The AAA® Guide to Drafting Alternative Dispute Resolution Clauses for Construction Contracts

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American Arbitration Association®

Available online at **adr.org/construction**

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Note: Rules, forms, procedures and guides are subject to periodic change and updating.

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Why Alternative Dispute Resolution (ADR) for Construction Disputes?

The typical construction project is complex and lengthy, and given these variables, disputes among parties often occur. The cost and duration of disputes can be lessened significantly—and potential disputes often prevented entirely—through judicious planning of how disputes will be handled should they arise. The number of details considered in advance is directly proportional to the amount of control parties can exert over the management of the resolution process when and if necessary.

Contrary to litigation, alternative dispute resolution (ADR) allows parties the ability to plan early for possible disputes and the flexibility to customize the most time- and cost-effective resolution process for their case. This is accomplished by inserting an ADR clause in the dispute resolution section of the construction contract spelling out the terms of the resolution process agreed to by both parties. Even if a project is underway and bound by an existing contract when a dispute arises, parties still can use ADR to their advantage.

Parties want to have control over the management of any dispute that might arise. The best way to ensure this is to write an alternative dispute resolution clause into your original contract, or, if you are in the dispute, to submit your case to ADR.

Arbitration is a private, informal process by which all parties agree, in writing, to submit their disputes to one or more impartial persons authorized to resolve the controversy by rendering a final and binding award. It is widely used in the construction industry; most of the industry's standard contracts—those of the American Institute of Architects (AIA), ConcensusDocs and Engineers Joint Contract Documents Committee (EJCDC)—contain ADR provisions, and many of them incorporate arbitration as a means by which to resolve disputes.

These standard provisions state simply that disputes will be settled by arbitration in accordance with specifically outlined procedures, such as those found in the *American Arbitration Association® (AAA) Construction Industry Arbitration Rules and Mediation Procedures*. This standard clause is sufficient for many of the disputes that can arise during the course of a construction project. However, seldom does "one size fit all" and due to the complexity, costs, materials, technology and other specific requirements of some projects, a simple arbitration clause may not be enough for the particular needs of every case.

Why the American Arbitration Association?

Time-tested Rules and Procedures

Since its founding in 1926, the AAA has revised and refined its *Arbitration Rules and Procedures*. These *Construction Rules*—especially when combined with the expertise of AAA case management—offer parties simple, time-tested means of resolving disputes. The major benefits of using the *AAA Construction Industry Arbitration Rules and Mediation Procedures* are:

- Parties have a written agreement to resolve disputes using rules reviewed by the *National Construction Dispute Resolution Committee (NCDRC),* which is comprised of members representing major construction industry organizations. These rules reflect current law and are referred to in most major construction industry contract document guidelines.
- Flexible rules may be varied by mutual agreement of the parties based upon the needs of the case.
- A panel of impartial, knowledgeable and experienced arbitrators and mediators, made up of professionals with a wide range of expertise including but not limited to architects, engineers, contractors, subcontractors and lawyers with specific construction backgrounds.
- Awards are final, binding and enforceable in a court.

Four Tracks Specific to the Type of Case

The *AAA Construction Industry Arbitration Rules and Mediation Procedures* provides four tracks for the management of cases (more details are provided later in this guide).

- *Fast Track*—for cases involving claims of less than $100,000
- *Regular Track*—for cases involving claims between the ranges of $100,000-$1,000,000
- *Large, Complex Track*—for cases involving claims in excess of $1,000,000

- *Resolution of Disputes through Document Submission*—for cases where oral hearings are waived

Specialized Knowledge to Customize Clauses

Parties or their counsel may desire to augment the standard clause with additional provisions tailored to the particular nature of their project. The AAA is instrumental in assisting drafters with information on what issues and what procedures may benefit the parties to the contract and what ultimately will be the right procedure for a successful outcome of the project and the resolution of any disputes.

These issues include selection of the arbitrator(s), scope of discovery, duration of the arbitration proceeding, assessment of attorneys' fees, awards and remedies and international provisions, along with many others detailed in this guide.

Developed in conjunction with the *National Construction Dispute Resolution Committee*, the *AAA Guide to Drafting Alternative Dispute Resolution Clauses for Construction Contracts* is designed to lead parties and counsel toward clear options for different and effective ways to structure and to conduct an alternative dispute resolution procedure.

For further information about the AAA, the *AAA Construction Industry Arbitration Rules and Mediation Procedures* or AAA Case Management services, please feel free to contact one of our local regional offices' customer service at (1.800.778.7879) or visit us on our website at www.adr.org. Please also feel free to utilize the AAA online ClauseBuilder® Tool available at www.clausebuilder.org.

Pre-Contract Stage: Designing the ADR Clause

The standard arbitration clause suggested by the American Arbitration Association addresses many basic drafting questions by incorporating the *AAA Construction Industry Arbitration Rules and Mediation Procedures.* This simple approach has proven highly effective in hundreds of thousands of disputes. Standard clauses also may be used for negotiation, mediation, and Dispute Resolution Boards (DRBs). The AAA can assist parties and their counsel in drafting clauses and outlining procedures for other forms of ADR such as partnering, on-site panelists and other procedures that may be a more effective fit to resolve an individual case.

Standard Clauses

Basic Arbitration Clause

The parties can provide for arbitration of future disputes by inserting the following clause into their contracts:

> *Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.*

The standard arbitration clause also may be supplemented with references to the *AAA Procedures for Large, Complex Construction Disputes* or *Fast Track Procedures.* These additional clauses, which are discussed in the following section entitled *Supplemental Clauses*, may be added to the basic arbitration clause to specify things such as the make-up of the panel, limited discovery, type of award, preliminary relief, depositions, and a host of other options so that the final clause fits the parties and the contract.

The Rules contain a *Fast Track* arbitration system for cases involving claims of less than $100,000; enhancements to the *Regular Track Rules* (claims between $100,000 to $1,000,000); and a *Large, Complex Construction Case Track* for use in cases involving claims in excess of $1,000,000.

Copies of the Association's Rules may be viewed on its website at **www.adr.org.**

See Appendix A for details discussing the benefits of incorporating the AAA Construction Industry Arbitration Rules into your contract.

Basic Mediation Clause

If parties wish to adopt mediation as part of their contractual dispute settlement procedure, they can include the following mediation clause for use either alone or in conjunction with a standard arbitration provision and may also provide that the requirement of filing a notice of claim with respect to the dispute submitted to mediation shall be suspended until the conclusion of the mediation process.

> *If a dispute arises out of or relates to this contract or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try to settle the dispute by mediation administered by the American Arbitration Association under its Construction Industry Mediation Procedures before resorting to arbitration. If a party fails to respond to a written request for mediation within 30 days after service or fails to participate in any scheduled mediation conference, that party shall be deemed to have waived its right to mediate the issue in dispute.*

Step Mediation-Arbitration Clause

Parties also have the option of including a "step" mediation-arbitration clause into their contracts. A dispute resolution hybrid, the clause provides first for mediation and then, if the dispute is not resolved within a specified time frame, the remaining matters are resolved by arbitration.

> *Any controversy or claim arising out of or relating to this contract, or breach thereof, shall be settled by mediation under the Construction Industry Mediation Procedures of the American Arbitration Association. If a party fails to respond to a written request for mediation within 30 days after service or fails to participate in any scheduled mediation conference, that party shall be deemed to have waived its right to mediate the issues in dispute. If the mediation does not result in settlement of the dispute within 30 days after the initial mediation conference or if a party has waived its right to mediate any issues in dispute, then any unresolved controversy or claim arising out of or relating to this contract or breach thereof shall be settled by arbitration administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.*

Large, Complex Cases

Key elements of the *Large, Complex Case (LCC)* framework contained within the *AAA Construction Industry Arbitration Rules* are:

- A select panel of arbitrators that meet rigorous qualifications criteria and who have been trained in effective case management techniques.
- As with all *AAA Procedures*, *LCC Procedures* provide flexibility so that parties can resolve disputes efficiently.
- Case management by specialized AAA administrative teams assigned to these cases.
- A reasoned award.

Unless the parties agree otherwise, the *Large, Complex Case* framework is mandatory for all claims of $1,000,000 or more, although parties are free to agree to use the *LCC Procedures* in other disputes.

LCC Procedures provide for an early administrative conference with the AAA and a preliminary hearing with the arbitrator(s). (See Sections L of the Rules.) Documentary exchanges and other essential exchanges of information are facilitated. The Procedures also provide that a statement of reasons may accompany the award if requested by the parties. The Procedures are meant to supplement the applicable rules that the parties have agreed to use and include the possibility of the use of mediation to resolve some or all issues at an early stage.

Parties can provide for future application of *LCC Procedures* by including the following arbitration clause in their contract.

> *Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by arbitration administered by the American Arbitration Association under its Procedures for Large, Complex Construction Disputes, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.*

Mediation-Arbitration

A clause may provide first for mediation under the *AAA Mediation Rules*. If the mediation is unsuccessful, the mediator could be authorized to resolve the dispute under the *AAA Arbitration Rules* in a process sometimes referred to as "Med-Arb."

A procedure whereby the same individual(s) serving as mediator(s) become(s) arbitrator(s) when the mediation fails is not recommended except in unusual circumstances. This is because it could inhibit the candor that should characterize the mediation process and/or it could convey evidence, legal points or settlement positions *ex parte*, improperly influencing the arbitrator(s).

For a sample of a med-arb clause, please see the "step" mediation-arbitration clause in this guide.

Dispute Resolution Boards

A Dispute Resolution Board provides a prompt, rational, impartial review of disputes by mutually accepted experts, which frequently results in substantial cost savings and can eliminate years of wasted time and energy in litigation. *DRB Procedures* may be made a part of construction contract documents.

The contract should contain a paragraph reflecting the agreement to establish the DRB. The text of the actual procedures also should be physically incorporated into the general conditions or supplementary conditions of the contract for construction wherever possible and practical, and documents such as the invitation to bidders or the request for proposals should mention that the formation of a DRB is contemplated. The *DRB Procedures* should be coordinated with the other dispute resolution procedures required by the contract documents.

Suggested language for incorporating *DRB Procedures* in a contract is as follows:

> *The parties shall impanel a Dispute Resolution Board of [one] [three] member(s), in accordance with the Dispute Resolution Board Guide Specifications of the American Arbitration Association. The DRB, in close consultation with all interested parties, will assist and recommend the resolution of any disputes, claims, and other controversies that might arise among the parties.*

The AAA provides *Dispute Resolution Board Guide Specifications* and *DRB Operating Procedures.*

Optional Detailed Clauses

The standard AAA construction arbitration clause in a contract usually is sufficient to secure a smooth resolution process. However, providing for specific issues in advance—over and beyond the standard clause—will streamline the process later on if a dispute arises. If parties determine exactly how details particular to the nature of their transaction or relationship will be handled, they will exercise more control over the process, ensuring a more cost-effective proceeding.

Some disputes require a more detailed ADR clause, and drafters must take care to ensure that the clause meets the parties' needs adequately. An inappropriate ADR clause may result in delay, expense and inconvenience. If disagreements arise over the meaning of the clause, it is often because it failed to properly address the particular needs of the parties. Every party to a construction contract should carefully consider its dispute resolution needs before the contract is completed. In order to fully understand the implications of any ADR clause, parties should consult experienced legal counsel for advice and guidance.

The following is a list of options that, although not exhaustive, highlights some of the issues to consider in drafting, adopting or recommending a dispute resolution process.

- Selection of Arbitrator(s)
- Locale Provisions
- Governing Law
- Conditions Precedent to Arbitration
- Consolidation/Joinder
- Discovery
- Duration of Arbitration Proceeding
- Awards/Remedies
- Assessment of Attorneys' Fees
- Form and Scope of the Award
- Confidentiality
- Appeal of Construction Arbitration Awards
- Statute of Limitations
- International Provisions

Selection of Arbitrator(s)

How many arbitrators?

The parties may agree to have one arbitrator or three (which increases the cost and duration of the process). Cases heard under the *Fast Track Procedures* will be heard by one arbitrator, unless the parties specify a panel of three. Cases heard under the *Regular Track Procedures* will be heard by one arbitrator unless the parties specify a panel of three. If parties disagree on the number of arbitrators, the AAA shall consider the contentions of each side and make a final determination (see Section R-18 of the Rules). When there is a disagreement over the number of arbitrators on LCC cases, Section L-3 requires that three arbitrators shall be appointed.

How are arbitrators selected?

Under the *AAA Arbitration Rules,* arbitrators usually are selected using a listing process. The AAA case manager presents each party with a list of proposed arbitrators who are experienced in the subject matter involved in the dispute. For parties selecting the expedited *Fast Track,* the list contains fewer arbitrators to facilitate faster selection. Often the AAA case manager will conduct a conference call with the parties and/or counsel to ascertain the preferred qualifications of potential arbitrators, such as desired construction occupations (i.e., architect, engineer, contractor, subcontractor) or expertise in specific subject matter, geographical considerations or even compensation rates.

Within a specified number of days, each side must strike any unacceptable names, number the remaining names in order of preference and return the list to the AAA. The case manager then invites panelists to serve from the names remaining on the list, in the designated order of mutual preference.

When the dispute requires a panel of three arbitrators, Section R-14(e) requires that the parties first attempt to agree on the professional backgrounds of the composition of the panel. The case manager will work with the parties to craft an agreement so as to achieve the composition which best suits the needs of each dispute. If the parties are unable to reach an agreement, the AAA shall make the determination, taking into account each party's stated preferences.

Sample clauses providing for specific qualifications of arbitrator(s) are set forth below:

The arbitrator(s) shall be a civil engineer.

or

The arbitrator(s) shall be a practicing attorney specializing in construction law.

or

A balanced panel of three arbitrators, such as one consisting of one contractor, one design professional, and one construction attorney.

or

In the event any claim exceeds [$1 million], exclusive of interest and attorneys' fees, the dispute shall be heard and determined by three arbitrators consisting of persons qualified in [civil engineering, construction management, construction law, mechanical engineering, etc.] or [one contractor, one design professional and one construction attorney].

Locale Provisions

Parties might want to add language specifying the place of the arbitration. The choice of the proper place to arbitrate is most important because the place of arbitration generally implies a choice of the applicable procedural law, which in turn affects questions of arbitrability, procedure, court intervention and enforcement.

In specifying a locale, parties should consider: (1) the convenience of the location and how it affects the availability of witnesses, local counsel, transportation, hotels, meeting facilities, court reporters; (2) the available pool of qualified arbitrators within the geographical area and (3) the applicable procedural and substantive law. An example of locale provisions that might appear in an arbitration clause follows:

The place of arbitration shall be [city], [state], or [country(1)].

(1) See International Provisions

Procedures establishing the locale of the hearing are set forth in the *Construction Industry Arbitration Rules* in Section R-12.

Governing Law

It is common for parties to specify the law that will govern the contract and/or the arbitration proceedings. Some examples follow:

> *This agreement shall be governed by and interpreted in accordance with the laws of the State of [specify(2)]. The parties acknowledge that this agreement evidences a transaction involving interstate commerce. The Federal Arbitration Act (Title 9 US Code) shall govern the interpretation and enforcement of the arbitration clause in this agreement.*
>
> or
>
> *Disputes under this clause shall be resolved by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association.*
>
> or
>
> *This contract shall be governed by the laws of the State of [specify(2)].*
>
> *(2) Parties should be mindful of state laws regarding choice of law rules governing construction projects.*

Conditions Precedent to Arbitration

Under an agreement of the parties, satisfaction of specified conditions may be required before a dispute is ready for arbitration. Examples of such conditions precedent include written notification of claims within a fixed period of time and exhaustion of other contractually established procedures, such as submission of claims to an architect or engineer. These kinds of provisions may, however, be a source of delay and may require linkage with a statute of limitations waiver (see below). An example of a "condition precedent" clause follows:

> *If a dispute arises from or relates to this contract, the parties agree that upon request of either party, they will seek the advice of [a mutually selected engineer] and try in good faith to settle the dispute within 30 days of that request, following which either party may submit the matter to mediation under the Construction Mediation Procedures of the American Arbitration Association. If the matter is not resolved within 60 days after initiation of mediation, either party shall demand arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules.*

Consolidation/Joinder

The *AAA Construction Industry Arbitration Rules* has procedures for consolidation and joinder (See Section R-7).

Where there are multiple parties with disputes arising from the same transaction, complications often can be reduced by the consolidation of all disputes. Since arbitration is a process based on voluntary contractual participation, parties may not be required to arbitrate a dispute without their consent.

Standard industry documents may provide procedures for consolidation or joinder of additional parties to a dispute. When this language is present in a document, those procedures should be followed.

However, parties can provide for the consolidation of two or more separate arbitrations into a single proceeding or permit the joinder of a third party into an arbitration. In a construction dispute, consolidated proceedings may eliminate the need for duplicative presentations of claims and avoid the possibility of conflicting rulings from different panels of arbitrators. However, consolidating claims might be a source of delay and expense. An example of language that can be included in an arbitration clause follows:

> *The owner, the contractor, and all subcontractors, specialty contractors, material suppliers, engineers, designers, architects, construction lenders, bonding companies and other parties concerned with the construction of the structure are bound, each to each other, by this arbitration clause, provided that they have signed this contract or a contract that incorporates this contract by reference or signed any other agreement to be bound by this arbitration clause. Each such party agrees that it may be joined as an additional party to an arbitration involving other parties under any such agreement. If more than one arbitration is begun under any such agreement and any party contends that two or more arbitrations are substantially related and that the issues should be heard in one proceeding, the arbitrator(s) selected in the first filed of such proceedings shall determine whether, in the interests of justice and efficiency, the proceedings should be consolidated before that (those) arbitrator(s).*

Discovery

Discovery is the process by which information is exchanged between the parties. This process includes exchange of documents and depositions of persons who have knowledge of the dispute. Often, expert witnesses are hired to investigate and explain the more difficult and complex elements of the dispute and to provide opinions regarding causes, repairs and costs. The results of the investigation are typically provided during the discovery process.

Discovery is one of the most expensive and time-consuming portions of the arbitration process and it often is desirable to control the amount and scope of discovery through a clause in the contract. In addition, the process can be limited by agreement of the parties at any time up to and including the preliminary hearing.

Under the *Construction Industry Arbitration Rules* (Rule-24 – Pre-Hearing Exchange and Production of Information), arbitrators are authorized to direct the exchange of documents and witness lists.

Generally arbitrators prefer to hear and be able to question witnesses at a hearing rather than rely on deposition testimony. There are circumstances where depositions are the most expedient method of obtaining information, for example, if the parties anticipate the need for distant witnesses or witnesses who may be incapacitated and who would not be able to testify except through depositions. In these cases, the arbitrator(s) normally will either travel to the locale of the witness or require a deposition.

In most cases, it is desirable to limit the amount of additional discovery. Sample language providing for such discovery is set forth below:

> *At the request of a party, the arbitrator(s) shall have the discretion to order examination by deposition of witnesses to the extent the arbitrator(s) deem(s) such additional discovery relevant and appropriate. Depositions shall be limited to a maximum of [three] per party, limited to [three] hours each and shall be held within 30 days of the making of a request. Additional depositions may be scheduled only with the permission of the arbitrator(s), and for good cause shown. All objections are reserved for the arbitration hearing except for objections based on privilege and proprietary or confidential information.*
>
> or

The discovery process shall be limited by the following: 1. Where the dispute is less than $1,000,000, there shall be no discovery other than exchange of documents. 2. In disputes of $1,000,000 or more, discovery shall be limited to the number and length of depositions as determined by the arbitrator(s). All objections are reserved for the arbitration hearing except for objections based on privilege and proprietary or confidential information.

or

Consistent with the expedited nature of arbitration, each party will, upon the written request of the other party, promptly provide the other with copies of all relevant documents. There shall be no other discovery allowed.

or

The discovery process shall be in accordance with the AAA Construction Industry Arbitration Rules. There shall be no deviation.

Duration of Arbitration Proceeding

Parties can specify the amount of time that the arbitration will take, from filing to award. *Fast Track* cases generally are heard in one day and the award issued within 14 days of the closing of hearing.

While *AAA Construction Industry Arbitration Rules* normally provide for an award within 30 days of the closing of the hearing, parties sometimes underscore their wish for an expedited result in the arbitration clause, holding that there will be an award within a specified number of months of the notice of intention to arbitrate and that the arbitrator(s) must agree to the time constraints before accepting appointment.

Sample language is set forth below.

The award shall be made within _____ months of the filing of the notice of intention to arbitrate, and the arbitrator(s) shall agree to comply with this schedule before accepting appointment. The parties shall allow the arbitrator appropriate time for drafting the award as per Rule 43. However, this time limit may be extended by agreement of the parties and the arbitrator(s), if necessary.

or

The arbitration hearings shall be concluded within _____ months of the filing of the notice of intention to arbitrate and the award shall be made within 30 days thereafter. However, this time limit may be extended by agreement of the parties and the arbitrator(s). The arbitrator(s) shall agree to comply with this schedule before accepting appointment.

or

Time is of the essence in dispute resolution. Arbitration hearings shall take place within 90 days of filing and awards issued within 120 days. Arbitrator(s) shall agree to these limits prior to accepting appointment.

Awards and Remedies

Under a broad arbitration clause and the *Construction Industry Arbitration Rules*, the arbitrator(s) may grant "any remedy or relief that the arbitrator(s) deems just and equitable" within the scope of the parties' agreement. Some parties object to the clause as being overly broad and believe this could lead to "excessive" or "runaway" awards. To allay this fear, the parties may wish to include a clause limiting the scope or value of the award. Sometimes parties want to include or exclude certain specific awards or remedies, either in the contract or stipulated by the parties at any time before or during the preliminary hearing.

Examples of clauses dealing with awards and remedies follow:

The arbitrator(s) will have no authority to award punitive or other damages not measured by the prevailing party's actual damages, except as may be required by statute.

or

In no event shall an award exceed the amount of the claim by either party.

or

The award shall be limited to the amount either claimed or counterclaimed. There shall be no punitive or consequential damages.

or

Any award shall be limited to monetary damages and shall include no injunction order for specific performance or direction to any party other than the direction to pay a monetary amount.

or

If the arbitrator(s) find(s) liability, liquidated damages shall be awarded in the amount of $ _____ per day.

or

Any monetary award shall include pre-award interest at the rate of _____ % from the time of the act or acts giving rise to the award.

Assessment of Attorneys' Fees

While the case is active, the *AAA Rules* generally provide that the administrative fees be borne as incurred and that the arbitrator(s)'s compensation be allocated equally between the parties. The Rules, except for international cases, are silent concerning attorneys' fees, but this can be modified by agreement of the parties. The *AAA Rules* give the arbitrator the authority to reassess the allocation of administrative and arbitrator fees and expenses (see Section R-48) unless the parties address fees and expenses in the arbitration clause.

Some typical language dealing with fees and expenses follows:

The prevailing party[3], as determined by the arbitrator shall be entitled to an award of reasonable attorney fees.

or

The arbitrator(s) shall award to the prevailing party[3], if any, as determined by the arbitrator(s), all of its costs and fees. "Costs and fees" mean all reasonable pre-award expenses of the arbitration, including the arbitrator(s)' fees, administrative fees, travel expenses, out-of-pocket expenses such as copying and telephone, court costs, witness fees and attorneys' fees.

or

Each party shall bear its own costs and expenses and an equal share of the arbitrator(s) and administrative fees of arbitration.

or

The arbitrator(s) may determine how the costs and expenses of the arbitration shall be allocated between the parties, but they shall not award attorneys' fees.

(3) State law may define prevailing party—check your local state laws.

Form and Scope of the Award

The *AAA Construction Industry Arbitration Rules* provide that the arbitrator will include a concise written financial breakdown of the amount awarded. In addition, if there are non-monetary claims, the arbitrator shall also provide a line-item disposition of any such claims (see section R-47).

In domestic construction cases, arbitrator(s) usually will not write a reasoned opinion explaining their award unless requested to do so by all parties or if the award is for a complex case (see L-5).

While some take the position that reasoned opinions detract from finality if they facilitate post-arbitration and resort to the courts, parties sometimes desire such opinions, particularly in *Large, Complex Cases* or as already provided by most applicable rules in international disputes. Since full-blown written opinions will add cost to the process, arbitrators and parties should utilize the preliminary hearing process to discuss what specific portions of the award may need more than a breakdown of numbers. This affords the parties the benefits of some reasoning (which may be helpful for insurance purposes or in cases involving public projects) without the expense of a more formal legal opinion.

Parties may wish to include some form of reasoned opinion in their contract language, such as the following:

A reasoned award may add considerably to the cost of arbitration.

> *The award of the arbitrator(s) shall be accompanied by a reasoned opinion.*
>
> or
>
> *The award shall be in writing, shall be signed by a majority of the arbitrator(s), and shall include a statement setting forth the reasons for the disposition of any claim.*
>
> or
>
> *The award shall include findings of fact [and conclusions of law].*
>
> or
>
> *The award shall include a breakdown as to specific claims.*

Confidentiality

While the AAA and arbitrator(s) adhere to certain standards concerning the privacy or confidentiality of the hearings (see the *AAA-ABA Code of Ethics for Arbitrator(s) in Commercial Disputes*, Canon VI), parties might wish to impose limits on themselves as to how much information regarding the dispute may be disclosed outside the hearing. For example:

> *Except as may be required by law, neither a party nor an arbitrator(s) may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.*

The preceding language could also be modified to restrict only disclosure of certain information (e.g., trade secrets).

Appeal of Construction Arbitration Awards

Appeal procedures are not necessary in most cases, and careful review of the necessity for an appeal process should be done during the contract negotiation phase.

The objective of arbitration is a fair, fast and expert result that is achieved economically. Consistent with this goal, an arbitration award traditionally will be set aside by a court only where narrowly defined statutory grounds exist. Sometimes, however, the parties may desire a more comprehensive appeal of an arbitration award within the arbitral process. The AAA has included clauses for appellate arbitration in its *Guide to Drafting Alternative Dispute Resolution Clauses for Construction Contracts* for a number of years. In addition, parties have developed their own processes and standards for conducting these proceedings. In order to provide for an easier, more standardized process, the AAA has developed *Optional Appellate Arbitration Rules*.

The *Optional Appellate Arbitration Rules* provide for an appeal to an appellate arbitral panel that would apply a standard of review greater than that allowed by existing federal and state statutes. The *Appellate Rules* anticipate an appellate process that can be completed in about three months, while giving both sides adequate time to submit appellate briefs. The Rules permit review of errors of law that are material and prejudicial, and determinations of fact that are clearly erroneous.

Utilization of these Rules is predicated upon agreement of the parties. The right to appeal an arbitration proceeding is a matter of contract. A party may not unilaterally appeal an arbitration award under these rules absent agreement with the other party(s). The following sample language provides for such appellate review assuming a standard arbitration clause is already in place:

> *"Notwithstanding any language to the contrary in the contract documents, the parties hereby agree: that the Underlying Award may be appealed pursuant to the AAA Optional Appellate Arbitration Rules ("Appellate Rules"); that the Underlying Award rendered by the arbitrator(s) shall, at a minimum, be a reasoned award; and that the Underlying Award shall not be considered final until after the time for filing the notice of appeal pursuant to the Appellate Rules has expired. Appeals must be initiated within thirty (30) days of receipt of an Underlying Award, as defined by Rule A-3 of the Appellate Rules, by filing a Notice of Appeal with any AAA office. Following the appeal process the decision rendered by the appeal tribunal may be entered in any court having jurisdiction thereof."*

Statute of Limitations

Parties may wish to consider whether the applicable statute of limitations will be tolled (i.e., the clock is stopped) for the duration of mediation proceedings and can refer to the following language:

> *The requirements of filing a notice of claim with respect to the dispute submitted to mediation shall be suspended until thirty (30) days after the mediator or one of the parties declares an impasse.*

International Provisions

When dealing with disputes involving parties from different countries, it is desirable to specify means and methods of dispute resolution in the contract. Given the wide variety of laws, customs and procedures, specific definition of the dispute resolution process is highly recommended. Where the parties have not provided for the law applicable to the substance of the dispute, the *International Arbitration Rules* from the AAA's International Centre for Dispute Resolution® (ICDR®) contain specific guidelines for arbitrator(s) regarding applicable law.

Parties might wish to specify that the arbitrator(s) should or should not be a national or citizen of a particular country. The following examples can be added to the arbitration clause to deal with this concern.

The arbitrator(s) shall be a national of [country(4)].

or

The arbitrator(s) shall not be a national of either [country A(4)] or [country B(4)].

or

The arbitrator(s) shall not be of the nationality of either of the parties.

In matters involving multilingual parties, the arbitration agreement often specifies the language in which the arbitration will be conducted. Examples follow:

The language(s) of the arbitration shall be [specify].

or

The arbitration shall be conducted in the language in which the contract was written.

Such arbitration clauses could also deal with selection and cost allocation of an interpreter.

(4) In international contracts, parties should consider the importance of the applicability of a convention providing for recognition and enforcement of arbitral agreements and awards and the arbitration regime at the chosen site.

Post-Contract Stage: Using ADR for Existing Disputes

If a dispute occurs on a project with underlying contact documents that do not provide for AAA administration, parties still can choose to have the case decided by means other than litigation. If the parties wish to enter into an arbitration or mediation proceeding for an existing dispute, they may use the following clause and complete a *Submission to Dispute Resolution* form.

Construction Dispute Mediation Submission Clause:

The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Construction Industry Mediation Procedures (the clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, the tolling of the statute of limitations, pre-dispute resolution step clause with time frames and any other item of concern to the parties). If a party fails to participate in any scheduled mediation conference, that party shall be deemed to have waived its right to mediate the issues in dispute.

Construction Dispute Arbitration Submission Clause:

We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules the following controversy: (cite briefly). We further agree that the controversy be submitted to [one] [three] arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, and that a judgment of any court having jurisdiction may be entered on the award.

Large, Complex Construction Dispute Submission Clause:

We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Procedures for Large, Complex Construction Disputes the following controversy [describe briefly]. Judgment of any court having jurisdiction may be entered on the award.

Conclusion

The best way for parties and their advocates to maintain control over managing any disputes that might arise as a construction project evolves is to write an alternative dispute resolution clause into the original contract.

When writing a dispute resolution clause, it is important to keep in mind the following key point:

- The purpose of an ADR clause is to resolve disputes, not to create them.

An inappropriate ADR clause may result in delay, expense and inconvenience. Disagreements arising over the meaning of the clause can be minimized if it properly addresses the particular needs of the parties.

Although every dispute is unique, the *AAA Construction Industry Arbitration Rules and Mediation Procedures* (as well as our other construction ADR services) provide parties with significant flexibility to address many special needs, all within a time-tested structure and usually without the need for a more complex ADR clause.

Some disputes may require a more detailed ADR clause, however, and every party to a construction contract should carefully consider its dispute resolution needs before the contract is completed. In order to fully understand the implication of any ADR clause, parties should consult experienced legal counsel for advice and guidance.

The American Arbitration Association has over 80 years of experience in providing ADR services and guidance. The use of standard, straightforward AAA language may help parties avoid difficulties and result in a more efficient and effective ADR process.

If you would like further assistance with the process of drafting your clause or if you have questions about any section of this Guide, please feel free to contact a local AAA regional office, call customer service at 1.800.778.7879 or visit the AAA website at www.adr.org.

Appendix A

Benefits of Using the AAA Standard Construction Industry Arbitration Clause

- Makes clear that all disputes are arbitrable. Thus, it minimizes dilatory court actions to avoid the arbitration process.
- Allows arbitrators to deal with questions of their own jurisdiction and arbitrability.
- Is self-enforcing. Arbitration can continue despite an objection from a party, unless the proceedings are stayed by court order or by agreement of the parties.
- Provides a complete set of Rules and Procedures. This eliminates the need to spell out dozens of procedural matters in the parties' agreement.
- Provides for the selection of a specialized, impartial panel. Arbitrator(s) are selected by the parties from a screened and trained pool of available experts. Under the *AAA Rules*, a procedure is available to disqualify any arbitrator (see Sections R-3, R-14 to R-20, F-5 and L-3).
- Provides for the settlement of disputes over the locale of proceedings. When the parties disagree, locale determinations are made by the AAA as the administrator, precluding the need for intervention by a court (see Section R-12).
- Makes possible administrative conferences. An administrative conference with the parties' representatives and AAA case management to expedite the arbitration proceedings is available when appropriate (see Section R-11).
- Makes available preliminary hearings. A preliminary hearing can be arranged in construction cases of any size to specify the issues to be resolved, clarify claims and counterclaims, provide for a pre-hearing exchange of information and consider other matters that will expedite the arbitration proceedings (see Section R-23).
- Makes mediation available. Mediation conferences can be arranged to facilitate a voluntary settlement without additional administrative cost to the parties (see Section M and Section R-10).
- Establishes time limits to ensure prompt resolution for all disputes. In particular, time limits are established for the rendering of awards (see Sections R-46 and F-12).
- Allows the parties to amend claims with simple notice requirements and provide for arbitrator consent to changes made after a certain time period to prevent abuse of claim changes (see Section R-6).
- Provides a mechanism to hear requests to consolidate or join claims (see Section R-7).
- Provides for AAA administrative assistance to the arbitrator(s) and the parties. To protect neutrality and avoid unilateral contact, most rules provide for the AAA to channel communications between the parties and the arbitrator(s). An AAA case manager also provides guidance to help ensure prompt conclusion of a proceeding (see Section R-21).

- Establishes a procedure for serving notices. Notices may be served by regular mail, addressed to the party or its representative at the last known address. Additionally, the AAA and the parties may use email, facsimile transmission or other written forms of electronic communication to give the notices required by the Rules (see Section R-44).
- Gives the arbitrator(s) the power to decide matters equitably and to fashion appropriate relief, unless otherwise provided. The arbitrator(s) is empowered to grant any remedy or relief that the arbitrator(s) deems just and equitable and within the scope of the agreement of the parties, including specific performance (see Section R-38).
- Provides a remedy when parties attempt to abuse the process by failing to attend hearings or make required deposits. A hearing may be held in the absence of a party who has been given due notice. Thus, a party cannot avoid an award by refusing to appear (see Section R-32, R-58 and R-59).
- Provides for enforcement of the award. The award can be enforced in any court having jurisdiction, with only limited statutory grounds for resisting the award. If, in a domestic transaction, as distinguished from an international one, the parties desire that the arbitration clause be final, binding and enforceable, it is essential that the clause contain an "entry of judgment" provision such as that found in the standard arbitration clause ("and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof") (see Section R-54).
- Provides two Procedures specifically designed to address the resolution needs of cases both larger and smaller than average: the *Large, Complex Construction Dispute Procedures* for claims in excess of $1,000,000 and the *Fast Track Procedures* for claims of no more than $100,000 (see Sections L and F).

Appendix B

Checklist for Drafting Construction Clauses

When drafting, adopting or recommending a dispute resolution clause in a construction contract, parties or their attorneys need to give thought to the following areas:

- ❒ Does the clause cover all disputes or only certain, specific type of disputes?
- ❒ Should the clause have other ADR options such as early panel evaluation, mediation and then arbitration?
- ❒ Should one or three arbitrators handle the dispute?
  In considering this, remember to consider the cost and time that is involved when there are three arbitrators serving.
- ❒ Are there special circumstances involved in the project? If yes, does the arbitrator need to have specific expertise in a given area of construction and, if so, consider having your contract specify such expertise.
- ❒ Consider whether or not the clause should contain information on the specific location for the hearings. Note that the *Construction Rules* Section R-12 will apply regarding the determination of the location of the hearings.
- ❒ Should the AAA's *Procedures for Large, Complex Case Disputes* (*Construction Rules* Section L) be included in this contract?
  What about the *Fast Track Procedures* (*Construction Rules* Section F)?
- ❒ Consider adding time frames into the clause to deal with time limits as it relates to discovery or hearing and consider how much is necessary.
- ❒ What are the expectations for the final award?
  Should there be specific language that states a reasoned award will be rendered by the arbitrator or a standard award with a specific breakdown including all claims considered on the case?