202 Arbitration Basics: The Why's, How's, & Who's of ADR

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Faculty Biographies

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William Cosden is the vice president and general counsel of Active Technologies, Inc., a web-based incentive management software startup, located in Orinda, California.

Prior to this, he was director of legal affairs, for Beyond.com, an e-commerce services provider. While with Beyond.com, he provided and managed legal services for e-commerce stores operating in six continents, 10 languages, and 15 currencies. Before joining Beyond.com, Mr. Cosden was corporate counsel with the Pacific, Gas & Electric Company (PG&E). His responsibilities included antitrust, commercial, environmental, and tort litigation, commercial and real estate transactions, insurance coverage, unlawful business practices defense, and internal investigations, and regulatory compliance. Prior to PG&E, Mr. Cosden was a senior deputy district attorney with the Alameda County California District Attorney's Office. There his responsibilities included civil and criminal white-collar and environmental enforcement, and prosecution of unlawful business practices under California Business & Professions Code § 17200.

Mr. Cosden is past president of the ACC's San Francisco Bay Area Chapter, and a past chair of ACC's Environmental Law Committee. He is a frequent speaker, atACC national meetings, National Association of Corporate Directors, and U.S. Environmental Protection Agency programs. Further, he is a past member of the board of directors of the Alameda County California Bar Association, and former president of the Alameda County Lawyers Club.
He holds a B.S. from the University of California, Berkeley, and a J.D. from the University of San Francisco, School of Law.

Barbara McLemore

Barbara R. McLemore is vice president and general counsel of Gannett Fleming, Inc., an international consulting engineering firm, ranked by *Engineering New Record* as one of the top 50 design firms in the United States, headquartered in Harrisburg, Pennsylvania. Her responsibilities include all general corporate legal matters including litigation and risk management, acquisitions, securities compliance, litigation, corporate filings, contract review, registrations, and filings. Areas of expertise and specialty include engineering, architecture and construction issues, employee relations, insurance and risk management, and contracts.

Prior to establishing the legal department of Gannett Fleming, Ms. McLemore was in private practice with a business law firm in Harrisburg.

She currently serves as president of ACC's Central Pennsylvania Chapter, is a member of the legal counsel committees of the Pennsylvania and New Jersey Consulting Engineers Council, and has hosted numerous foreign exchange students through AFS and the United States Future Leaders Exchange program.

Ms. McLemore received B.A. and B.S. degrees from Virginia Tech and her J.D. from the Dickinson School of Law of the Pennsylvania State University.

Deanne M. Tully

Deanne M. Tully is general counsel and secretary for Tier Technologies, Inc., located in Reston, Virginia, a leading IT consulting firm providing transaction processing and systems integration services for public sector clients. Ms. Tully works with a legal staff of five, counseling on a wide range of topics from contracts and licensing to corporate governance and securities.

Prior to Tier, Ms. Tully was in private practice practicing in business litigation. Ultimately, she reformed and went in-house, first as senior counsel with Dillingham Construction in Pleasanton, California and then as general counsel with Tier.

Ms. Tully received an A.B from the University of California at Berkeley and a J.D. from Hastings College of the Law in San Francisco.

ADR Basics Outline
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Introduction[1]

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I. DIFFERENT TYPES OF ADR

A. Clarify Terminology

Alternative Dispute Resolution ("ADR"): a broad term to describe any number of different processes available to resolve disputes in lieu of a trial. Arbitration is one form of ADR, so is mediation, but the two processes are very different.

Adjudicative: authority to reach a resolution is vested in a third party. Arbitration is classic example of an adjudicative form of ADR in that the parties present their case and the arbitrator(s) makes a decision (which may or may not be binding).

Non-adjudicative: the authority to reach and enforce a resolution to a dispute rests entirely with the parties. Mediation is the most common form of a non-adjudicative process. A mediator is a neutral third party that helps the parties objectively evaluate their respective positions and evaluates/facilitates settlement options.

B. Arbitration

Arbitration is an adjudicatory ADR process that can be binding. A single arbitrator or panel of arbitrators hears each party's case then renders a decision and determines the remedies.

1. Laws Affecting Arbitration

State Laws: The Uniform Arbitration Act ("UAA") - which is available online from any number of sources - serves as a model approach to arbitration. It addresses virtually all aspects of arbitration. Every state has adopted some version of the UAA, primarily to ensure that arbitration awards are enforced by the courts. Some states have adopted or are considering adopting a Revised Uniform Arbitration Act.

Federal Laws: The Federal Government enacted the Federal Arbitration Act ("FAA") to regulate arbitration. *See* 9 U.S.C. § 1-16 (1994). With some exceptions, the FAA applies to any written contract relating to a transaction involving interstate commerce (and which contains an arbitration provision). The United States Supreme Court has repeatedly endorsed broad enforcement of arbitration clauses under the FAA and declared a national policy favoring arbitration.

Practice Tip: In general, state and federal law supports arbitration and will compel the parties to honor arbitration provisions and enforce arbitration awards. However, laws vary from state to state, as do the cases interpreting them. As a practical matter, always check the applicable state law and the FAA. The take-away here is do not enter into arbitration provisions lightly: once agreed to, it is very difficult to extricate from an arbitration provision.

2. Types of Arbitration

Ad hoc arbitration, where the parties can design and administer an arbitration on whatever terms are mutually agreeable.

More commonly, an arbitration is administered by one of the private organizations that are in the business of ADR, such as the American Arbitration Association ("AAA") or the International Chamber of Commerce. A list of some of the larger national and international private organizations actively engaged in ADR is set forth in the Resources section at the end of this outline. There are also numerous other state and local resources for arbitration.

AAA has over three dozen sets of rules and procedures applicable to various types of disputes such as real estate, construction, patent, employee, etc. See AAA's website (www.adr.org) for a complete list.

Practice Tip: Unless you are extremely experienced in ADR, and arbitration in particular, don't try and reinvent the wheel by coming up with a custom designed arbitration process. It's safer to utilize existing rules – either by type of dispute or locale of dispute – and customize those if need be.

3. Scope of Arbitration

As a practical matter, the scope can be whatever the parties find mutually agreeable. This gets into the art of drafting the arbitration provision and is discussed in more detail below.

However, the issues typically addressed are:

- A broad scope ("all disputes arising out of this contract") or one more narrowly defined ("any claim for liquidated damages under Section X of the contract").
- The authority and power of the arbitrators, especially regarding the issues of authority to award attorneys' fees and punitive damages.
- Choice of law and venue.
- The number of arbitrators, typically either a single arbitrator or a panel of three.
- The process for selecting the arbitrators.
- The requisite qualifications of the arbitrator(s) – not all arbitrators are attorneys, especially in complex or technical disputes like patent infringement or construction claims.
- The arbitration process, especially discovery.
- Generally, the arbitration award is binding and subject to extremely limited grounds for vacating or appealing the award.
- The procedure for enforcing an arbitration award.

4. Procedures

Arbitration procedures are similar to the basic steps in litigation:

- The claimant (plaintiff) files a demand for arbitration which is like a complaint only much shorter and simpler. The claimant need only cite the arbitration provision, provide a brief description of the claims and pay the filing fees.
- The respondent (defendant) answers and files any counterclaim.
- Selection of arbitrator(s). If the process is not spelled out in the provision, then the rules of the administrative body will apply. Typically, the parties will try and agree on a single arbitrator. If they cannot agree within a certain period of time, the administrative body will appoint one from their list. For arbitrator panels, each party appoints one arbitrator and those two then agree on a third. All arbitrators are required to be neutral.
- The administrative body schedules a Pre Hearing Conference with the parties and the arbitrator to decide on discovery (if any), establish other procedures, set the date(s) for the hearing, etc. This is similar to Case Management Conference or a Pre Trial Hearing in court.
- There may be a period of discovery.
- A Hearing or a series of hearing dates where the parties present their respective cases, put on witnesses, etc.

- Award. The level of detail in the award is typically up to the parties. However, if one party wants findings of fact/conclusions of law, it is important to specify that in the arbitration provision or at the Pre Hearing Conference.

- Enforcement of award: Most states have statutes that describe the procedure for enforcing an arbitration award. For example, in California, any party to an arbitration can petition the court to confirm, correct or vacate an award (Code of Civil Procedure § 1285). Once the court confirms the arbitration award, it is enforced like any other judgment.

5. Pros and Cons of Arbitration

Pros

- Arbitration can be faster than litigation, especially in jurisdictions that have crowded dockets. At the very least, it can avoid "trailing" where parties are ready for trial but no judge is available and the parties incur the time and expense of multiple trial preparation phases.

- Arbitration can be less expensive, especially if the parties agree to a more streamlined process.

- An arbitration will avoid the risk of a runaway jury and runaway awards, particularly in cases with high emotional content.

- Arbitrations are confidential proceedings. This can be an important benefit in cases addressing trade secrets or where the parties do not want the proceedings to be a public record.

- The parties have some influence over the decision-maker, as opposed to the hit-or-miss approach of a judge/jury. In highly complex or technical cases, such as patent infringement or construction claims, selecting an arbitrator knowledgeable in that field can make a significant difference.

Cons

- Arbitration can slow to a grind and be even slower than litigation. Lengthy arbitrations usually take place in bits and pieces – a week's hearing here, another week there – to accommodate schedules (usually the arbitrator's) thereby stringing out the process.

- Arbitration can be just as expensive as litigation and can be *more* expensive. In an arbitration, a party will incur the usual expenses of preparing for and conducting discovery, the hearing, etc. *In* addition, there are filing fees (generally dependent on the amount claimed) and arbitrator fees (ranging from $200 - $600 an hour) that are not required in litigation.

- There is a lack of defined procedures in arbitration. In court, the parties are subject to the rules of evidence, code of civil procedure, etc., that typically are more predictable than arbitration.

- In addition, other procedural safeguards inherent in the judicial system – such as the right to appeal a poor decision – are generally lacking in the arbitration process. There are very limited grounds to vacate or appeal an arbitration award. For example, California Code of Civil Procedure §1286.2 provides that an award will be vacated only in instances of fraud, corruption, misconduct of the arbitrator or the arbitrator exceeding their powers. See, however, *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 381. In that case, the losing party claimed the arbitrator exceeded his powers. The California Supreme Court held that the arbitration award need only bear some rational relationship to the contract and the breach, and "the award will be upheld so long as it was even arguably based on the contract." Other states have reached similar conclusions.

- Arbitrators are not bound by legal precedent and their decisions are not published. So, disputes resolved by arbitration do not help to establish case law that will provide certainty to businesses in making decisions. In evaluating any dispute, it is important to have a sense of how it will likely be resolved. That predictability is largely lacking in arbitration. Arbitration can also lead to conflicting decisions on similar fact patterns.

- An arbitrator lacks injunctive authority. Also, an arbitrator may not be able to compel third parties to produce documents or testimony. (Although many states do grant the arbitrator these powers, *see* California Code of Civil Procedure §1282.6.)

- A party may end up litigating the enforceability of an arbitration provision, thereby defeating its intent entirely.

6. One Last Note: What is Judicial Arbitration?

Also called Court-Annexed Arbitration or Judicial Mandated Arbitration. This is a non-binding arbitration process that many jurisdictions will impose on certain or all cases. Typically, the parties present a very abbreviated form of their case to an arbitrator (usually a volunteer attorney, sometimes a judge or a magistrate), who renders a non-binding decision. If the parties agree to the decision, it can become binding. If either party disagrees, the case generally reverts back to the court docket. It is used primarily as a settlement tool.

C. Mediation

Mediation is a non-adjudicative facilitated settlement negotiation process. The parties are there to try and resolve the dispute and the mediator is there to help them. Any resolution is up to the parties.

1. Laws Affecting Mediation

State Laws: In general, all states favor mediation as a form of ADR and most have legislation that officially encourages mediation as a matter of policy. See for example *California Code of Civil Procedure* §1775, which declares that mediation is a preferred form of ADR and encourages mediation of civil cases. The California Code then goes on to address other issues arising out of mediation, such as the affect of mediation on statutes of limitations, the impact of mediation on the rules of evidence, the requirements of a written agreement confirming any resolution reached at a mediation, etc. California, like many other states, also has rules on court sponsored mediation procedures.

Most states also have very specific rules that protect the settlement nature of mediations. All states have some evidentiary rule that prohibits the introduction at trial of certain statements made in the course of settlement negotiations, and these rules apply to mediations. But many states go further and have detailed rules that govern the mediation process and are careful to protect the confidential nature of mediations.

The Uniform Mediation Act was approved by the American Bar Association and has been adopted in some states.

Federal Laws: There is no comprehensive piece of federal legislation on mediation akin to the Federal Arbitration Act which governs arbitration provisions in contracts involving interstate commerce. However, most District Courts in the federal court system have rules applicable to mediation.

Federal Rule of Evidence 408 protects confidentiality by prohibiting the admission of statements made by the parties during settlement negotiations when offered to show liability or the lack of liability for the underlying claim. Rule 408 includes within its protection statements made during voluntary and court-ordered mediations. However, the rule does not require the exclusion of evidence when offered for another purpose, such as proving the bias or prejudice of a witness or negating an allegation of undue delay.

Federal Rule of Evidence 501 provides that the privileges applied in federal civil cases that are not based on diversity jurisdiction shall "be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

Practice Tip: There are abundant rules – both at a state and local court level – that apply to mediation. Some are quite specific about the process, such as what must be set forth in any written settlement agreement arising out of a mediation for it to be enforceable, so always check these first.

2. Types of Mediation

Court Annexed Mediation: Mandatory supervised mediation that may be imposed by statute or court order. Applicable in both state and federal courts. The specific rules usually establishes the procedure. Typically, a mediator is appointed by the court but some jurisdictions permit the parties to select a mutually agreeable alternative mediator.

Ad hoc mediation: Once parties agree to mediate a dispute they can design their own process.

Private organization: Most mediations take place under the auspices of a private organization in the business of ADR such as AAA or JAMS. See the Resources section for contact information on these organizations. Typically, they will have their own set of applicable rules for the mediation process. Many of the best mediators work in connection with these private organizations and they only way to access their services is through the organization.

In particular, the JAMS website (www.jamsadr.com) has a wealth of information about ADR in general and mediation in particular. There are several helpful articles, FAQs, tips, etc.

Individuals: Some individual attorneys maintain a separate or exclusive mediation practice and are available to parties. They are retained only as a

mediator – no attorney-client relationship is established. Typically, these individuals will follow state or local rules and procedures. Local bar associations often maintain a list of these attorneys who do nothing but mediations. Most of them have built their reputation by word of mouth recommendations.

3. Timing of Mediation

Parties can agree to take a dispute to mediation as part of their contractual obligations. (Specific mediation provisions are discussed later in these materials.) Much like court-annexed mediation, this so called "mandatory" mediation is still a good idea. There have been plenty of mediations where the parties grudgingly attended only because they were required to under the contract and, once there, found that they could reach a successful resolution. Also, in a "stepped ADR" provision (where mediation may be a first or second step before the parties can resort to court) several states have held that the parties are required to follow each step and not jump ahead. For example, *Kemiron Atlantic Inc. v. Aquakem International Inc.* (11th Cir. 2002) 290 F.3d 1287. So there is ample authority to compel the parties to attend the mediation and, once underway, there is always the possibility of a resolution.

In the absence of a contractual obligation, the parties can agree to a mediation. It is especially worthwhile to consider this option before filing a lawsuit.

Even if a lawsuit has already been filed, consider mediation. California Code of Civil Procedure §1775(d) states that mediation "can have the greatest benefit for the parties in a civil action when used early, before substantial discovery and other litigation costs have been incurred" and "should be encouraged in the early stages of a civil action."

4. Mediation Process

Selection of the mediator: Sometimes a court will appoint a mediator but more typically the parties will agree on a mediator. It is absolutely critical that the mediator be ethical, neutral and have the respect of both parties.

Role of the mediator: A mediator always acts as a *facilitator* – that is by definition the nature of the job. As a facilitator, the mediator helps the parties understand their own and the other party's positions and their needs; clarifies points of disagreement; and keeps the focus on areas of agreement. In some instances, the mediator may also be an *evaluator* that, where appropriate, provides an unbiased independent evaluation of one or both party's position or argument. This can be a helpful reality check and can sometimes break a logjam. However, some believe that a mediator loses credibility and the ability to push the mediation to a successful resolution if the mediator's own views come into play. Most mediators will not take on the role of evaluator unless the parties specifically request it and even then, only in appropriate instances. It is important to clarify the parties' expectations with respect to the mediator's role.

Pre hearing submission: Generally, it is up to the parties to decide the nature and extent of any pre hearing documentation. Most mediators will require only a short position paper or brief a week or two before the date of the mediation just so they will have a general idea of the nature of the dispute. The parties should clarify the length of the brief, whether it will include other attachments or exhibits, and whether the briefs will be exchanged by the parties or sent only to the mediator.

The mediation session:

Usually, it starts out with the mediator explaining their approach, clarifying their role (the facilitator versus evaluator issue) and stating the goals for the mediation. The parties will generally be required to sign an agreement of some kind that protects the confidentiality of the procedure and may address other issues as well.

Almost always, the process starts with a joint session where each party presents its position. This is not just to educate the mediator but also to speak to the other side. Usually, the attorneys representing the parties do the presenting on the arguments. However, it is often a positive experience for the parties themselves to have an opportunity to address the mediator and the other side. By having an opportunity to "speak their piece" many parties are then more amenable to working toward a compromise and ultimately a resolution.

The parties then break out into separate rooms and "shuttle diplomacy" begins whereby the mediator will have a series of private conversations with each side. The mediator will typically try for agreements on smaller issues first to demonstrate that a resolution is possible. A mediator may also offer hypothetical settlement positions or solutions. A mediator's main goal is strive toward narrowing - if not closing - the gaps in the parties' positions.

The mediator cannot and will not force a settlement. Under the AAA Model Standards of Conduct for Mediators, the mediator must make the parties take responsibility for the success of the process: "Self determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement."

If successful, the parties will typically draft a short (one or two pages) written agreement documenting the key points of the resolution. The mediator may assist in this process by clarifying points or suggesting mutually agreeable language. Sometimes, the mediator may physically write up the terms of the deal under the direction of the parties. Some states limit the ability of the mediator to serve in this function. The lengthy detailed settlement agreement usually comes later.

Practice tip: bring a draft agreement with you to the mediation. It does not have to be the full and final agreement, but pays to think ahead about all the details involved in a settlement so that they do not derail the settlement at a later date.

5. Pros and Cons of Mediation

Pros

- Mediation is a reasonably good opportunity to resolve a dispute quickly and cheaply. It can lead to a settlement early in a dispute thereby saving lots of money and grief. Even if conducted after a lawsuit has been filed and litigated, it is still an opportunity to get the matter resolved.

- Mediation is an opportunity to be creative and flexible in devising resolutions. It is one of the few legal procedures where attorneys and parties can think outside the box and devise win-win solutions.

- A successful mediation can help preserve a business or personal relationship.

- If the mediator plays the role of an evaluator, parties can obtain an objective evaluation of their case and learn more about their strengths and weaknesses.

- Mediation is an opportunity to learn about the opposing party's positions and arguments.

- Mediations are confidential proceedings.

Cons

- If one party is not prepared to retreat from their position and consider a compromise, a mediation can be a frustrating waste of time and money.

- A party unwilling to settle may be using the process to gain free discovery.

- The enforceability of an agreement reached in a mediation can be problematic. That is, the morning after, one party may get cold feet and not proceed with the deal or raise new issues as a way of backing out. It is imperative that each party bring to the mediation a representative with the authority to settle that day or the ability to make a recommendation to a board, government agency, etc. that the party settle on terms reached in a mediation. This is especially true for government agencies.

D. Other Forms of ADR

1. Other Forms of Adjudicative ADR

High-Low Arbitration: Also known as Bracketed Arbitration. This is an arbitration where the parties have agreed in advance to the parameters within which the arbitrator may render the award. If the award is lower than the pre-set "low," the defendant will pay the agreed-upon low figure; if the award is higher than the pre-set "high," the plaintiff will accept the agreed-upon high; if the award is in between, the parties agree to be bound by the arbitrator's figure. The high and low figures may or may not be revealed to the arbitrator.

Baseball Arbitration: A form of binding arbitration where each party chooses one - and only one - number, and the arbitrator may select only one of the figures as the award. In a baseball arbitration, there are only two possible outcomes.

Night Baseball Arbitration: Like baseball arbitration, this is a form of arbitration where the parties exchange their own determination of the value of the case, but the figures are not revealed to the arbitrator. The arbitrator will assign a value to the case and the parties agree to accept the high or low figure closest to the arbitrator's value.

Mediation/Arbitration Hybrids: A process where the parties first participate in a mediation and if unsuccessful, the mediator then becomes an arbitrator and renders a decision. The decision can be binding or non-binding.

2. Other Forms of Non-Adjudicative ADR

Early Neutral Evaluation ("ENE"): A facilitated evaluation process to make case management and settlement more efficient. Approximately twenty Federal District Courts use this process. An evaluator is typically selected by the parties from a list of private attorneys maintained by the court. The attorney is selected generally based on their expertise in a particular subject matter. The evaluator holds one or more sessions with the attorneys early in the case to get a sense of each party's strengths and weaknesses and identify areas of possible agreement or resolution. The evaluator then renders an oral non-binding assessment of the merits of the case to the

parties and assists the court in facilitating settlement. The procedure by which cases are selected for, or ordered to, ENE is set forth in the local rules.

Summary Trial: A non-binding procedure used by some courts to allow parties to see how their cases might sell to a judge or jury in order to help facilitate a settlement. Typically, the parties present an abbreviated version of their case to a magistrate or private attorney – sometimes a judge – who renders a non-binding decision that is then used to facilitate settlement.

II. EVALUATING CASES FOR ADR

What types of cases lend themselves to ADR and if so, what form of ADR? That is a question that does not lend itself to broad generalities. Any analysis will hinge on a number of specific facts and circumstances. There is no one-size-fits-all concept where a particular form of ADR is *always* the best approach or, conversely, should *never* be used. Also, experience is crucial: parties who have been scorched at trial tend to look more favorably at any form of ADR; whereas parties who have had a few bad experiences with binding arbitrations may swear off them forever.

With that caveat, here are some ideas to consider.

A. Routine Contracts

Some agreements may not lend themselves to ADR at all. Purchase orders, very simple agreements or contracts that don't involve substantial money may not require addressing ADR if only because there is not that much at stake and the parties want to keep it simple.

Routine template contracts, like subcontracts, teaming agreements, client contracts, etc., may lend themselves to a particular form of ADR. To help in this analysis, look to the past. What kinds of disputes typically have arisen out of your company's standard agreements. If there is no track record, what are the likely sources of possible disputes. Having some sense of what the disputes have been or might be provides a basis to gauge what might be an efficient way of resolving them.

A "stepped" ADR approach (parties first try to resolve any dispute at a project or executive level, then it escalates to mediation, then court or binding arbitration) often lends itself to a variety of contracts and gives the parties some flexibility to work on resolving disputes. The danger here is that courts will require the parties to follow each step – no skipping ahead so the party has to be willing to follow each step.

It is always worth considering including some form of mediation provision, particularly as a required step before filing a lawsuit.

Arbitration provisions should be carefully reviewed before including one as a matter of course in every contract. ADR is subject to fads and fashions like anything else. For a long while, arbitration was regarded by many as the silver bullet solution to every dispute and arbitration provisions were automatically included in every contract. The pendulum has swung back the other way and, based on an entirely unscientific survey, many corporate counsel regard arbitration as an unfavorable form of ADR. When considering whether to include arbitration provisions as a matter of course in certain contracts, look to the types and nature of disputes that have arisen before or are likely to arise and analyze the potential advantages and disadvantages. The list below poses some of the issues to consider in this analysis.

B. Specific Contracts or Pending Dispute

When negotiating a specific contract (as opposed to a routine template) or evaluating a pending dispute, what kinds of ADR should a party consider?

Consider mediation or a stepped approach.

When considering binding arbitration or another form of adjudicative ADR, here are some factors to consider:

- Is the matter especially complex and likely to be time consuming. Is it a subject matter that lends itself to a jury, a judge or an arbitrator with expertise in the matter.
- Will the matter likely turn on strict legal issues (contract interpretation, application of statute of limitation) or is it a factually intensive case with “softer" issues at stake.
- Is the matter highly technical, like a patent dispute, environmental matter or construction dispute with technical issues. Would it be advantageous to have an adjudicator with technical expertise, such as an engineer or computer expert.
- Will either party want to pursue injunctive relief.
- Is establishing a precedent important (this cuts both ways).
- Is establishing a deterrent a business goal.
- Does the dispute or potential dispute have a certain emotional appeal or David v Goliath aspect such that a jury could be unduly influenced.
- Is an award of attorneys fees and/or punitive damages an important element.
- Is one party particularly obstinate or abusive of the litigation process.

C. Arbitration in the Employment Context

There has been considerable litigation over the last few years regarding the enforceability of mandatory arbitration agreements, *i.e.*, an employee is required to arbitrate employment disputes as a condition of employment.

In *Circuit City v. Saint Clair Adams*, 532 US 105, 121 S Ct 1302, 149 L Ed 2d 234 (2001) the U.S. Supreme Court decided that the Federal Arbitration Act ensures that an employee will be bound by his or her agreement to arbitrate claims arising out of the employment relationship, even where those claims involve "unwaivable" state antidiscrimination and civil rights statutes.

However, many courts remain skeptical of mandatory employment arbitrations and will carefully scrutinize or regulate them. California, in particular, has established case law that sets the parameters for an enforceable arbitration agreement. In *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 the California Supreme Court held that arbitration agreements are enforceable under the California Arbitration Act so long as they permit an employee to vindicate his or her statutory rights

The court noted that employment arbitration agreements are only enforceable when the arbitration procedure allows the employee the opportunity to enforce all of his or her statutory rights. To do so, the arbitration agreement must:

- allow the employee to recover all the types of relief that would be available in a court action;
- allow for the selection of a neutral arbitrator, more than minimal formal discovery of facts, a written award and judicial review, and mutuality between employer and employee; and
- not require the employee to bear any type of expense the employee would not have to bear if he or she brought the case in court.

Practice Tip: *Always* check state law regarding enforceability before requiring employees to arbitrate employment disputes.

C. ADR Myths and Truths

1. Split the Baby

The complaint: Arbitrators don’t evaluate the law and apportion the damages accordingly, they just give each side some of what they are asking for, often with no analysis or explanation.

From experience: It happens; probably not as much as critics claim but enough that it can be a concern.

What can you do: Draft provisions that require the arbitrator to make findings of fact and conclusions of law instead of just a bare award. Use the Pre-Hearing Conference as an opportunity to clarify expectations and persuade the arbitrator to prepare a substantiated award. Be careful about selecting arbitrators who have done this in the past.

2. Favoring the Party that Produces the Volume of Cases

The complaint: XYZ Franchise Inc. requires arbitration in all 3000 of its franchise agreements and mandates the use of ADR Services Co. to conduct all arbitrations. ADR sees a large volume of cases from XYZ and ADR knows "which side their bread is buttered," therefore, in any arbitration they will favor the source of their revenue, XYZ. Basically, one side isn't getting a fair shake from the start.

From experience: This has been alleged in some instances and is a concern in certain industries (medical malpractice, franchise agreements, NASD contracts) where there is a high volume of arbitrations. However strongly plaintiffs' attorneys feel this may be the case, it is difficult to prove. Some state cases have addressed this issue and concluded that as long as the arbitration award has some basis, and in the absence of other evidence that indicates bias, they court will uphold the award.

What can you do: Most ADR private organizations that provide these services have a substantial number of potential arbitrators so there is some room to select one that has the respect of both sides. Research potential candidates, especially word of mouth from other attorneys.

3. The Critical Decision: How To Choose the Right ADR Provider

Look to the various private organizations that provide ADR services.

Review the resumes provided by the ADR organization. Look for experience, particular expertise in the subject matter at hand, how long that person has been serving as an ADR provider not just as an attorney, ADR education, etc. Ask how busy a potential candidate is: if their schedule is pretty tight then they are in demand and that is generally a good sign.

Research the record outside of what the ADR organization provides. If a candidate is a retired judge, review prior opinions, look at court biographies, bar association ratings, etc. If the candidate was in private practice, what were some of the cases they worked on, who were some of their clients, was it all or mostly one side (plaintiff work v. defending claims; representing employees or employers, etc). There is plenty of biographical information from any number of sources. Google the name and see what it turns up.

The single most important step is to obtain information/insight from others who have used this candidate and the word on the street from your colleagues. Call and email as many colleagues as possible to talk with other attorneys or parties who have direct experience with this candidate.

Warning signs:

- Candidates who profess to be an expert in every subject.
- Candidates who have not been utilized in some time.
- Candidates who have no or little formal training in ADR.
- Candidates who are not busy with ADR.

III. ANALYSIS OF SAMPLE DISPUTE RESOLUTION CLAUSES

A. ARBITRATION

1. SIMPLE SAMPLE CLAUSE

SAMPLE 1 (No Administrative Entity named)

"Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by binding arbitration in accordance with the procedures agreed upon by the parties and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof."

SAMPLE 1 (AAA):

"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 [applicable] rules and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof."

SAMPLE 2 (AAA):

"WE, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its [applicable] rules the following controversy [cite briefly]. We further agree that will faithfully observe this agreement and the rules and we will abide by and perform any award rendered by the arbitrator(s) and that a judgment of the court having jurisdiction may be entered upon the award."

SAMPLE INTERATIONAL ARBITRATION CLAUSE
(International Centre for Dispute Resolution ICDR)

a. "Any controversy or claim arising out of or relating to this contract shall be determined by arbitration in accordance with the International Dispute Resolution Procedures of the International Dispute Resolution Procedures of the International Centre for Dispute Resolution.
b. 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.
c. 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 in accordance with the Rules of Procedure of the Inter-American Commercial Arbitration Commission in effect on the date of this agreement.
d. 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 under its Procedures for Cases under the UNCITRAL Arbitration Rules."

Practice Tip: Standard clauses, which refer to the rules of the AAA, have consistently received judicial support, which aids in enforcement, if necessary.

The American Arbitration Association has developed rules and supplementary rules that specifically apply to many different types of business disputes and industries. Applicable rules that can be inserted into the appropriate clause include:

Arbitration Rules for the Real Estate Industry
Arbitration Rules for Wills and Trusts

Commercial Arbitration and Mediation Rules and Mediation Procedures
(also includes Procedures for Large Complex Commercial Disputes)
Commercial Mediation Rules for Financial Planning Disputes
Construction Industry Arbitration Rules and Mediation Procedures
(also includes Procedures for Large Complex Construction Disputes)
Dispute Resolution Rules for Professional Accounting and Related Services Disputes
Emergency Interim Relief Procedures
Employee Benefit Plan Claims Arbitration Rules
International Dispute Resolution Procedures
Labor Arbitration Rules (including Expedited Labor Arbitration Rules)
Mini Trial Procedures
Multi-Employer Pension Plan Arbitration Rules for Withdrawal Liability Disputes
National Rules for the Resolution of Employment Disputes
Patent Arbitration Rules
Resolving Commercial Financial Disputes
Supplementary Procedures for
Consumer Related Disputes
Domain Name Disputes
International Commercial Arbitration
Nexus Disputes
Online Arbitration
Residential Construction Disputes

Securities Arbitration
Wireless Industry Arbitration Rules

In addition, there are rules applicable to specific state arbitration statutes or procedures, such as California Consumer Disputes, No-Fault Disputes in the State of New Jersey, Michigan Home Buyer/Seller Arbitration Rules, etc. These Rules can be found on the American Arbitration Association website at www.adr.org/RulesProcedures.

2. BINDING OR NOT

One of the benefits of arbitration is that the decision of the arbitrators is generally final and there are extremely limited grounds for appeal and it is difficult to appeal. However, because dispute resolution using arbitration in many cases is voluntary, the parties could certainly agree that that the opinion of the arbitrator can be advisory rather than binding or on specific grounds for review of the arbitrator's decision in your clause. The parties may wish to attempt to resolve their disputes through negotiation prior to arbitration by use of mediation (see sample clauses under "Mediation") or negotiation prior to arbitration. Additionally, the parties may wish to wait to determine if the controversy lends itself to resolution by arbitration and make the choice at that time.

SAMPLE NEGOTIATION CLAUSE

"In the event of any dispute, claim, question, or disagreement arising from or relating to this agreement or 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."

OPTIONAL ARBITRATION

"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 **may, by mutual agreement of the parties,** be settled by arbitration administered by _____ in accordance with the provisions of _____ rules and procedures."

3. ONE ARBITRATOR OR A PANEL

Choosing the Panel. Under the AAA's arbitration rules, arbitrators are generally selected using a list process. The AA administrator 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 administrator 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 arbitrators (which increases the cost). If parties do not agree on the number of arbitrator(s), it will be left to the discretion of the administrator.

Party Appointed Panel. 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 designates one arbitrator and the two thus selected appoint the chair of the panel. With the exception of international arbitration, where all arbitrators must be neutral, this method can be cumbersome because use of party-appointed arbitrators can delay the process and produce compromise awards or deadlocks. One way to address this problem is to agree that party-appointed arbitrators serve in a neutral capacity.

Prior Agreement on Arbitrator. 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. In the alternative, the parties can specify the qualifications of the arbitrator to be chosen.

Timing of Selection. When providing for appointment of 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 result may be time consuming, costly and unpredictable. Therefore, even if the parties chose their own method of appointment of arbitrators, they would be well advised to provide a fall back, such as if the procedures fail for any reason, "arbitrators shall be appointed as provided in the AAA Commercial Arbitration Rules.

Revised Code of Ethics for Arbitrators. In March 2004, the American Arbitration Association adopted a Revised Code of Ethics for Arbitrators for Commercial Disputes. The revised rules were developed in conjunction with the American Bar Association. The provisions of the Revised Code are subject to any contrary principles that may be found in the governing law of applicable arbitration rules. The parties can also agree to proceed under different rules or standards. The full text of the Revised Code of Ethics and the 1997 Code which preceded the

The most substantive changes to the Code of Ethics include:

Presumption of Neutrality: A presumption of neutrality is applied to all arbitrators, including party appointed arbitrators, which requires the arbitrators to be both independent and impartial. This reverses the presumption of non-neutrality for party-appointed arbitrators that was contained in the 1997 Code. For cases where the parties agree to the use of non-neutral arbitrators, the Revised Code also delineates ethical obligations non-neutral arbitrators are expected to maintain.

Duties of Party-Appointed Arbitrators: Party-appointed arbitrators are obligation, under the Revised Code, to ascertain and disclose to the parties whether he or she will be

acting as a neutral or non-neutral arbitrator as early in the arbitration as possible. In the event of doubt or uncertainty, party-appointed arbitrators are to serve in a neutral capacity until such doubt or uncertainty is resolved.

Duty to Disclose Interests and Relationships: The Revised Code subjects all arbitrators, whether serving as neutral arbitrators or non-neutral arbitrators, to the same obligation to disclose interests or relationships likely to affect impartiality or which might create an appearance of partiality.

Communications with the Parties and the other arbitrators: The Revised Code clarifies the permissible *ex parte* communications between arbitrators and the parties (generally compensation, setting up the logistics of the arbitration proceeding and to continue a hearing if a party is absent). It also provides that , whenever an arbitrator communicates in writing with one party, the arbitrator should at the same time send a copy of the communication to every other party, and whenever the arbitrator receives any written communication concerning the case from one party which has not already been sent to every other party, the arbitrator should send or cause it to be sent to the other parties.

Arbitrator Suitability: The arbitrator under the Revised Code is obligated to determine his or her competence and availability to service in the case.

SAMPLES – ONE ARBITRATOR

- "In the event that arbitration is necessary, [name of specific arbitrator] shall act as the arbitrator."
- "Within 30 days after the demand for arbitration is files, the parties shall select an arbitrator from a list provided by the arbitration service."

SAMPLES – PANEL

- "Within 30 days of the commencement of arbitration, each party shall select one person to act as arbitrator and the two shall select a third arbitrator within 10 days of their appointment. If the arbitrators selected by the parties are unable or fail to agree upon a third arbitrator, the third arbitrator shall be selected by the American Arbitration Association."
- "The arbitrator selected by the claimant and arbitrator selected by the respondent shall, within 10 days of their appointment, select a third neutral arbitrator. In the event that they are unable to do so, the parties of their attorneys may request the arbitration service to appoint the third neutral arbitrator. Prior to the hearings, each of the arbitrators appointed shall provide an oath or undertaking of impartiality."
- "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."

4. QUALIFICATIONS OF THE ARBITRATOR/ PANEL

Qualifications. The parties may wish that one or more of the arbitrators be a lawyer or account 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 for specific qualifications are set forth below.

International. For international arbitration, the parties may wish to specify that the arbitrator should or should not be a citizen of a particular country, which can be addressed in the clause.

SAMPLES (Arbitrator Qualifications)

- "The arbitrator shall be a certified public accountant."
- "The arbitrator shall be a practicing attorney [or retired judge] [of specified Court]."

International:

- "The arbitrator shall be a national of [country]."
- "The arbitrator shall not be a national of either [County A] or [Country B]."
- "The arbitrator shall not be the nationality of either of the parties."

5. DISCOVERY ALLOWED/ CONTROLLED

Document Production. Under the AAA Rules, arbitrators are authorized to direct a prehearing exchange of documents. In order to preserve one of the benefits of arbitration – a faster method of resolving disputes – it is most important that the parties agree to limit the discovery process. The parties should discuss a limited exchange of documents and seek to agree on (limit) its scope. In most instances, arbitrators will order prompt production of limited numbers of documents that are directly relevant to the issues involved. In order to provide a limit on document discovery, the parties may try to limit the scope of discovery in the arbitration clause, either by limiting the time when discovery shall be completed and the type of documents to be produced.

Depositions. The AAA does not encourage depositions and, as a general rule (except as provided by local statutes), arbitrators do not have authority to order depositions. Many arbitrators prefer to hear and be able to question witnesses at a hearing. Typically, the parties who agreed to arbitration are acquainted with the other parties and do not need to conduct depositions in order to determine how the witness will perform or to lock in their testimony. However, many attorneys are used to conducting discovery and depositions as a matter of course in preparing their case. It also may be necessary to obtain the testimony of distant witnesses and use of a deposition is more convenient than the arbitrator holding a hearing where the witness is located and subject to subpoena.

If the parties provide for depositions, they should do so in a very limited fashion, *i.e.*, they might specify a 30-day deposition period, with each side permitted a limited number of depositions, none of which may last for more than three hours and the arbitrator would determine all objections at the arbitration hearing. Sample language for limiting discovery follow:

SAMPLE – Limiting Discovery

"Consistent with the expedited nature of arbitration, each party will, upon the written request of the other party, promptly [or within 30 days after the appointment of the arbitrator(s)] 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] [chair of the arbitration panel], which determination shall be conclusive. All discovery shall be completed within [45] [60] days following appointment of the arbitrator(s)."

"At the request of a party, the arbitrator(s) shall have the discretion to order examination by deposition of witnesses to the extent that 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] [chairman of the arbitration panel], and for good cause shown. Each deposition shall be limited to a maximum of [three] [six] hours [or one day's duration]. All objections are reserved for the arbitration hearing except for objections based on privilege and proprietary or confidential information.

"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."

6. SCOPE OF DECISIONS

The basic arbitration clause can limit the type of disputes that are to be settled by arbitration, by specifying that only certain types of disputes (involving only interpretation of the contract or determination of royalties payable for use of the patented process) will be determined by arbitration. The concern with specifying that only certain types of disputes are to be arbitrated, is that one party may seek to avoid or seek arbitration to resolve other types of disputes and the parties may have to go to the expense of having to go to court to determine if arbitration is to be enforced in that situation or not. It may be easier to limit the types of damages that can be awarded.

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 specific remedies. Here are some samples of different clauses limiting remedies:

SAMPLES Limiting Damages

"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."

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

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

"The arbitrator(s) shall not award consequential damage in any arbitration initiated under this section."

"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."

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

Any monetary award in 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."

There may be some situations where the parties believe it may appropriate to provide specifically for it if a need for an interim remedy is anticipated. Preliminary relief is permitted under the AAA's commercial rules if they have been chosen as the applicable rules. One way to do so is to incorporate the Emergency Interim Relief Procedures of the AAA Commercial Arbitration Rules. Or, 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 their arbitration administrator to appoint an arbitrator to address appropriate issues. Another option is to allow the option of seeking emergency relief through the courts.

SAMPLE Allowing Preliminary Relief

"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). "

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

SAMPLE – ESCROW AGREEMENT

"Pending the outcome of the arbitration, [name of party] shall place in escrow with [law firm, institution, or arbitration service] as the escrow agent, [the sum of _____, the amount of the unpaid invoices or retainage, 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 the subject matter in dispute] as directed by the arbitrator(s) in the award unless the parties agree otherwise in writing."

7. ADDING OTHER PARTIES

Because arbitration is a process based on voluntary contractual participation, parties may not be required to arbitrate a dispute without their consent. However, where there are multiple parties with disputes rising from the same transaction, complications can often be reduced by the consolidation of all disputes. This is particularly true in construction disputes. If arbitration is the chosen dispute resolutions method for a construction project, then it is important that the parties permit the joinder of third parties into the arbitration proceeding or provide for the consolidation of two or more separate arbitrations. Because of the many different parties (contractors, owner, subcontractor, architect, engineers, suppliers, equipment manufacturers, etc.) involved in construction projects, consolidated proceedings may eliminate the need for duplicative presentation of claims and avoid the possibility of conflicting rulings from different panels of arbitrators. Keep in mind, however, consolidating claims can cause delay and additional expense. The following is an example of an arbitration clause that can be included in construction documents to allow consolidation of all proceedings in the arbitration process.

SAMPLE of Consolidation Rights:

"The owner, the contractor, and all subcontractors, specialty contractors, material suppliers, engineers, designers, architects, construction lenders, bonding companies, and other parties involved in the construction of the project are bound to each to each other, by this arbitration clause, provided that they have signed this contact or a contract that incorporates this contract by reference or signed by 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 contend that two or more arbitration s 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 shall be consolidated before that [those] arbitrator(s). "

8. APPEAL RIGHTS

In typical arbitration cases, arbitrators will usually not write a reasoned opinion explaining their award unless such an opinion is requested by all parties. Although reasoned opinions can detract from the finality of the arbitration, there can be a number of reasons why the parties may need or desire such opinions, particularly in large complex cases or in international arbitration. If the parties desire to have appeal rights, a reasoned opinion would appear to be required in order to establish the standard of review. There are a number of clauses that can be used to obtain a reasoned opinion:

SAMPLE – REASONED OPINION:

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

"The award shall be in writing, shall be signed by a majority of the arbitrators, and shall include a statement regarding the reasons for the disposition of any claim."

"The award shall include findings of fact."

"The award shall include a breakdown of specific claims."

One of the hallmarks of arbitration is the finality of the decision and that the decisions may be set aside only in the moat egregious circumstances such as demonstrable bias of an arbitrator or the decision is arbitrary or capricious. Sometimes the parties desire a

more comprehensive appeal, most often in the setting of legally complex cases. If appeal rights are expanded, the basic objective of a fast, fair, more economical and expert result may not be achieved. In addition, providing a mechanism for appeal is very tempting to the party on the losing side.

While parties can attempt to provide for an appeal to the court system, 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. Here are examples of both types of clauses:

SAMPLE – APPEAL TO COURT

"Within 30 days of receipt of any award (which shall not be binding if an appeal is taken), any party may notify the arbitrator(s) of its' intention to appeal to the [_____ court] having jurisdiction over the parties. Such review shall be [de novo or review to determine if the arbitrator(s)' decision was issued in manifest disregard of the law or facts or incorrect because of clean and convincing factual errors]. [The court shall be entitled to adopt the initial award as its own, modify the initial award or substitute its own award for the initial award.]"

SAMPLE – APPEAL TO ARBITRATORS

"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 its' intention to appeal to a second 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 the law or facts or because of clean 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."

9. MISCELLENEOUS – LOCATION/ GOVERNING LAW/ FEES AND EXPENSES

It is important to al language specifying the place of arbitration. The choice of the proper place is important because the chosen place generally implies 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 geographic area; and the (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. The following are examples of chosen locations:

SAMPLE – LOCATION

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

It is also common for parties to specify the law that will govern the contract and/or arbitration proceedings. Here are some sample provisions:

SAMPLE – GOVERNING LAW

"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 proceeding pursuant to the arbitration clause in this agreement."

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."

SAMPLE – FEES and EXPENSES

"All fees and expenses shall be borne by the parties equally. However, each party shall bear the expense of its own counsel, experts, witnesses, and preparation of proofs.

"The prevailing party shall be entitled to an award of reasonable attorney's fees."

"The arbitrator(s) is authorized to award any parties such sums as shall be deemed proper for the time, expense, and trouble of arbitration, including arbitration fees and attorney's fees."

10. ENFORCEABILITY OF EMPLOYMENT ARBITRATION

Employers are attracted to *mandatory* arbitration as a method of resolving employment disputes because arbitration can resolve employment disputes without costly litigation and the employees forfeit their rights to sue the employer in state or federal court. The typical arbitration agreement is designed in accordance with the American Arbitration Association's National Rules for the Resolution of Employment Disputes and its Due Process Protocol. The Supreme Court upheld the right of employers to enforce mandatory arbitration agreements in Circuit City Stores v. Adams, No. 99-1379 (March 2001). However, courts continue to scrutinize arbitration pacts in the employment

context and rejecting agreements that they find are overreaching, negotiated in bad faith or that are unfair to employees.

In addition, the EEOC is increasingly challenging arbitration provisions that may block employees from lodging complaints with the EEOC or a state agency. The EEOC is seeking to protect its rights to investigate charges of discrimination, even if the employee has agreed to a prior arbitration provision and several courts have upheld this type of provision.

One down side of arbitration is that because arbitration is less expensive than litigation, employees may be more likely to file a claim. But because such disputes are resolved more quickly and inexpensively, the employee has less basis to extort a large settlement from the employer.

In order to protect your mandatory arbitration policy, your company should be sure to cover the following areas:

- **Make sure your employees read, understand and sign the agreement.**

  The employee's attention should specifically be called to the arbitration agreement during orientation. The provision should not be buried the employee handbook and should require a separate signature. Employees should not be rushed when reviewing and signing the agreement and should be given a copy of the policy. Employers should be able to prove that the employee read and understood the arbitration provision.

- **Provide consideration for signing.**

  When instituting an arbitration program in an established company, employees must be given consideration (pay raise, additional benefits) in order to make the provision valid and enforceable. For new hires, the consideration for their agreement to arbitrate can be a condition of employment.

- U**se a neutral arbitrator.**

  Courts scrutinize the qualifications of arbitrators if they are repeatedly rule in favor of the employer or the employee has little input into the choice of arbitrator. One way to increase the likelihood that arbitration will be enforced is to follow established arbitration rules, such as the American Arbitration Association.

- **The procedure should be fair to the employee.**

  There should be a procedure for discovery so employees must have access to the same personnel documents and data as the company. In addition, the employee should be entitled to a written opinion to outline their findings.

- **Limit the employee's costs.**

  Courts have thrown out arbitration programs that cost more for employees to pursue arbitration than to go to court.

- **Make the Agreement equally binding on both parties.**

  Don't require employees to resolve disputes in arbitration if the employer has the right to pursue either arbitration or a legal remedy.

- **The Employer may not be able to prevent an EEOC claim.**

  There have been a number of decisions where courts have refused to uphold arbitration agreements when they purport to prevent employees from lodging a complaint with the EEOC or state agencies that have cognizance over discrimination claims. Check the law in your jurisdiction to determine if your company has already lost that battle.

11. SAMPLE EMPLOYEE ARBITRATION POLICY

Attached is a sample Employee Arbitration policy that can be adopted by a corporation. As described above, the method of adoption and communication with employees with regard to the policy is of the utmost importance in adopting an employee arbitration program.

Sample Policy: Employee Mediation/Arbitration

This organization is committed to prompt and fair resolution of all disputes of any nature that may arise in the workplace. This policy governs all aspects of employment dispute resolution, including all legal claims that the employee may have against the company, up to and including discharge, and any claims of discrimination based upon race, color, sex, disability, religion, national origin, age or any other protected attribute, or any claims arising under any federal, state or local law or any common law. This dispute resolution procedure is a condition of employment with this organization.

1. Employees should promptly discuss any problems or concerns that are related to their work in any way with their immediate supervisor. If the immediate supervisor is the cause of the problem or if the employee feels uncomfortable discussing the matter with the supervisor, issues may be raised initially with the president.

2. Whenever issues are raised, both the company and the employee will make a good faith effort to resolve the matter by openly discussing the matter and attempting to reach a resolution. If resolution is not achieved, the issue may be referred to the president who will conduct such investigation as she deems

appropriate and meet with the employee in a sincere effort to discuss, analyze and resolve the matter. If a mutual resolution is not reached, the president may issue a determination on the issue, which shall be final unless the employee invokes mediation under this procedure.

3. If the employee is dissatisfied with the president's decision and the claim involves a material aspect of the employment or an allegation of violation of any law, the employee can request that the matter be submitted to mediation. The parties shall jointly designate a mediator or, if the parties can't agree, the employer can request that a mediator be designated from any one of three or more certified mediation organizations located in the area that the employee designates. The cost of the mediation shall be borne equally by the company and the employee, unless the parties agree otherwise. The company and the employer are obligated to make a good faith effort to resolve the issue through mediation.

4. If the matter is not resolved in mediation, either party may request that the matter be referred to arbitration by making a written request of the other party within sixty days of the conclusion of mediation. If the parties do not mutually designate an arbitrator, one will be selected under the rules of the American Arbitration Association for the arbitration of employment disputes. Upon the employee's request, an arbitration hearing will be held under the AAA arbitration rules. The decision of the arbitrator will be final and binding upon both parties. Judgment upon the arbitration award may be entered by any court having jurisdiction. The cost of the arbitration will be borne equally by the parties, unless otherwise directed by the arbitrator in the award.

B. OTHER TYPES OF ARBITATION CLAUSES

1. Baseball Arbitration

"Baseball" Arbitration is a method used in different contexts including baseball player's 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 and nothing else. A key aspect of this approach is that there is incentive for a party to submit a highly reasonable number because 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 for baseball arbitration follows:

SAMPLE – BASEBALL ARBITRATION

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

2. Mini Trial

The mini-trial is not a trial, but rather a structured dispute resolution method in which senior executives of the parties involved in a dispute meet, sometimes in the presence of a neutral advisor, and, after hearing presentations, attempt to formulate a voluntary settlement. The following clause would provide for a mini trial:

SAMPLE – Mini Trial:
"Any controversy or claim arising from or relating to this contract shall be submitted to the American Arbitration Association under its Mini-Trial Procedures."

C. MEDIATION

Mediation is increasingly chosen by parties to commercial transactions as the preferred method of Dispute Resolution or as a prelude to arbitration. The following clauses provide different examples of Mediation dispute resolution clauses.

SAMPLE (AAA)

"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 first agree 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."

SAMPLE – JAMS

"Except as provided herein, no civil action with respect to any dispute, claim or controversy arising out of or related to this agreement may be commenced until the matter has been submitted to JAMS, or its successor, for mediation. Either party may commence mediation by providing to JAMS and the other party a written request for mediation, setting forth the subject of the dispute and the relief requested. The parties will cooperate with JAMS and one another in selecting a mediator from JAMS's panel of neutrals, and in scheduling the mediation proceedings. The parties covenant that they will participate in the mediation in good faith, and that they will share equally in its costs. All offers, promises, conduct and statements, whether oral or written, made in the course of the mediation by

any of the parties, their agents, employees, experts and attorneys, and by the mediator and any JAMS employees, are confidential, privileged and inadmissible or nondiscoverable as a result of its use in mediation. Either party may seek equitable relief prior to the mediation to preserve the status quo pending the completion of that process. Except for such an action to obtain equitable relief, neither party may commence a civil action with respect to the matters submitted to mediation until after the completion of the initial mediation session, or 45 days after the date of filing the written request for mediation, whichever occurs first. Mediation may continue after the commencement of a civil action, if the parties so desire. The provisions of this Clause may be enforced by any Court of competent jurisdiction, and the party seeking enforcement shall be entitled to an award of all costs, fees and expenses, including attorney's fees, to be paid by the party against whom enforcement is ordered"

SAMPLE: Stepped Mediation

"Any dispute arising out of this Agreement shall be resolved as follows:

1. One party shall provide written notification to the other of a dispute. The parties will then have ten (10) business days following receipt of the notification to resolve the dispute at the project level.

2. If no resolution is achieved at the project level, each party shall then appoint one senior officer or representative with at least the title of Vice President, Deputy Director, or equivalent, and such officers shall meet to review the dispute and make every reasonable and good faith attempt to resolve it.

3. If no resolution is achieved at the Vice President/ Deputy Director Level within ten (10) business days of their initial meeting regarding the issue, any controversy or claim arising under this Agreement, or breach thereof will be submitted to at least one session of voluntary mediation before a mutually acceptable Mediator, selected by the parties from a panel maintained by the American Arbitration Association or such other panel as the parties may agree.

4. If mediation does not result in settlement, the parties may proceed with whatever other remedies they may choose as though the mediation had never happened. No person serving as mediator may serve as judge or arbitrator in the same grievance.

5. The mediation agreement shall not constitute precedent, unless the parties agree otherwise.

6. The costs of mediation shall be shared equally by the parties unless they agree otherwise.

7. All disputes controversies or claims arising out of or relating to this Agreement or breach thereof shall be subject to the exclusive jurisdiction of either the _____ State Court located in _____ County, or the Federal Court located in _____ County, _____, and for these purposes, the parties hereby confer and submit to the exclusive jurisdiction of these courts. In the event legal proceedings are commenced arising out of or relating to this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees and costs incurred in connection therewith.

SAMPLE: Mediation- Arbitration

A clause may provide first for mediation and then move to arbitration if mediation is unsuccessful. Because the mediator is familiar with the facts and circumstances, the same mediator could be authorized to resolve the dispute under arbitration rules (AAA or otherwise). This procedure should be used only in appropriate circumstances, because having the same mediator and arbitrator could limit the potential for successfully mediating the claim. A party may feel that arbitration (or the arbitrator) would lead to a better result for their company and therefore will resist mediation solutions. This process can also inhibit the candor which should characterize the mediation process. In addition, the parties could reveal evidence, legal position or settlement positions to the mediator/ arbitrator on an *ex parte* basis, which could improperly influence the arbitrator. The following provision can be used for this type of Mediation Arbitration process:

"If a dispute arises from or related 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 Rules 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 the parties agree, a mediator involved in the parties' mediation may be asked to serve as the arbitrator."

IV. INTERNATIONAL ADR

A. Backbone of International Arbitration

1958 UN Convention on the Enforcement of Arbitration Awards (Referred to as *The New York Convention*): The thrust of this treaty is to make arbitration awards enforceable in the courts of the over 100 countries that are signatories to it.

B. International Arbitration Rules/Procedures(Including Model Rules)

Similar to domestic ADR organizations, rules/procedures can vary significantly among the forums/institutions that provide international arbitration services. Model international arbitration rules for commercial disputes were issued by the *United Nations Commission on International Trade Law* in 1976, and are known as the UNCITRAL rules. These model rules are commonly used in *ad hoc* international arbitrations. Additionally, they are an option that parties may use in a number of international ADR forums, rather than the forums' rules.

C. International ADR Forums(Organizations) include:

1. ***International Chamber of Commerce (ICC)***: Based in Paris, it is the oldest (1917) and largest international ADR organization. Most of its arbitrations, however, are held outside of France. Administrative Fees generally higher than other ADR organizations. (*www.iccadr.org*)

2. ***AAA's International Centre for Dispute Resolution(ICDR)***: Relatively new to international arbitration (rules first issued in 1991), most matters heard at its International Center for Dispute Resolution in New York. But parties may choose other locations, or if unable to agree, by determination of the Administrator. (*www.Icdr.org*)

3. ***The London Court of International Arbitration (LCIA)***: Not as well known, but arbitration is popular in Great Britain. Parties may agree to other locations ("seat"), but default is London. Or, if parties argue for another seat, the LCIA Court will decide the issue. (*www.lcia-arbitration.com*)

4. ***Stockholm Chamber of Commerce (SCC)***: Established in 1917 as a forum for resolving trade, industry, and shipping disputes. In the 1970's, the United States and Soviet Union used the SCC as a neutral center for resolving East-West trade issues It has since expanded its international ADR services to over 40 countries around the world, including China. (*www.sccinstitute.com*)

5. ***Singapore International Arbitration Centre (SIAC)***: SIAC arbitrators considered among the cream of bar, and follow the law. Proceedings are held in the region, with usually one of the parties having a nexus to it. Nevertheless, could have SIAC governing clause for parties not connected to the region that would allow matter to be heard there. Parties control over what law will apply. SIAC will not apply Singapore law, unless parties agree. One of the best forums for technology issues. (*www.siac.org*)

6. ***China International Economic and Trade Arbitration Commission (CIETAC)***: Established in 1954, and has more westernized its rules, and expanded its jurisdiction over the years. Rules borrow from AAA, SCC, ICC and UNCITRAL. Most recent version became effective May 1, 2005, and includes some significant changes. Among them is that parties may agree to appoint qualified arbitrators, of any nationality, from outside t he CIETAC panel. Also, now more flexible about holding proceedings outside of China. (*www.cietac.org*).

7. ***World Intellectual Property Organization (WIPO)***: Specialized UN agency that is headquartered in Geneva, Switzerland. Especially suited for intellectual property disputes. In 1999, WIPO established an on-line dispute resolution center, which reduces time and cost of resolving disputes. Also, the Internet Corporation for Assigned Names and Numbers (ICANN), has accredited WIPO to administer its Uniform Dispute Policy. Consequently, WIPO's Center is acknowledged as the leading service for disputes regarding registration and use of domain names. (www.wipo.int)

D. Pre-Hearing Procedures and Allocation of Costs

1. ***Provisional(Interim)Relief***: Most, if not all, international ADR institutions provide that their arbitration tribunals may grant interim relief. Also, under ICC rules, a party may seek injunctive relief in court without infringing or waiving the arbitration agreement. Further, in some circumstances, injunctive relief may be sought, even after a file has been submitted to the arbitration panel (ICC 23).

2. ***Discovery***: Rules of discovery vary widely among the international ADR institutions. UNCITRAL, SIAC, and AAA rules provide broad discovery powers to the arbitrator. ICC, however, leaves it to the discretion of the parties. SCC and others require the parties to summarize their positions, but do not otherwise expressly provide for discovery. WIPO and CIETAC have parties exchange relevant documentary evidence on which the claim, or defense, is based.

3. ***Allocation of Costs***: Once again, the rules regarding allocation of costs vary

among the institutions. Under the UNCITRAL rules, all costs are borne by the unsuccessful party. But, based on the circumstances, the tribunal can apportion costs between the parties. A number of other institutions grant the arbitrators discretion to determine which party should bear the costs.

E. Mediation

1. ***Background***: Although perhaps evolving somewhat, mediation is much less utilized in international ADR than in the United States. Explanations include that Europe has much more of a tradition of arbitration, and outside of the UK, few mediations take place there. Also, lack of trained mediators, and especially those skilled in dealing with cultural differences, is a factor. Asia, however, does prefer mediation.

2. ***Procedures:*** Again, rules and procedures differ among the institutions. AAA allows parties to mediate at any stage of the proceedings. With ICC, mediation can occur prior to, or during the proceedings. Although with both AAA and ICC, a mediator cannot also serve as an arbitrator. In contrast, under SIAC rules, the mediator may also serve as an arbitrator, if he/she consents, and the parties agree. In CIETAC proceedings, the parties may first request mediation.

F. Practice Tips

1. Concerning the New York Convention, review a country's enforcement record. There are instances where certain countries have refused enforcement, or interfered with it.

2. For some important issues, such as IP, it may be wise to bifurcate the proceedings. In another words, have the IP issues venued in California, under California law, while other issues may be heard in a foreign venue.

3. Hawaii is a venue where both Asian and Western parties may feel more culturally comfortable.

4. If contract provides that arbitration is to be in a less desirable ("Siberia") location, parties may be more inclined to resolve the matter on their own, rather than travel to the location for an arbitration.

5. A corollary regarding location is that if the arbitration is held in a less appealing location, there will be fewer distractions, and more incentive for the parties to conclude it in a timely manner.

G. Resources

1. ***Websites of the International ADR institutions***: As mentioned earlier in this outline, the websites of the ADR providers are, and can be a rich resource of materials, including practice guides, law, clauses, and services. For example, AAA's site, www.icdr.org, has publications such as, *Drafting Dispute Resolution Clauses-A Practical Guide;* and *A Guide for Mediation and Arbitration for Business People*.

2. ***Other Websites***
   a. **Links to ICC and other organizations, plus case law**: http://www.kluwerarbitration.com/arbitration/arb/default.asp
   b. **Links to domestic and international ADR**: http://www.adr-resolve.com/links.htm - http://www.megalaw.com/top/alternative.php
   c. **Sample ADR clauses**: cpradr.wld.com/formbook/pdfs/2/intc.pdf

3. ***Lex Mundi Publications***:
   a. *International Business Transactions Checklist*
   b. *Resource Guide for International Business Transactions*

(Both publications available on the Lex Mundi website, www.lexmundi.com, and the ACC Virtual Library, www.acca.com/v)

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V. RESOURCES FOR ADR INFORMATION AND ORGANIZATIONS

American Arbitration Association
Corporate Headquarters
335 Madison Avenue, Tenth Floor
New York, NY 10017
(212) 716-5800
www.adr.org

JAMS
Main office
1920 Main Street at Gillette Avenue
Suite 300
Irvine, CA 92614
(949) 224-1810
www.jamsadr.com

CPR (International Institute for Conflict Prevention and Resolution)
366 Madison Avenue
New York, NY 10017
(212) 949-6490
www.cpradr.org

American Bar Association Section on Dispute Resolution
1800 M Street NW
Washington, DC 20036
(202) 331-2258
www.abanet.org

National Arbitration Center
www.lawmemo.com/arb

EEOC Guidance on Mandatory Arbitration Policies
www.eeoc.gov/policy/docs/mandarb.html

Mediation by the EEOC
www.eeoc.gov/mediate

Association of Corporate Counsel InfoPAK – Alternative Dispute Resolution
www.acca.com

Drafting Dispute Resolution Clauses – A Practical Guide

The U.S. Equal Employment Opportunity Commission

[redacted]	***NOTICE***	**Number**
EEOC		915.002
		Date
[redacted]		7/17/95

1 . SUBJECT: Equal Employment Opportunity Commission's Alternative Dispute Resolution Policy Statement

2. PURPOSE: This policy statement sets out the Commission's policy on Alternative Dispute Resolution

3. EFFECTIVE DATE: Upon receipt

4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix 6, Attachment 4, a(5), this Notice will remain in effect until rescinded or superseded.

5. ORIGINATOR: Legal Services, Office of Legal Counsel

6. INSTRUCTIONS: File in Volume 11 of the Compliance Manual.

7. SUBJECT MATTER.

I. **Introduction**

The Equal Employment Opportunity Commission (EEOC) is firmly committed to using alternative methods for resolving disputes in all of its activities, where appropriate and feasible. Used properly in appropriate circumstances, alternative dispute resolution (ADR) can provide faster, less expensive and contentious, and more productive results in eliminating workplace discrimination, as well as in Commission operations.

The use of ADR is fully consistent with EEOC's mission as a law enforcement agency. It is squarely based in the statutes creating and enforced by the Commission Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Equal Pay Act and the Americans with Disabilities Act. The use of ADR is also predicated on the Administrative Dispute Resolution Act (ADRA), pursuant to which this policy is being adopted, Executive Orders 12778 and 12871, and the National Performance Review. Finally, the Commission's 1995 ADR Task Force Report made a strong and persuasive case for the use of ADR programs.

II. **Core Principles Governing Commission ADR Programs**

Any use of ADR under Commission auspices will be governed by certain core principles. Above all, any Commission ADR program must further the agency's mission. It must also be fair, which requires voluntariness, neutrality, confidentiality, and enforceability. Recognition of the differing circumstances that

obtain in the Commission's District Offices suggests that ADR be flexible enough to respond to varied and changing priorities and caseloads. In addition, any EEOC ADR programs must have adequate training and evaluation components.

A. **Furthering the Commission's Mission**

First and foremost, an effective ADR program must further the EEOC's dual mission: vigorously enforcing federal laws prohibiting employment discrimination and resolving employment disputes. ADR will complement current systems in operation by facilitating early resolution of disputes where agreement is possible, thereby freeing up resources for identifying, investigating, settling, conciliating or litigating other matters.[1] These improvements in our enforcement efforts should, in turn, enhance the Commission's credibility as a law enforcement agency, encourage victims to come forward, and make the process of filing a charge less daunting. However, as a law enforcement agency, the Commission will vigorously enforce the statutes over which it has jurisdiction and will not hesitate to seek appropriate legal remedies through litigation when warranted.[2]

B. **Fairness**

Any ADR enterprise developed and implemented by the EEOC must be fair to the participants. both in perception and reality. Fairness should be manifested throughout all Commission ADR proceedings by incorporating each of the core principles identified in this policy as well as by providing as much information about the ADR proceeding to the parties as soon as possible. Fairness requires that the Commission provide the opportunity for assistance during the proceeding to any party who is not represented. Fairness also requires that any Commission-sponsored program include the following elements:

1. Voluntariness

ADR programs developed by the Commission will be voluntary for the parties because the unique importance of the laws against employment discrimination requires that a federal forum always be available to an aggrieved individual. The Commission believes that parties must knowingly, willingly and voluntarily enter into an ADR proceeding. Likewise, the parties have the right to voluntarily opt out of a proceeding at any point prior to resolution for any reason, including the exercise of their right to file a lawsuit in federal district court. In no circumstances will a party be coerced into accepting the other party's offer to resolve a dispute. If the parties reach an agreement, the parties will be allowed to settle as long as the proposed agreement is lawful, enforceable, and both parties are informed of their rights and remedies under the applicable statutes.

2. Neutrality

Commission ADR proceedings will rely on a neutral third party to facilitate resolution of the dispute. ADR proceedings are most successful where a neutral or impartial third party, with no vested interest in the outcome of a dispute, allows the parties themselves to attempt to resolve their dispute. Neutrality will help maintain the integrity and effectiveness of the ADR program.

The facilitator's duty to the parties is to be neutral, honest, and to act in good faith. Those who act as neutrals under EEOC auspices should possess a thorough knowledge of EEO law, and must be trained in mediation theory and techniques.[3]

3. Confidentiality

Maintaining confidentiality is an important component of any successful ADR program. Subject to the limited exceptions imposed by statute or regulation, confidentiality in any ADR proceeding must be maintained by the parties, EEOC employees who are involved in the ADR proceeding, and any outside neutral or other ADR staff. This will enable parties to ADR proceedings to be forthcoming and candid, without fear that frank statements may later be used against them. To accomplish this purpose, the Commission will be guided by the nondisclosure provisions of Title VII and the confidentiality provisions of ADRA which impose limitations on the disclosure of information. In order to encourage participation in a Commission sponsored ADR program, the Commission will include confidentiality provisions in all of its ADR programs or projects, and will notify the parties to the dispute of the protection offered by confidentiality provisions.

In order to ensure confidentiality, those who serve as neutrals for the Commission should be precluded from performing any investigatory or enforcement function related to charges with which they may have have been involved. The dispute resolution process must be insulated from the investigative and compliance process.

4. Enforceability

Any agreement reached during an ADR proceeding must be enforceable. An allegation that an ADR settlement agreement has been breached should be brought to the attention of the EEOC official responsible for that program function. The Commission will review and investigate the allegation and determine whether it will utilize its authority and resources to seek enforcement of the agreement.

C. **Flexibility**

The ADR program must be flexible enough to respond to the variety of challenges the Commission and its individual offices face. The Commission recognizes that there cannot be one ADR model which will work for all of its programs or all of its offices within the same program. Within the parameters set by the Commission, Commission staff should be able to adapt ADR techniques to fit specific program needs. Because offices operate in different cultures and milieus, and because the nature of the workload varies from office to office, Commission offices will need maximum flexibility in implementing an ADR program.

D. **Training and Evaluation**

Commission-sponsored ADR programs should include training and evaluation components. A successful ADR scheme requires that EEOC provide appropriate training and education on ADR to its own employees, the public, persons protected under the applicable laws, employers and neutrals. In addition, an evaluation component is essential to any ADR program in order to determine whether the program has achieved its goals, and how the program might be improved to be more efficient and achieve better results.

III. **CONCLUSION**

Through this Policy Statement, the Commission affirms its commitment to the use of ADR techniques throughout its programs, where appropriate and feasible, including charge processing, litigation, federal sector EEO complaint processing, internal EEO complaint processing, labor-management relations and contract administration.

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1. These procedures will continue to be governed by current standards except as specifically discussed in this document.

2. The Commission remains cognizant that there are instances in which ADR may not be appropriate or feasible, such as in cases in which there is a need to establish policies or precedents, where resolution of a dispute would have a significant effect on non-parties, where a full public record is important, where the agency must maintain continuing jurisdiction over a matter, or where it would otherwise be inappropriate.

3. The Commission will accept as sufficient such training as is generally recognized in the dispute resolution profession.

The U.S. Equal Employment Opportunity Commission

EEOC NOTICE
Number 915.002
Date July 10, 1997

1. SUBJECT: Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment

2. PURPOSE: This policy statement sets out the Commission's policy on the mandatory binding arbitration of employment discrimination disputes imposed as a condition of employment.

3. EFFECTIVE DATE: Upon issuance.

4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

5. ORIGINATOR: Coordination and Guidance Programs, Office of Legal Counsel.

6. INSTRUCTIONS: File in Volume II of the EEOC Compliance Manual.

7. SUBJECT MATTER:

The United States Equal Employment Opportunity Commission (EEOC or Commission), the federal agency charged with the interpretation and enforcement of this nation's employment discrimination laws, has taken the position that agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles evinced in these laws. EEOC Motions on Alternative Dispute Resolution, Motion 4 (adopted Apr. 25, 1995), 80 Daily Lab. Rep. (BNA) E-1 (Apr. 26, 1995).1 This policy statement sets out in further detail the basis for the Commission's position.

I. Background

An increasing number of employers are requiring as a condition of employment that applicants and employees give up their right to pursue employment discrimination claims in court and agree to resolve disputes through binding arbitration. These agreements may be presented in the form of an employment contract or be included in an employee handbook or elsewhere. Some employers have even included such agreements in employment applications. The use of these agreements is not limited to particular industries, but can be found in various sectors of the

workforce, including, for example, the securities industry, retail, restaurant and hotel chains, health care, broadcasting, and security services. Some individuals subject to mandatory arbitration agreements have challenged the enforceability of these agreements by bringing employment discrimination actions in the courts. The Commission is not unmindful of the case law enforcing specific mandatory arbitration agreements, in particular, the Supreme Court's decision in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 33 (1991).2 Nonetheless, for the reasons stated herein, the Commission believes that such agreements are inconsistent with the civil rights laws.

II. The Federal Civil Rights Laws Are Squarely Based In This Nation's History And Constitutional Framework And Are Of A Singular National Importance

Federal civil rights laws, including the laws prohibiting discrimination in employment, play a unique role in American jurisprudence. They flow directly from core Constitutional principles, and this nation's history testifies to their necessity and profound importance. Any analysis of the mandatory arbitration of rights guaranteed by the employment discrimination laws must, at the outset, be squarely based in an understanding of the history and purpose of these laws.

Title VII of the historic Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., was enacted to ensure equal opportunity in employment, and to secure the fundamental right to equal protection guaranteed by the Fourteenth Amendment to the Constitution.3 Congress considered this national policy against discrimination to be of the "highest priority" (Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968)), and of "paramount importance" (H.R. Rep. No. 88-914, pt. 2 (1963) (separate views of Rep. McCulloch et al.)),4 reprinted in 1964 Leg. Hist. at 2123.5 The Civil Rights Act of 1964, 42 U.S.C. § 2000a et seq., was intended to conform "[t]he practice of American democracy . . . to the spirit which motivated the Founding Fathers of this Nation -- the ideals of freedom, equality, justice, and opportunity." H.R. Rep. No. 88-914, pt. 2 (1963)(separate views of Rep. McCulloch et al.), reprinted in 1964 Leg. Hist. at 2123. President John F. Kennedy, in addressing the nation regarding his intention to introduce a comprehensive civil rights bill, stated the issue as follows:

> We are confronted primarily with a moral issue. It is as old as the Scriptures and it is as clear as the American Constitution.
>
> The heart of the question is whether all Americans are to be afforded equal rights and equal opportunities, whether we are going to treat our fellow Americans as we want to be treated.

President John F. Kennedy's Radio and Television Report to the American People on Civil Rights (June 11, 1963), Pub. Papers 468, 469 (1963).6

Title VII is but one of several federal employment discrimination laws enforced by the Commission which are "part of a wider statutory scheme to protect employees in the workplace nationwide," McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 357 (1995). See the Equal Pay Act of 1963 ("EPA"), 29 U.S.C. § 206(d); the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621 et seq.; and the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 et seq. The ADEA was enacted "as part of an ongoing congressional effort to eradicate discrimination in the workplace" and "reflects a societal condemnation of invidious bias in employment decisions." McKennon, 513 U.S. at 357. The ADA explicitly provides that its purpose is, in part, to invoke congressional power to enforce the Fourteenth Amendment. 29 U.S.C. § 12101(b)(4). Upon signing the ADA, President George Bush remarked that "the American people have once again given clear expression to our most basic ideals of freedom and equality." President George Bush's Statement on Signing the Americans with Disabilities Act of 1990 (July 26, 1990), Pub. Papers 1070 (1990 Book II).

III. The Federal Government Has The Primary Responsibility For The Enforcement Of The Federal Employment Discrimination Laws

The federal employment discrimination laws implement national values of the utmost importance through the institution of public and uniform standards of equal opportunity in the workplace. See text and notes supra in Section II. Congress explicitly entrusted the primary responsibility for the interpretation, administration, and enforcement of these standards, and the public values they embody, to the federal government. It did so in three principal ways. First, it created the Commission, initially giving it authority to investigate and conciliate claims of discrimination and to interpret the law, see §§ 706(b) and 713 of Title VII, 42 U.S.C. §§ 2000e-5(b) and 2000e-12, and subsequently giving it litigation authority in order to bring cases in court that it could not administratively resolve, see § 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1). Second, Congress granted certain enforcement authority to the Department of Justice, principally with regard to the litigation of cases involving state and local governments. See §§ 706(f)(1) and 707 of Title VII, 42 U.S.C. §§ 2000e-5(f)(1) and 2000e-6. Third, it established a private right of action to enable aggrieved individuals to bring their claims directly in the federal courts, after first administratively bringing their claims to the Commission. See § 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1).7

While providing the states with an enforcement role, see 42 U.S.C. §§ 2000e-5(c) and (d), as well as recognizing the importance of voluntary compliance by employers, see 42 U.S.C. § 2000e-5(b), Congress emphasized that it is the federal government that has ultimate enforcement responsibility. As Senator Humphrey stated, "[t]he basic rights protected by [Title VII] are rights which accrue to citizens of the United States; the Federal Government has the clear obligation to see that these rights are fully protected." 110 Cong. Rec. 12725(1964). Cf. General Tel. Co. v. EEOC, 446 U.S. 318, 326 (1980)(in bringing enforcement actions under Title VII, the EEOC "is guided by 'the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement'")(quoting 118 Cong. Rec. 4941 (1972)).

The importance of the federal government's role in the enforcement of the civil rights laws was reaffirmed by Congress in the ADA, which explicitly provides that its purposes include "ensur[ing] that the Federal Government plays a central role in enforcing the standards established in [the ADA] on behalf of individuals with disabilities." 42 U.S.C. § 12101(b)(3).

IV. Within This Framework, The Federal Courts Are Charged With The Ultimate Responsibility For Enforcing The Discrimination Laws

While the Commission is the primary federal agency responsible for enforcing the employment discrimination laws, the courts have been vested with the final responsibility for statutory enforcement through the construction and interpretation of the statutes, the adjudication of claims, and the issuance of relief.8 See, e.g., Kremer v. Chemical Constr. Corp., 454 U.S. 461, 479 n.20 (1982) ("federal courts were entrusted with ultimate enforcement responsibility" of Title VII); New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 64 (1980) ("Of course the 'ultimate authority' to secure compliance with Title VII resides in the federal courts").9

A. The Courts Are Responsible For The Development And Interpretation Of The Law

As the Supreme Court emphasized in Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974), "the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts." This principle applies equally to the other employment discrimination statutes.

While the statutes set out the basic parameters of the law, many of the fundamental legal principles in discrimination jurisprudence have been developed through judicial interpretations and case law precedent. Absent the role of the courts, there might be no discrimination claims today based on, for example, the adverse impact of neutral practices not justified by business necessity, see Griggs v. Duke Power Co., 401 U.S. 424 (1971), or sexual harassment, see Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986). Yet these two doctrines have proved essential to the effort to free the workplace from unlawful discrimination, and are broadly accepted today as key elements of civil rights law.

B. The Public Nature Of The Judicial Process Enables The Public, Higher Courts, And Congress To Ensure That The Discrimination Laws Are Properly Interpreted And Applied

Through its public nature -- manifested through published decisions -- the exercise of judicial authority is subject to public scrutiny and to system-wide checks and balances designed to ensure uniform expression of and adherence to statutory principles. When courts fail to interpret or apply the antidiscrimination laws in accord with the public values underlying them, they are subject to correction by higher level courts and by Congress.

These safeguards are not merely theoretical, but have enabled both the Supreme Court and Congress to play an active and continuing role in the development of employment discrimination law. Just a few of the more recent Supreme Court decisions overruling lower court errors include: Robinson v. Shell Oil Co., 117 S. Ct. 843 (1997) (former employee may bring a claim for retaliation); O'Connor v. Consolidated Coin Caterers, Corp., 116 S. Ct. 1307 (1996) (comparator in age discrimination case need not be under forty); McKennon, 513 U.S. 352 (employer may not use after-acquired evidence to justify discrimination); and Harris 510 U.S. 17 (no requirement that sexual harassment plaintiffs prove psychological injury to state a claim).

Congressional action to correct Supreme Court departures from congressional intent has included, for example, legislative amendments in response to Court rulings that: pregnancy discrimination is not necessarily discrimination based on sex(General Elec. Co. v. Gilbert, 429 U.S. 125 (1978), and Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), overruled by Pregnancy Discrimination Act of 1978); that an employer does not have the burden of persuasion on the business necessity of an employment practice that has a disparate impact (Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), overruled by §§ 104 and 105 of the Civil Rights Act of 1991); that an employer avoids

liability by showing that it would have taken the same action absent any discriminatory motive (Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), overruled, in part, by § 107 of the Civil Rights Act of 1991); that mandatory retirement pursuant to a benefit plan in effect prior to enactment of the ADEA is not prohibited age discrimination (United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977), overruled by 1978 ADEA amendments); and, that age discrimination in fringe benefits is not unlawful(Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 158(1989), overruled by Older Workers Benefits Protection Act of 1990).

C. The Courts Play A Crucial Role In Preventing And Deterring Discrimination And In Making Discrimination Victims Whole

The courts also play a critical role in preventing and deterring violations of the law, as well as providing remedies for discrimination victims. By establishing precedent, the courts give valuable guidance to persons and entities covered by the laws regarding their rights and responsibilities, enhancing voluntary compliance with the laws. By awarding damages, backpay, and injunctive relief as a matter of public record, the courts not only compensate victims of discrimination, but provide notice to the community, in a very tangible way, of the costs of discrimination. Finally, by issuing public decisions and orders, the courts also provide notice of the identity of violators of the law and their conduct. As has been illustrated time and again, the risks of negative publicity and blemished business reputation can be powerful influences on behavior.

D. The Private Right Of Action With Its Guarantee Of Individual Access To The Courts Is Essential To The Statutory Enforcement Scheme

The private right of access to the judicial forum to adjudicate claims is an essential part of the statutory enforcement scheme. See, e.g., McKennon, 513 U.S. at 358 (granting a right of action to an injured employee is "a vital element" of Title VII, the ADEA, and the EPA). The courts cannot fulfill their enforcement role if individuals do not have access to the judicial forum. The Supreme Court has cautioned that, "courts should ever be mindful that Congress . . . thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum." Gardner-Denver, 415 U.S. at 60 n.21.10

Under the enforcement scheme for the federal employment discrimination laws, individual litigants act as "private attorneys general." In bringing a claim in court, the civil rights plaintiff serves not only her or his private interests, but also serves as "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418 (1978) (quoting Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968)). See also McKennon, 513 U.S. at 358 ("[t]he private litigant who seeks redress for his or her injuries vindicates both the deterrence and compensation objectives of the ADEA").

V. Mandatory Arbitration Of Employment Discrimination Disputes "Privatizes" Enforcement Of The Federal Employment Discrimination Laws, Thus Undermining Public Enforcement Of The Laws

The imposition of mandatory arbitration agreements as a condition of employment substitutes a private dispute resolution system for the public justice system intended by Congress to govern the enforcement of the employment discrimination laws. The private arbitral system differs in critical ways from the public judicial forum and, when imposed as a condition of employment, it is structurally biased against applicants and employees.

A. Mandatory Arbitration Has Limitations That Are Inherent And Therefore Cannot Be Cured By The Improvement Of Arbitration Systems

That arbitration is substantially different from litigation in the judicial forum is precisely the reason for its use as a form of ADR. Even the fairest of arbitral mechanisms will differ strikingly from the judicial forum.

1. The Arbitral Process Is Private In Nature And Thus Allows For Little Public Accountability

The nature of the arbitral process allows -- by design -- for minimal, if any, public accountability of arbitrators or arbitral decision-making. Unlike her or his counterparts in the judiciary, the arbitrator answers only to the private parties to the dispute, and not to the public at large. As the Supreme Court has explained:

> A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept.
>
> He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. . . .

United Steelworkers of Am. v. Warrior and Gulf Navigation Co.,

363 U.S. 574, 581 (1960) (quoting from Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999, 1016 (1955)).

The public plays no role in an arbitrator's selection; s/he is hired by the private parties to a dispute. Similarly, the arbitrator's authority is defined and conferred, not by public law, but by private agreement.11 While the courts are charged with giving force to the public values reflected in the antidiscrimination laws, the arbitrator proceeds from a far narrower perspective: resolution of the immediate dispute. As noted by one commentator, "[a]djudication is more likely to do justice than . . . arbitration . . . precisely because it vests the power of the state in officials who act as trustees for the public, who are highly visible, and who are committed to reason."Owen Fiss, Out of Eden, 94 Yale L.J. 1669, 1673 (1985).

Moreover, because decisions are private, there is little, if any, public accountability even for employers who have been determined to have violated the law. The lack of public disclosure not only weakens deterrence (see discussion supra at 8), but also prevents assessment of whether practices of individual employers or particular industries are in need of reform. "The disclosure through litigation of incidents or practices which violate national policies respecting nondiscrimination in the work force is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a misappreciation of [Title VII's] operation or entrenched resistance to its commands, either of which can be of industry-wide significance." McKennon, 513 U.S. at 358-59.

2. Arbitration, By Its Nature, Does Not Allow For The Development Of The Law

Arbitral decisions may not be required to be written or reasoned, and are not made public without the consent of the parties. Judicial review of arbitral decisions is limited to the narrowest of grounds.12 As a result, arbitration affords no opportunity to build a jurisprudence through precedent.13 Moreover, there is virtually no opportunity for meaningful scrutiny of arbitral decision-making. This leaves higher courts and Congress unable to act to correct errors in statutory interpretation. The risks for the vigorous enforcement of the civil rights laws are profound. See discussion supra at section IV. B.

3. Additional Aspects Of Arbitration Systems Limit Claimants' Rights In Important Respects

Arbitration systems, regardless of how fair they may be, limit the rights of injured individuals in other important ways. To begin with, the civil rights litigant often has available the choice to have her or his case heard by a jury of peers, while in the arbitral forum juries are, by definition, unavailable. Discovery is significantly limited compared with that available in court and permitted under the Federal Rules of Civil Procedure. In addition, arbitration systems are not suitable for resolving class or pattern or practice claims of discrimination. They may, in fact, protect systemic discriminators by forcing claims to be adjudicated one at a time, in isolation, without reference to a broader -- and more accurate -- view of an employer's conduct.

B. Mandatory Arbitration Systems Include Structural Biases Against Discrimination Plaintiffs

In addition to the substantial and inevitable differences between the arbitral and judicial forums that have already been discussed, when arbitration of employment disputes is imposed as a condition of employment, bias inheres against the employee.14

First, the employer accrues a valuable structural advantage because it is a "repeat player." The employer is a party to arbitration in all disputes with its employees. In contrast, the employee is a "one-shot player"; s/he is a party to arbitration only in her or his own dispute with the employer. As a result, the employee is generally less able to make an informed selection of arbitrators than the employer, who can better keep track of an arbitrator's record. In addition, results cannot but be influenced by the fact that the employer, and not the employee, is a potential source of future business for the arbitrator.15 A recent study of nonunion employment law cases16 found that the more frequent a user of arbitration an employer is, the better the employer fares in arbitration.17

In addition, unlike voluntary post-dispute arbitration -- which must be fair enough to be attractive to the employee -- the employer imposing mandatory arbitration is free to manipulate the arbitral mechanism to its benefit. The terms of the private agreement defining the arbitrator's authority and the arbitral process are characteristically set by the more powerful party, the very party that the public law seeks to regulate. We are aware of no examples of employees who insist on the mandatory arbitration of future statutory employment disputes as a condition of accepting a job offer -- the very suggestion seems far-fetched. Rather, these agreements are imposed by employers because they believe them to be in their interest, and they are made possible by the employer's superior bargaining power. It is thus not surprising that many employer-mandated arbitration systems fall far short of basic concepts of fairness. Indeed, the Commission has challenged -- by litigation, amicus curiae participation, or Commissioner charge -- particular mandatory arbitration agreements that include provisions flagrantly eviscerating core rights and remedies that are available under

the civil rights laws.18

The Commission's conclusions in this regard are consistent with those of other analyses of mandatory arbitration. The Commission on the Future of Worker-Management Relations (the "Dunlop Commission") was appointed by the Secretary of Labor and the Secretary of Commerce to, in part, address alternative means to resolve workplace disputes. In its Report and Recommendations(Dec. 1994) ("Dunlop Report"), the Dunlop Commission found that recent employer experimentation with arbitration has produced a range of programs that include "mechanisms that appear to be of dubious merit for enforcing the public values embedded in our laws." Dunlop Report at 27. In addition, a report by the U.S. General Accounting Office, surveying private employers' use of ADR mechanisms, found that existing employer arbitration systems vary greatly and that "most" do not conform to standards recommended by the Dunlop Commission to ensure fairness. See "Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution" at 15, HEHS-95-150 (July 1995).

The Dunlop Commission strongly recommended that binding arbitration agreements not be enforceable as a condition of employment:

> The public rights embodied in state and federal employment law -- such as freedom from discrimination in the workplace . . . -- are an important part of the social and economic protections of the nation. Employees required to accept binding arbitration of such disputes would face what for many would be an inappropriate choice: give up your right to go to court, or give up your job.

Dunlop Report at 32. The Brock Commission (see supra n.13) agreed with the Dunlop Commission's opposition to mandatory arbitration of employment disputes and recommended that all employee agreements to arbitrate be voluntary and post-dispute. Brock Report at 81-82. In addition, the National Academy of Arbitrators recently issued a statement opposing mandatory arbitration as a condition of employment "when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights." See National Academy of Arbitrators' Statement and Guidelines (adopted May 21, 1997), 103 Daily Lab. Rep. (BNA) E-1 (May 29, 1997).

C. Mandatory Arbitration Agreements Will Adversely Affect The Commission's Ability To Enforce The Civil Rights Laws

The trend to impose mandatory arbitration agreements as a condition of employment also poses a significant threat to the EEOC's statutory responsibility to enforce the federal employment discrimination laws. Effective enforcement by the Commission depends in large part on the initiative of individuals to report instances of discrimination to the Commission. Although employers may not lawfully deprive individuals of their statutory right to file employment discrimination charges with the EEOC or otherwise interfere with individuals' protected participation in investigations or proceedings under these laws,19 employees who are bound by mandatory arbitration agreements may be unaware that they nonetheless may file an EEOC charge. Moreover, individuals are likely to be discouraged from coming to the Commission when they know they will be unable to litigate their claims in court.20 These chilling effects on charge filing undermine the Commission's enforcement efforts by decreasing channels of information, limiting the agency's awareness of potential violations of law, and impeding its ability to investigate possible unlawful actions and attempt informal resolution.

VI. Voluntary, Post-Dispute Agreements To Arbitrate Appropriately Balance The Legitimate Goals Of Alternate Dispute Resolution And The Need To Preserve The Enforcement Framework Of The Civil Rights Laws

The Commission is on record in strong support of voluntary alternative dispute resolution programs that resolve employment discrimination disputes in a fair and credible manner, and are entered into after a dispute has arisen. We reaffirm that support here. This position is based on the recognition that while even the best arbitral systems do not afford the benefits of the judicial system, well-designed ADR programs, including binding arbitration, can offer in particular cases other valuable benefits to civil rights claimants, such as relative savings in time and expense.21 Moreover, we recognize that the judicial system is not, itself, without drawbacks. Accordingly, an individual may decide in a particular case to forego the judicial forum and resolve the case through arbitration. This is consistent with civil rights enforcement as long as the individual's decision is freely made after a dispute has arisen.22

VII. Conclusion

The use of unilaterally imposed agreements mandating binding arbitration of employment discrimination disputes as a condition of employment harms both the individual civil rights claimant and the public interest in eradicating discrimination. Those whom the law seeks to regulate should not be permitted to exempt themselves from federal enforcement of civil rights laws. Nor should they be permitted to deprive civil rights claimants of the choice to vindicate their statutory rights in the courts -- an avenue of redress determined by Congress to be essential to enforcement.

Processing Instructions For The Field And Headquarters

1. Charges should be taken and processed in conformity with priority charge processing procedures regardless of whether the charging party has agreed to arbitrate employment disputes. Field offices are instructed to closely scrutinize each charge involving an arbitration agreement to determine whether the agreement was secured under coercive circumstances (e.g., as a condition of employment). The Commission will process a charge and bring suit, in appropriate cases, notwithstanding the charging party's agreement to arbitrate.

2. Pursuant to the statement of priorities in the National Enforcement Plan, see § B(1)(h), the Commission will continue to challenge the legality of specific agreements that mandate binding arbitration of employment discrimination disputes as a condition of employment. See, e.g., Briefs of the EEOC as Amicus Curiae in Seus v. John Nuveen & Co., No. 96-CV-5971 (E.D. Pa.) (Br. filed Jan. 11, 1997); Gibson v. Neighborhood Health Clinics, Inc., No. 96-2652 (7th Cir.) (Br. filed Sept. 23, 1996); Johnson v. Hubbard Broadcasting, Inc., No. 4-96-107 (D. Minn.) (Br. Filed May 17, 1996); Great Western Mortgage Corp. v. Peacock, No. 96-5273 (3d Cir.) (Br. filed July 24, 1996).

/s/

_____ _____

Date Gilbert F. Casellas

Chairman

1. Although binding arbitration does not, in and of itself, undermine the purposes of the laws enforced by the EEOC, the Commission believes that this is the result when it is imposed as a term or condition of employment.

2. The Gilmer decision is not dispositive of whether employment agreements that mandate binding arbitration of discrimination claims are enforceable. As explicitly noted by the Court, the arbitration agreement at issue in Gilmer was not contained in an employment contract. 500 U.S. at 25 n.2. Even if Gilmer had involved an agreement with an employer, the issue would remain open given the active role of the legislative branch in shaping the development of employment discrimination law. See discussion infra at section IV. B.

3. See, e.g., H.R. Rep. No. 88-914, pt. 1 (1963), reprinted in United States Equal Employment Opportunity Commission, Legislative History of Title VII and XI of the Civil Rights Act of 1964 ("1964 Leg. Hist.") at 2016 (the Civil Rights Act of 1964 was "designed primarily to protect and provide more effective means to enforce. . . civil rights"); H.R. Rep. No.88-914, pt.2 (1963) (separate views of Rep. McCulloch et al.), reprinted in 1964 Leg. Hist. at 2122 ("[a] key purpose of the bill . . . is to secure to all Americans the equal protection of the laws of the United States and of the several States"); Charles & Barbara Whalen, The Longest Debate: A legislative history of the 1964 Civil Rights Act 104 (1985) (opening statement of Rep. Celler on House debate of H.R. 7152: "The legislation before you seeks only to honor the constitutional guarantees of equality under the law for all. . . . [W]hat it does is to place into balance the scales of justice so that the living force of our Constitution shall apply to all people . . . ."); H.R. Rep. No. 92-238 (1971), reprinted in Senate Committee on Labor and Public Welfare, Subcommittee on Labor, Legislative History of the Equal Employment Opportunity Act of 1972 ("1972 Leg. Hist.") at 63 (1972 amendments to Title VII are a "reaffirmation of our national policy of equal opportunity in employment").

4. William McCulloch (R-Ohio) was the ranking Republican of Subcommittee No. 5 of the House Judiciary Committee, to which the civil rights bill (H.R. 7152) was referred for initial consideration by Congress. McCulloch was among the individuals responsible for working out a compromise bill that was ultimately substituted by the full Judiciary Committee for the bill reported out by Subcommittee No. 5. His views, which were joined by six members of Congress, are thus particularly noteworthy.

5. See also Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975) (The Civil Rights Act of 1964 is a "complex legislative design directed at an historic evil of national proportions").

6. Commitment to our national policy to eradicate discrimination continues today to be of the utmost importance. As President Clinton stated in his second inaugural address:

Our greatest responsibility is to embrace a new spirit of community for a new century . . . . The challenge of our past remains the challenge of our future: Will we be one Nation, one people, with one common destiny, or not? Will we all come together, or come apart?

The divide of race has been America's constant curse. And each new wave of immigrants gives new targets to old prejudices . . . . These forces have nearly destroyed our Nation in the past. They plague us still.

President William J. Clinton's Inaugural Address (Jan. 20, 1997), 33 Weekly Comp. Pres. Doc. 61 (Jan. 27, 1997).

7. Section 107 of the ADA specifically incorporates the powers, remedies, and procedures set forth in Title VII with respect to the Commission, the Attorney General, and aggrieved individuals. See 42 U.S.C.§ 12117. Similar enforcement provisions are contained in the ADEA. See 29 U.S.C. §§ 626 and 628.

8. In addition, unlike arbitrators, courts have coercive authority, such as the contempt power, which they can use to secure compliance.

9. See also H.R. Rep. No. 88-914, pt.2 (1963) (separate views of Rep. McCulloch et al.), reprinted in 1964 Leg. Hist. at 2150 (explaining that EEOC was not given cease-and-desist powers in the final House version of the Civil Rights Act of 1964, H.R. 7152, because it was "preferred that the ultimate determination of discrimination rest with the Federal judiciary").

10. See also 118 Cong. Rec. S7168 (March 6, 1972) (section-by-section analysis of H.R. 1746, the Equal Opportunity Act of 1972, as agreed to by the conference committees of each House; analysis of § 706(f)(1) provides that, while it is hoped that most cases will be handled through the EEOC with recourse to a private lawsuit as the exception, "as the individual's rights to redress are paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief").

11. Article III of the Constitution provides federal judges with life tenure and salary protection to safeguard the independence of the judiciary. No such safeguards apply to the arbitrator. The importance of these safeguards was stressed in the debates on the 1972 amendments to Title VII. Senator Dominick, in offering an amendment giving the EEOC the right to file a civil action in lieu of cease-and-desist powers, explained that the purpose of the amendment was to "vest adjudicatory power where it belongs -- in impartial judges shielded from political winds by life tenure." 1972 Leg. Hist. at 549. The amendment was later revised in minor respects and adopted by the Senate.

12. Under the Federal Arbitration Act, arbitral awards may be vacated only for procedural impropriety such as corruption, fraud, or misconduct. 9 U.S.C. § 10. Judicially created standards of review allow an arbitral award to be vacated where it clearly violates a public policy that is explicit, well-defined, "dominant" and ascertainable from the law, see United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 43 (1987), or where it is in "manifest disregard" of the law, see Wilko v. Swan, 346 U.S. 427, 436-37 (1953). The latter standard of review has been described by one commentator as "a virtually insurmountable" hurdle. See Bret F. Randall, The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards, 1992 BYU L. Rev. 759, 767. But cf. Cole v. Burns Int=l Sec. Servs., 105 F.3d 1465, 1486-87 (1997) (in the context of mandatory employment arbitration of statutory disputes, the court interprets judicial review under the "manifest disregard" standard to be sufficiently broad to ensure that the law has been properly interpreted and applied).

13. Congress has recognized the inappropriateness of ADR where "a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent," see Alternative Dispute Resolution Act, 5 U.S.C. § 572(b)(1)(providing for use of ADR by federal administrative agencies where the parties agree); or where "the case involves complex or novel legal issues," see Judicial Improvements and Access to Justice Act, 28 U.S.C. § 652(c)(2) (providing for court-annexed arbitration; §§ 652(b)(1) and (2) also require the parties' consent to arbitrate constitutional or statutory civil rights claims).
Similar findings were made by the U.S. Secretary of Labor's Task Force on Excellence in State and Local Government Through Labor-Management Cooperation ("Brock Commission"), which was charged with examining labor-management cooperation in state and local government. The Task Force's report, "Working Together for Public Service" (1996) ("Brock Report"), recommended "Quality Standards and Key Principles for Effective Alternative Dispute Resolution Systems for Rights Guaranteed by Public Law and for Other Workplace Disputes" which include that "ADR should normally not be used in cases that represent tests of significant legal principles or class action." Brock Report at 82.

14. A survey of employment discrimination arbitration awards in the securities industry, which requires as a condition of employment that all brokers resolve employment disputes through arbitration, found that "employers stand a greater chance of success in arbitration than in court before a jury" and are subjected to "smaller" damage awards. See Stuart H. Bompey & Andrea H. Stempel, Four Years Later: A Look at Compulsory Arbitration of Employment Discrimination Claims After Gilmer v. Interstate/Johnson Lane Corp., 21 Empl. Rel. L.J. 21, 43 (autumn 1995).

15. See, e.g., Julius G. Getman, Labor Arbitration and Dispute Resolution, 88 Yale L.J. 916, 936 (1979) ("an arbitrator could improve his chances of future selection by deciding favorably to institutional defendants: as a group, they are more likely to have knowledge about past decisions and more likely to

be regularly involved in the selection process"); Reginald Alleyne, Statutory Discrimination Claims: Rights 'Waived' and Lost in the Arbitration Forum, 13 Hofstra Lab. L.J. 381, 428(Spring 1996) ("statutory discrimination grievances relegated to. . . arbitration forums are virtually assured employer-favored outcomes," given "the manner of selecting, controlling, and compensating arbitrators, the privacy of the process and how it catalytically arouses an arbitrator's desire to be acceptable to one side").

16. Arbitration of labor disputes pursuant to a collective bargaining agreement is less likely to favor the employer as a repeat-player because the union, as collective bargaining representative, is also a repeat-player.

17. See Lisa Bingham, "Employment Arbitration: The effect of repeat-player status, employee category and gender on arbitration outcomes," (unpublished study on file with the author, an assistant professor at Indiana U. School of Public & Environmental Affairs).

18. Challenged agreements have included provisions that: (1) impose filing deadlines far shorter than those provided by statute; (2) limit remedies to "out-of-pocket" damages; (3) deny any award of attorney's fees to the civil rights claimant, should s/he prevail; (4) wholly deny or limit punitive and liquidated damages; (5) limit back pay to a time period much shorter than that provided by statute; (6) wholly deny or limit front pay to a time period far shorter than that ordered by courts; (7) deny any and all discovery; and (8) allow for payment by each party of one-half of the costs of arbitration and, should the employer prevail, require the claimant, in the arbitrator's discretion, to pay the employer's share of arbitration costs as well.

19. See "Enforcement Guidance on non-waivable employee rights under Equal Employment Opportunity Commission (EEOC) statutes," Vol. III EEOC Compl. Man. (BNA) at N:2329 (Apr. 10, 1997).

20. The Commission remains able to bring suit despite the existence of a mandatory arbitration agreement because it acts "to vindicate the public interest in preventing employment discrimination," General Tel., 446 U.S. at 326. Cf. S.Rep. No. 101-263 (1990), reprinted in, Legislative History of The Older Workers Benefits Protection Act, at 354 (amendment to ADEA § 626(f)(4), which provides that "no waiver agreement may affect the Commission's rights and responsibilities to enforce [the ADEA]," was intended "as a clear statement of support for the principle that the elimination of age discrimination in the workplace is a matter of public as well as private interest"). As a practical matter, however, the Commission's ability to litigate is limited by its available resources.

21. Despite conventional wisdom to the contrary, the financial costs of arbitration can be significant and may represent no savings over litigation in a judicial forum. These costs may include the arbitrator's fee and expenses; fees charged by the entity providing arbitration services, which may include filing fees and daily administrative fees; space rental fees; and court reporter fees.

22. The Dunlop Commission similarly supported voluntary forms of ADR, but based its opposition to mandatory arbitration on the premise that the avenue of redress for statutory employment rights should be chosen by the individual rather than dictated by the employer. Dunlop Report at 33.

202 Arbitration Basics: The Why's, How's and Who's of ADR

William Cosden
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Barbara McLemore
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Tier Technologies, Inc.

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Topics To Cover

I. Different Types of ADR
II. Evaluating Cases for ADR
III. Analysis of Sample Dispute Resolution Clauses
IV. International ADR

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I. Different Types of ADR

Alternative Dispute Resolution: resolution of disputes in lieu of a trial

Adjudicative: third party reaches a decision

Non-adjudicative: the parties reach a settlement - facilitated by an ADR Provider

ARBITRATION

An adjudicatory ADR process that may or may not be binding. Arbitrator (s) hear the case, then renders a decision and determines the remedies.

Laws Affecting Arbitration

Federal Arbitration Act
Uniform Arbitration Act
State Statutes
Court Rules - State and Federal

Types of Arbitration

Ad hoc
Private Organizations
Court - Annexed Arbitration

Scope of Arbitration

- Broad or narrow
- Authority and power of arbitrators
- Number, qualifications and selection of arbitrators
- Arbitration process
- Choice of law and venue

Procedures in Arbitration

- Claim and Response
- Selection of arbitrators
- Pre Hearing Conference
- Discovery
- Hearing
- Award
- Enforcement of Award

Advantages of Arbitration

- **Faster, possibly more efficient**
- **Less costly**
- **Confidential proceedings**
- **Parties have influence over decision-maker**
- **Less risk of "runaway jury" type awards**

Disadvantages of Arbitration

- **Can be a slow grind**
- **Can be just as expensive as litigation, sometimes *more* so**
- **Lack of defined procedures**
- **Extremely limited grounds for vacating or appealing award**
- **Arbitrators not bound by precedent**
- **Arbitrators lack some authority, like injunctive relief**
- **May still litigate the enforceability of arbitration provision**

MEDITATION

A non-adjudicative facilitated settlement process. Any resolution is up to the parties.

Laws Affecting Mediation

- State laws
- Uniform Mediation Act
- Court Rules - State and Federal
- Applicable evidence rules

Types of Mediation

- Ad hoc
- Private organizations
- Individuals
- Court - annexed mediation

Timing of Mediation

- As part of a contract
- A post - dispute voluntary agreement
- Before filing a lawsuit
- Anytime during the course of a lawsuit

Mediation Process

- Selection of mediator
- Role of the mediator: facilitator/ evaluator
- Pre-hearing submission
- Mediation session
  - Joint session
  - No coerced settlement
  - Terms of final resolution

Advantages of Mediation

- Can be extremely efficient resolution
- Opportunity to reach creative settlements
- Can help preserve relationships - not so antagonistic
- Opportunity to get an objective evaluation of your case
- Confidential proceedings

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Disadvantages of Mediation

- Can be a frustrating waste of time and money
- Party unwilling to compromise may be using the process to gain free discovery
- Enforceability of mediation agreements

OTHER FORMS OF ADR

Adjudicative

Baseball Arbitration

Mediation/Arbitration Hybrids

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Non Adjudicative

Early Neutral Evaluation

Summary Trial (Bench and Jury)

II. EVALUATING CASES FOR ADR

One size does not fit all

Experience often dictates approach

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Routine Contracts

- ADR at all?
- Evaluating past or anticipating future disputes
- "Stepped" ADR
- Arbitration fads and fashions

ADR Analysis Checklist

- Complexity of the matter
- Legal issues v. "softer" issues
- Technical issues
  - Panel of arbitrators
- Injunctive relief

ADR Analysis Checklist (cont.)

- Establishing a precedent
- Establishing a deterrent
- Emotional issues
- Award of punitive damages and/or attorneys fees
- Other party's behavior

A Brief Note on Arbitration Agreements in the Employment Context

- Employee allowed to recover all types of relief available in court
- Neutral arbitrator, adequate discovery, written award and judicial review
- Employee does not have to bear any additional expense

Arbitration and Employment

- **Always check applicable state law**

ADR Myths and Truths

- **Split the baby**
- **Favoring the party that produces the volume of cases**
- **Institutional favoritism**

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Selecting the Right ADR Provider (Organizations)

- American Arbitration Association
- JAMS
- Other Providers

Selecting the Right ADR Provider (Individuals)

- Review Resume or C.V. Provided
  - Experience in general
  - Subject matter expertise
  - Length of ADR experience
  - ADR education
  - Are they busy

Selecting the Right ADR Provider (Individuals) cont.

- **Additional Outside Research**
  - **Prior opinions**
  - **Court biographies**
  - **Bar association ratings**
  - **Cases worked on**
  - **Clients represented**
  - **One sided representation**

Selecting the Right ADR Provider (Individuals) cont.

OBTAIN INFORMATION/INSIGHT FROM OTHERS WHO HAVE USED THIS CANDIDATE BEFORE

WHAT'S THE WORD FROM YOUR COLLEAGUES

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Selecting the Right ADR Provider (Individuals) cont.

Warning Signs for Potential Candidates

- An expert in everything
- Idle for some time
- Little or no formal ADR training

202 Arbitration Basics: The Why's, How's and Who's of ADR

Faculty 1

Barbara R. McLemore, VP and General Counsel, Gannett Fleming, Inc.

William E. Cosden, VP & GC

Active Technologies, Inc.

III. Analysis of Sample Provisions

Drafting an Arbitration provision

Using a custom clause or

standard American Arbitration Association

III. Analysis of Sample Provisions

- Applicable to **all Claims and Controversies** that arise out of the Contract, or Breach thereof
- Specific Portions of the Contract
- Issues only between the Parties
- An Option available to the Parties

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III. Analysis of Sample Provisions

- Arbitration - Binding on the parties or not?
- Proceed with non-binding negotiation or mediation first
- Initiate arbitration, but have choice to move to mediation if the parties choose

III. Analysis of Sample Provisions

- **Number of Arbitrators**
- One Individual or a Panel
- Prior Agreement On Arbitrator
- Prior Agreement on Qualifications
- Dependant on Amount in Controversy

III. Analysis of Sample Provisions

- **Advantages of One Arbitrator**
  - Easier to Schedule One Arbitrator
  - Less Expensive
  - Question of Impartiality
  - Expertise

III. Analysis of Sample Provisions

- **Number of Arbitrators**
  - **Procedure**
    - Choose from List
    - Party Appointed Arbitrators
    - Choice of Third Member

III. Analysis of Sample Provisions

- **Number of Arbitrators**
- **Advantages of Panel**
  - Differing Viewpoints
  - Different Qualifications
  - Legal Input
  - More Expensive & harder to Schedule

III. Analysis of Sample Provisions

- **Number of Arbitrators**

  - Time Limit for Choice of Arbitrators
  - Default to Administrator

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III. Analysis of Sample Provisions

- **Qualifications of Arbitrators**
  - Specify the area of expertise
  - Carefully review disclosure statements
  - Check References
  - Parties can choose an expert in addition to an arbitrator
  - International Arbitrators

III. Analysis of Sample Provisions

- **Discovery**
  - **Document Production**
  - Limitation on Time for Discovery
  - Limitation on Type of Documents Produced

III. Analysis of Sample Provisions

- **Discovery**
  - **Depositions**
    - Limitation on Time for Depositions
    - Limitation on Time
    - Limitation on Who is Deposed

III. Analysis of Sample Provisions

- **Scope of Decisions**
  - **Limit on Type of Damages**
    - No Punitive Damages
    - No Consequential Damages
    - Only Monetary Damages
    - Preliminary Relief

III. Analysis of Sample Provisions

- **Adding Other Parties**

Consent to Joinder

Include in all Applicable Contracts

Allow Consolidation of cases

III. Analysis of Sample Provisions

- **Appeal Rights**

Right to Appeal is Limited

Must Clearly Reserve Right to Appeal

Duplicative Procedure

Reasoned Opinion

Appeal to Court or another Panel

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III. Analysis of Sample Provisions

- **Miscellaneous**

Location of Arbitration

Convenience of Location

Pool of Qualified Arbitrators

Applicable Procedural Law

Governing Law

Coordinate with Choice of Law Provision

III. Analysis of Sample Provisions

- Miscellaneous

Fees and Expenses

Split between Parties

Own Costs and Expenses

Prevailing Party

Arbitrator Award

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III. Analysis of Sample Provisions

- **Employment Arbitration**
  - **Less Expensive Than Litigation**
    - More Predictable
    - Control of Damages
  - **Employees may be more likely to file**

III. Analysis of Sample Provisions

- Employment Arbitration
  - **Courts Do Not Favor**
  - **Circuit City Stores v. Adams**
  - **Challenged by the EEOC**
    - EEOC favors Mediation
    - May not be able to prevent EEOC claim

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III. Analysis of Sample Provisions

- **Employment Arbitration**

Enforceability

Employees Must Read, Understand and sign Agreement

Employer must be able to prove

III. Analysis of Sample Provisions

- Employment Arbitration

Enforceability

Provide Consideration

New Hires

Existing Employees

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III. Analysis of Sample Provisions

- **Employment Arbitration**

Enforceability

Use a Neutral Arbitrator

Proceeding Must be Fair

Limit Employee's Cost

Equally Binding on Both Parties

III. Analysis of Sample Provisions

- **Mediation Provisions**

Choice of Mediator

Mediation Services

Recommended Mediators

Qualifications

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III. Analysis of Sample Provisions

- **Mediation Provisions**
  - **Mediation Only**
  - **Stepped Mediation**
    - Meeting of Principals
    - If Mediation not Successful

III. Analysis of Sample Provisions

- **Mediation**
  - **Good Faith Participation**
    - Non-Binding
    - Protection of Disclosed Material
    - Protection of Information Disclosed

III. Analysis of Sample Provisions

- **Mediation**
  - **Timing**
    - Limit on Time for Choice of Mediator
    - Limited Time for Efforts at Mediation
  - **Enforceability**

III. Analysis of Sample Provisions

- **Other Forms**
  - **Baseball Arbitration**
    - Each Party Gives Figure
    - Can only Choose One
  - **Mini-Trial**

IV. International ADR

1958 UN Convention on the Enforcement of Arbitration Awards
(The New York Convention)

Arbitration Awards are Enforceable in the Courts of the over 100 Countries that are signatories to the Treaty

International Arbitration Rules

- Rules vary widely among providers
- Model Rules: **UNCITRAL**
  (United Nations Commission on International Trade Law)
  - Many international ADR providers allow as option to provider's own rules
  - Commonly used in international *ad hoc* arbitrations

International ADR Providers incl.

1. **International Chamber of Commerce (*ICC)*** *www.iccadr.org*
   - Based in Paris; Oldest (1917)& Largest
2. **AAA's International Centre for Dispute Resolution(ICDR)** *www.Icdr.org*
   - Relatively new to Int. ADR (Rules issued in 1991)
3. **The London Court of International Arbitration (LCIA**) *www.lcia-arbitration.com*
   - Not as well known, but Arbitration popular in UK

Providers Continued:

4. **Stockholm Chamber of Commerce (SCC)**

   www.sccinstitute.com:
   - In'70's, US and Soviet Union used SCC as a neutral center for resolving East-West trade issues Now expanded ADR services to over 40 countries around the world, including China
5. **Singapore International Arbitration Centre (SIAC)** *www.siac.org*
   - Cream of the Bar and Follow Law

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Prehearing Procedures & Allocation of Costs

Provisional(Interim)Relief: Most, if not all, international ADR institutions grant interim relief. Also, under ICC rules, a party may seek injunctive relief in court without infringing or waiving the arbitration agreement. (ICC 23).

Providers continued:

6. China International Economic and Trade Arbitration Commission (CIETAC)

www.cietac.org

- Becoming more Westernized; significant rule changes became effective May 1, 2005

7. World Intellectual Property Organization (WIPO) *www.wipo.int*

- Suited for IP issues, especially Domain names (ICANN), and has on-line service

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Some Pre-hearing Items & Cost Allocation

- **Provisional (Interim)Relief**: Most, if not all, international ADR tribunals may grant interim relief. Per ICC rules, a party may seek injunctive relief in court without infringing or waiving the arbitration agreement. (ICC 23)

Pre-hearing Items & Cost Alloc. cont.

Rules of discovery vary widely among the international ADR institutions. UNCITRAL, SIAC, and AAA rules provide broad discovery powers to the arbitrator. ICC, however, leaves it to the discretion of the parties. SCC and others require the parties to summarize their positions, but do not otherwise expressly provide for discovery. WIPO and CIETAC have parties exchange relevant documentary evidence on which the claim, or defense, is based.

Pre-hearing Items & Cost Alloc. cont.

Mediation: Much less used than in US.

- Explanations include:
  - that Europe has much more of a tradition of arbitration, and outside of the UK, few mediations take place there.
  - Also, lack of trained mediators, and especially those skilled in dealing with cultural differences, is a factor.
- Asia, however, does prefer mediation.

Pre-hearing Items & Cost Alloc. Cont

- Procedures: Again, rules and procedures differ among the institutions.
  - AAA allows parties to mediate at any stage of the proceedings. With ICC, mediation can occur prior to, or during the proceedings. Although with both AAA and ICC, a mediator cannot also serve as an arbitrator.
- In contrast, under SIAC rules, the mediator may also serve as an arbitrator.
- In CIETAC proceedings, the parties may first request mediation.

Practice Tips

- Concerning the New York Convention, review a country's enforcement record.
- For some important issues, such as IP, it may be wise to bifurcate the proceedings. E.g., IP issues venued in California, under California law, while other issues may be heard in a foreign venue

Practice tips continued

- Hawaii is a venue where both Asian and Western parties may feel more culturally comfortable.
- If contract provides that arbitration is to be in a less desirable location ("Siberia"), parties may be more inclined to resolve the matter on their own, rather than travel.
- Corollary: if the arbitration is held in a less appealing location, there will be fewer distractions, and more incentive for the parties to conclude it in a timely manner.

Resources

Websites of the International ADR Providers: websites of the ADR providers are, and can be a rich resource of materials, including practice guides, law, clauses, and services. For example, AAA's site, www.icdr.org, has publications such as, *Drafting Dispute Resolution Clauses-A Practical Guide;* and *A Guide for Mediation and Arbitration for Business People.*

Resources continued

- ***Other Websites***
- **Links to ICC and other organizations, plus case law**: http://www.kluwerarbitration.com/arbitration/arb/default.asp

Links to domestic and international ADR: http://www.adr-resolve.com/links.htm - http://www.megalaw.com/top/alternative.php

Sample ADR clauses: cpradr.wld.com/formbook/pdfs/2/intc.pdf

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Resources continued

- ***Lex Mundi Publications***:
- 1. *International Business Transactions Checklist*
- 2. *Resource Guide for International Business Transactions*

(Both publications available on the Lex Mundi website, www.lexmundi.com, and the ACC Virtual Library, www.acca.com/v)