the Governing Body, the Governing Body shall appoint the A/M, who must be an attorney with experience in the resolution of commercial disputes and/or glasswares manufacturing disputes.
(3) The A/M shall conduct an initial status conference within 10 business days of being appointed; during the initial status conference the A/M and the Parties shall discuss these Arb/Med Rules; logistics associated with the arb/med; set a schedule for proceeding; and address any other matters as determined by the A/M.
(4) There shall be no discovery.
(5) Each Party shall make a written submission ("Submission") to the A/M which shall not exceed 20 pages in length, and which may attach an appendix not to exceed 50 additional pages. Affidavits may be submitted as part of the appendix.
(6) The Parties shall submit an agreed-upon copy of the Deed to the A/M, which may occur simultaneously with the Submissions or, at the request of the A/M, prior thereto.
(7) There shall be no oral testimony unless expressly requested by the A/M after reviewing the Submissions. The A/M must request and schedule any oral testimony in a reasonably prompt manner, in consideration of the duration of other time limits provided herein.
(8) The A/M shall finalize a written decision ("Decision") within 21 days of receipt of the Submissions or of taking any oral testimony, whichever is later.
(9) The A/M shall not provide the Parties with the Decision at the time it is completed, but shall instead seal the Decision and maintain its contents confidential at that time. The A/M shall notify the Parties in writing that the Decision has been reached and sealed ("Notice of Sealed Decision").

MEDIATION

(10) Within 10 business days of the Notice of Sealed Decision, the Parties and the A/M shall agree upon dates during which mediation will be conducted.

(11) The mediation shall take place within 30 days of the Notice of Sealed Decision.

(12) The mediation shall take place for no more than two business days.

(13) Prior to the mediation, the A/M may request the Parties to submit additional written materials. The Parties may submit additional written materials without any A/M request only upon written agreement.

(14) If the Parties reach a negotiated resolution through such mediation, that negotiated resolution shall be the final resolution of the Parties as to the Dispute. The Parties shall proceed with all reasonable haste to give effect to the negotiated resolution. After giving effect to the negotiated resolution, and after agreeing in writing that such has occurred, the Parties may request in writing that the A/M unseal the Decision, and provide it to the Parties for informational purposes only. If only one of the Parties requests the Decision, the A/M shall not unseal the Decision, and shall not provide it to either of the Parties. If the Parties have not requested the Decision within 12 months of reaching a negotiated resolution, the A/M is under no obligation to retain the Decision.

(15) If the Parties are unable to reach a negotiated resolution through the mediation process, the A/M shall unseal the Decision, provide it to the Parties, and the Parties shall be bound by the Decision. The Decision shall be fully enforceable by any court of competent jurisdiction.

(16) The arb/med shall be a confidential process, treated as compromise and settlement negotiations for purposes of all applicable rules of evidence.

(17) In no event shall the Decision provide a remedy beyond that permitted pursuant to this Deed; any Decision purporting to do so shall not be confirmed, no presumption of validity shall attach, such award will be vacated and it shall not be enforceable by any court of law.

4. Urgent Equitable Relief**:** Either party may, without waiving any remedy pursuant to this Deed, seek interim or provisional equitable relief from any court of competent jurisdiction to protect its Confidential Information, non-solicitation, and intellectual property rights, regardless of this Arbitration/Mediation provision.





- Consultation: The Parties agree to attempt in good faith to settle any dispute, controversy or claim, whether based on contract, tort, statute or other legal or equitable theory arising out of or related to this Agreement (collectively, a "Dispute") by way of consultation between themselves. Consultation will be initiated upon written notice by either Party to the other and each party must be represented by the Project Manager or individual of commensurate authority.

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- What's good: Excellent detail; encourages successful mediation (reducing surprises); circumscribed timing.

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- What's bad: Pressure to reach agreement is high; arbitration before mediation may increase overall expense.



- What's good: Excellent detail; encourages successful mediation (reducing surprises); circumscribed timing.
- What's bad: Pressure to reach agreement is high; arbitration before mediation may increase overall expense.
- What's ugly: Isn't beauty really in the eye of the beholder?

# Random Reflections of a Canadian



# Why Can't We Be Friends?

ADR Where the Relationship Continues

## Where the Relationship is Ongoing

- Different Considerations for continuing relationships (JV, Merger, Continuing Customer Relationship)
- Consider mediation clauses to avoid the adversity of arbitration
- Consider including an escalation clause
  - Executive Escalation clause
  - Binding Mediation
  - Med/Arb



## Where the Relationship is Ongoing

- To ensure closure, avoid appeals or any potential resort to the courts
- Focus on choosing fact-finder rather than process, where nature of dispute is generally known
- If you want confidentiality, include it in the clause
- If you really want confidentiality…consider enforcement without filing reasons for decision

# International ADR:
# A Few Tips from a "Foreigner"



## Cross-Border Clauses

- Choose a country that is a signatory to the New York Convention (UNCITRAL)
- Consider parents/subsidiaries that hold the assets – they need to be a party!
- If using an institution, use an international institution to avoid "home turf bias"
- ADR with a foreign state
  - avoid their turf
  - sovereign immunity in the clause
  - Clear rules of the game

# Best Of/Worst Of





## 4 Basic Needs of Clauses

1. Clear agreement to arbitrate and the scope of disputes to arbitrate
2. Number of arbitrators and how to select
3. "Seat" (place) of arbitration and choice of substantive law
4. Jurisdiction of arbitrator to award "extras" like costs, interest, aggravated or punitive damages

## 4 Killers: Pathological Clause Problems

- No clear mechanism for appointment of decision-maker(s)
- Requirements to do something before arbitration, with no direction or limits or with "good faith" obligations
- Non-existent rules, arbitrators, qualifications or institutions
- Unworkable time limits that cannot be enforced



## Parting Thought:
## Shout it from the Mountaintop