Alternative Dispute Resolution Clauses
For Intellectual Property and Other Commercial Agreements

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In an attempt to minimize ongoing conflict from disputes that may (or are likely to) arise from contractual business relationships, many agreements have an Alternative Dispute Resolution ("ADR") Clause. These clauses are often added at the end of a protracted negotiation and often seem to be the Rodney Dangerfield of contract clauses. They get "no respect" until there is a dispute and then you may be stuck with a process that may well not fit the parties' needs. Also, if these clauses are not properly drafted to fit the situation of the present contract, they may actually increase conflict as the parties fight over the ADR Clause.

While no one likes to think about problems with a deal and/or a relationship, especially during the courtship period, a properly considered ADR Clause will make addressing these future issues between the parties less painful. In addition, where there is an important business relationship that needs to be maintained, a properly structured ADR Clause will maximize the chance that this relationship can survive the dispute. A good ADR Clause is like a good pre-nuptial agreement – difficult to think about but very valuable if you need it. Just as a hammer is a very useful tool for its intended purpose, you would not use a hammer for a situation where a screwdriver is the correct tool. Blindly copying an ADR provision into an agreement from a prior deal may well result in a situation where need a screwdriver but you only have a hammer.

I. Should You Include an ADR Clause?

Before you put an ADR Clause into an agreement, there are a number of questions you should consider. The most fundamental question is: "is an ADR Clause appropriate for this agreement?" There are a number of considerations that go into the decision to include or not include an ADR Clause. These considerations are: 1) the business purpose of the agreement; 2) the need for confidentiality; 3) the speed to resolution; 4) cost issues; 5) the ability to tailor the ADR process (flexibility); 6) the nature of the relationship between the parties; and 7) the ability to have a predictable and familiar forum.

A. Business Purpose

The business purpose also includes the nature of the agreement and the relative importance of the agreement to the contracting entities ongoing business. If the agreement is strategic and critical to the ongoing operation of the business, having an ADR process that will minimize the disruption to the ongoing business during the dispute may well be critical. In this instance, a robust ADR provision that includes relatively short time lines to resolution may be in the parties' best interest. For example, it may be beneficial for the ADR provision to include a short negotiation period between high level representatives of the parties followed by expedited arbitration.

For agreements where the same or very similar agreements are going to be entered into with multiple parties, having a predictable and cost efficient dispute resolution process may be essential to the business purpose of the agreements and/or to the efficient management of these multiple agreements. In this situation, assuming the bargaining power of the parties is similar;

using ADR can result in significant savings of money and/or time, and minimize disruption to other relationships during the dispute. If the bargaining power among the parties is not similar, care should be exercised to make the ADR provisions fair to all parties, otherwise there is a risk a court, particularly in the United States, may later rule that the ADR clause is not enforceable. For "one off" agreements that may not be strategic or business critical, the nature of the ADR provision is likely to be dictated by other considerations; this aspect is at most neutral to the inclusion of an ADR clause in the agreement.

B. Confidentiality

One of the key advantages of ADR over litigation or other public dispute resolution forums is confidentiality. The issue of confidentiality covers a number of areas from public relations – you don't want to air your problems in public – to confidential business information, like trade secrets, business plans or other secret business information. There may be times where you need a public forum for resolving the dispute; you may want or need a holding of patent infringement and/or validity as a deterrent to others. On the issue of confidentiality, don't assume that just because you are using an ADR process the results and all the proceedings will be confidential. While most arbitration rules have some provisions for confidentiality, this is something that should be addressed by language in the ADR clause, especially if the information involved is particularly sensitive to one or both parties. With mediation, it may not be appropriate to rely on the state laws in the United States and foreign laws governing mediation confidentiality, particularly because these laws vary widely and in some states the "mediation confidentiality" law really doesn't provide for true confidentiality, but only provides for an evidentiary privilege. Outside the United States, confidentiality, while generally accepted, may vary based on national norms.

On the subject of confidentiality, it also may be appropriate to address this issue in a separate (from the ADR clause) provision in the agreement. Most agreements have a confidentiality provision and this general confidentiality provision is a good place to address conflict resolution confidentiality as well.

C. Speed to Resolution

One perceived advantage for ADR is that ADR processes are faster than litigation. In many ways this is true, but a very complex arbitration can take just as long as U.S. court and/or foreign litigation, particularly when compared with the International Trade Commission or one of the U.S. District Court "rocket dockets." The importance of speed to resolution may also suggest ADR where the national courts that might be the appropriate forum for resolving disputes have a reputation for being slow. Speed is something that can be addressed in the ADR clause by setting tight time limits for resolution or by choosing expedited rules. However, this is an area to exercise caution. You want to be sure that you have sufficient time to present and develop your case, particularly in arbitration, so that the arbitrator understands the context of the evidence presented. For stepped processes, make sure there is sufficient time to mediate the dispute and/or for the negotiators to effectively try to resolve the dispute. Alternatively, you may not want to have the negotiation and/or mediation steps as conditions that must be completed before you can go to arbitration or to court. Having these steps as conditions precedent can potentially delay resolution of the dispute. Consider providing a specific time period after which either

party can proceed to the next step, be that arbitration or litigation, even if there has been no negotiations and/or mediation.

D. Cost Considerations

These days with the expense of all litigation, and particularly intellectual property litigation, all clients are looking for ways to contain costs. Because ADR has historically been viewed as a less costly way to resolve disputes, ADR clauses are often put into agreements. While ADR can be a cost efficient way to resolve many disputes, as noted previously, for very complex matters, ADR, in particular arbitration, can become as costly if not more costly that court litigation, if not properly managed.

There are methods available to contain costs, particularly in the arbitration context. Discovery is one of the major factors in the escalating cost of litigation. Having language in the ADR Clause that limits discovery can limit the costs of the arbitration. While short time periods may seem like a way to control costs, sometimes the cost to get something done in a short period of time can be greater than the same task over a longer period of time. One of the advantages of litigation in court is that judges will grant summary relief. While this is available in arbitration, the parties need to make it clear, either expressly or by choosing rules that allow for summary decisions, like the newly revised American Arbitration Association ("AAA") Commercial Rules.[1] The parties should also consider the types of evidence that needs to be presented to the arbitrator? For example, the evidence is largely in document form, will live testimony at a hearing add much information to the arbitrator. Certainly the need to cross-examine is a consideration, but the cost of a hearing often is a major factor in the cost of an arbitration proceeding.

One major driver of cost is having a three person arbitration panel. While three people minimize the likelihood that there will be a rogue decision, it does add significantly to the cost, especially if there is an evidentiary hearing. The lack of an appeal process in most arbitration proceedings has in the past driven the use of three person panels. There are a few arbitration rules that do allow for an optional appeal process. For instance the AAA, International Institute for Conflict Prevention and Resolution ("CPR"), and the Judicial Mediation and Arbitration Service ("JAMS") have optional Rules that provide for an appeal from an arbitration decision.[2] Use care in this area as one of the advantages of arbitration is that the lack of an appeal can reduce costs i.e., the arbitrator's decision is final.

E. Flexibility

As ADR processes are creatures of contract, the parties have a great deal of latitude to craft a dispute resolution process that precisely fits their needs. Having said this, this is also an area where caution should be exercised. First of all, it may be difficult to see into the future and rules that you craft today may not be in your client's best interest tomorrow. Second, as in any agreement, the agreement can be amended or modified in the future to more closely fit the parties' needs. For instance, if the parties are not able to reach a negotiated or mediated

[1] AAA Commercial Rule 33, Revised October 1, 2013.
[2] AAA Optional Appellate Arbitration Rules, Nov 1, 2013; CPR Arbitration Appeal Procedure, 2007; and JAMS Rule 34 and JAMS Optional Arbitration Appeal Procedure, June, 2004.

settlement, the parties might use the negotiation period or mediation period to modify the arbitration provision to provide for a more summary arbitration procedure.

For situations where the bargaining power among the parties is relatively equal, there are fewer issues with using a highly modified ADR Clause, especially one that severely limits a party's ability to have choices in resolving the dispute. Where the bargaining power among the parties is unequal, you should use extreme caution in this area.[3]

Also, the choice of ADR Rules is something that should be done with care. There are significant differences among the ADR Rules and these differences can impact both cost and flexibility. The proper choice of ADR Rules can enhance the parties' ability to resolve the dispute in an effective and cost efficient manner.[4]

F. Party Relationship

ADR, especially mediation and negotiation, is a good way to preserve important business relationships. Where you will have to deal repeatedly with the same party, having a highly adversarial dispute resolution process may not make good business sense. In these instances, a stepped approach may be appropriate. Another consideration is the parties acceptance of ADR as an effective way to settle the dispute. If one party does not fully agree that ADR is an effective process, you may end up with a situation where the losing party in arbitration challenges the arbitration decision in court. While the vast majority of arbitration decisions are voluntarily accepted and for those that are challenged most are upheld, the cost of going through a challenge both in terms of cost and time can be substantial. Dragging a party to ADR that really does not believe in the process can be a recipe for disaster and increased costs.

Where there are multiple parties that might be involved in any resulting dispute relating to an agreement, ADR may well be a more efficient way to resolve these disputes, even when the goals of parties on the "same" side are not fully aligned. A skilled arbitrator or mediator can effectively deal with multiple parties and most major arbitration rules have provisions for dealing with multiple parties. If you think this is likely, make sure to consider provision in the ADR clause that address these other parties, especially if they are not signatories to the agreement[5].

G. Familiar Forum

Particularly for international agreements, ADR can address the parties' relative distrust, sometimes based on lack of familiarity, with national judicial systems in the situs of the parties. Some of this is a concern with giving the other party "home court" advantage. Also, court proceedings vary widely, certainly between common law and civil law jurisdictions. But even between countries that share a similar type of legal system, the court procedures and customs can vary widely.

However, don't assume that arbitration, particularly international arbitration, procedures will be an exact match to what you have become accustomed in litigation. Even in the United States,

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[3] E.g., See: Hill v. Garda CL Northwest, Inc., 281 P.3d 334, 169 Wash. App. 685 (Wash. 2013)

[4] PDF copies of the rules for major US and international ADR organizations and providers can be downloaded from the following link on my website: www.frankadr.com/rules

[5] See Section II. L below

most arbitrators will not afford the parties "full" discovery like in federal or state courts. International arbitration will approach procedures like civil law jurisdictions, particularly where discovery/disclosure issues are concerned.

II. How to Structure an ADR Clause

Now that you have considered the options and issues, and have decided to include an ADR Clause in your agreement, what exactly should be in the ADR Clause? One of the most basic questions concerns the type of ADR chosen. For the purpose of this paper, I will assume some familiarity with the various types of ADR, and that the reader knows that there are many forms of ADR from negotiation thru mediation on to early neutral evaluation and lastly arbitration.

A. Issues to be covered by the ADR Clause

This topic relates to the breadth of issues that will be submitted to ADR. Many agreements use language that makes it clear that any dispute that relates in any way to the agreement is to be handled by ADR. Other agreements limit the issues that can be resolved by ADR. One thing to consider is limiting ADR to disputes that directly relate to the agreement. This will prevent some tangential dispute from triggering the ADR clause. The use of language like "directly relate" to the agreement likely limits disputes that have little or no relation to the agreement from being subject to the ADR clause. Depending on the rule chosen, what is and is not subject to the ADR clause is often decided by the arbitrator and not a court. A narrow ADR clause in terms of subject matter increases the possibility of a later challenge to an award as exceeding the arbitrator's authority.

Also, an attempt to bifurcate the issues, where some issues are decided in arbitration and some issues are decided by a court proceeding, can lead to problems as these bifurcated issues invariably are linked and it can be difficult to separate them neatly and efficiently. This can be an issue where you consider using proceedings that are limited in scope, like the Inter Parties Review proceedings at the Patent Office, discussed in the next section.

B. Choice of Alternative Dispute Resolution Type(s)

Some clauses will specify only one type of ADR, i.e., mediation, while other clauses will have a stepped approach, such as negotiation, followed by mediation, followed by arbitration. Each type of ADR has advantages and disadvantages. There are also advantages and disadvantages to using a single or stepped approach to ADR or to not using ADR at all as noted previously. In addition, if the agreement relates primarily to U. S. patent rights, you might consider specifying as a partial dispute resolution method the recently enacted Inter Parties Review proceedings[6] for issues relating to the validity of these U.S. patents. As discussed above, there can be issues where the parties have identified multiple tribunals with different rules for "different" issues. In this instance, the parties could provide that any issues that can be decided in an Inter Parties Review proceeding should be submitted within a defined period of time. Failure to file and Inter Parties Review within the time period should then have some effect, such as allowing either party to go to arbitration on all issues or possibly precluding the party asserting invalidity from

[6] For purposes of clarity I will refer to Inter Parties Review, but this is meant to also include both Post Grant Review and Covered Business Methods as appropriate. 35 USC §§ 311–319; 37 CFR §§ 42.100– 108, 120–123, 200–208, 220–224, and 300–304.

raising that as a defense in a subsequent arbitration. Also, because of the statutory requirement to complete these proceedings in a short period of time, usually one year, this can be considered as a step in the ADR process particularly where the validity of a patent could be a key issue. You should however consider what effect if any a Patent Office refusal to institute an IPR will have on later ADR processes. If no IPR is instituted, can either party continue to the next step immediately? Is there any effect of the refusal to institute an Inter Parties Review on the issues that are to be decided in arbitration, the likely next step? Will the refusal to institute an Inter Parties Review preclude a party urging invalidity from raising issue that as a defense in the arbitration based on the same documents and evidence presented to the Patent Office? Because this is relatively new, I would urge caution with this approach.

One advantage of the stepped approach to dispute resolution is that you start with relatively inexpensive and potentially useful methods of resolving the dispute amicably. Both negotiation and mediation are non-binding processes that provide the parties with maximum flexibility to fashion a resolution to the dispute without becoming too adversarial. For situations where the parties either have a long standing relationship or where there are factors that make an adversarial dispute resolution mechanism disruptive of necessary business relationships, then these non-binding methods of resolving disputes should be included in an ADR clause. In fact, the newly revised AAA Commercial Rules now automatically provide that for all disputes submitted for arbitration at the AAA where the amount in controversy is greater than $75,000, there will automatically be a mediation step unless one of the parties affirmatively opts out.[7]

The downside of using a stepped approach is that these non-binding methods take time and where the chances of resolving the dispute in this manner are low and especially where there is a need for a fast resolution, having to go through these non-binding steps prior to a more binding type of resolution process, either arbitration or litigation can be frustrating. If the time periods for negotiation and or mediation are too long, it can work to the detriment of a party that is being damaged as the clock ticks onwards. However, if there is too short a period for mediation and/or negotiation, there is a risk that the parties may not put sufficient effort into these processes as they are pointing toward the binding dispute resolution mechanism. Also, although an Inter Parties Review is to be concluded within 12 months, there can be appeals from the Patent Trial and Appeal Board decision. This can delay resolution of other issues of the dispute until the Inter Parties Review has concluded.

While negotiation and/or mediation are non-binding, they work best if there are true senior level decision makers participating directly in the process. The object is to have people participating in the process that can both make decisions and also be creative in ways to resolve the dispute. The downside of specifying that very senior representatives participate is that if the dispute is not sufficiently mission critical to the organization, it may be difficult or impossible to actually get these very busy people fully engaged in the process so that the mediation and/or negotiation has a chance of succeeding. Also, consider having experienced decision makers involved in resolving the dispute that were minimally involved in crafting the original deal. There can be advantages in having someone involved in the negotiation and/or mediation process that does not need to "save face." This can be offset by the time it may take to familiarize that person with the intricacies of the dispute. The same concept can apply to counsel. Your litigator may not be the

[7] AAA Commercial Rule 9, Revised October 1, 2013.

best person to advise you on settlement negotiations and/or mediation. If the dispute is large enough, think about engaging settlement counsel. This could be an attorney in the same firm as your litigation team, but a person experienced in settlement issues.

Another potential dispute resolution method to consider for the stepped approach is Early Neutral Evaluation. In this method an independent experienced person provides a non-binding evaluation of the merits of the dispute. While non-binding this can be very persuasive, especially when the person chosen has significant standing within the community. Early Neutral Evaluation works best for disputes having a significant technical component.

You also want to craft stepped provisions with care and provide that either party can go to the binding process after a stated period of time, even if there has not been a negotiation and mediation session to prevent a party from dragging the process out and arguing that all conditions of the agreement have not been met to prevent the other party from proceeding to the binding process.

Fortunately, you do not have to start from scratch in this area. All of the major ADR providers have stock or suggested clauses that provide an excellent starting point for your drafting.[8] In addition, the AAA has recently introduced a Clause Builder Tool.[9] This tool provides a good overview of the process of crafting a custom ADR Clause and while there are some limitations, it can provide a good starting point. Many of these clauses provide for either single step or multi-step approaches to the ADR process.

C. Choice of ADR Rules

In crafting an ADR clause for an agreement, the next consideration should be the rules that will govern any ADR proceedings. The rule choice can have a significant impact on how the ADR process moves forward and can also impact the ultimate cost of resolving the dispute. Also in choosing a set of rules, you should look at the parties. If this is an international agreement, the parties are residents of different countries, you should consider an international set of rules. If the parties are all resident in the same country, then you might want to look to rules that relate to that country. While it is possible to use the domestic rules for an agreement where the parties are from different countries and conversely use international rules where the parties are all from the same country, the various international and domestic rules are designed for parties that are from different countries or the same country respectively.

It goes without saying that you should be very familiar with the rules that you are specifying in the ADR clause. There can be significant differences among the rules and certain rules will have default provisions that if the parties have not specified otherwise in the ADR clause will govern the conduct of the dispute resolution process. As one example, the CPR Domestic and International Non-administered rules, the CPR Administered Rules and the United Nations Commission on International Trade Law ("UNCITRAL") Rules provide for a default of three

[8] Appendix A has links to clause drafting resources from a variety of US and international ADR providers. These links were valid as of November, 2013.

[9] See my review: http://www.americanbar.org/groups/dispute_resolution/JustResolutions/may-e-news-2.html. Link to tool in Appendix A.

arbitrators where the number is not specified.[10] However, the CPR Patent Rules, the AAA Rules, the International Center for Dispute Resolution ("ICDR") Rules, the World Intellectual Property Organization ("WIPO") Rules, the International Chamber of Commerce ("ICC") Rules and London Court of International Arbitration ("LCIA") Rules provide for one arbitrator[11] although some of the rules allow the administering body to appoint three arbitrators if they believe the case warrants.[12] In addition, as noted relative to the AAA Commercial Rules, the providers occasionally change or update their rules. Most rules provide that the rules that will govern the dispute are the rules that are current at the time the dispute is filed or arbitration is requested. If there is a specific rule provision that is important, you can add language to the clause that either provides that the rules to govern the dispute are the rules that were in effect at the date the agreement was signed or alternatively add language to the clause that specifically deals with the issue as specific contract language will always pre-empt the rules. The issues relative to discovery, taking of evidence and related topics are included in most rules but the parties may choose to modify the standard language as noted below.

A further rules consideration is the use of an administered arbitration and a non-administered arbitration. Briefly administered rules provide that the ADR provider will handle many of the administrative activities like getting the fees for the arbitrators or mediators and handle challenges to the neutrality of neutrals, even during the arbitration. Most providers, both administered and non-administered, will assist the parties in choosing a neutral from the rosters that they maintain. For non-administered proceedings, after the neutral is chosen, the provider is not involved further in the process. Even though there is a provider fee for using an administered arbitration, this may result in savings to the parties by avoiding some later disputes, like challenges to the neutrality of the arbitrator.

D. Arbitrators

The next clause consideration relates to the arbitrators: the number of arbitrators; the specific skills or background that the arbitrators must possess; and how the arbitrators are to be selected. The number of arbitrators can be a major cost driver in arbitration. While a three arbitrator panel will minimize the risk of a rogue award, careful choice of a single arbitrator can result in a lower cost and also result in a very thoughtful award. Typically, either one or three arbitrators are specified. There have been examples where an in-artfully drafted clause left the parties with a panel of two arbitrators.[13] Also, be careful where party appointed arbitrators are to choose a chair but neither the agreement nor the rules delineate what happens if the two arbitrators cannot agree on a third chair arbitrator.[14] Where the arbitration is an ad hoc arbitration under the UNCITRAL Rules, the parties should agree on an appointing authority otherwise they will have to either agree on an appointing authority after the dispute has occurred or if the parties have not agreed on an appointing authority within 30 days, UNCITRAL Rule 6(b) provides that either

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[10] CPR Domestic Non-Administered Rule 5.1; CPR International Non-Administered Rule 5.1; UNCITRAL Article 26.

[11] CPR Patent Rule 5.1; AAA Commercial Rule 16 ICDR Article 5; WIPO Article 14; ICC Article 12; and LCIA Article 5.4.

[12] AAA, ICDR, and ICC.

[13] The specific clause provided that "Each party will choose an arbitrator." There was no reference to the number of arbitrators or that the two arbitrators would choose a chair arbitrator.

[14] Most provider rules have specific rules that govern this situation, for example AAA Commercial Rule R-14; CPR Rule 5 (Domestic, International and Administered); and WIPO Rule 15(b).

party can request the Secretary-General of the Permanent Court of Arbitration to act as the appointing authority. By not specifying this in the agreement, the parties will either have to agree on an appointing authority or wait for 30 days before either party can file a request with the Permanent Court of Arbitration to act as the appointing authority.

One of the advantages of ADR is that you can have a decision maker that is familiar with the area of law and/or the technology. Parties will often specify that the arbitrator(s) have a specific background or level of experience. Use caution here and make sure that you are not being so specific that your pool of potential arbitrators is zero or very small.[15] Having too small a pool of potential arbitrators can significantly delay resolution as these people may have limited availability. Also, consider the neutrality of highly qualified potential arbitrators, as these potential arbitrators may have serious relationships with the parties, counsel, the witnesses and/or competitors. This is an area where being too specific can be a serious problem not only for the parties, but for the administering body.

E. Choice of Place And/or Law Governing Arbitration

While virtually all agreements will have a choice of law provision, do not assume that this general choice of law provision will govern all aspects of the arbitration. The location or seat of the arbitration is generally used as the determining factor, absent clear agreement by the parties to different law, in the choice of the law that governs the administrative aspects of the arbitration.

This often comes up in international arbitrations where the parties will specify a particular location for the hearing, often based on the hearing being in a neutral convenient location relative to the parties. However, this convenient, neutral location may have laws regulating arbitrations that can have unintended consequences. For instance, one of the countries of the parties does not recognize court decisions from the country where the arbitration will occur, the local law in the venue location is hostile to arbitration and the local courts cannot be called upon to aid in the jurisdiction of the arbitrator by enforcing orders, enabling discovery/disclosure, etc.

Even worse is a situation where the parties agree on a place to hold the hearings, but specify a different arbitration law to govern the proceedings. This can lead to extended fighting over how the arbitration will take place before there is any resolution or consideration of the merits of the case.[16] In one very famous UK case, the parties agreed to London as the place of the arbitration but specified that the Indian Arbitration law should govern the arbitration. This bifurcation is not advisable. The UK courts in spite of this language believed they had jurisdiction to resolve administrative and procedural aspects of the arbitration, but in the end deferred to the Indian courts where the parties were also fighting about the procedural aspect of the arbitration.[17] In any event this makes it difficult for the parties and the arbitrator if there is need for court assistance during the arbitration process.

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[15] As an example an ADR clause specified that the arbitrators have a certain technical background and that they are a registered patent attorney that has both written and prosecuted over 500 patent application in a specific technology and also have significant litigation experience in that technical area. If there is anyone that meets all these criteria, the list would be very small if not zero.

[16] http://www.shepwedd.co.uk/knowledge/?a=4877

[17] http://www.shepwedd.co.uk/knowledge/flyer/?a=5121

To a lesser degree, this can occur within the U.S. as the various state arbitration laws are not identical and where some state courts are still somewhat hostile toward arbitration. For instance, California arbitration law has very strict disclosure requirement for arbitrators and the California courts, while generally favorable to arbitration, are likely to look far more closely at the mechanics of the arbitration when asked to enforce an award. While the general rule is that the Federal Arbitration Act ("FAA") pre-empts state arbitration acts for most arbitrations, some states, like Kentucky have narrowly construed the federal pre-emption of the FAA.

A best practice is to state that the place of the arbitration is a particular location, such as London, England and the law governing the arbitration is the law that covers that place, in this case the UK Arbitration Act. In the U.S., if you want the FAA to apply, clearly state that the arbitration is to be conducted under the FAA or under a particular local state arbitration act if that is the parties' choice. This specific statement of party intent will trump any consideration that the local state arbitration act will govern the proceedings. The point here is to consciously make that choice and not the leave it to some court to try (at significant cost) figure out what the parties intended. In a number of U.S. States, the states have a dual system of laws for arbitration. These is one law for domestic arbitrations and a different law for international arbitration, typically based on the UNCITRAL Model Law.[18]

F. Timing Issues

This subject was touched on in the discussion of the stepped approach to ADR in section A above. From a jurisdictional perspective, you should coordinate when a party to an agreement can resort to the agreed ADR procedure. If time to resolution is very important to the businesses involved, you may want to specify that where there is a negotiation and/or mediation step, that either party can request negotiation or mediation before the end of any cure period provided in the agreement for a breach. Where it is likely that the parties can head off a dispute by direct negotiation and/or mediation, you may not want to wait out the entire cure period before you can resort to this procedure. While the parties can always agree ad hoc to earlier negotiations or mediation, if the parties are concerned about speed, this can be specifically provided for in the agreement.

For arbitration, however, the ability of either party to commence an arbitration proceeding should be tied directly to the breach and cure provisions of the main agreement. It likely does not make sense to start an arbitration proceeding where the other party has a realistic opportunity to cure the breach. On the other hand, it should be clear that once the cure period has expired, either party can request arbitration.

As noted above, you want to balance the time allowed for the various stepped approaches to ADR to work verses the ability of one party to drag out the proceedings to avoid a decision that might be unfavorable to that party.

Some parties will write in specific scheduling aspects in the arbitration clause, such as specifying that the hearing will occur within a specified number of days from the commencement of the arbitration. Use caution here as specifying too short a period may make it difficult to properly prepare your case. If you think about limiting traditional discovery and/or the use of experts as

[18] California, Connecticut, Florida, Georgia, Illinois, Louisiana, Oregon, Texas and Washington.

discussed below, these might be better ways to shorten the time from start to finish of an arbitration. Also, depending on the parties' choice of arbitration rules, many arbitration rules have specific default times for the arbitrator to complete the award (decision) from the closing of the hearing.[19]

G. Confidentiality

This subject was discussed in Section 1B above. However, in most business disputes there are serious issues relating to confidentiality. While the ADR clause need not specify confidentiality rules, the confidentiality provisions that are likely part of the main agreement can easily provide that these confidentiality provisions will apply to any subsequent ADR proceeding. Make sure that the confidentiality provisions apply to a later proceeding, even if the agreement has been terminated.

H. Fee Shifting And Other Fee Issues

Although the U.S. rule is that each side pays their own attorney fees, it is common in arbitration that the loser pays the winner's fees. This particularly is true in international arbitration proceedings as these tend to mirror local court customs. The winner's fees can, and normally does in international arbitrations, include both their attorney fees and the winner's share of the arbitrator's fees. While this thought is somewhat "foreign" to most U.S. attorneys, thought should be given to a fee shifting provision. Where there is a risk you might end up paying the other side's attorney fees and the cost of the arbitration, there is less value in running up the cost for all involved when these types of provisions are in place. If the bargaining power of the parties is not equal, be careful of this for a domestic arbitration as this is one of the areas where the activist courts, i.e., California, look with suspicion. Having said that, a provision that allows, but does not require, the arbitrator to award fees and costs can actually reduce costs overall as both sides have an incentive to be efficient in the pre-hearing and the hearing phases of the arbitration.

I. Interim Relief

Although most major arbitration rules provide for some interim relief measures, if damage from a breach is something that will need immediate relief, this should also be addressed in the ADR clause. Most recent rules revisions have made it very clear that the arbitrator can issue preliminary injunctions and similar relief.[20] Further, many rules also provide for the appointment on an emergency arbitrator to deal with emergency type of relief.[21]

J. Discovery And Other Disclosure Provisions

If the parties to the agreement are either both U.S. parties or are parties that are used to litigating in the U.S. Courts, then they will be somewhat comfortable with the concept of discovery. In many cases, however, because discovery is one of the major forces that increase the cost of

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[19] AAA Commercial Rule R-45; CPR Ad Hoc Rule 15.7; WIPO Article 63 .
[20] For example, see AAA Commercial Rule 37.
[21] AAA Commercial Rule 38 (for agreements dated after Oct 1, 2013); CPR Non-Administered Domestic Rule 14 (For agreements dated after Nov 1, 2007); CPR Non-Administered International Rule 14 (For agreements dated after Nov 1, 2007); CPR Administered Rule 14; ICC Article 29.

litigation, it is typical to see limits on discovery written into ADR clauses such as: zero or a very limited number of depositions; limits on document productions; including e-discovery limits; fee shifting arrangements for discovery where the requestor pays for the cost of production; limitation or elimination of interrogatories or requests for admissions; and the like. Agreement provisions that specifically authorize the arbitrator to limit discovery to that which actually is used at the hearing will likely speed up the arbitration and limit cost without adversely effecting either parties' ability to present their case. Also, consider if expert testimony will actually assist the arbitrator, who may have significant experience in the area of the arbitration. An agreement not to use experts or to limit the areas where experts will testify can have a significant impact on costs.

L. Post Arbitration Matters

In most instances, the parties voluntarily follow the arbitration award without the intervention of a court. In those cases where a party refuses to comply with an award, it will be necessary to go to court to enforce the award. While most rules provide for this, the parties should consider adding a provision to the ADR clause that expressly provides that any award may be enforced by a court of competent jurisdiction. Further, the clause could provide that if the party challenging the award in court loses, that the court shall award attorney fees to the other party.

L. Consider Necessary Parties

One issue is that arbitration has long been considered a creature of contract. As such it is effective only between parties that have consented to arbitrate in an agreement. This is acceptable in most instances, but if there is a necessary third party that will need to be a party to any arbitration involving the agreement, consider having that party sign a separate agreement where they agree to be a party to any arbitration that results from a dispute under the agreement. If this agreement is not in place initially, you may find yourself in a situation where there is a necessary party that refuses to voluntarily join the arbitration. Make sure you have looked ahead to potential disputes that might occur and make sure that all parties have consented to arbitration.

III. Conclusion

While ADR clause may be placed near the end of most agreements, careful planning and consideration of potential disputes that may arise relating to the agreement before the agreement is signed likely will lead to a more cost efficient resolution of those disputes.

Appendix A

Links to ADR Provider and Other Model Clauses

Links Valid as of November 22, 2013

American Arbitration Association: www.clausebuilder.org (Clause Builder Tool does not cover international arbitration)

CPR (International Institute for Conflict Prevention and Resolution): http://www.cpradr.org/Resources/ADRTools/Resources/ALLCPRArticles/tabid/265/ID/635/CPR-Model-Clauses-and-Sample-Language.aspx

ICDR (AAA International): http://www.icdr.org/cs/groups/international/documents/document/dgdf/mday/~edisp/adrstg_002539.pdf

JAMS: http://www.jamsadr.com/clauses/

UNCITRAL (Model clause on page 29 of rules pamphlet): http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf

ICC (International Chamber of Commerce – Paris): http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Standard-ICC-Arbitration-Clauses/

LCIA (London Court of International Arbitration): http://www.lcia.org/Dispute_Resolution_Services/LCIA_Recommended_Clauses.aspx

WIPO: http://www.wipo.int/amc/en/clauses/

CIArb (Chartered Institute of Arbitrators (London)): http://www.ciarb.org/dispute-resolution/dispute-resolution-contract-clauses/

Canadian Department of Justice: http://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/index.html

DRIC (Canada): http://www.adrcanada.ca/rules/arbitration.cfm

ACICA (Australia): http://acica.org.au/acica-services/arbitration-clauses

DIS (Germany): http://www.dis-arb.de/en/17/clause/overview-id0