

Mediation and Arbitration in Construction ... for the people who write the checks

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SPEAKING PLAINLY

Although not a complex or difficult subject, Alternative Dispute Resolution (ADR) concepts such as mediation and arbitration are not generally well understood. There are hundreds of texts, handbooks and articles written by and for the arbitrator/mediator and the legal professional, but virtually none for the person involved in mediation or arbitration for the first time. Hopefully, this pamphlet will help fill the void.

This pamphlet was written as a resource for those who have been sued, or had a claim filed against them, and are now facing their first ADR process either voluntarily or as required by contract. These are the people who will write the checks for dispute resolution services. The following discussion will touch on ADR methods, processes, roles and relationships.

This work is not intended to be a complete or legal discussion of ADR; just a source of information to help construction professionals direct and control the ADR process and minimize the cost and time to reach a settlement in a construction dispute. Nothing in this work is intended or should be construed as legal advice. Anyone seeking such advice should consult with his or her own legal counsel.

Speaking of attorneys, many parties defer to their attorney because they have no specific experience with ADR. While this is a valid position when dealing with the court system, arbitration and mediation procedures were developed primarily for the individuals in the dispute; in fact neither process requires the parties to be represented by attorneys (although in a number of circumstances involving attorneys is advisable). The tools provided in this pamphlet will help individuals to negotiate contracts and post-dispute agreements that will limit costs and time; select the proper neutral (i.e., mediators or arbitrators); and control the process so as to achieve the best possible outcome. Some of the topics covered in this pamphlet are:

- ***The Top Twelve ADR Myths***
- ***The Lawsuit***
- ***Alternative Dispute Resolution***
- ***What's the Difference between Mediation and Arbitration?***
- ***Clause Drafting***
- ***Selection of a Neutral***
- ***Mediation ... Let Us Decide the Dispute***
- ***The Mediation Process***
- ***Arbitration ... We Can't Agree ... You Decide***
- ***The Arbitration Process***
- ***Roles of Participants***

This document focuses on the American Arbitration Association (AAA) processes and procedures since it is the only organization that has Construction Industry Rules written by the industry and monitored by the industry. The Engineers Joint Contract Documents Committee (EJCDC), of which the American Council of Engineering Companies is a member, recommends

mediation and the use of the AAA's Construction Industry Rules or, as an alternative, pairing mediation with binding arbitration under the auspices of the AAA or another ADR provider. The AAA also has a dedicated Construction Panel of arbitrators and mediators, almost half of whom are engineers, architects and contractors. The activities, programs, rules and case administration of the AAA are governed by the National Construction Dispute Resolution Committee (NCDRC) which is composed of design and construction professional societies (ACEC, ASCE, AGC, AIA, etc.) and organizations which represent the design and construction community such as the Construction Bar of the American Bar Association. While the author believes the AAA best represents the construction industry and is most experienced in construction dispute resolution, there are numerous other ADR providers, and it is ultimately up to the end user to make an informed choice.

The Top Twelve ADR Myths

12. Mediators will decide the case.

Mediators only facilitate an agreement between the parties. Settlement is totally voluntary.

11. Mediation agreements are not enforceable.

Agreements can be filed with the courts, which have the power to enforce them with the same vigor as a court ruling.

10. Arbitration is structured for the attorneys.

Construction Industry Rules are structured for the parties. Representation by an attorney is not required. Parties often present their own cases.

9. Arbitrators and Mediators are attorneys and judges.

At least 47% of the AAA Construction panels are engineers, architects, contractors and subcontractors. You can select arbitrators or mediators in any construction specialty including structural, geotechnical, civil, mechanical, electrical, general contractor, specialty subcontractor, architect, etc.

8. Alternative Dispute Resolution is only arbitration.

Mediation, On-Site Neutrals, Dispute Review Boards, Mini Trials, and many other Alternative Dispute Resolution methods are available. For example, the AAA has complete sets of rules for Large Complex, Regular Track, Fast Track, Dispute Review Boards, and Mediation just for construction.

7. The ADR process takes too long.

Using the AAA Fast-Track Rules, the process from filing a claim to award can take as little as 60 days.

6. The Arbitration fees are too high.

Fees can vary depending upon the ADR service provider. Some providers encourage mediation and provide for refunds in the event the dispute settles; shop for the best value amongst the ADR providers. Before choosing, check the rules and the panel to see if they cater to the construction industry. Regardless, a well structured mediation settlement or quick decision in arbitration is a very efficient way to get a dispute settled.

5. Arbitration just "Splits the Baby."

Only 9% of arbitration cases result in awards ranging from 41 to 60% of the amount claimed. Thus, almost all disputes have a prevailing party. In 70% of the cases this party

obtains between 80 and 100 percent of the amount claimed and is often awarded attorney's fees and expenses (something seldom achieved in court).

4. The ADR processes and procedures are too complex.

This pamphlet, the AAA's website (www.adr.org) and other ADR service providers supply much or all that you need to know to file and conduct your own ADR process without the cost of an attorney.

3. Arbitration takes as long and costs as much as a trial.

The speed and cost are a function of the wishes of the parties and are dependent on the amount of discovery and scheduling, a decision made by the parties. Specific content clauses are available to restrict the time and cost of the process, even after a dispute arises. As long as you take control, the cost and speed are strictly a function of your decisions. If you ignore the process and do not provide firm guidance to the attorneys involved, the process can easily become very much like a trial, a phenomenon called "Arbi-trial."

2. You as a party have no right of appeal.

If the right of appeal is an important or legally required component, it can be structured within the arbitration process either by contract or post dispute agreement.

1. Mediation Can't Help.

Mediation is highly effective, with a settlement rate of over 85%.

THE LAWSUIT

Most people don't consider dispute resolution in the general course of business until a dispute arises. Disputes are usually small disagreements, which over time, like good wine, become more involved, complex and costly. The author's personal experience has included simple disputes over a \$17,000 correction (on a \$30,000,000 construction project) that festered and grew into a \$2,750,000 claim which took over 4 years and \$1,700,000, excluding attorney's fees, to settle.

It should be noted once again that depending on the circumstances, the strategic use of attorneys in the ADR process can be the key to achieving a fair resolution of the dispute. This work does not and cannot categorically discourage the use of attorneys, but rather recommends that a party use his or her own informed judgment in deciding whether or not to engage attorneys in a given ADR process. The use of skilled attorneys dedicated to achieving a mutually agreeable resolution can be highly beneficial.

Disputes escalate from a personal level, either friendly or hostile, to "I'll see you in court." Once a suit is filed, the parties can look forward to waiting two or more years to get to court and spending hundreds of thousands of dollars on attorneys, expert witnesses, investigators and a host of other folks. The lawsuit process can sometimes be described, in somewhat tongue-in-cheek fashion, like this:

- First, we hire an attorney and pay him or her to listen to a dispute that is so complex "we must hire experts" to investigate and learn the "truth." The attorney files pages and pages of questions called "interrogatories" regarding everything from insurance to who is responsible for everything on the site. Of course the opposing attorneys reciprocate in spades. Then we deforest a county by exchanging every piece of paper created for the project with every other party in the case. In the process, we create careers for about four people. Usually this takes about a year.

- Next, we have depositions. This is when you get to pay your attorney, his co-counsel, a paralegal, a court reporter and expert witnesses thousands of dollars per hour to ask seemingly endless questions in an effort to induce someone into saying something favorable to your side. Time elapsed: about one year.
- After receiving their honorary degree in the dispute's practical, theoretical, esoteric and "possible but not probable" aspects, the attorneys begin to talk settlement.
- After the attorneys become versed in the facts of the dispute, they declare that presenting this complex case to a jury is *very risky*; a fact you may have known from the beginning. Total elapsed time: eighteen months to two years. Cost: \$50,000 to \$500,000.
- Now it's time to reflect. Realizing the effort and money poured into this dispute, you decide to carry onward to the end: "*it's a matter of principle.*"
- The judge orders settlement conferences. The attorneys jockey back and forth making offers and counter-offers until someone finally declares the process at an impasse. Finally, the case goes to trial – *but not quite*. We have to wait till the court can find room on the schedule to hear the case and the attorneys need time to prepare, coach expert witnesses, prepare exhibits, clarify claims issues, etc.
- Now maybe another year or two passes, not to mention tens of thousands of additional dollars. Perhaps more experts are needed to professionally assess damages or thwart the other side's claim of damages.
- Finally, we get to trial. You can look forward to 10 to 30 days of time in a courtroom only to find experts and even fact witnesses distorting or denying the truth. The verdict might show that the judge and/or jury totally misunderstood the dispute. The award might be either unreasonably large or unrealistically small and the attorney's fees have to be borne by the parties. *Net result: not what either party wanted.*

ALTERNATIVE DISPUTE RESOLUTION

The more things change, the more they stay the same. For example, close to 80 years ago a group of businessmen decided the legal process was too complex and expensive. They created the American Arbitration Association (AAA) with the goal of quick, economical dispute resolution which is controlled by business professionals rather than legal professionals. In fact, the original direction of the AAA was to enlist non-legal neutrals and to use simplified, informal procedures to settle disputes. Since then, an entire suite of ADR procedures ranging from facilitated negotiation and mediation to arbitration and mini-trials have been developed and refined. Even today, new ADR systems are being developed and refined or enhanced to simplify and improve dispute resolution.

Alternative Dispute Resolution encompasses all forms of dispute resolution other than litigation (lawsuits). These processes range from a simple negotiation to a mini-trial which has all the formality, rigidity and appearance of a courtroom proceeding. These represent the extremes in the ADR continuum. Mediation represents the side of this system most near negotiation, while arbitration represents a less formal trial-type resolution process. The AAA website (www.adr.org) has an explanation of processes and procedures currently offered, which also include many processes designed to avoid or mitigate disputes as part of the ADR continuum. The majority of disputes in the construction industry are settled with either mediation or arbitration, which are the primary focuses of this pamphlet.

Alternative Dispute Resolution can be either contractual or by agreement. Many contracts contain ADR provisions that require mediation followed by arbitration. Contracts can also contain many limiting or expanding clauses for both mediation and arbitration, including appeals. Even when a lawsuit has been filed, the parties can agree to mediate or arbitrate. These post-

dispute agreements can specify the discovery limits, hearing length and location, neutral by name or qualification, etc.

WHAT IS THE DIFFERENCE BETWEEN MEDIATION AND ARBITRATION?

There is a great deal of popular confusion about the difference between mediation and arbitration. Mediation is simply a process, facilitated by a neutral party, designed to reach an agreement between the parties. In other words, the parties decide the outcome. In arbitration, the dispute is submitted to an arbitrator or panel of arbitrators, and they decide the outcome. Both the mediation agreement and the arbitration award carry the weight of a court ruling.

There is general agreement that mediation is the preferred form of ADR. In mediation, the parties come to their own agreement with the help of the mediator. Settlements can be innovative, have cash and non-cash components, and can be structured over a period of time. Mediation is most helpful when the relationship between the parties can be preserved or even enhanced. The process can either be facilitative, evaluative or both. In the “facilitative” mode, it is up to the mediator to aid the parties in coming to an agreement. In theory, the mediator remains completely neutral and non-judgmental throughout the course of the mediation. The second and most common mediation process is “evaluative.” In this process, the mediator may, if requested, provide his or her opinion of the case, including its merits and the value of the claim privately to each party. Experience suggests that every mediation, regardless of the original intent, will become an evaluative situation. Generally, parties want to hear a neutral’s view of the merits of the case and expect the neutral to be an active participant in trying to achieve an acceptable settlement.

By design, arbitration is structured to achieve a quick and inexpensive resolution by letting a neutral decide the dispute. The process discourages discovery (the process of deposing witnesses, retaining experts, publishing reports and rebuttals, etc.). The European arbitration process specifically prohibits any discovery. This means arbitrations become a “Perry Mason” episode where surprises and revelations are the order of the day and the arbitrator’s knowledge is critical to the fair and just resolution of the dispute. In arbitration, the parties present their cases to either a single arbitrator or panel of three arbitrators who decide the dispute and award cash to the prevailing party. The goal of arbitration is to “get to the truth.” There are no legal technicalities by which a party may escape the dispute. Rules permit the arbitrator wide latitude in the hearing and no rules of evidence or any other legal doctrine, case law, or precedent must be applied. In fact, arbitrators are not bound by any legal constraints. Arbitration results in an Order which is enforceable by the courts (i.e., the Order is binding) and generally cannot be appealed to a higher authority or questioned in any way. The process is much like a trial. The primary differences between arbitration and a trial are:

- Arbitrations have very little, if any, discovery (depositions, expert reports, etc.) and are therefore less costly;
- Selection of arbitrators can be done by the parties and the arbitrators can be experts in the field of the dispute;
- Arbitrations can be held in as little as 30 days with the final award in another 30 days;
- Arbitrators are bound only by the Construction Industry Rules; and
- Awards can be “reasoned,” meaning that the arbitrator provides reasons why the award was made on an item-by-item basis.

The efficacy of either the mediation or arbitration process is largely in the hands of the parties. If you don’t maintain control of the process, arbitration can quickly become as long and drawn out as a trial, and cost just as much. It becomes the dreaded “Arbi-Trial.”

Informed and active parties can make the mediation or arbitration process quick, inexpensive and successful. The first thing to do is understand the process. As a party, you can restructure the dispute by coming to an agreement regarding the dispute's boundaries - specifically, discovery limits, depositions, hearing length, method qualifications, use of attorneys, appeals, etc. There is virtually no limit to the restrictions you as parties can place on the process **prior** to filing the claim. Here's how you can control the process:

- Carefully examine the issues to see if you actually need an attorney. Many disputes, especially in mediation, can be settled without an attorney.
- Instruct your attorney that depositions and long drawn out discovery are not needed – you provide the necessary facts and story.
- File the demand along with the post dispute agreements with the ADR provider. Include in the demand the necessary qualifications for the neutrals. Be specific; for example, “Geotechnical Engineer with experience with driven pile foundations”; “Architect with design experience in chemical laboratory facilities”; or “Contractor familiar with mass grading and selective removal and replacement.”
- Attend and participate in the preliminary hearing. Let your wishes be known, be insistent, and demand a speedy hearing and an abbreviated presentation. Generally, even the most complex case can be presented to knowledgeable arbitrators in two to three days.

CLAUSE DRAFTING

Contrary to the opinion of many, the manner in which a mediation or arbitration is conducted is not limited to the terms of the contract. As a party to the dispute, you can customize the mediation or arbitration process even after the dispute has begun, but prior to filing the demand for mediation or arbitration. The parties can draft supplemental clauses which will apply to the dispute as long as the parties agree. Clauses can be used to limit the scope of the dispute, number and qualifications or name(s) of the mediator/arbitrators, limits on the award (high and/or low), limitations on discovery (number of depositions, timing, etc.), number of hearing days and location of hearing, definition (limits) of the dispute, stipulated facts, distribution of attorney's fees, limitation of experts, provisions for appeal, etc. The Appendix contains sample clauses applicable to many typical situations commonly encountered in construction disputes. Clauses are presented for possible inclusion in contracts and in post dispute agreements. All of these clauses, except the appeal clause, have the support of the American Arbitration Association and the National Construction Dispute Resolution Committee (NCDRC). A typical post dispute agreement might appear as follows:

With respect to the dispute between Good Engineering and Tree House Construction, we, the undersigned authorized representatives do hereby agree to have the following provisions and limitations used in the arbitration of our dispute:

- 1. Parties will not be represented by attorneys. No more than 4 representatives from each party shall attend the hearing;*
- 2. The arbitration shall be held in Houston, Texas before a single arbitrator appointed by the American Arbitration Association having significant experience with foundation distress caused by settlement. The hearing shall last no longer than 4 days with each party limited to 2 days of presentation;*
- 3. The dispute shall be limited to distress of the foundation. No other matters are to be heard;*

4. *Discovery shall be limited to exchange of documents and 2 depositions lasting no longer than 4 hours each by each party. Expert Witnesses are not permitted in this matter; and*

5. *The Award shall be a reasoned award within the limits of no less than \$50,000 and no more than \$1,000,000. The award must contain: a) specific dollar amounts, b) allocation (both to and from), and c) reasons for each portion of the award.*

SELECTION OF A NEUTRAL

Most of the ADR providers rely on a specialized cadre of neutrals who have common backgrounds, experience and expertise. The selection of an ADR provider and the neutral for your case is the most significant single factor in determining how your dispute will be decided. Many of the ADR provider panels are dominated by experienced attorneys or retired judges. These neutrals are ideal to help settle a dispute which is largely legal in nature.

Construction disputes often have very real technical issues which must be decided. A construction industry professional with expertise in the technical area of the dispute (e.g., structural, geotechnical, architectural, construction management, etc.) is often the best person to help decide the dispute.

In mediations, the neutral is often also an arbitrator and can provide significant input on both the merits and value of the case. Here, careful selection of the neutral is also critical. The selection should be based upon the type of dispute. Legal disputes should have a mediator with a legal background, while technical disputes should benefit from having a mediator with a background in the technical discipline of the dispute. By selecting technical neutrals, the process is speedy since the neutral is knowledgeable and experienced in the subject and does not require education about the technical aspects of the dispute.

In arbitration, the technical arbitrator is even more important since valuable hearing time is conserved and technical nuances are not lost on the arbitrator. Most important, the technical arbitrator is usually best able to determine if and when an expert witness is providing non-meritorious technical testimony. Often disputes are complex and involve aspects of design, construction, scheduling, management, contract law, and interpretation of plans and specifications. When this occurs, it is best to select a panel of arbitrators to hear the case; for instance one designer (engineer or architect), one contractor and one construction attorney.

Experience has shown that parties that carefully select the most appropriate neutrals are often very satisfied with the results of the ADR process. Not only can the parties review the qualifications of potential neutrals, but prior to selection they may also question them regarding hearing and discovery matters, technical expertise and experience, arbitration/mediation training and experience, and general demeanor. Often this is done by submitting a questionnaire, but telephone or in-person interviews are also used. It behooves you, as a party to the dispute and the one writing the checks, to carefully evaluate the nature of the dispute before selecting the neutrals.

MEDIATION...LET US DECIDE THE DISPUTE

Mediation is a form of ADR in which the parties decide the dispute. Unlike any other form of dispute resolution, mediation requires an agreement of the parties rather than a decision on the dispute from an outsider. The process is non-binding in the sense that agreements are not forced on the parties; however, once agreements are signed, they are enforceable in court and cannot be

appealed for any reason. The mediator is present to facilitate the negotiation and defuse the emotional aspects of the dispute. In some cases, where the mediator is also a trained arbitrator, the parties can ask for an “evaluative” assessment of their case. This is done in private and is not disclosed to the opposing party; nor can the results be disclosed in any subsequent proceedings. The evaluation can provide the party an assessment of their case, both strong and weak points, and an opinion regarding the value of the claim or counter-claim.

As noted above, mediation is successful over 85% of the time when parties willingly come to the table, and it is generally perceived as the best way to resolve a dispute and maintain the relationship of the parties. The goal of a successful mediation is to **“make each of the parties equally unhappy.”** Should the parties fail to reach an agreement, nothing said in the mediation can be used in arbitration or legal proceedings. The mediator is specifically exempt from any subpoenas or orders to testify. When an agreement is reached by the parties, it is documented and signed.

THE MEDIATION PROCESS

Often mediation is a contractual requirement, but parties can agree at any time to mediate a dispute even after arbitration has been started. The key is having all parties willing to mediate. The AAA process, which is typical in the field, involves the following steps:

- Filing the case. This can be done in person, via mail, or via the internet at www.adr.org. Parties can act on their own behalf or be represented by attorneys. (Note: to reduce costs, it is sometimes best to try self-representation before retaining attorneys.)
- The provider appoints a case manager who aids the parties in selecting a mediator, offers scheduling services, space for mediation, and handles the necessary fees, billing, paperwork, coordination, etc.
- The case manager will provide a list of mediators to the parties based upon their criteria: engineers, architects, contractors, other industry professionals, attorneys, judges or other legal professionals. The case manager may also directly appoint the mediator, if desired by the parties.
- A Pre-Mediation Conference (usually by telephone) will be held to provide the parties an opportunity to schedule the mediation and hear the process explained.
- Prior to the mediation conference, documents may be submitted to the mediator to explain the dispute and the positions of the parties.
- The mediation conference typically only lasts one day (more for multi-party or complex disputes). The process can include the following steps:
 - Introductions and remarks by the mediator.
 - Brief presentation by the claimant (the party that filed the case) to outline the dispute and the claimant’s position (typically no more that 30 minutes).
 - Presentation by the respondent regarding the same.
 - Mediator may, or may not allow, very brief rebuttal (arguments why the other party may be incorrect) from both sides.
 - Caucuses (private meetings) are held with each party.
 - Caucuses continue with the mediator and the parties until a settlement is reached or until the Mediator determines that the negotiations are at a stalemate and the dispute cannot be resolved.
 - When an agreement is reached, a settlement agreement is drafted and wording negotiated until both parties concur. The final agreement is then signed by both parties and becomes enforceable by the courts.

- Final signed copies of the agreement are provided to both parties and filed with the AAA.
- The mediation is concluded.

Comments on the mediation process:

- The role of the mediator is to get the parties to agree on a settlement. ***He or she is not a judge and will not decide the dispute, or the fairness of the settlement.***
- Mediation is a private process. The mediator will never disclose private discussions. Offers and counter-offers are freely discussed within the caucuses, but never private discussions or opinions of the other parties in the dispute.
- The mediator keeps no records other than the final settlement and is prohibited and protected from deposition or testimony in court. All matters are in strict privacy. No information can be divulged to any other party, judge, court, etc. Notes are destroyed.
- Mediation can involve some very interesting alternatives to a cash settlement. Exchange of goods and services, future work, accelerated scheduling, additional amenities and many other inventive tools can be used. Arbitration involves only cash to the prevailing party.
- Party representatives at the mediation must represent the highest levels of the organization and have the most knowledge of the dispute and the authority to settle. Often several representatives may be necessary to present and settle the dispute.
- Agreements signed by the parties can be filed with the court. The agreements cannot be appealed for any reason.
- A frequently used method for very complex disputes involves mediation to settle as many of the disputes as possible, followed by arbitration with a different neutral for the remaining issues. This can prove to be a very efficient method of resolving complex disputes.

ARBITRATION ... WE CAN'T AGREE YOU DECIDE

Unlike mediation, in arbitration a decision will be made by the arbitrator with or without participation of all the parties. The decision is legally binding and enforceable in the courts and generally cannot be appealed. The arbitrator is the Judge, the Jury, the Appellate Court and the Supreme Court all in one. Therefore, it is critical to appoint the best and most knowledgeable person.

The process was designed with the parties in mind. There are no requirements for legal representation by attorneys, use of experts, or discovery. There are rules that specifically prohibit discovery, other than the exchange of documents. Rules also provide for a speedy hearing and presentation of the award within 30 days after the hearing is closed.

The efficacy of the process is largely a result of your involvement. Attorneys are, by training, truth seekers who will leave no stone unturned in trying to have complete knowledge of a dispute. While this is laudable, it is still in your best interest to exercise control over the process so as to avoid unnecessary legal procedural steps that will add cost but may not improve your strategic position.

As with mediation, arbitration agreements must be made between the parties prior to any filing of a "Demand for Arbitration." Most often the clauses are part of the original contract, but obtaining an agreement to arbitrate after the dispute erupts is not uncommon. The agreement to arbitrate should contain:

- Agreement to arbitrate any dispute (often includes mediation before arbitration),
- Designation of the administrator and the preferred ADR rules to govern the proceedings,
- Number of arbitrators (typically, a panel of three for disputes involving over \$500,000) and their qualifications; i.e., contractor, engineer, lawyer, etc.,
- Applicability of the agreement to subconsultants, subcontractors and other parties subject to the contract,
- Location of arbitration proceedings (the hearing),
- Allocation of arbitrator and attorneys fees (if desired), and
- All post dispute agreements such as limits on discovery, awards, hearings, etc.

THE ARBITRATION PROCESS

Arbitration is a much more formal process than mediation. The arbitrator is also held to a high standard of ethical conduct, must be unbiased, and must have no conflict of interest or even be perceived to have a conflict of interest. Arbitrator selection is critical to the outcome. As previously discussed, arbitrators should generally be selected based upon the nature of the dispute: engineers and contractors for technical disputes and attorneys for legal disputes. In general, the arbitration process includes:

- Developing any post dispute agreements desired.
- Filing the case, paying the filing fee and serving the other parties. Any party may file the “Demand for Arbitration,” but please note that the demand cannot be filed against parties who are not subject to a contractual arbitration agreement without the parties’ prior consent.
- After filing the “Demand” and serving the other parties (the respondents), the next step is to select the arbitrator. This is the most important step in the process for the parties.
 - The arbitrator’s résumé should be carefully examined to determine qualifications.
 - The arbitrator should be selected based upon the nature of the dispute. If the dispute is strictly legal, an attorney may be the best choice. Where the dispute is related to design, construction, or other issues, an engineer, architect or contractor may be preferable.
 - The number of arbitrators, either one or three arbitrators, is up to the parties and should be based upon the nature and value of the dispute.
 - Interviews or written questions may be appropriate for high value cases or where procedural matters need clarification, e.g., limited discovery, no depositions, strict control of the hearing, etc.
- After a panel is selected, each arbitrator must do a conflict check to make sure there are no conflicts or perceived conflicts regarding the parties, attorneys or potential witnesses. The arbitrator will then make a “disclosure” which details any current or past business, personal, or family relationship or even passing acquaintances, which could be perceived as a conflict. The parties, attorneys and witnesses must review the disclosures and résumés and inform the case manager if any potential conflicts of interest or even knowledge of the arbitrator exists. In the event of a potential conflict, the parties may either reject the arbitrator or accept and waive the disclosure provided all parties agree.
- The next step in the process is the Preliminary Hearing. This is a critical step in determining the cost and speed of the process. The hearing is almost always conducted via telephone and will normally last less than one hour. Participation by the parties is critical to preventing the process from becoming excessively long, complex and expensive. Among the most important items decided are:

- Time and place of the hearing
- Length of the hearing
- Type of award
- Amount of discovery beyond document exchange
- Witnesses
- Exhibits
- Court Reporter
- Stipulated Facts (agreed to by the Parties)
- Specification of claims - items/costs/backup
- Other Issues

The results of the hearing are published as a Preliminary Hearing Order which specifies the process to be followed and, as a result, the cost and time.

- During the discovery period (if allowed), depositions are taken of fact and expert witnesses. The arbitrator has the power to issue subpoenas for witnesses reluctant to appear. The number and length of depositions are specified in the Preliminary Hearing Order.
- The final step in the process is the hearing, which is very much like a trial. There are opening statements, first by the claimant (the party who filed the Demand for Arbitration) then by the respondent. Witnesses for the claimant are presented to prove their case and are cross examined by the respondent's attorney and even by the arbitrator. After the claimant witnesses are finished, the respondent puts on its defense or counter claim witnesses. The final step is the presentation of closing remarks by all parties, either orally or in writing.
 - The hearing is more informal than a trial in that arbitrators can limit testimony, question witnesses, dismiss or add claims, etc.
 - There are no rules of evidence; thus, almost all testimony is allowed and is given its due weight by the arbitrators.
 - Unlike jury trials, claims and damages must be proven with documents and witnesses. Any claim not properly proven or inflated will usually be dismissed.
 - Arbitrators have the power to recall and question witnesses and even require independent experts and subpoena reluctant witnesses.
- The arbitrator will then adjourn the hearing and may close the hearing process or leave the hearing open for some very specific purpose, usually briefs or records not produced during the hearing. The arbitrator has 30 days from the date of closure to review the evidence and provide the written decision. Once the decision is filed with the ADR provider, copies are presented to the parties, and may be filed with the courts to ensure compliance.

Comments on the arbitration process

- Consider your case and decide if an attorney is needed. Remember the process was set up for individuals to represent themselves. If you feel you can present the case without help, you may not need an attorney. Normally, the higher the value of the dispute, the more likely that legal representation will be desirable.
- Your role in the process is critical. Participate in the arbitrator selection process and the Preliminary Hearing; insist on limited discovery and a speedy hearing.

- You and your staff know the problems and also, very likely, those responsible for them. Educate your attorney rather than have the attorney educate himself or herself through depositions and discovery.
- Utilize your resources: the case manager, regional vice president, and the ADR provider website. Ask questions.
- Always be respectful to the arbitrator and the opposing parties. Remember the arbitrators are human and do not care for disrespectful behavior.
- If you present your own case, be brief and logical. Don't repeat the facts; the arbitrator is a professional and will not respond well to repetitive testimony.
- Do not exaggerate costs and damages; the arbitrators deal with these in the ordinary course of their businesses and know what is reasonable. Inflated costs will likely damage your case.
- Rules prohibit any contact between the arbitrator and the parties or their representatives. Case Managers can provide a communication conduit.
- Rules of evidence and trial procedures do not apply in arbitration. The process is designed to get to the truth and be fair and equitable. Cases are not thrown out due to legal technicalities.

ROLES OF THE PARTICIPANTS

Participants in this process include; the parties, their representatives (attorneys), the arbitrator or mediator, the case manager, experts and fact witnesses. The parties, the claimant and respondent, should be prepared and know the case, their positions, limits of compromise, and be knowledgeable about the strengths and weaknesses of their cases. Remember, a case can be settled at any time until the arbitration hearing is closed. Remember that arbitrators and mediators are human beings who have opinions and who can sense deceptive behavior. Be fair and honest.

The Case Manager is a professional with specialized training in construction industry disputes. Many are lawyers. Their job is to assist the parties, attorneys, and the arbitrators and mediators. Their primary roles are to:

- Collect, manage and distribute information
- Arrange and schedule hearings
- Provide guidance through the process
- Filter information and requests from the parties to the arbitrator or mediator
- Provide locations for hearings
- Collect and distribute fees.

The parties' roles are to provide information during the hearings and guide the process. Be active and let the attorneys, arbitrators and case managers know that you expect a speedy and inexpensive process without extended discovery or delays. It is amazing to note the difference in the ease of scheduling when the parties are present as opposed to when they are not. The process is set up for *you*; if you choose not to participate, you lose control of its speed and expense. The dispute belongs to the parties; they must share the information in a clear, concise and honest manner. If you try to "hide the ball," the arbitrators will find out and that knowledge will damage your case and credibility.

Witnesses should provide testimony that is clear, concise, and above all truthful. Experts can be useful on the rare occasion where the arbitrators do not have expertise in a particular subject area; they should be coached to be fair and honest and not be advocates for their client. This behavior reflects badly on both the expert and the party.

The attorneys are advocates. Their role is to organize and present the facts in the “light most favorable” to their client. They provide legal arguments and, if necessary, legal briefs requested by the arbitrator. The parties must take care that their advocates not press too hard and become adversarial to witnesses and sometimes the arbitrators. You should exercise extreme caution in this regard and remember the fundamental rule of arbitration: ***“Never irritate the arbitrator.”***

The mediator’s role is to facilitate an agreement between the parties. Upon request, mediators may offer opinions in private. They are in no way to act as a judge or suggest publicly the merits of the case. The arbitrator’s role is to find the truth and provide a fair and equitable hearing and a just award.

IN CLOSING

Please note that there has been no effort made in this pamphlet to present exhaustive analyses of the mediation and arbitration processes. In addition, the opinions expressed in this work are solely those of the author and may not reflect the views of others in or outside of the legal profession.

The author would like to thank those who helped make this pamphlet accurate and readable. Particular thanks go to Mr. Robert Meade of the AAA and Ms. Judy Tisdale, whose help and comments are especially appreciated.

APPENDIX

SAMPLE CONTRACT CLAUSES

Contract clauses contained in this Appendix, except the appeal clause, are courtesy of the American Arbitration Association, specifically the National Construction Dispute Resolution Committee. These clauses may be copied and are also available on the AAA website www.adr.org

*The appeal clause is courtesy of Christi Underwood, Esq.
of Christi L. Underwood, PA, Orlando, FL*

These clauses are provided for informational purposes only and are not intended to constitute legal advice. The accuracy of the transcriptions is not guaranteed. Neither the author nor ACEC accepts any responsibility for the use of these clauses or this pamphlet for any purpose.

Basic Arbitration Clause

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.

If the parties wish to enter into an arbitration proceeding of an existing dispute they may use the following 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.

Basic Mediation Clause

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 in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Construction Industry Mediation Procedures before resorting to arbitration.

Parties also have the option of inserting a "step" mediation-arbitration clause into their contracts by:

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 within 30 days after service of a written demand for mediation, the mediation does not result in settlement of the dispute, then any unresolved controversy or claim arising from or relating to this contract or breach thereof shall be settled by arbitration administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

If the parties wish to enter into a mediation proceeding of an existing dispute they may use the following 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-arbitration step clause with time frames and any other item of concern to the parties).

Large, Complex Cases

Any controversy or claim arising from 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.

A pending dispute can be referred to the program by:

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.

Selection of Arbitrator(s)

In the event that a claim exceeds [\$1,000,000], exclusive of interest and attorney's fees, the dispute shall be heard and determined by a panel of three arbitrators (one civil engineer, one contractor and one construction attorney).

In the event that arbitration is necessary, [name(s) of specific arbitrator(s)] shall act as the arbitrator(s).

The arbitrator(s) shall be a civil engineer.

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

The panel of three arbitrators shall consist of one contractor, one engineer, and one construction attorney.

Locale Provisions

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

Governing Law

This agreement shall be governed by and interpreted in accordance with the laws of the State of [specify]. The parties acknowledge that this

agreement evidences a transaction involving interstate commerce. The United States Arbitration Act shall govern the interpretation, enforcement, and proceedings pursuant to the arbitration clause in this agreement.

Disputes under this clause shall be resolved by arbitration in accordance with the Construction Arbitration Rules of the American Arbitration Association.

This contract shall be governed by the laws of the State of [specify].

Conditions Precedent to Arbitration

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 may demand arbitration administered by the American Arbitration Association under its Construction Arbitration Rules.

Consolidation/Joinder

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

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) deems 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.

The discovery process shall be limited by the following: 1. Where the dispute is less than \$500,000, there shall be no discovery other than exchange of documents. 2. Where the dispute is over \$500,000 but less than \$1,000,000, discovery shall consist of no more than [2] depositions of [3] hours or less. 3. Disputes in excess of \$1,000,000, 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.

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.

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

Duration of Arbitration Proceeding

The award shall be made within [4] 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. However, this time limit may be extended by agreement of the parties and the arbitrator(s), if necessary.

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

Awards/Remedies

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.

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

Unless provided for elsewhere in the contract, the arbitrator(s) shall not award consequential or liquidated damages.

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

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

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

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

The prevailing party (party obtaining at least 51% of the amount claimed) shall be entitled to an award of reasonable attorney fees.

The arbitrator(s) shall award to the prevailing party, 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)'s fees, administrative fees, travel expenses, out-of-pocket expenses such as copying and telephone, court costs, witness fees, and attorneys' fees.

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

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.

Form and Scope of the Award

The award of the arbitrator(s) shall be accompanied by a reasoned opinion.

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.

The award shall include findings of fact [and conclusions of law].

The award shall include a breakdown as to specific claims.

Confidentiality

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

The basic objective of arbitration is a fair, fast and expert result, achieved economically. Consistent with this goal, an arbitration award traditionally will be set aside by a court only in egregious circumstances such as demonstrable bias of an arbitrator(s). Sometimes, however, in a large complex construction case (involving a dispute of more than \$500,000), the parties may desire a more comprehensive appeal. While parties can attempt to provide for an appeal in the court system pursuant to traditional standards of court review, the authority is divided as to whether courts will accept appeals from arbitration on such a basis. Some courts allow a broader review process but most do not.

Another approach is to provide for an appeal to an appellate arbitrator(s) who would apply a standard of review greater than that allowed by existing federal and state statutes. The new Construction Arbitration Appellate Procedures provide an expedited appellate review process that affords a solution to those who object to arbitration on the basis that there is little, if any, real opportunity for appellate review of arbitration awards. The new appellate procedures anticipate a 90 to 110 day appellate process, subject to modest time extensions for good cause, and provide for a single appellate arbitrator or a panel if that is desired. The procedures permit review of material errors of law, failure to apply the law, erroneous conclusions of expert testimony, failure to find entitlement for attorney fees where warranted by contract or statute, and other grounds. Set forth below is an example of arbitration clause language providing for this type of appeal.

Notwithstanding any language to the contrary in the contract documents, if an arbitration award is rendered from a dispute that exceeds \$500,000 then the parties hereby agree: that the award may be appealed pursuant to the AAA's Construction Arbitration Appellate Procedures ("Appellate Procedures"); that the award rendered by the arbitrator(s) shall, at a minimum, be a reasoned award, and; that the award shall not be considered final until after the time for filing the appeal has expired. Appeals must be initiated within seven (7) days of receipt of an award, as defined by rule A-2 of the Appellate Procedures, by serving a Notice of Appeal upon the Case Manager.

Following the appeal process the decision rendered by the appellate arbitrator(s) may be entered in any court having jurisdiction thereof. Should for any reason the agreement to, or the procedures for, appellate review be determined by a court of competent jurisdiction to be unenforceable then the remaining contractual arbitration clauses are intended to be valid and binding on the parties.

*This language is courtesy of Christi Underwood, Esq. Christi L. Underwood, PA, Orlando, FL. She has also developed a complete procedural guide which is available upon request.

Statute of Limitations

The requirements of filing a notice of claim with respect to the dispute submitted to mediation shall be suspended until the conclusion of the mediation process.

Mediation-Arbitration

If a dispute arises from or relates to this contract or the breach thereof, and if the dispute cannot be settled through direct discussions, the parties agree to endeavor first to settle the dispute by mediation administered by the American Arbitration Association under its Construction Mediation Procedures before resorting to arbitration. Any unresolved controversy or claim arising from or relating to this contract or breach thereof shall be settled by arbitration administered by the American Arbitration Association in accordance with its Construction Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. If all parties to the dispute agree, a mediator involved in the parties' mediation may be asked to serve as the arbitrator(s).

Dispute Resolution Boards

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.