

Resolving Commercial Financial Disputes - A PRACTICAL GUIDE
Including Sample Clauses and Mediation and Arbitration Rules
Amended and Effective July 1, 2003

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INTRODUCTION

Each year, a vast number of business transactions take place. Many of these involve financial institutions. If a dispute occurs and litigation ensues, the value of a transaction is usually diminished or lost and the business relationship damaged. Mediation and arbitration, particularly with experienced and highly qualified panel members, provide a fair and effective process to resolve disputed transactions while, in some cases, preserving the business relationships. The costs, fees and delays associated with litigation are also substantially reduced.

Procedures for resolving disputes involving commercial financial products and services have been prepared by the American Arbitration Association (AAA) in cooperation with the American College of Commercial Finance Lawyers (ACCFL) and representatives of financial institutions. The procedures provide a specialized approach with experienced, highly qualified panel members to resolve disputes that could involve loan agreements, multi-credit arrangements, participations, subordinations, guaranties, letters of credit, asset-backed securitizations, collateral perfection and priority issues, workouts, equipment leasing, and other commercial transactions, as well as preference, fraudulent conveyance and other claims relating to bankruptcy and disputes involving regulators.

The AAA is a not-for-profit, public service organization offering, since 1926, a broad range of dispute resolution services to business executives, business entities, attorneys, individuals, trade associations, unions, management, consumers and all levels of government. Services are available through AAA headquarters in New York City and through offices located in major cities throughout the United States. Hearings may be held at locations convenient for the parties and are not limited to cities with AAA offices. In addition, the AAA serves as a center for education and training, issues specialized publications, and conducts research on all forms of out-

of-court dispute settlement.

The American College of Commercial Finance Lawyers is a not-for-profit organization of professors and lawyers who have earned the recognition of their peers as experienced and highly qualified attorneys and academicians in the area of commercial finance, bankruptcy and related litigation.

A committee of the American College of Commercial Finance Lawyers has assisted the AAA in the establishment of a National Roster for Commercial Financial Disputes (National Roster) and qualification criteria and training requirements for arbitrators and mediators who serve in commercial finance transaction mediations and arbitrations. Panelists on the National Roster are drawn from a variety of business and professional areas with proven expertise in commercial finance transactions and litigation and include lawyers with a substantial practice in commercial finance and related litigation, knowledgeable accountants, and business executives.

What is mediation?

Mediation is a process by which parties submit their dispute to a neutral third party (the mediator) who works with the parties to reach a settlement of their dispute. Mediation is an extension of the negotiation process. Mediators do not have the authority to decide issues; they simply assist the parties in reaching an acceptable settlement by probing the motivation and concerns of the parties in an effort to find a basis for resolving the parties' dispute. It is the mediator's neutrality that frequently enables him or her to transcend the posturing of the parties so that their true concerns can be addressed.

Submitting your dispute to AAA mediation will not cause delay to any pending lawsuit or arbitration you may have unless agreed to by the parties. Mediators who serve on the AAA's roster are experts in successful negotiation. Mediators receive a fee from the parties for their services. They are also rewarded by knowing that their efforts have resulted in an amicable settlement of a dispute that would have cost substantial time and money had it been litigated.

What are the benefits of mediation?

The benefits of successfully mediating a dispute to settlement vary, depending on the needs and interests of the parties. The most common advantages follow:

- Parties are directly engaged in negotiating the settlement.
- The mediator, as a neutral third party, can view the dispute objectively and can assist the parties in exploring alternatives that they might not have considered on their own.
- Because mediation can be scheduled early in the dispute, a settlement can be reached much more quickly than in litigation.
- Parties generally save money through reduced legal costs and less staff time.
- Parties enhance the possibility of continuing their business relationship with each other.
- The AAA experience has been that parties are able to reach a settlement in 85% of disputes submitted to mediation.
- Creative solutions or accommodations of special needs of the parties can become a part of the settlement.

The parties might wish to try mediation before submitting their dispute to arbitration. This can be accomplished by making a provision for mediation in a contractual document. To be most effective, the mediation clause can specify the AAA's Commercial Finance Disputes Mediation Rules.

What is arbitration?

Arbitration is the referral of a dispute to one or more impartial persons for final and binding determination. It is designed to be private, informal, quick, practical and economical. Parties can exercise additional control over the arbitration process by adding specific provisions to their contract's arbitration clause or, when a dispute arises, by modifying certain of the arbitration rules to suit a particular dispute. Stipulations may be made regarding confidentiality of proprietary information, evidence, locale, the number of arbitrators, and issues subject to arbitration, as examples.

The parties may also provide for expedited arbitration procedures, including expedited rendering of the award, if they anticipate a need for hearings to be scheduled on short notice.

An important feature of arbitration is its informality. Under the standard AAA rules, the procedure is relatively simple: legal rules of evidence are not applicable; there is no motion practice or court conference; there is no requirement for transcripts of the proceedings or for written opinions of the arbitrators. Although there is no formal discovery process, the AAA's rules allow the arbitrator to require production of relevant documents, the deposition of factual witnesses, and an exchange of reports of expert witnesses. The standard AAA's rules are flexible and may be varied by mutual agreement of the parties.

The fact that the arbitrators are trained and have professional expertise is also important. Arbitrators are selected for specific cases because of their knowledge of the subject matter. Based on that experience, arbitrators can render an award grounded on thoughtful and thorough analysis.

Most parties provide for arbitration of disputes because they are seeking a final and binding resolution of their business conflicts. Court intervention and review are limited by applicable state or federal arbitration laws; award enforcement is facilitated by those same laws.

Another important advantage of arbitration is that it is designed to be private, having no public record of the dispute or of the facts presented in resolving the dispute.

The AAA has prepared a booklet, *Drafting Dispute Resolution Clauses: A Practical Guide*, which sets forth many examples of specific provisions that can be included in a mediation or arbitration clause.

In addition, the AAA has available *A Guide to Mediation and Arbitration for Business People*, which details how to initiate and prepare for the arbitration process. Model mediation and arbitration clauses have been prepared which are specific to commercial financial services. Those model clauses appear in later in this booklet.

Copies of the guides are available from any of the AAA regional offices or by calling the AAA's customer service department at (800) 778-7879. The guides can also be downloaded from the AAA's Web site at www.adr.org.

What are the benefits of arbitration?

- *Confidentiality*. Arbitration is a private process. There is no public record of the proceedings.
- *Limited Discovery*. Extensive discovery is avoided. Arbitrators arrange for limited exchange of documents, witness lists and depositions appropriate to the particular dispute.
- *Speed*. There is no docket or backlog in arbitration. Hearings are scheduled as soon as the parties and the arbitrator have dates available.
- *Expert Neutrals*. The arbitrators have expertise in the subject matter in dispute, as well as training in the arbitration process.
- *Cost Savings*. Because of the limited discovery and informal hearing procedures, as well as the expedited nature of the process, the parties save on legal fees and transactional costs.
- *Preservation of Business Relationships*. In most instances, litigation between professionals and their clients destroys the working relationship. Arbitration is less adversarial and, because of its informal nature, it is more likely that the parties will be able to continue their business relationship.

Parties may arbitrate disputes either by inserting a future-disputes clause into a contract or by submitting an existing dispute to arbitration.

Who are the mediators and the arbitrators?

Neutrals on the National Roster for Commercial Financial Disputes include lawyers, former judges, and business persons from the financial service arena who have met the qualification criteria and who have been trained by the AAA in arbitration and/or mediation techniques. Qualification criteria include:

- a minimum of fifteen years professional or business experience,
- successful completion of AAA mediator/arbitrator training programs,
- relevant academic and business/professional credentials and licenses,
- scholarship and continuing education achievements,
- dispute management and neutral skills,
- reputation in the business/professional community, and
- commitment and availability to serve as a neutral arbitrator or mediator.

When a case is filed with the AAA, you and the other party select the arbitrator or mediator from a list prepared by the AAA. The list contains the proposed arbitrators' credentials, including educational institutions attended, degrees earned, employment history, professional licenses or certifications, offices held in professional and trade associations, the individuals' work experience, and participation in neutral training programs.

Mediators and arbitrators must disclose any relationship with the parties, their attorneys, or others involved in the case, such as witnesses; those with disqualifying relationships will not be permitted to serve on the particular case. This assures the parties that the mediators and arbitrators are neutral.

Arbitration Procedures for Large, Complex Disputes

Recognizing that large, complex disputes often present unique procedural problems, the AAA, working with attorneys, arbitrators, and industry advisory groups, has developed special supplementary procedures for these cases. The overall purpose of those procedures is to provide for the efficient, flexible, and economical resolution of large, complex disputes that can arise in the area of commercial finance. The procedures are designed to give the parties substantial discretion in most aspects of the process to fit the nature of the dispute. They may be used as a supplement to the *Dispute Resolution Procedures for Commercial Financial Disputes* and they will apply only if the parties agree to their use (unless a court or other entity directs their application). The parties are free to modify any provision of the procedures. The entire process may be tailored to suit the particular requirements of the parties to single or multiple dispute(s).

What is the role of the AAA?

The AAA conducts educational programs, prepares materials that explain alternative dispute resolution (ADR) processes, maintains current data on panel members and provides flexible administrative services to the parties.

When you are considering the use of an ADR procedure, the AAA will:

- provide sample language for the contract clause or the submission agreements,
- meet with you and the other parties to the dispute to facilitate agreement on an ADR procedure (in this regard, the AAA will contact the other party(ies) to gain their agreement to participate in an ADR procedure), and
- provide relevant materials, articles, and videotape to educate the parties in the use of ADR.

When you have a dispute, your initial step is to notify the AAA and the other parties. To bring the matter to a prompt, fair conclusion, the AAA will provide administrative services that will include, but are not limited to:

- receipt and acknowledgment of claims and counterclaims,
- an administrative conference with the parties and their counsel,
- preparation of lists of neutral arbitrators or mediators suitable to the specific dispute,
- supervision of the neutral arbitrator or mediator selection process,
- scheduling of meetings or hearings in AAA facilities or at other locations convenient to the parties,' management and facilitation of all communications between the parties and the neutral, including any arrangement for compensation of the neutral arbitrator or mediator,
- determination of whether a neutral has a disqualifying relationship, and

- ensuring that the mediated settlement or decision of the arbitrator is achieved promptly and fairly.

You can obtain rules, filing forms, and general information on ADR by calling any of the AAA regional offices or by contacting the AAA's headquarters at:

Customer Service Department
American Arbitration Association
335 Madison Avenue
New York, NY 10017-4605
Telephone 800-778-7879

MEDIATION RULES FOR COMMERCIAL FINANCIAL DISPUTES

1. Agreement of Parties

Whenever, by stipulation or in their contract, the parties have provided for mediation or conciliation of existing or future Commercial Financial Disputes under the auspices of the American Arbitration Association (AAA) or under these rules, they shall be deemed to have made these rules, as amended and in effect as of the date of the submission of the dispute, a part of their stipulation or contract, subject however to the precedence of those specific provisions of the stipulation or contract governing the conduct of the mediation and matters relating thereto.

2. Initiation of Mediation

Any party or parties to a dispute may initiate mediation by filing with the AAA a submission to mediation or a written request for mediation pursuant to these rules, together with the \$325 nonrefundable case set-up fee. If there is no submission to mediation or any contract providing for mediation, a party may request the AAA to invite another party to join in a submission to mediation. Upon receipt of such a request, the AAA will contact the other parties involved in the dispute and attempt to obtain a submission to mediation.

3. Requests for Mediation

A request for mediation shall contain a brief statement of the nature of the dispute and the names, addresses, and telephone numbers of all parties to the dispute and those who will represent them, if any, in the mediation. The initiating party shall simultaneously file two copies of the request with the AAA and one copy with every other party to the dispute.

4. Appointment of the Mediator

Upon receipt of a request for mediation, the AAA will appoint a qualified mediator from the AAA National Panel of Mediators to serve. Normally, a single mediator will be appointed unless the parties agree otherwise or the AAA determines otherwise. If the agreement of the parties names a mediator or specifies a method of appointing a mediator such as the submission of names of qualified persons to the parties for their selection, that designation or method shall be followed.

5. Qualifications of the Mediator

No person shall serve as a mediator in any dispute in which that person has any financial or personal interest in the result of the mediation, unless approved by the written consent of all parties. Prior to accepting an appointment, the prospective mediator shall disclose any circumstance likely to create a presumption of bias or prevent a prompt meeting with the parties. Upon receipt of such information, the AAA shall either replace the mediator or immediately communicate the information to the parties for their comments. In the event that the parties disagree as to whether the mediator shall serve, the AAA will appoint another mediator. The AAA is authorized to appoint another mediator if the appointed mediator is unable to serve promptly.

6. Vacancies

If any mediator shall become unwilling or unable to serve, the AAA will appoint another mediator, unless the parties agree otherwise.

7. Representation

Any party may be represented by persons of the party's choice. The names and addresses of such persons shall be communicated in writing to all parties and to the AAA. It is expected that any executive or other representative of a party will have authority at the mediation to resolve the dispute.

8. Date, Time, and Place of Mediation

The mediator shall fix the date and the time of each mediation session. The mediation may be held at the appropriate regional office of the AAA, or at any other convenient location agreeable to the mediator and the parties, as the mediator shall determine.

9. Identification of Matters in Dispute

At least ten days prior to the first scheduled mediation session, each party shall provide the mediator with a brief confidential memorandum setting forth its position with regard to the issues to be resolved. At the discretion of the mediator, such memoranda may be mutually exchanged by the parties.

At the first session, the parties will be expected to produce all information reasonably required for the mediator to understand the issues presented.

The mediator may require any party to supplement such information.

10. Authority of the Mediator

The mediator does not have the authority to impose a settlement or other resolution on the parties but will attempt to help them reach a satisfactory resolution of their dispute. The mediator is authorized to conduct joint and separate meetings with the parties and, when requested, to make

oral and written recommendations for resolution of the dispute. Whenever necessary, the mediator may also obtain expert advice concerning technical aspects of the dispute, provided that the parties agree and assume the expenses of obtaining such advice. Arrangements for obtaining such advice shall be made by the mediator or the parties, as the mediator shall determine.

11. Privacy

Mediation sessions are private. Only the parties and their representatives may attend mediation sessions; other persons may attend only with the permission of the parties and with the consent of the mediator.

12. Confidentiality

Confidential information disclosed to a mediator by the parties or by witnesses in the course of the mediation shall not be divulged by the mediator. All records, reports or other documents received by a mediator while serving in that capacity shall be confidential. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding involving one of the parties in any judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding:

- (a) views expressed or suggestions made by a party with respect to a possible settlement or resolution of the dispute;
- (b) admissions made by a party in the course of the mediation proceedings;
- (c) proposals made or views expressed by the mediator; or,
- (d) the fact that another party had or had not indicated a willingness to accept a proposal for resolution made by the mediator.

13. No Stenographic Record

There shall be no stenographic record of the mediation process.

14. Termination of Mediation

The mediation shall be terminated:

- (a) by the execution of a settlement agreement by the parties;
- (b) by a written declaration of the mediator to the effect that further efforts at mediation are no longer worthwhile; or,
- (c) by a written declaration of a party to the effect that the mediation proceedings are terminated.

15. Exclusion of Liability

Neither the AAA nor any mediator is a necessary party in judicial proceedings relating to the mediation.

Neither the AAA nor any mediator shall be liable to any party for any act or omission in connection with any mediation conducted under AAA rules or procedures.

16. Interpretation and Application of Rules

The mediator shall interpret and apply these rules insofar as they relate to the mediator's duties and responsibilities. All other rules shall be interpreted and applied by the AAA.

17. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the mediation, including required travel and other expenses and fees of the mediator and expenses of representatives of the AAA, and the expenses of any witness and the cost of any proofs or expert advice produced at the direct request of the mediator, shall be borne equally by the parties unless they agree otherwise.

ADMINISTRATIVE FEES

The nonrefundable case set-up fee is \$325 per party. In addition, the parties are responsible for compensating the mediator at his or her published rate, for conference and study time (hourly or per diem).

All expenses are generally borne equally by the parties. The parties may adjust this arrangement by agreement.

Before the commencement of the mediation, the AAA shall estimate anticipated total expenses. Each party shall pay its portion of that amount as per the agreed upon arrangement. When the mediation has terminated, the AAA shall render an accounting and return any unexpended balance to the parties.

ARBITRATION RULES FOR COMMERCIAL FINANCIAL DISPUTES

1. Agreement of Parties

The parties to a dispute involving any commercial financial arrangement, product or other matter or conduct relating thereto, shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (AAA) or under its Commercial Financial Disputes Arbitration Rules. These rules and any amendment of them shall apply in the form in effect at the time the demand for arbitration or submission agreement is received by the AAA, provided, however, that the parties, by written agreement, may vary the procedures set forth in these rules, and such variations will then have precedence over these rules.

Consistent with the expedited nature of arbitration, the parties shall make every effort in good

faith to conclude the arbitration within 120 days of its commencement.

2. Name of Tribunal

Any tribunal constituted by the parties for the settlement of their dispute under these rules shall be called the Commercial Financial Services Arbitration Tribunal.

3. Administrator and Delegation of Duties

When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these rules, and may be carried out through such of the AAA's representatives as it may direct.

4. National Roster

The AAA shall establish and maintain a National Roster for Commercial Financial Disputes (National Roster) and shall appoint arbitrators as provided in these rules. The AAA, in consultation with established legal and industry associations involved in commercial financial services, shall establish and maintain eligibility requirements for arbitrators to become and continue as members of the National Roster.

5. Regional Offices

The AAA may, in its discretion, assign the administration of an arbitration to any of its regional offices.

6. Initiation under an Arbitration Provision

Arbitration under an arbitration provision in a contract shall be initiated in the following manner:

- (a) The initiating party (claimant) shall, within the time period, if any, specified in the contract(s), give written notice to the other party (respondent) of its intention to arbitrate (demand), which notice shall contain a statement setting forth the nature of the dispute, the specific matters to be arbitrated, the claims being asserted, the amount involved, if any, the remedy sought, and the hearing locale requested, and
- (b) shall file at any regional office of the AAA three copies of the notice and three copies of the arbitration provisions of the contract, together with the appropriate filing fee.

The AAA shall give notice of the filing to the respondent(s). A respondent may file an answering statement in duplicate with the AAA within 10 days after notice from the AAA, in which event the respondent shall at the same time send a copy of the answering statement to the claimant. If a counterclaim is asserted, it shall contain a statement setting forth the nature of the counterclaim, the specific matters to be arbitrated, the claims being asserted, the amount involved, if any, and the remedy sought. If a counterclaim is made, the appropriate fee shall be forwarded to the AAA with the answering statement.

If the respondent does not file an answering claim, within the stated time, it will be deemed to have denied the claim. Failure to file an answering statement shall not operate to delay the arbitration.

7. Initiation under a Submission

Parties to any existing dispute may commence an arbitration under these rules by filing, at any regional office of the AAA, three copies of a written submission to arbitrate under these rules, signed by the parties. It shall contain a statement setting forth the nature of the matter in dispute, the specific matter to be arbitrated, the claims being asserted, the amount involved, if any, the remedy sought, and the hearing locale requested together with the appropriate filing fee.

8. Changes of Claim

After the filing of a claim, if either party desires to make any new or different claim or counterclaim, it shall be made in writing with the same specificity as the claim or counterclaim and filed with the AAA, and a copy shall be mailed to the other party, who shall have a period of 10 days from the date of mailing within which to file an answering claim with the AAA. After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator's consent.

9. Applicable Procedures

Unless the AAA in its discretion determines otherwise or the parties agree otherwise, the Expedited Procedures shall be applied in any case where no disclosed claim or counterclaim exceeds \$75,000, exclusive of interest and arbitration costs. Parties may also agree to use the Expedited Procedures in cases involving claims in excess of \$75,000. The Expedited Procedures are described in Sections 51 through 55 of these rules, and may include any other portion of these rules that is not in conflict with the Expedited Procedures as determined by the arbitrator.

The parties may also stipulate to have the Procedures for Large, Complex Disputes apply to their case. Those procedures are set forth later in this booklet.

All other cases shall be administered in accordance with Sections 1 through 50 of these rules.

10. Administrative Conference, Preliminary Hearing and Mediation Conference

At the request of any party or at the discretion of the AAA, an administrative conference with the AAA and the parties and/or their representatives will be scheduled in appropriate cases to expedite the arbitration proceedings. At the request of any party or at the discretion of the arbitrator or the AAA, a preliminary hearing with the parties and/or their representatives and the arbitrator may be scheduled by the arbitrator to specify the issues to be resolved, to stipulate to uncontested facts and to consider any other matters that will expedite the arbitration proceedings. Consistent with the expedited nature of arbitration, the arbitrator may, at the preliminary hearing, establish (i) whether discovery is required and, if so, the extent of production of relevant documents and other information, (ii) the identification of witnesses to be called, and (iii) a schedule for further hearings to resolve the dispute. Any information or material exchanged

during the course of discovery, or the arbitration, shall be confidential unless the parties specifically agree otherwise.

With the consent of the parties, the AAA at any stage of the proceeding may arrange a mediation conference under the Commercial Financial Disputes Mediation Rules, in order to facilitate resolution. The selected mediator shall not be an arbitrator previously appointed to the case. Where the parties to a pending arbitration agree to mediate under the AAA's mediation rules, no additional administrative fee is required to initiate the mediation. There is no administrative fee for the first preliminary hearing.

11. Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. If any party requests that the hearings be held in a specific locale and the other party files no objection thereto within 10 days after notice of the request has been sent to it by the AAA, the locale shall be the one requested. If a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale and its decision shall be final and binding.

12. Qualifications and Number of Arbitrators

The term "arbitrator" in these rules refers to the arbitration panel, whether composed of one or more arbitrators and whether the arbitrators are neutral or appointed directly by a party (party-appointed). Unless otherwise agreed, any arbitrator acting under these rules, including party-appointed arbitrators, shall be impartial and independent and shall be subject to disqualification pursuant to Section 17.

All arbitrations shall be conducted before a panel of three arbitrators selected from the National Roster in accordance with Section 13, unless: the Expedited Procedures apply, or the parties agree or the AAA, in its discretion, determines otherwise.

13. Appointment from National Roster

If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner: promptly after the filing of the demand or submission, the AAA shall send simultaneously to each party to the dispute an identical list of 12-15 names of persons chosen from the National Roster.

Each party to the dispute shall have 10 days from the transmittal date in which to strike any names objected to, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall submit a second list of qualified persons, and if none of such persons are selected or are able or willing to serve, then AAA shall have the power to make the appointment from among other members of the National Roster without the submission of additional lists.

14. Direct Appointment by a Party

If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. The notice of appointment, with the name and address of the arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any appointing party, the AAA shall submit a list of members of the National Roster from which the party may, if it so desires, make the appointment.

If the agreement specifies a period of time within which an arbitrator shall be appointed and any party fails to make the appointment within that period, the AAA shall make the appointment.

If no period of time is specified in the agreement, the AAA shall notify the party to make the appointment. If, within 10 days thereafter, an arbitrator has not been appointed by a party, the AAA shall make the appointment.

15. Appointment of Neutral Arbitrator by Party-Appointed Arbitrators or Parties

If the parties have selected party-appointed arbitrators, or if such arbitrators have been appointed as provided in Section 14, and the parties have authorized them to appoint a neutral arbitrator within a specified time and no appointment is made within that time or any agreed extension, the AAA may appoint a neutral arbitrator from the National Roster, who shall act as chairperson.

If no period of time is specified for appointment of the neutral arbitrator and the party-appointed arbitrators or the parties do not make the appointment within 10 days from the date of the appointment of the last party-appointed arbitrator, the AAA may appoint the neutral arbitrator, who shall act as chairperson, from the National Roster.

If the parties have agreed that their party-appointed arbitrators shall appoint the neutral arbitrator from the National Roster, the AAA shall transmit to the party-appointed arbitrators a list of arbitrators selected from the National Roster, and the appointment of the neutral arbitrator shall be made by the party-appointed arbitrators' striking from the list the names objected to, numbering the remaining names in order of preference, and returning the list to the AAA within 10 days from the transmittal date. From the persons who have been approved on both lists and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of a neutral arbitrator to serve. If the parties fail to agree on any of the persons named, if acceptable arbitrators are unable to act, or if, for any other reason, the appointment cannot be made from the lists submitted to the party-appointed arbitrators, the AAA shall have the power to make the appointment from other members of the National Roster without the submission of additional lists.

16. Notice to Arbitrator of Appointment

Notice of the appointment of any arbitrator, whether appointed unilaterally by a party, mutually by the parties or by the AAA, shall be sent to the arbitrator by the AAA, together with a copy of these rules, and the signed acceptance of the arbitrator shall be filed with the AAA prior to the opening of the first hearing.

17. Disclosure and Challenge Procedure

Any person appointed as an arbitrator shall disclose to the AAA any circumstance likely to affect impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Any party to the arbitration having similar knowledge about an arbitrator shall also disclose such information to the AAA as soon as practicable. Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.

Unless the parties agree otherwise, any arbitrator serving under these rules is subject to disqualification if he or she has any material financial or other personal interest in the result of the arbitration.

Upon objection of a party to the continued service of any arbitrator, the AAA shall determine whether the arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive.

18. Vacancies

If, for any reason, an arbitrator is unable to or fails to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with these rules.

In the event of a vacancy of any arbitrator prior to the commencement of the arbitration hearings, a replacement arbitrator shall be selected in the same manner and in accordance with the rules under which the original arbitrator was selected.

In the event of a vacancy of a neutral arbitrator after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.

In the event of a vacancy of a party-appointed arbitrator after the hearings have commenced, the party that appointed that arbitrator shall select a successor arbitrator in accordance with the rules under which the original arbitrator was selected, and the arbitration shall continue as if the successor had been selected in the first instance.

19. Date, Time and Place of Hearing

The arbitrator shall set the date, time and place for each hearing. The AAA shall send a notice of hearing to the parties at least 10 days in advance of the hearing date, unless otherwise agreed by the parties.

20. Representation

Any party may be represented by counsel or another authorized representative. A party intending to be so represented shall notify the other party and the AAA of the name and address of the

representative at least three days prior to the date set for the hearing at which that person is first to appear. When a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

21. Stenographic Record

Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements in advance of the hearing. The requesting party or parties shall pay the costs of the record. If the transcript is agreed by the parties to be, or determined by the arbitrator to be, the official record of the proceeding, it must be made available to the arbitrator and to the other parties for inspection, at a date, time and place determined by the arbitrator.

22. Interpreters

Any party desiring an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

23. Attendance at Hearings

The arbitrator shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person.

24. Postponements

The arbitrator for good cause shown may postpone any hearing upon the request of a party or upon the arbitrator's own initiative, and shall also grant such postponement when all of the parties agree.

25. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under an oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

26. Majority Decision

All decisions of the arbitrators must be by a majority. The award must also be made by a majority unless the concurrence of all is expressly required by the arbitration agreement or by law.

27. Order of Proceedings and Communication with Arbitrator

A hearing shall be opened by the filing of the oath of the arbitrator, where required; by the

recording of the date, time and place of the hearing, and the presence of the arbitrator, the parties and their representatives, if any; and by the receipt by the arbitrator of the statement of the claim and the answering statement, if any.

The arbitrator may, at the beginning of the hearing, ask for statements clarifying the issues involved. In some cases, part or all of the above will have been accomplished at a preliminary hearing conducted by the arbitrator pursuant to Section 10.

The complaining party shall then present evidence to support its claim. The defending party shall then present evidence supporting its defense. Witnesses for each party shall submit to questions or other examination. The arbitrator has the discretion to vary this procedure, but shall afford a full and equal opportunity to all parties for the presentation of any material and relevant evidence.

Exhibits, when offered by either party, may be received in evidence by the arbitrator.

The names and addresses of all witnesses and a description of the exhibits in the order received shall be made a part of the record.

There shall be no direct communication between the parties and any arbitrator including party-appointed arbitrators following their appointment, other than at oral hearing, unless the parties and the arbitrator agree otherwise. Any other oral or written communication from the parties to any arbitrator shall be directed to the AAA for transmittal to the arbitrator.

28. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall determine whether proper notice of the hearing was given to the defaulting party. The arbitrator shall require the party who is present to submit evidence that the arbitrator requires for the making of an award.

29. Evidence

The parties may offer evidence that is relevant and material to the dispute and shall produce evidence that the arbitrator may deem necessary to an understanding and determination of the dispute. An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

The arbitrator shall be the judge of the relevance, materiality, credibility and weight of the evidence offered, and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default or has waived the right to be present.

The arbitrator may receive and consider the evidence of witnesses by affidavit, giving it such weight as the arbitrator deems it entitled to after consideration of any objection made to its admission.

30. Post-Hearing Filing of Documents or Other Evidence

If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine such documents or other evidence.

31. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the date and time and the AAA shall notify the parties. Any party who so desires may be present at such an inspection or investigation. In the event that one or all parties are not present at the inspection or investigation, the arbitrator shall make an oral or written report to the parties and afford them an opportunity to comment.

32. Interim Measures

The arbitrator may issue such orders for interim relief as may be deemed necessary to safeguard the property that is the subject matter of the arbitration, without prejudice to the rights of the parties or to the final determination of the dispute.

33. Closing of Hearing

The arbitrator shall specifically inquire of all parties whether they have further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed.

If briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If documents are to be filed as provided in Section 30 and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the date of closing the hearing. The time limit within which the arbitrator is required to make the award shall commence to run, in the absence of other agreements by the parties, upon the closing of the hearing.

34. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed on by the parties in the contract(s) of which the controversy has arisen, the matter may not be reopened unless the parties agree on an extension of time. When no specific date is fixed in the contract or engagement letter, the arbitrator may reopen the hearing and shall have 30 days from the closing of the reopened hearing within which to make an award.

35. Waiver of Oral Hearing

The parties may provide, by written agreement, for the waiver of oral hearings in any case. If the

parties are unable to agree as to the procedure, the AAA shall specify a fair and equitable procedure.

36. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

37. Extensions of Time

The parties may modify any period of time by mutual agreement. The AAA or the arbitrator may for good cause extend any period of time established by these rules, except the time for making the award. The AAA shall notify the parties of any extension.

38. Serving of Notice

Each party shall be deemed to have consented that any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules; for any court action in connection therewith; or for the entry of judgment on any award made under these rules may be served on a party by mail or by a commercial delivery service, addressed to the party or its representative at the last known address, or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard thereto has been granted to the party.

The AAA and the parties may also use facsimile transmission, telex, telegram or other written forms of electronic communication to give the notices required by these rules.

39. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 days from the date of closing the hearing, or if oral hearings and filing of briefs have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.

40. Form of Award

The award shall be in writing and shall be signed by a majority of the arbitrators. The award shall be executed in the manner required by law.

41. Scope of Award

The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties. The arbitrator shall, in the award, assess arbitration fees, expenses and compensation as provided in Sections 46, 47 and 48 in favor of any party and, in the event that any administrative fees or expenses are due the AAA, in favor of the AAA.

42. Award upon Settlement

If the parties settle their dispute during the course of the arbitration, the arbitrator may set forth the terms of the agreed settlement in an award. Such an award is referred to as a consent award.

43. Delivery of Award to Parties

Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail addressed to a party or its representative at the last known address, personal service of the award, or the filing of the award in any other manner that is permitted by law.

44. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party to an arbitration proceeding, furnish to the party, at its expense, certified copies of papers in the AAA's possession that are required in judicial proceedings relating to the arbitration.

45. Applications to Court and Exclusion of Liability

- (a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of a party's right to arbitrate.
- (b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary party in judicial proceedings relating to the arbitration.
- (c) Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.
- (d) Neither the AAA nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these rules.

46. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe an initial filing fee and a case service fee to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable.

The filing fee shall be advanced by the initiating party or parties subject to final apportionment by the arbitrator in the award.

The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.

47. Expenses

The expenses of witnesses for either side shall be paid by the party producing the witnesses. All other expenses of the arbitration, including required travel and other expenses and fees of the arbitrator, expenses of AAA representatives and any witness, and the cost of any proof produced

at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

48. Arbitrator's Compensation

Members of the National Roster appointed as arbitrators will be compensated based on the amount of service involved and the number of hearings. Arbitrators shall charge a rate consistent with the arbitrator's stated rate of compensation, beginning with the first day of hearing. If the parties fail to agree to the terms of compensation, an appropriate rate shall be established with the arbitrator by the AAA and communicated in writing to the parties.

Any arrangement for the compensation of an arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.

49. Deposits

The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fees, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.

50. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, it shall be decided by a majority vote. If that is not possible, any arbitrator may refer the questions to the AAA for a final decision. All other rules shall be interpreted and applied by the AAA.

Expedited Procedures

51. Notice by Telephone

The parties shall accept all notices from the AAA by telephone. Such notices by the AAA shall subsequently be confirmed in writing to the parties. Should there be a failure to confirm in writing any notice hereunder, the proceeding shall nonetheless be valid if notice has, in fact, been given by telephone.

52. Appointment and Qualification of Arbitrator

- (a) Where no disclosed claim or counterclaim exceeds \$75,000, exclusive of interest and arbitration costs, the AAA shall appoint a single arbitrator, from the National Roster, without submission of lists of proposed arbitrators.
- (b) Where all parties request that a list of proposed arbitrators be sent, the AAA shall submit simultaneously to each party an identical list of five proposed arbitrators, drawn from the National Roster of Arbitrators, from which one arbitrator shall be appointed. Each party

may strike two names from the list on a peremptory basis. The list is returnable to the AAA within seven days from the date of the AAA's mailing to the parties.

If for any reason the appointment of an arbitrator cannot be made from the list, the AAA may make the appointment from among other members of the National Roster without the submission of additional lists.

- (c) The parties will be given notice by telephone by the AAA of the appointment of the arbitrator, who shall be subject to disqualification for the reasons specified in Section 17. Within seven days, the parties shall notify the AAA, by telephone, of any objection to the arbitrator appointed. Any objection by a party to the arbitrator shall be confirmed in writing to the AAA with a copy to the other party or parties.

53. Date, Time and Place of Hearing

The arbitrator shall set the date, time and place of the hearing. The AAA will notify the parties by telephone, at least seven days in advance of the hearing date. A formal notice of hearing will also be sent by the AAA to the parties.

54. The Hearing

Generally, the hearing shall be completed within one day, unless the dispute is resolved by submission of documents under Section 35. The arbitrator, for good cause shown, may schedule an additional hearing to be held within seven days.

55. Time of Award

Unless otherwise agreed by the parties, the award shall be rendered not later than 30 days from the date of the closing of the hearing.

ADMINISTRATIVE FEES

The administrative fees of the AAA are based on the amount of the claim or counterclaim. Arbitrator compensation is not included in this schedule. Unless the parties agree otherwise, arbitrator compensation and administrative fees are subject to allocation by the arbitrator in the award.

Fees

An initial filing fee is payable in full by a filing party when a claim, counterclaim or additional claim is filed.

A case service fee will be incurred for all cases that proceed to their first hearing. This fee will be payable in advance at the time that the first hearing is scheduled. This fee will be refunded at the conclusion of the case if no hearings have occurred.

However, if the Association is not notified at least 24 hours before the time of the scheduled hearing, the case service fee will remain due and will not be refunded.

These fees will be billed in accordance with the following schedule:

Amount of Claim	Initial Filing Fee	Case Service Fee
Above \$0 to \$10,000	\$500	\$200
Above \$10,000 to \$75,000	\$750	\$300
Above \$75,000 to \$150,000	\$1,500	\$750
Above \$150,000 to \$300,000	\$2,750	\$1,250
Above \$300,000 to \$500,000	\$4,250	\$1,750
Above \$500,000 to \$1,000,000	\$6,000	\$2,500
Above \$1,000,000 to \$5,000,000	\$8,000	\$3,250
Above \$5,000,000 to \$10,000,000	\$10,000	\$4,000
Above \$10,000,000	*	*
Nonmonetary Claims **	\$3,250	\$1,250

*Contact your local AAA office for fees for claims in excess of \$10 million.

** This fee is applicable when a claim or counterclaim is not for a monetary amount. Where a monetary claim is not known, parties will be required to state a range of claims or be subject to the highest possible filing fee.

Fees are subject to increase if the amount of a claim or counterclaim is modified after the initial filing date. Fees are subject to decrease if the amount of a claim or counterclaim is modified before the first hearing.

The minimum fees for any case having three or more arbitrators are \$2,750 for the filing fee, plus a \$1,250 case service fee.

Expedited Procedures are applied in any case where no disclosed claim or counterclaim exceeds \$75,000, exclusive of interest and arbitration costs.

Parties on cases held in abeyance for one year by agreement, will be assessed an annual abeyance fee of \$300. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be closed.

Refund Schedule

The AAA offers a refund schedule on filing fees. For cases with claims up to \$75,000, a minimum filing fee of \$300 will not be refunded. For all other cases, a minimum fee of \$500 will not be refunded. Subject to the minimum fee requirements, refunds will be calculated as follows:

- 100% of the filing fee, above the minimum fee, will be refunded if the case is settled or withdrawn within five calendar days of filing.
- 50% of the filing fee, in any case with filing fees in excess of \$500, will be refunded if the case is settled or withdrawn between six and 30 calendar days of filing. Where the filing fee is \$500, the refund will be \$200.
- 25% of the filing fee will be refunded if the case is settled or withdrawn between 31 and 60 calendar days of filing.

No refund will be made once an arbitrator has been appointed (this includes one arbitrator on a three arbitrator panel). No refunds will be granted on awarded cases.

Note: the date of receipt of the demand for arbitration with the AAA will be used to calculate refunds of filing fees for both claims and counterclaims.

Hearing Room Rental

The fees described above do not cover the rental of hearing rooms, which are available on a rental basis. Check with the AAA for availability and rates.

Rules forms, procedures and guidelines, as well as information about applying for a fee reduction or deferral, are subject to periodic change and updating. To ensure that you have the most current information, see our Web Site at www.adr.org.

A NEW APPROACH TO ADR FOR THE FINANCIAL SERVICES INDUSTRY

Commercial financial services and ADR experts, in a collaborative effort, have designed a flexible alternative dispute resolution Draft Clause for use in the commercial financial services industry. This material is an excerpt from an article written by Donald Lee Rome that appeared in the Spring 1997 issue of ADR Currents.*

The Draft Clause was developed as the result of the joint efforts of the ADR Committee of the American College of Commercial Finance Lawyers (ACCFL) and the American Arbitration Association (AAA).

The Draft Clause, which is written from the lender's perspective, provides for mediation and arbitration of disputes for money damages (and, with the agreement of the parties, other types of

disputes). At the same time, it preserves access to judicial and self-help remedies relating to the preservation and realization of the lender's collateral.

The Draft Clause contains numerous drafting options, allowing it to be specifically tailored to particular financial services needs and uses. The clause is suitable for loan agreements, inter-creditor agreements, subordination agreements, syndication and participation agreements, and workout agreements, among others. With this clause, commercial finance institutions can obtain the benefits of speedy, cost effective, and predictable dispute resolution while addressing essential legal rights with respect to the ongoing lending relationship.

**Mr. Rome is Senior Counsel at Robinson & Cole LLP in Hartford, Connecticut. He is a fellow in the American College of Commercial Finance Lawyers, and co-chairs its ADR Committee. He serves on the Dispute Resolution (co-chair), Commercial Financial Services and Business Bankruptcy Committees of the American Bar Association Section of Business Law and is on the AAA's National Commercial Disputes Mediation Panel.*

Background

The commercial lending relationship is a complex one, involving ongoing payment and performance obligations by both the lender and the borrower. These parties frequently must make quick business and credit decisions based upon their legal relationship and the borrower's business activities, knowing that in many situations the decision may lead to the exercise of legal rights by the other party. These decisions may be based on the parties' understanding of the applicable law and the legal remedies available to them.

Disputes between parties in the commercial finance setting often involve Uniform Commercial Code (UCC) issues, surety law, lending and rate formulas, interpretation of loan agreement covenants, bankruptcy law, asset valuation issues, balance sheet and other financial analysis, lien priority issues other than those governed by the UCC, and matters relating to shareholders and other third parties with financial involvement with the borrower. Rarely while the ongoing lending relationship exists will these disputes ripen into discrete litigation. These disputes may be resolved quickly by agreement because of the exigencies of the situation, or simply by the passage of time because of the inability of one party under applicable law to force the other party to perform. For example, if the borrower wants to draw down on a line of credit, and the lender refuses because the lending formula and financial ratios under the loan agreement allow it to decline to lend, the parties may agree on what to do. If they don't agree, the lender simply will not lend at that time. It will all happen quickly because of pressing business issues; neither party will look to a court to resolve the immediate problem. However, litigation may arise out of the dispute. The lender may decide to call a default and demand repayment of the loan because of the borrower's failure to maintain the collateral and financial ratios, or other breaches of the loan documents. The borrower may respond with a claim for damages due to the lender's failure to lend, and assert defenses to the lender's claims. When this happens, the lending relationship is over and litigation becomes the focal point of their relationship.

Lenders rely on specific legal remedies designed to recover the loan, and preserve, foreclose and liquidate collateral. Lenders lend based upon the knowledge that predictable legal remedies and procedures are available in the event of a default or a need to preserve the collateral without a

default. The law allows a lender to take speedy action to protect, preserve or liquidate its collateral position. Similarly, borrowers rely on the specific protections available under applicable debtor/creditor laws to protect their rights. Thus, a borrower can take speedy action, to the extent allowed by law, to try to prevent the lender from exercising remedies that could impair the borrower's continued operation. Neither party, however, can obtain an order of specific performance directing a lender to lend or a borrower to perform its covenants under a loan agreement (other than those relating specifically to collateral preservation and maintenance).

Depending on the specific situation, the lender will decide whether to call a default and exercise its remedies, and the borrower will decide whether to defend against the exercise of remedies by the lender and/or assert a claim for damages against it.

Thus, the myriad of controversies that may arise in the commercial lending transaction must be viewed, not as discrete disputes suitable for resolution by a court or ADR, but rather as a series of events that may or may not be worked out by the parties according to their business needs and the exigencies of the situation.

For these reasons, lenders have found that the standard ADR clause calling for mediation or arbitration of "any controversy or dispute" does not comport with the business and legal realities of the commercial finance relationship. The industry needs a commercial finance ADR clause that:

- allows the parties to conduct business as they will,
- preserves currently available judicial and self-help remedies for the lender and currently available legal safeguards for the borrower, and
- provides for mediation and arbitration of disputes over legal defenses and claims for money damages.

Creating such a clause can lead to difficult drafting issues. This difficulty has been solved by the Draft Clause; it addresses lenders' concerns and provides a vehicle for lenders and borrowers to experience cost-effective and speedy resolution of disputes for money damages that otherwise would require long and expensive litigation.

Key Features of the Draft Clause

The key features of the Draft Clause are:

- terms defining when a "controversy" becomes an "ADR dispute" ripe for mediation and/or arbitration,
- provision for mediation first and thereafter arbitration if a resolution does not materialize,
- limitations on arbitral remedies to those appropriate in a commercial finance setting after preserving well-established available and statutorily mandated rights and remedies,
- inclusion in the ADR process of all parties necessary for resolution of the dispute,
- provision for neutrals from a national roster with commercial finance knowledge and experience, and
- numerous optional provisions to further tailor the agreement.

Definition of "Controversy" and "ADR Dispute" ('1)

The Draft Clause limits the type of controversy to be mediated and/or arbitrated by defining two key concepts: a "controversy" and an "ADR dispute." A "controversy" is an all-encompassing term that embraces any problem that might arise in the lending relationship. A "controversy" means any action, dispute, claim, counterclaim or controversy of any kind, whether founded in contract, tort, statutory or common law, now existing or hereafter arising, based upon or arising out of, or pertaining to or related to or in connection with the loan agreements, extensions of credit and/or the transactions and events arising out of or related thereto.

An "ADR dispute" is a narrower term. It sets the criteria for the type of "controversy" that will be mediated and/or arbitrated. Thus, the parties are contracting that only an "ADR dispute," not any controversy, will require the parties to use ADR. What, then, is an "ADR dispute"? This term is defined to mean any "controversy" if and only if the controversy:

1. is such at the time any provision of this Article 00 is invoked that the prevailing Party could under applicable law be adequately compensated by ascertainable money damages, and
2. one Party to this Agreement has made a claim for money damages against another Party to this Agreement in a writing that has been delivered to the other Party, provided, however, that a demand made by a lender or other financial services provider for repayment of money or for compliance with contracted-for obligations, whether based upon contractual default or otherwise shall not be an ADR Dispute.

The Draft Clause also provides that the parties may mutually agree in writing that a controversy shall be treated as an ADR dispute even though at the time of the agreement the controversy did not meet the above criteria.

Preservation of Rights . The Draft Clause provides that an ADR dispute shall be resolved solely and exclusively under the procedures specified in the clause. However, preserved to the parties are the right to pursue equitable judicial relief, injunctive relief, appointment of a receiver and other self-help and judicial remedies. Unlike the traditional ADR clause exclusions for "provisional remedies," which are limited to foreclosure-type remedies, the Draft Clause includes "protection, continuation and preservation of lien rights and priorities, the processing and payment or return of checks, the right of set-off, recoupment, foreclosure, or repossession, whether such occurs before, during or after the pendency of any negotiation, mediation, or arbitration proceeding."

Dispute Resolution Methods

Attempt to Resolve (§2) . The Draft Clause imposes an obligation on the parties to meet informally and confer regarding their respective positions and interests in an ADR dispute. The purpose is to help them improve their ability to make informed decisions. The clause contains a covenant by the parties to use their best efforts to resolve the dispute.

Mediation (§3) and Arbitration (§4) . Failing to resolve the ADR dispute after these negotiations brings on mediation, followed by arbitration if a resolution is not reached in mediation. The Draft Clause provides for mediation and arbitration administered by the AAA. It is the experience of many that an independent third-party neutral provider and administrator is desirable in commercial financial cases.

In many cases, especially in multi-party transactions, and where a continuing relationship may be desirable, mediation can cut costs and bring about an early resolution of the dispute. This is especially true in commercial financial disputes where workout techniques which are very similar to mediation techniques are used. The reality-checking character of mediation is particularly suitable in these cases since the future course of a controversy often can be predicted based upon experience, cases, bankruptcy and other applicable law. Thus, the sooner the parties discuss the matter openly with the aid of a neutral third party, the better.

The mediation clause requires good-faith efforts by the parties. However, the parties are not bound to a resolution in the absence of mutual agreement. If the ADR dispute is not resolved by mediation, binding arbitration is required.

Consistent with debtor/creditor law, an arbitrator acting under the Draft Clause does not have authority to order specific performance of any obligation or duty of any party, or to issue injunctions. The arbitrator does have authority to control the use of discovery.

Optional Provisions

The Draft Clause provides a number of drafting options.

Choice of Law (§4). Many in the commercial financial community want to know that the ultimate decision will be governed by applicable law in a particular jurisdiction. The option permits selection of the jurisdiction whose law is to be applied.

Defenses/Punitive Damages (§4). Another option is to exclude defenses based upon the passage of time during negotiation, mediation and arbitration, and to choose whether punitive, exemplary or statutory damages may be awarded in arbitration.

Discovery (§4). There is an option to limit discovery to disputes over a certain size.

Costs and Expenses (§§3,4). While the Draft Clause calls for the sharing of mediation and arbitration costs and expenses, an option may be selected to have costs and expenses shared or awarded in accordance with the loan agreement, promissory note and/or other loan documents.

The Award ('4). The Draft Clause provides options as to the specificity of the award. Must the award contain (1) the factual and legal basis for the award, (2) findings of fact and law, or (3) a reasoned opinion? Absent one of these choices, the arbitrator would normally include in the award only the final result. Many lenders will have more confidence in the arbitration process if they have the option of requiring a more detailed award. In addition, an option is provided for either a unanimous decision or a majority decision of the panel.

Time Limitations (§§2,3,10). Another optional provision imposes limitations on the time when the various ADR procedures must be commenced with respect to an ADR dispute.

Other Provisions

Consolidation (§4)/Parties (§§1,5). The Draft Clause prohibits consolidation with another

arbitration proceeding without the parties' consent. It specifically provides that it is for the benefit only of the signatories and their respective successors and assigns, and therefore is not available to third parties. However, in order to avoid piecemeal resolution of disputes, the clause broadly defines "parties" (in '1) to include "the respective employees, officers, directors, attorneys and other agents of the parties to this Agreement," with the option to include "any partner, limited liability member, shareholder, beneficiary or other equity holder or person who authorized or approved its related parties' execution of this Agreement."

FAA (§4). An arbitration under the Draft Clause will be governed by the Federal Arbitration Act, which permits a broad spectrum of enforceable contractual arbitration options.

Survival of Clause (§9). The Draft Clause is designed to continue in effect after the last payment to a lender has been made and after contractual termination may have occurred.

Qualifications of Neutrals

One of the obstacles to both mediation and arbitration in the commercial lending community has been concern over the qualifications of the neutral. The better-informed lenders have recognized that an evaluative approach by a mediator knowledgeable in commercial finance (which can provide a helpful reality-check for the borrower) can be especially beneficial. If the case goes to arbitration, it is even more important for the arbitrator to be well-versed in commercial finance transactions and issues, since a binding decision will result.

The AAA has a national roster of exceedingly qualified commercial finance mediators and arbitrators available to handle cases under the Draft Clause. Members are nominated to the panel by the AAA and the American College of Commercial Finance Lawyers (ACCFL). However, election to the ACCFL is not a requirement for appointment to the panel.

This Guide is intended to provide drafting options to researchers and legal counsel so parties may modify their arbitration clauses to meet specific concerns. Neither the American Arbitration Association or the American College of Commercial Finance Lawyers recommend any specific provisions or combinations there of.

The AAA is grateful for the work of the ADR Committee of the American College of Commercial Finance Lawyers, Inc. in the formulation of the commercial finance ADR clauses. The College is a collection of individual lawyers experienced in commercial finance matters and whose purposes include the promotion of high standards in the commercial finance field.

The ADR clauses are offered as a resource to those involved in commercial finance transaction. But the clauses should not be viewed as an endorsement of the College as to the appropriateness or enforceability of the ADR clauses or any of its provisions in the context of any specific transaction. In particular, legal counsel should be consulted as to the acceptability or enforceability of the ADR clause or any of its provisions in any given jurisdiction.

Conclusion

Neither the American Arbitration Association or the American College of Commercial Finance Lawyers recommend any specific provisions or combinations thereof. Parties should consult

legal counsel for guidance and advice.

It is recommended that this guide be used in conjunction with the Association's booklet, *Drafting Dispute Resolution Clauses A Practical Guide* (available at the AAA's Web site at <http://www.adr.org>), as well as the Association's *Commercial Arbitration Rules for Commercial Financial Disputes*.

DRAFTING DISPUTE RESOLUTION CLAUSES

Model Mediation and Arbitration Clause for Commercial Financial Dispute Resolution

Short Form

Article 00

1. If a dispute arises out of or relates to this Agreement, or the breach thereof, the parties agree first to try in good faith to resolve the dispute by mediation administered by the American Arbitration Association under its Commercial Financial Disputes Mediation Rules, before resorting to arbitration. Thereafter, any unresolved controversy or claim arising out of or relating to this Agreement, or breach thereof, shall be resolved by arbitration administered by the American Arbitration Association in accordance with its Commercial Financial Disputes Arbitration Rules, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof pursuant to applicable law.
2. Nothing in the preceding paragraph, or otherwise, nor the exercise of any right to negotiation, mediation or arbitration, nor the commencement or pendency of any proceeding, shall limit the right of any party to this Agreement:
 - (1) to seek judicial equitable relief, or other equitable relief available to it under applicable statutory and/or case law including, but not limited to, injunctive relief and the appointment of a receiver; or
 - (2) to exercise any self-help rights or any other rights or remedies available to it by contract or applicable statutory or case law (including but not limited to the filing of an involuntary petition in bankruptcy, the right of set off, attachment, recoupment, foreclosure, or repossession) with respect to its extension of credit, the protection and preservation of collateral, the liquidation and realization of collateral, the protection, continuation and preservation of lien rights and priorities, the collection of indebtedness, and the processing and payment or return of checks, whether such occurs before, during or after the pendency of any negotiation, mediation, or arbitration proceeding.

The institution and maintenance of an action for judicial relief or pursuit of provisional or ancillary rights or remedies or exercise of self-help remedies, all as provided herein, and the pursuit of any such rights or remedies, shall not constitute a waiver of the right or obligation of any Party, including the plaintiff seeking judicial relief or remedies, to submit a dispute to negotiation, mediation and arbitration, including disputes that may arise from the exercise of such rights.

3. The arbitrator(s) shall not have the power to order specific performance of any obligation or duty of any party to this Agreement or to issue injunctions in connection therewith or otherwise.
4. Arbitrators appointed by AAA hereunder shall be appointed from the National Roster for Commercial Financial Disputes as provided in the Rules unless otherwise mutually agreed to by the parties. Mediators shall be appointed, with consent by the parties, from the National Panel of Mediators, when practicable, but otherwise by AAA with the consent of the parties.

Model Mediation and Private Arbitration Clause for Commercial Financial Dispute Resolution

Long Form

Article 00

1. *Dispute Resolution.* An "ADR Dispute" (as defined and limited below) shall be resolved in accordance with the procedures specified in this Article 00, which shall be the sole and exclusive procedure for the resolution of an ADR Dispute. A "Controversy," as the term is used in this Article 00, shall mean any action, dispute, claim, counterclaim or controversy of any kind, whether founded in contract [OPTIONAL: , whether regarding express or implied terms, such as implied covenants of good faith, fair dealing and the commercial reasonableness of any collateral disposition, or any other contract claim], trade practices, tort [OPTIONAL: , including, without limitation, negligence, breach of fiduciary duty, fraud, conversion, duress, interference, wrongful replevin, fraud in the inducement, or any other tort], statutory or common law, now existing or hereafter arising between or among any of the "Parties" (as defined below) to this Agreement, based upon or arising out of, or pertaining to or related to or in connection with this Agreement, extensions of credit hereunder and/or the transactions and events that are governed by or arise out of the subject of this Agreement and/or any related agreements, documents or instruments, and its or their negotiation, execution, collateralization, administration, repayment, modification, extension or collection, or any amendment thereto. The term Parties or Party as used herein shall include the respective employees, officers, directors, attorneys and other agents of the parties to this Agreement [OPTIONAL: , together with any partner, limited liability member, shareholder, beneficiary or other equity holder or person who authorized or approved its related parties' execution of this Agreement].

An "ADR Dispute", as the term is used in this Article 00, shall mean any Controversy, as defined herein, if and only if:

- A. the Parties to this Agreement mutually agree in writing that a Controversy shall be treated as an ADR Dispute even though at the time of such mutual written agreement the Controversy would not meet the criteria set forth below for such a Controversy to be an ADR Dispute hereunder, OR

- B. the Controversy

(1) is such at the time any provisions of this Article 00 are invoked that the prevailing

Party could under applicable law be adequately compensated by ascertainable money damages, and

- (2) one Party to this Agreement has made a claim for money damages against another Party to this Agreement in a writing that has been delivered to the other Party, PROVIDED, HOWEVER, that a demand made by a lender or other financial services provider for repayment of money or for compliance with contracted-for obligations, whether based upon contractual default or otherwise, shall not be an ADR Dispute.

Example: A controversy relating to a lender's refusal to make or continue to make loans to a borrower, or a Controversy as to whether a borrower is in default under an agreement with a lender, would not be an ADR Dispute within the definition of an ADR Dispute for purposes of this Article 00. If a borrower is aggrieved after a lender refuses to lend and/or calls a default or takes other action in relation to the borrower based upon a claimed default, the resulting Controversy would become an ADR Dispute only if and when the borrower notifies the lender in writing of a claim against the lender for damages arising from the lender's actions.

Nothing in the preceding paragraphs, or otherwise, nor the exercise of any right to negotiation, mediation or arbitration, nor the commencement or pendency of any proceeding, shall limit the right of any party to this Agreement:

- (1) to seek judicial equitable relief, or other equitable relief available to it under applicable statutory and/or case law including but not limited to injunctive relief and the appointment of a receiver; or
- (2) to exercise any self-help rights or any other rights or remedies available to it by contract or applicable statutory or case law (including but not limited to the filing of an involuntary petition in bankruptcy, the right of set-off, attachment, recoupment, foreclosure, or repossession) with respect to its extension of credit, the protection and preservation of collateral, the liquidation and realization of collateral, the protection, continuation and preservation of lien rights and priorities, the collection of indebtedness, and the processing and payment or return of checks, whether such occurs before, during or after the pendency of any negotiation, mediation, or arbitration proceeding.

The institution and maintenance of an action for judicial relief or pursuit of provisional or ancillary rights or remedies or exercise of self-help remedies, all as provided herein, and the pursuit of any such rights or remedies, shall not constitute a waiver of the right or obligation of any Party, including the plaintiff seeking judicial relief or remedies, to submit an ADR Dispute to negotiation, mediation and arbitration, including ADR Disputes that may arise from the exercise of such rights.

[OPTIONAL: It is not the intent of this Article 00 to replace and/or limit the legal rights of the Parties to relief available under applicable law to exercise and/or enforce contracted-for rights and obligations; rather, it is the intent under Article 00 to limit an

ADR Dispute to Controversies that may arise from and after the exercise and enforcement of contracted-for rights and obligations, and the claims or counterclaims for money damages that may result therefrom.]

[OPTIONAL: Example: If a secured lender with accounts receivable as collateral, claiming default and the contractual right to notify account debtors to make direct payments to the lender, notifies the borrower of the intent to do so, and the borrower claims such notification is not authorized, the Controversy at that point is not an ADR Dispute; the lender may notify the account debtors (and/or seek judicial relief to do so) and the borrower may seek judicial relief to enjoin the lender from doing so. The Controversy will not become an ADR Dispute until the criteria set forth above (in A or B above) for a Controversy to be an ADR Dispute have been met.]

2. *Attempt to Resolve: Negotiation.* The Parties agree to meet informally and promptly and confer regarding their respective positions and interests in any ADR Dispute arising between or among them, with a view toward attempting to improve their mutual ability to make informed decisions relating to the ADR Dispute; and the Parties agree to use their best efforts to resolve any such ADR Dispute between or among them. The executives or representatives with authority to resolve the ADR Dispute shall meet at a mutually acceptable time and place, within 15 days after receipt of a letter (Notice of Negotiation) requesting a meeting pursuant to this paragraph, sent by any Party, and thereafter shall meet as often as they deem necessary, shall exchange relevant information and shall, recognizing their mutual interests, diligently endeavor to resolve the ADR Dispute in a manner satisfactory to both parties. All reasonable requests for information made by one party to the other will be honored.

All negotiations pursuant to this Article and pursuant to any negotiation or mediation procedures under this Article are confidential, shall not be disclosed to anyone other than a Party's own counsel of record, and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence and for all other purposes, unless disclosure is directed by subpoena issued by a court after the Party from whom disclosure is sought has objected to disclosure based upon the confidentiality provisions of this Article 00. The Parties to this Agreement agree that should any Party seek such a subpoena, the request for such a subpoena shall specifically refer to the confidentiality provision above, and notice that such subpoena is being requested shall be submitted to the Parties hereto prior to judicial action with respect to such subpoena.

3. *Mediation.* If the Parties have not been able to resolve the ADR Dispute, pursuant to Paragraph 2 negotiation, within thirty (30) days after the receipt of the Notice of Negotiation, any Party may then submit the ADR Dispute to mediation, pursuant to the Mediation Rules for Commercial Financial Disputes of the American Arbitration Association (AAA), which rules shall govern the conduct of the mediation. The Parties agree to mediate in good faith through executives or representatives attending the mediation sessions and having authority to resolve the dispute at the mediation sessions. If the ADR Dispute is not resolved through mediation, the mediation shall be terminated by a written declaration of the mediator that the ADR Dispute has not been resolved.

The mediation shall be administered by the AAA and governed by the AAA Mediation Rules

for Commercial Financial Disputes in effect at the time of the mediation, subject to this Agreement. The costs of the mediation, including the fees and expenses of the mediator, shall be borne by the parties to the arbitration in equal shares, each party to this agreement bearing the expense of its own counsel, experts, witnesses, and preparation and presentations at the mediation [OPTIONAL: , provided, however, the costs and expenses of the mediation shall be borne in accordance with the provisions of the loan agreement, promissory note and/or other loan documents relating to the ADR Dispute which is the subject of the mediated claim or dispute to the extent provided thereunder].

4. *Arbitration.* If the Parties are not able to resolve the ADR Dispute through negotiation or mediation, the ADR Dispute shall be resolved by binding arbitration administered by the American Arbitration Association (AAA). Confirmation and judgment upon the award rendered by the arbitrator(s) may be entered by any state or federal court having jurisdiction thereof.

A. The published AAA Rules for Resolving Commercial Financial Disputes, including, if applicable, the Supplementary Procedures for Large, Complex Disputes, in effect on the date of this Agreement, shall govern such arbitration, subject to the provisions set forth herein. The arbitrator(s) will decide if any inconsistency exists between the Rules and arbitration provisions contained herein. If any such inconsistency exists, the arbitration provisions contained herein will control and supersede the Rules.

B. Since this Agreement touches and concerns interstate commerce, this Agreement shall be governed by the Federal Arbitration Act (Title 9, United States Code).

C. [OPTIONAL: The parties agree that the arbitrator(s) shall give effect to the substantive law of the State of [], including but not limited to conflicts of law provisions, statutes of limitation, and matters pertaining to the validity of this arbitration clause in determining matters submitted to arbitration hereunder; provided, however, that the Federal Arbitration Act (Title 9 U.S.C.), to the extent inconsistent, will supersede the laws of such State and govern. In doing so, the arbitrator(s) shall not be required to do independent legal research, and shall be entitled to rely upon briefs and memoranda of law submitted by counsel for the Parties.]

[OPTIONAL: Defenses based upon the passage of time during any negotiation or mediation or arbitration provided for hereunder shall not be available to the parties.]

D. The arbitrator(s) is/are not empowered and shall not have the authority to award damages (such as punitive, exemplary, or statutory damages) in addition to compensatory damages, and each party hereby irrevocably waives any right to recover such damages with respect to any ADR Dispute resolved by arbitration.

[OPTIONAL: The arbitrator(s) is/are empowered and shall have the authority to award damages (such as punitive, exemplary, or statutory damages), to the extent permissible under applicable law, in addition to compensatory damages. Such damages shall be reasonable in amount in relation to receiving party's actual pecuniary loss and be clearly available under applicable law under the circumstances of the case.]

The arbitrator(s) are not empowered and shall not have the authority to order specific performance of any obligation or duty of any party to this Agreement or to issue injunctions in connection therewith or otherwise.

- E. In any arbitration hereunder, discovery of relevant and non-privileged documents shall be permitted at the discretion of the arbitrator(s) with an end to providing the arbitrator(s) with relevant facts regarding the ADR Dispute. All disputes with respect to discovery shall be promptly resolved by the arbitrator(s). In resolving disputes over discovery, the arbitrator(s) shall give great weight to whether requested discovery would under the circumstances be available under applicable law.

[OPTIONAL: In any arbitration hereunder, discovery proceedings of the type provided by the Federal Rules of Civil Procedure shall be permitted at the discretion of the arbitrator(s), but only with respect to any disputes arbitrated wherein the amount in controversy is at least \$_____. Any disagreement relating to such discovery will be resolved by the arbitrator(s) after a hearing by such arbitrator(s).]

- F. The costs of the arbitration, including the fees and expenses of the arbitrator(s), shall be borne by the parties to the arbitration in equal shares, each party to this agreement bearing the expense of its own counsel, experts, witnesses, and preparation and presentation of proofs [OPTIONAL: , PROVIDED, HOWEVER, the arbitrators shall award costs and expenses of the arbitration proceeding in accordance with the provisions of the loan agreement, promissory note and/or other loan documents relating to the ADR Dispute which is the subject of the arbitrated claim or dispute to the extent provided thereunder].

- G. In any ADR Dispute between the Parties that is arbitrable hereunder, when the aggregate of all claims and the aggregate of all counterclaims each is in an amount less than \$75,000, the arbitration shall be before a single neutral arbitrator to be selected in accordance with the Rules for Commercial Financial Disputes of the AAA under the Expedited Procedures of said Rules.

- H. The Parties agree that any ADR Dispute shall not be consolidated with any other arbitration proceeding for any reason without the consent of all parties hereto.

- I. It is the intent of the parties that the testimony of witnesses in any arbitration hereunder be subject to cross-examination.

[OPTIONAL: Notwithstanding the foregoing, it is agreed that the testimony of any witness may be submitted through previously-taken deposition, provided such deposition is authorized by the arbitrator(s) and the opportunity for cross-examination is given at such deposition.]

- J. Any arbitration award or portion thereof, whether preliminary or final, shall be in a writing signed by each [OPTIONAL: a majority of the arbitrators] arbitrator. [OPTIONAL: and shall generally state the reasons

[OPTIONAL: and factual and legal basis] upon which the award or any portion thereof is based.] [OPTIONAL: and upon the request of a party shall include findings of fact and conclusions of law.]

[OPTIONAL: and shall be accompanied by a reasoned opinion.] An arbitrator(s) dissenting from an award or portion thereof may issue a dissent from the award or portion thereof in writing, stating the reasons for dissent.

5. *Parties.* It is expressly understood, anything in this Agreement to the contrary notwithstanding, that this Article 00 is for the benefit only of the signatories hereto and their respective successors and assigns and is not for the benefit of any other party or person whatsoever.
6. *Confidentiality.* The Parties, arbitrator(s) and mediators shall treat all aspects of the mediation and arbitration proceedings, including, without limitation, discovery, testimony and other evidence, briefs and the award, as strictly confidential, provided, however, that any award or order rendered by the arbitrator(s) pursuant to the terms of this Agreement may be entered as a judgment or order in court as provided herein.
7. *Venue.* The mediation and arbitration proceedings shall be conducted in [city], [state], or at such other place as may be selected by mutual agreement.
8. *National Roster.* Arbitrators appointed by the AAA hereunder shall be appointed from the National Roster for Commercial Financial Disputes (National Roster) as provided in the Rules unless otherwise mutually agreed to by the parties. Mediators shall be appointed, with consent by the parties, from the National Roster, when practicable, but otherwise by the AAA with the consent of the parties.
9. *Survivability.* The parties agree that the duty to arbitrate disputes hereunder extends beyond the date of the expiration or termination of this Agreement, and beyond the date of the fulfillment of any repayment obligations of any party hereunder.
10. [OPTIONAL: *Time Limitation.* Any arbitration proceeding hereunder must be instituted: (a) with respect to any ADR Dispute arising out of the collection of any debt owed by either party to the other, within two years after the date of the last payment made or received by the instituting party; and (b) with respect to any other ADR Dispute, within two years after the event giving rise thereto occurred, whether or not either party knew of such event. Failure to institute an arbitration proceeding within such a period will constitute an absolute bar and waiver of the institution of any proceedings, whether in arbitration or in court, with respect to such ADR Dispute.]