SPECIAL FOCUS

Drafting ADR Contract Provisions: A Checklist And Sample Clauses

By David A. Hoffman

This is the first of a two-part article.

The growing use of ADR methods has led to an increasing interest in drafting appropriate dispute resolution clauses. Until recently, negotiations over the use of such clauses in contracts were relatively rare, and the issue was usually whether or not to include an arbitration provision, such as the American Arbitration Association's standard pre-dispute clause:

> Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in accordance with the [applicable][1] Arbitration Rules of the American Arbitration Association and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

In cases where the parties have no contractual obligation to arbitrate but instead decide to execute a "submission agreement" after a dispute has arisen, there has also been a tendency to rely on standard forms, such as those offered by the AAA or other ADR providers. The AAA's standard submission agreement states:

> We, the undersigned parties, hereby agree to submit to arbitration under the [applicable] Arbitration Rules of the American Arbitration Association the following controversy: (describe briefly). We further agree that the above controversy shall be submitted to (one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, and that we will abide by and perform any award rendered by the arbitrator(s) and that a judgment of the court having jurisdiction may be entered upon that award.

While there is nothing wrong with using such clauses in an appropriate case, the drafting of ADR clauses presents an opportunity for tailoring the dispute resolution process to the particular needs of the client. For example, an arbitration could be structured with limitations on the magnitude of an award — a "bracketed" arbitration — where the floor and ceiling control the risk to which the parties are exposed. Or, mediation might be specified as an initial step before arbitration, thus creating opportunities for a win-win solution that might be unavailable in an arbitration. Or, the parties could submit a critical part of their dispute to a case evaluator, whose opinion might enable the parties to settle the rest of the case themselves.

The most common types of ADR contract clauses are (a) pre-dispute clauses incorporated into a contract, lease or other agreement, and (b) submission agreements, which provide that an existing dispute will be submitted to mediation, arbitration or other ADR procedure. In both pre-dispute clauses and submission agreements, the parties must decide certain fundamental issues, such as the method of dispute resolution (e.g., mediation, arbitration or other methods), whether the result will be binding or advisory (e.g., arbitration versus case evaluation) and whether the process will be administered by the parties themselves or by a third party (such as the AAA or another ADR provider).

In most cases, pre-dispute clauses are shorter, simpler and more general, whereas submission agreements are often highly specific in tailoring the ADR process to the dispute. In drafting pre-dispute clauses, the goal is to anticipate the types of disputes most likely to arise and to include language that will protect the client on issues most likely to be of concern. For example, in some contracts the most critical issues might be the location of the proceedings, the governing law or the scope of relief available, whereas in other contracts the manner of selection of the neutral might be the most important issue.

Submission agreements can be even more specific. For example, they might include the name of the neutral(s), the specific date(s) of the proceedings, the length of time each side will have to present its case and the type of discovery — if any — that will be available.

Checklist And Sample Clauses

The following checklist and sample clauses deal with some of the more common issues that should be considered when drafting dispute resolution clauses — either pre-dispute clauses or submission agreements. This article discusses the following issues:

1. Type of ADR process to be used
2. Administered versus non-administered proceedings
3. Rules
4. Scope of dispute covered by agreement
5. Selection of neutrals
6. Payment of neutrals
7. Timing and scheduling matters
8. Statutes of limitations and tolling
9. Escrow of funds
10. Provisional remedies
11. Discovery

Part 2 of the article will focus on:

12. Exchange of briefs and other information
13. Confidentiality
14. Record of the proceedings
15. Location of the proceedings
16. Rules of evidence
17. Bifurcation and dispositive motions
18. Consolidation
19. Governing law
20. Form of award
21. Limitation of remedies
22. Enforcement and appeal
23. Indemnification
24. Waiver of claims against neutral
25. Miscellaneous formal requirements

1. Type Of ADR Process To Be Used

A discussion of the various reasons to use one form of ADR rather than another is beyond the scope of this article. Suffice it to say, however, that considerable thought should be given to the choice. Moreover, because much of the terminology associated with ADR is unfamiliar to some lawyers and their clients, drafters should err on the side of caution and leave no doubt as to the process that is intended. For example, in the following clauses, the parties' intention to mediate (not arbitrate) is emphasized:

Mediation — pre-dispute clause. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be submitted to mediation under the [applicable] Mediation Rules of the American Arbitration Association. The mediator shall attempt to facilitate a negotiated settlement of the dispute but shall have no authority to impose any settlement terms on the parties.

Mediation - submission agreement. The parties agree to participate in a mediation of the following dispute to be conducted in accordance with the [applicable] Mediation Rules of the American Arbitration Association, by [name of Mediator] [describe dispute briefly]. The Mediator shall attempt to facilitate a negotiated settlement of the dispute but shall have no authority to impose any settlement terms on the parties.

The following are clauses for other types of ADR procedures:

Case evaluation — submission agreement. The parties agree to submit the following dispute to [name of Case Evaluator] for case evaluation: (describe briefly). [Case Evaluator] shall provide the parties with a written statement of his/her assessment of how the dispute would be decided by a court. This assessment shall not be binding on the parties and shall not be admissible in any arbitration or judicial proceedings in connection with the above-described dispute.

Mini-trial — submission agreement. The parties agree to participate in a mini-trial of this dispute to be conducted in accordance with the [Mini-trial Procedures of the American Arbitration Association] [Center for Public Resources Model Mini-trial Procedure]. The neutral third party will be selected from a panel of neutrals provided by the [AAA] [CPR]. If the parties cannot agree on the neutral, the neutral shall be selected by the [AAA] [CPR].

Multi-step ADR. For many parties, binding arbitration is a familiar and desirable end point, but requiring negotiation by specified individuals, followed by mediation, as a precondition to arbitration gives the parties a greater opportunity to reach a voluntary settlement.

The principal advantage of the multi-step approach, for both large- and small-stakes cases, is that once the parties realize they will ultimately face a binding resolution of the case within a reasonably short period of time, they may find that negotiation and/or mediation are more successful than they might otherwise have been. If those methods are successful, of course, the parties will have saved themselves the time, expense and uncertainty of an arbitrated result. Even if the mediation is only partly successful, however, the parties may have narrowed the issues in dispute and thus reduced the scope (and very likely the time and expense) of the arbitration.

Negotiation / mediation / arbitration — pre-dispute clause. In the event of any dispute arising out of or relating to this Agreement or the breach thereof, the parties shall use their best efforts to settle the dispute by direct negotiations between individuals with full settlement authority. If the dispute is not settled promptly through negotiation, the parties shall submit the dispute to mediation under the [applicable] Mediation Rules of the American Arbitration Association. Thereafter, any unresolved controversy or claim arising out of or relating to this Agreement, or breach thereof, shall be decided by binding arbitration in accordance with the [applicable] Arbitration Rules of the American Arbitration Association, and judgment upon the Award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Negotiation / mediation / arbitration — submission agreement. The parties agree to submit the following dispute for negotiation between [Ms. A] and [Mr. B], who shall have full settlement authority: (describe briefly). If the dispute is not settled promptly through negotiation, the parties shall submit the dispute to mediation under the [applicable] Mediation Rules of the American Arbitration Association. Thereafter, the dispute or any unresolved portion of the dispute shall be decided by binding arbitration in accordance with the [applicable] Arbitration Rules of the American Arbitration Association, and judgment upon the Award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

2. Administered Vs. Non-Administered Proceedings

One of the decisions the parties must make — in either a pre-dispute or post-dispute setting — is whether the ADR proceedings will be administered or non-administered. The AAA, which administers approximately 60,000 arbitrations and mediations per year, is the primary advocate for administered proceedings. The Center for Public Resources, which maintains a roster of neutrals and staff that can provide technical assistance but no administration of disputes, is the primary exponent of non-administered proceedings. There are advantages and drawbacks to each approach.

Administered proceedings require less time and effort to be expended by the parties on procedural matters. The organization administering the proceedings also operates as a buffer between the parties and the neutral(s), and can maintain an impartial record of the process from start to finish. On the other hand, the parties must pay an administrative fee and may not be happy with the panel of neutrals available through the administrator.

A non-administered proceeding costs less and may be more flexible. The Center for Public Resources has promulgated rules for non-administered mediation and arbitration of business disputes, and those rules provide a clear structure for the proceedings. However, if the parties' relationship has become highly adversarial, a non-administered process can break down, with resort to the courts a likely prospect. Courts may also be less likely to enforce a default award (as permitted, for example, under Rule 30 of the AAA Commercial Arbitration Rules) in a non-administered setting.

A multi-step clause suggested by the Center for Public Resources for non-administered ADR is as follows:

Negotiation / mediation / arbitration — pre-dispute clause. The parties will attempt in good faith to resolve any controversy or claim arising out of or relating to this agreement promptly by negotiations between senior executives of the parties who have authority to settle the controversy (and who do not have direct responsibility for administration of this agreement). The disputing party shall give the other party written notice of the dispute. Within 20 days after receipt of said notice, the receiving party shall submit to the other a written response. The notice and response shall include (a) a statement of each party's position and a summary of the evidence and arguments supporting its position, and (b) the name and title of the executive who will represent that party. The executives shall meet at a mutually acceptable time and place within 30 days of the date of the disputing party's notice and thereafter as often as they reasonably deem necessary to exchange relevant information and to attempt to resolve the dispute.

If the matter has not been resolved within 60 days of the disputing party's notice, or if the party receiving said notice will not meet within 30 days, either party may initiate mediation of the controversy or claim in accordance with the Center for Public Resources Model Procedure for Mediation of Business Disputes.

If the matter has not been resolved pursuant to the aforesaid mediation procedure within 60 days of the initiation of such procedure, or if either party will not participate in a mediation, the controversy shall be decided by arbitration in accordance with the Center for Public Resources Rules for Non-Administered Arbitration of Business Disputes, by (a sole arbitrator) (three arbitrators, of whom each party shall appoint one) (three arbitrators, none of whom shall be appointed by either party). (Any mediator or arbitrator not appointed by a party shall be selected from the CPR Panels of Distinguished Neutrals.) The arbitration shall be governed by the U.S. Arbitration Act, 9U.S.C. §1-16, and judgment upon the award rendered by the Arbitrator(s) may be entered by any court having jurisdiction thereof. The place of arbitration shall be _____. The arbitrator(s) (are) (are not) empowered to award damages in excess of actual damages, including punitive damages.

All deadlines specified in this Article [__] may be extended by mutual agreement.

3. Rules

Just as the use of ADR has grown in recent years, so has the number of model rules for conducting ADR proceedings. Until the mid-1980s, the AAA rules were virtually the only generally available procedures for conducting commercial arbitrations, and there were few generally available rules for the conduct of mediation. The AAA now has more than two dozen sets of standard rules (e.g., commercial, construction, title insurance, accident claim, securities, employment, etc.). In addition, several other organizations have promulgated model rules, including the Center for Public Resources, Endispute, Inc., Judicial Arbitration and Mediation Services (JAMS) and Judicate.

The advantage of incorporating such rules by reference is obvious: it eliminates the need for negotiation over a wide variety of specifics. In particular, there are many advantages to specifying the rules of the AAA — first and foremost, they are familiar and well accepted, and therefore less likely to result in satellite litigation over their interpretation or application to a particular case. In most cases, some fine tuning of those rules will be more efficient than starting from scratch. It is important, however, to specify which rules the parties intend to use (i.e., commercial, construction, etc.) and whether the rules are those in effect when the contract is signed or when the arbitration demand is filed.

One of the potential disadvantages of using model rules is that in some of them (such as those of the AAA), designation of

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Drafting Alternative Dispute Resolution Clauses

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the rules amounts to designation of the organization which published them as the administrator of the dispute resolution process. *See, e.g.*, Rule 3 of the AAA Commercial Arbitration Rules: "When parties agree to arbitrate under these rules, ... they thereby authorize the AAA to administer the arbitration." Of course, the parties can incorporate the AAA rules, or other rules, but specify that administration of the proceedings shall be performed by the neutral(s) selected by the parties. Consider, for example, the following clause:

> Any controversy or claim arising from or related to this Agreement, or any breach thereof, shall be decided by binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time this Agreement is executed, except that the arbitrator(s) selected pursuant to this Agreement shall act as the administrator of the arbitration and shall have all of the powers and duties conferred on the Association pursuant to said Rules.

With such a provision in place, the parties would have to make sure that they had created a reliable mechanism for selecting the arbitrator(s).[2]

4. Scope Of Dispute Covered By Agreement

Pre-dispute ADR clauses are usually broadly inclusive. For example, an arbitration clause recommended by the AAA covers "*any controversy or claim* arising out of or relating to this contract, or the breach thereof" (emphasis added).[3] In some cases, it may be advisable to narrow the range of disputes covered by a pre-dispute clause. The following are some examples of tailoring of a pre-dispute clause to provide for ADR for only certain types of disputes:

(a) *Dollar-figure-threshold.* Any claim or controversy arising from or related to this Agreement, or the breach thereof, in which the amount in controversy (as stated in the Demand and any counterclaim) is less than $100,000 exclusive of interest and costs shall be resolved by binding arbitration ... All other disputes arising from or related to this Agreement may be decided by any court of competent jurisdiction.

(b) *Asymmetrical right to arbitration.*[4] The Company may, at its option, demand arbitration of any dispute arising from or relating to this Agreement, ...

(c) *Carve-out of certain subjects.* All disputes concerning distribution of profits and losses by the Partnership shall be resolved by binding arbitration ... All other disputes arising from or related to this Agreement may be decided by any court of competent jurisdiction.

5. Selection Of Neutrals

One of the most crucial decisions in structuring an ADR proceeding is the selection of the mediator, arbitrator, case evaluator or other neutral. In the pre-dispute setting, parties to an agreement generally do not specify a particular neutral to be used in the event of a dispute, for the simple reason that that individual may not be available at the time he or she is needed. Instead, parties generally leave the selection of the neutral to such time as a dispute actually arises.[5] Where the contract calls for dispute resolution under the rules of a specific ADR provider organization (such as the AAA), that organization usually has the authority under those rules to select a neutral or propose a panel from which one or more neutrals will be selected by the parties. In some cases it may be advisable to specify in a pre-dispute clause that a mediator, arbitrator or other ADR neutral shall be someone with a particular background— e.g., a certified public accountant with a specified number of years of experience, a partner in a law firm of more than a specified number of lawyers, a physician with board certification in a specific field, etc.

In a post-dispute submission agreement, the parties can, of course, specify a particular individual or panel of individuals to serve as neutrals. In that setting, it is much easier to weigh such factors as the neutral's subject matter expertise or other factors that would affect his or her desirability as a neutral.

One of the issues to be decided in determining who the neutral(s) will be is the number of neutrals needed in the case. Most mediations are conducted by a single mediator, but co-mediation (involving two mediators) is increasingly common. Arbitrations are usually conducted by a sole arbitrator or panel of three. Under the American Arbitration Association Rules, both one-member and three-member panels are selected by the AAA after each party has had the opportunity to rank in order of priority its preferences and strike any arbitrators who are considered unsuitable. Three-member panels are often preferred in cases where the stakes are substantial (because there is less risk of an aberrant decision by a single arbitrator) or where the parties want a combination of skills on the panel (e.g., a general contractor, an architect and an attorney with construction law experience).

Some contracts call for a three-member arbitration panel to be composed of one party-appointed member for each of the two parties, and a neutral arbitrator to be selected by the two party-appointed arbitrators.[6] With this method of selection, it is important to have a fallback mechanism (such as appointment by the AAA) in case the party-designated arbitrators fail to agree on a neutral.[7] One problem with party-appointed arbitrators is that there is often confusion as to their proper role in the process (i.e., are they to be advocates for the party that appointed them or instead adopt a neutral role?). Party-appointed arbitrators are sometimes asked to take an oath of impartiality prior to the arbitration. If they do not take such an oath, the Code of Ethics for Arbitrators in Commercial Disputes approved by the American Bar Association and the AAA provides that party-appointed arbitrators "are permitted to be predisposed toward deciding in favor of the party who appointed them." Canon VII(E)(1).

Consider the following clause, which is similar to those suggested by the AAA and CPR:

> *Arbitrator selection — pre-dispute clause.* Within ____ days after the commencement of arbitration, each party shall select one person to act as arbitrator, and the two selected shall, within ___ days of their appointment, select a third arbitrator who shall be the chairperson of the panel. If the arbitrators selected by the parties are unable or fail to agree upon the third arbitrator, the third arbitrator shall be selected by the [AAA] [CPR] [other]. [Prior to the commencement of hearings, each of the arbitrators appointed shall take an oath of impartiality.]

Certification. Since there are no certification standards currently in effect in Massachusetts, it is difficult to specify, in a contract clause dealing with the selection of neutrals, a recognized standard of ADR expertise. Most mediators have had at least 30 hours of training, which is the standard set forth in G.L.c. 233, §23C. For arbitrators, there is no statutory requirement of training, but the AAA offers certain kinds of training as a prerequisite for members of its panels.

6. Payment Of Neutrals

The norm in most ADR settings — whether mediation, arbitration or other proceedings— is that the neutral's fee is paid in equal shares by the parties. In pre-dispute clauses, this issue is often covered by the incorporation of a specific set of rules from an established ADR provider. Those rules generally set forth not only the manner in which fees will be divided but also a schedule listing the amount of administrative and neutrals' fees.[8] The norm in most, but not all, ADR proceedings is that the parties share equally the cost of the neutral's services, including any administrative fee.

Fee shifting. One variation worth considering is a provision for shifting of the arbitrator's fee and/or attorneys' fees, either for the prevailing party or at the discretion of the arbitrator. The Center for Public Resources Rules for Non-Administered Arbitration of Business Disputes contain such a provision (Rule 15.3):

> [T]he Tribunal may apportion the costs of the arbitration [including attorney's fees] between or among the parties in such manner as it deems reasonable taking into account the circumstances of the case, the conduct of the parties during the proceeding, and the result of the arbitration.

The AAA Commercial Arbitration Rules permit the arbitrator to shift the arbitrator's fees and administrative fees, but there is no provision concerning the shifting of attorney's fees.

7. Timing And Scheduling Matters

Among the complaints often heard about mediation is that it may merely prolong the process of resolving a case headed for court or already filed there. Although mediated cases are generally resolved more quickly than non-mediated cases, some mediations can last for weeks or even months, with no assurance of settlement, and some arbitrations have been known to last as long as trials or longer. Accordingly, it is important to build time limits into an ADR process. In a pre-dispute clause, this can be done by setting time limits for the various stages in the process or, alternatively, incorporating by reference a set of rules which include scheduling provisions. In a post-dispute submission agreement, the parties can, of course, be very specific about the deadlines for completion of each stage in the process. For example:

> *Timing — mediation submission agreement.* The mediation provided for in this Agreement shall begin no later than [10] days after the execution of this Agreement. If the dispute has not been settled by mediation within [30] days after the execution of this Agreement, either party may demand binding arbitration.

In arbitrations, unless a specific set of rules with time limits is incorporated by reference in the agreement to arbitrate, the agreement should specify when the hearing will be commenced and when the award will be issued.

> *Timing — arbitration submission agreement.* The arbitrator(s) shall commence the hearing within [60] days after the execution of this Agreement and shall issue an award within [30] days of the close of the hearing.

8. Statutes Of Limitations And Tolling

Ordinarily a party is deemed to have made a timely demand for relief under an arbitration provision if the demand is filed or served on the respondent within the applicable limitations period. It may be desirable, however, to make such a limitation explicit in the parties' agreement:

> *Statutes of limitations - pre-dispute clause.* Any demand for arbitration under this Agreement must be made before the statute of limitations applicable to such a claim has run.

If the parties wish to mediate the dispute, conduct a mini-trial, or engage in any other settlement-oriented ADR procedures, they should consider whether the statute of limitations should be tolled during the pendency of those proceedings.

> *Tolling — pre-dispute clause.* In any dispute arising under or relating to this Agreement, the parties agree that any applicable statutes of limitations shall be tolled for a period not to exceed [___] days if either party notifies the other in writing that it wishes to submit the dispute to mediation [or other settlement-oriented ADR procedure].
>
> *Tolling — submission agreement.* The parties agree that any statutes of limitations applicable to this dispute shall be tolled for [___] days during which the parties shall submit the dispute to mediation by [a specified ADR neutral].

9. Escrow Of Funds

In a dispute over funds held by one of the parties, a submission agreement can freeze the status quo by requiring that the funds be placed in escrow:

> *Escrow of funds — submission agreement.* Within [___] days of the execution of this Agreement, [name of party] shall place in escrow $____ with [name of escrow agent], who shall release said funds only in accordance with the arbitrator's award or by agreement of the parties.

10. Provisional Remedies

When the parties provide in an agreement that all disputes shall be resolved by binding arbitration, they may nevertheless wish to reserve the right to obtain provisional relief (such as a temporary restraining order or preliminary injunction) from a court until such time as an arbitration can be conducted.[9] Such a clause should make it clear that, by requesting provisional relief from a court, the requesting party does not waive the right to insist on arbitration of the merits of the dispute, including such injunctive relief as may be obtainable in the arbitration.

> *Provisional remedies (pre-dispute clause).* In any dispute arising under or related to this Agreement, either party may request a temporary restraining order or preliminary injunction from any court of competent jurisdiction without thereby waiving its right to demand arbitration as otherwise provided in this Agreement.

11. Discovery

Although one of the advantages of ADR processes is that they can often be used before formal discovery (or indeed any litigation) has commenced, some cases may be difficult to settle or arbitrate without some discovery. Submission agreements can provide for a defined amount of discovery to precede the ADR proceeding, and that discovery can be either formal (i.e., depositions and document discovery requests) or informal (e.g., an agreement to exchange key documents or permit discussions with key witnesses). In arbitrations, unless the parties agree otherwise, the Massachusetts Arbitration Act provides for only (a) document discovery and (b) depositions of witnesses who cannot be subpoenaed or are unable to attend the hearing.[10] Of course, if the parties specify that a particular set of rules shall govern an arbitration, any provisions concerning discovery in those rules will operate as an agreement of the parties with respect to discovery.

> *Discovery (submission agreement).* The parties to this Agreement shall be entitled to obtain from each other and from third parties any documents relevant to the dispute and shall be permitted to conduct up to three depositions, such depositions to last no longer than sixhours each, not including breaks. Any contested issues concerning scheduling and management of discovery shall be decided by the [mediator] [arbitrator] [chair of the arbitration panel]. [The arbitrator(s) shall have the authority to order compliance with discovery requests, issue protective orders and include in the award sanctions, including monetary sanctions, for the parties' conduct with respect to discovery.]

Endnotes

[1]The blank is filled in by specifying the particular AAA rules that will apply, such as "Commercial" or "Construction Industry" Arbitration Rules.

[2]Among the functions performed by the AAA under the Commercial Arbitration Rules are the following:

Rule 10 — Conduct preliminary hearing

Rule 11 — Determine locale if the parties do not agree on one

Rule 12 — Determine qualifications of potential arbitrators

Rule 13-15 — Appoint the arbitrator if parties fail to agree

Rule 19 — Determine whether an arbitrator should be disqualified

Rule 20 — Determine whether a vacancy has occurred

Rule 29 — Handle the parties' communications with the arbitrator

Rule 39 — Rule on requests for extensions of time

Rule 46 — Provide certified copies of arbitration documents for judicial proceedings

[3]Such a clause would also encompass claims of fraud in the inducement of the contract. *See Quirk v. Data Terminal Systems, Inc.*, 379 Mass. 762, 768 (1980).

[4]*See Hannon v. Original Gunite Aquatech Pools, Inc.*, 385 Mass. 813 (1982) (holding that an arbitration clause which permits one party but not the other to demand arbitration is not unconscionable per se).

[5]One exception is the "standing neutral" or dispute review board, selected at the time an agreement is signed, who monitor the performance of the contract and are available to facilitate the resolution of any disputes that may arise.

[6]This party selection method can also be used to choose a single arbitrator (or mediator) where the party-selected neutrals do not themselves serve but instead withdraw once they have agreed on a neutral to handle the matter.

[7]If the parties' method of selection of an arbitrator fails, either party may obtain appointment of an arbitrator by the Superior Court. G.L.c. 251, §3.

[8]The AAA typically scales its administrative fees in accordance with the amount in controversy, while neutrals' fees are usually based on a per diem rate.

[9]Although an arbitrator can award preliminary relief, the party seeking it may need a court order to enforce the arbitrator's interim award or decision.

[10]*See* G.L.c. 251, §7.

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SPECIAL FEATURE

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12. Exchange Of Briefs And Other Information

In mediations where the issues are complex or the stakes are sufficiently high, the parties will often exchange, or file with a mediator on a confidential basis, pre-mediation briefs discussing the issues to be resolved in the mediation. It may also be desirable for the parties to exchange or present to the mediator copies of key documents.

Likewise, in an arbitration, parties will often exchange pre-arbitration briefs. (These are never submitted *ex parte* in an arbitration.) An exchange of proposed exhibits prior to the arbitration is also advantageous from the standpoint of streamlining the proceedings. At a mini-trial, the parties often exchange briefs prior to the proceeding, but it is not essential. All of these arrangements concerning the exchange of information are ordinarily done in a post-dispute setting, rather than as part of a pre-dispute clause.

Exchange of briefs and documents (submission agreement). No less than sevendays prior to the [mediation] [arbitration] [mini-trial] provided for in this Agreement, the parties shall exchange briefs concerning the issues in dispute and identify any documents or exhibits they plan to offer in the proceeding.

13. Confidentiality

In Massachusetts, the confidentiality of mediation is protected by statute. However, the prerequisites for confidentiality of mediations under G.L.c. 233, §23C, are highly specific. Unless the mediator has been appointed by a "judicial or governmental body," the mediator must enter into a written agreement with the parties, must have at least 30 hours of training in mediation, and must either (a) have four years of professional experience as a mediator, or (b) be accountable to a dispute resolution organization which has been in existence for at least three years.[11] In addition, under Massachusetts common law and Fed. R. Evid. 408, evidence concerning "offers of compromise" is inadmissible.[12] In arbitrations and ADR proceedings other than mediations, there is no statutory confidentiality protection for the parties, the materials presented in the proceeding, or the neutral.[13] Accordingly, it is often desirable to include a confidentiality provision in a post-dispute agreement. The following provision could be adapted for a mediation, arbitration or other ADR proceeding:

Confidentiality (Submission Agreement). Attendance at this proceeding shall be limited to the parties and their counsel and any witnesses. All information exchanged or presented to the [neutral] in this proceeding, whether in oral, written or other form, the [neutral's] work product and case file, and the results of the proceeding shall be confidential and shall not be disclosed to any person or entity without prior written permission from the other parties to this proceeding. A party offering evidence or information in this proceeding shall not be precluded thereby from offering that evidence or information in any other proceeding.

14. Record Of The Proceedings

In most arbitrations, transcripts are unusual because appeals are rare and successful appeals rarer still. However, the parties are free to provide for such a record to be made, and in highly complex arbitrations, transcripts are used because the proceedings may occur over an extended period of time. In mediations, ordinarily no transcript or tape recording is made in order to assure the confidentiality of the proceeding.

Transcript (Submission Agreement). Either party may have the arbitration transcribed at its expense by a certified court reporter.

OR

Transcript (Submission Agreement). The arbitration to be conducted under this Agreement shall be recorded on audio tape by a certified court reporter but shall not be transcribed unless either party requests it. If no such request is made, the parties shall share equally the costs of making the tape recording. In the event that either party requests a written transcript of the arbitration, that party shall pay the additional cost of preparing a transcript.

15. Location Of The Proceedings

In a dispute in which the parties are not located near each other, the location of an ADR proceeding might be one of the most crucial issues. For example, in a dispute between an architect located in Boston and a building owner in the Middle East, an arbitration clause providing that hearings shall be held in Boston gives the architect an obvious cost advantage and the owner an obvious disincentive to file claims against the architect. Even if the parties are located nearby at the time they execute their agreement, it may be worthwhile specifying, in a pre-dispute clause, the location of any ADR proceeding because of the possibility that either party will relocate or be acquired by another company with offices located elsewhere. Under the American Arbitration Association Commercial Arbitration Rules, if the parties do not agree on the location, the AAA has the authority "to determine the locale and its decision shall be final and binding."

Location (Pre-dispute). Any claim or controversy arising from or related to this Agreement, or the breach thereof, shall be decided by binding arbitration to be conducted in Boston, Massachusetts unless the parties agree in writing to another location.

16. Rules Of Evidence

In most non-adjudicative ADR proceedings (such as mediations and mini-trials) there is no need to provide for evidentiary rules. In arbitrations, however, it is essential to know the ground rules for admissibility of evidence. Absent agreement to the contrary, most arbitrators do not require strict conformity to the rules of evidence. Consider, for example, the following provision (Rule 31) from the Commercial Arbitration Rules of the AAA:

> The arbitrator shall be the judge of the relevance and the materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary.

Thus, if the parties wish to adhere to an evidentiary regime different from the "relaxed" evidentiary standard ordinarily used by arbitrators, they should say so in their agreement.

Rules of Evidence (Submission Agreement). In any arbitration conducted under this Agreement, adherence to [the rules of evidence applicable in the state courts of Massachusetts] [the Federal Rules of Evidence] shall be required.

Deposition transcripts and affidavits. Another consideration is whether, in an arbitration, deposition transcripts and affidavits should be admissible. Allowing them may streamline the proceedings and, where the information presented in them is relatively non-controversial, there should be little ground for objection. However, on significant factual issues, and especially those involving witness credibility, most parties will insist on live testimony. Therefore, if the parties wish to permit the use of affidavits and deposition transcripts, an appropriate provision should be included in the submission agreement.

Evidence - Affidavits and Deposition Transcripts (Submission Agreement). The parties may introduce as evidence in the arbitration affidavits and the transcripts of depositions given under oath before a certified court reporter [if the witness cannot be subpoenaed or is unable to attend the hearing].

17. Bifurcation And Dispositive Motions

In adjudicative ADR proceedings, such as arbitration, it may often be desirable to bifurcate the issues in dispute so that a potentially dispositive issue can be resolved, and thus avoid lengthy evidentiary proceedings on issues which might become moot after the threshold issue is decided. For example, issues relating to arbitrability, statute of limitations, or the meaning of a particular contract term can often be resolved on a motion to dismiss or for summary judgment. Unfortunately, arbitrators are generally reluctant to entertain such dispositive motions because either (a) such motions are unfamiliar in the arbitration setting, or (b) the arbitrator is concerned that refusing to hear all of the evidence in the case will render the award appealable under the Massachusetts or federal arbitration statutes.[14] There is a good argument that these concerns should not stand in the way of using dispositive motions because, if the arbitrator's ruling on such a motion disposes of the case, the other evidence is no longer material to the dispute and therefore the award should not be vulnerable to appeal on that ground.[15]

The rules of the AAA neither provide for the use of dispositive motions nor prohibit them. The Center for Public Resources Rules for Non-Administered Arbitration of Business Disputes are also silent on the subject, but the arbitration rules promulgated by Endispute, Inc. specifically allow such motions.

Bifurcation and Dispositive Motions (Pre-Dispute Clause). In any arbitration conducted pursuant to this Agreement, the arbitrators may consider and rule on any dispositive motions submitted by the parties.

Bifurcation and Dispositive Motions (Submission Agreement). The arbitrator(s) shall have the authority to rule on any dispositive motions submitted by the parties on the issues of [statute of limitations] [other].

18. Consolidation

In multi-party disputes, the issue of consolidation may be critical to the outcome of the case.[16] Suppose a building's structural steel buckles under a normal snow load and the owner must proceed separately against the architect, general contractor and steel supplier. The owner could lose all three cases, which, if consolidated, would likely result in a recovery.

Massachusetts law, unlike federal law, permits such consolidation even where the parties have arbitration clauses barring consolidation.[17] The Federal Arbitration Act, which requires that arbitration agreements be enforced "in accordance with their terms," has been interpreted to preclude consolidation if the parties have not agreed to it.[18] It seems likely that a Massachusetts state court would be obliged to follow the federal act if the parties were engaged in interstate commerce and one or more of their contracts expressly barred consolidation.[19] On the other hand, if the parties specified Massachusetts law, not federal law, as governing the conduct of the arbitration, a provision barring consolidation would likely be upheld.[20]

In any event, for purposes of drafting pre- or post-dispute ADR clauses, one must decide whether the right to consolidate would be desirable. If consolidation is desired, it is not enough for the relevant agreements to be silent on the subject, even in Massachusetts,[21] because the relevant arbitration clauses must each provide for the same "method of appointment of the arbitrator or arbitrators."[22] Thus, if one contract calls for one arbitrator and the other calls for three, an action to consolidate the two proceedings would likely fail. Therefore, if one of the parties to the agreement will be contracting with others in connection with the same project or transaction, a "pass down" clause should be used in order to ensure that suppliers and subcontractors, or other third parties involved in the transaction, can be brought into a consolidated arbitration. If consolidation would be undesirable, a non-consolidation provision should be inserted, and federal law should be specified as governing the conduct of the arbitration.

Consolidation Permitted (Pre-dispute or Submission Agreement). Any arbitration conducted pursuant to this Agreement may be consolidated with any other arbitration in which the issues to be decided relate to this Agreement or the breach thereof. The parties to this Agreement shall include in any other agreements they execute in connection with the Project an arbitration provision identical to the arbitration provision contained in this Agreement.

No Consolidation (Pre-dispute or Submission Agreement). An arbitration conducted pursuant to this Agreement shall not be consolidated with any other proceeding. The arbitration shall be governed by, and conducted in accordance with, the Federal Arbitration Act.

19. Governing Law

Well-drafted contracts usually specify the law that will govern enforcement of the agreement. In a dispute resolution clause, the parties should also specify the law that will govern the mediation, arbitration or other proceeding. This is necessary because the Federal Arbitration Act and state law may conflict on procedural issues relating to an arbitration (e.g., consolidation), or choice of law principles may result in the application of the law of a different juris-

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There is no "ideal" dispute resolution clause for every contract...Nevertheless, in drafting pre-dispute clauses and submission agreements, one can often create a structure which accomplishes the client's major objectives.

David A. Hoffman is a member of the Boston law firm Hill & Barlow, where he chairs the ADR Practice Group. Mr. Hoffman is also the chair of the ADR Committee of the Boston Bar Association Litigation Section and a member of the Supreme Judicial Court Standing Committee on Dispute Resolution.

This article is an excerpt from a book tentatively titled "Mediation and Other Alternatives to Litigation — A Massachusetts ADR Handbook," by D. Hoffman and D. Matz, to be published by Butterworth Legal Publishers, and may not be reprinted or used without written permission of the authors and Butterworth Legal Publishers. The author wishes to thank David Matz and Carl Sapers for their comments and suggestions.

Drafting ADR Contract Provisions: Part 2

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diction. Careful drafting can prevent such surprises since the parties' explicit choice of law governing the proceeding is entitled to enforcement.[23]

Governing Law (Pre-dispute Clause). Any [arbitration] [mediation] conducted pursuant to this Agreement, shall be governed by and enforced in accordance with the [law of the Commonwealth of Massachusetts] [Federal Arbitration Act] without resort to choice of [law or conflict of law principles]. The parties' substantive rights and obligations with respect to this agreement shall be governed by the law of [the Commonwealth of Massachusetts] without resort to choice of law or conflict of law principles.

Governing Law (Submission Agreement). The [arbitration] [mediation] conducted pursuant to this Agreement shall be governed by and enforced in accordance with the [law of the Commonwealth of Massachusetts] [Federal Arbitration Act], without resort to choice of law or conflict of law principles. The parties' substantive rights and obligations with respect to this dispute shall be governed by the law of [the Commonwealth of Massachusetts] without resort to choice of law or conflict of law principles.

20. Form of Award

In arbitrations, the parties may request a "reasoned" award (i.e., an award accompanied by a statement of the rationale for the decision) instead of a "bare" award (i.e., an award with no stated rationale). A reasoned award may increase the risk that a disappointed party will challenge the award. In most cases even a poorly reasoned award is not likely to be vacated, but, if the risk of appeal is a concern, a bare award is probably preferable. The chief advantage of a reasoned award is that it encourages greater adherence by the arbitrator to the legal principles governing the outcome of the case (as opposed to applying the arbitrator's sense of "rough justice"). Such awards are unusual, however, and therefore must be specifically requested by the parties or a bare award will generally be issued.

Reasoned Award. The arbitrator(s) shall issue a written decision stating the reasons for the award.

Regardless of whether the parties' agreement calls for a "reasoned" award, it is often desirable to specify, in a post-dispute submission agreement, a form of award that the parties wish the arbitrator to use. Consider, for example, the following form of award:

Award

Plaintiff Chris Jones is entitled to compensation from ABC Company in the following amounts:

For lost income	$_____
For medical expenses	$_____
For pain and suffering	$_____
SUBTOTAL	$_____

This subtotal should be reduced by the following amount because of the plaintiff's ____% comparative negligence: $_____

TOTAL AWARD $_____

By providing the arbitrator with a specific form for his or her award, the parties reduce the opportunity for mistakes or misunderstandings concerning the question to be decided by the arbitrator.

"Tailored" Awards. Post-dispute agreements involving arbitration can be "tailored" to narrow the range of risk the parties face. For example, in a bracketed arbitration the parties select an upper and/or lower limit before the arbitration begins. In "final offer" or "baseball" arbitration, the parties each present the arbitrator with a final offer, and the arbitrator picks one of those offers as the amount of the arbitral award.[24]

Bracketed (or "High/Low") Award (Submission Agreement). The award issued by the arbitrators shall not be more than $600,000 or less than $250,000. If the arbitrators find that the claimant is entitled to no compensation, or an amount less than $250,000, they shall enter an award for the claimant for $250,000. If the arbitrators find that the claimant is entitled to compensation in excess of $600,000, they shall enter an award of $600,000. [The parties shall not disclose this provision of the Agreement to the arbitrators until they have rendered a decision.]

Final Offer (or "Baseball") Award (Submission Agreement). At the [beginning] [conclusion] of the arbitration hearing, each party shall submit to the arbitrators its proposed award. The arbitrators shall select one of the proposed awards as the award for the arbitration. [If the claimant's proposed award is less than that of the respondent, the award shall be the numerical average of the two proposed awards.]

21. Limitation Of Remedies

Absent agreement to the contrary, an arbitrator can award virtually any relief — including injunctive relief, such as specific performance — available from a court. If the parties' agreement or an applicable statute permits an award of multiple damages, punitive damages or attorney's fees, those remedies may also be available in an arbitration.[25]

Punitive damages may be available even in the absence of any explicit mention of them in the parties' agreement.[26] Therefore parties wishing to exclude such damages (or interest, attorney's fees or any form of injunctive relief) should do so in their arbitration agreement.[27] It is worth noting, however, that such limitations with respect to statutory remedies could leave the claimant with a viable claim that could be brought in court for the relief excluded from the arbitration.[28]

Although the Massachusetts Arbitration Act, G.L.c. 251, §1 *et seq.*, has been interpreted to bar the award of attorney's fees by an arbitrator,[29] such fees may be recoverable if the parties so provide or if they specify in their agreement that the arbitration shall be conducted and enforced in accordance with the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, which contains no prohibition of the award of attorney's fees. Also, since pre-award interest is available in arbitrations only by agreement of the parties,[30] claimant's counsel should consider the addition of interest to the remedies available in arbitration when drafting an arbitration agreement.

In short, one should be as specific as possible in an agreement as to the damages and other relief that an arbitrator can -- and cannot -- award.

Limitation of Remedies. In any award issued pursuant to this Agreement, the arbitrator(s) shall not award multiple damages, punitive damages, pre-award interest or attorney's fees.

22. Enforcement And Appeal

Pre-dispute arbitration provisions often include the following clause: "Judgment upon the award may be entered by any court having jurisdiction thereof." Such a clause makes it clear that the parties intend the award to be final, binding and enforceable. In order to reduce still further the likelihood of appeals, one might consider adding a provision that shifts attorney's fees and costs of any court action to enforce the award if it is not paid within a specified time, or if the award is unsuccessfully challenged in court.

Enforcement, Costs. The prevailing party shall be entitled to recover reasonable attorney's fees and costs incurred in connection with the enforcement of the award if it is not paid within 30 days of the issuance of the award, or if the non-prevailing party in the arbitration unsuccessfully challenges the award in any court.

Non-Binding Arbitration. If the parties wish to use arbitration as a method of obtaining a purely advisory opinion, they may provide for non-binding arbitration. Such arbitrations are often conducted by court-annexed programs and involve provisions for shifting of attorney's fees and costs if the advisory opinion of the arbitrators is not accepted and the party rejecting the opinion fails to obtain a better result at trial. Another method of bridging the gap between a purely advisory opinion and a binding one is to permit either party to introduce the arbitral decision as evidence at trial.

Appeal of Advisory Opinion, Costs. Any award issued by the arbitrator(s) pursuant to this agreement shall not be binding on the parties but shall be advisory only, provided, however, that if the parties do not accept the award within 30 days of its issuance, any party challenging the award by proceeding with litigation or binding arbitration shall pay the cost of the proceeding, including reasonable attorney's fees and costs of the opposing party, if the litigation or arbitration does not result in a more favorable decision than the original award.

23. Indemnification

One of the concerns expressed by some attorneys about ADR is that the parties may wind up in court anyway if a dispute arises about the conduct of the ADR proceeding. This risk can be controlled to some extent by providing, in a pre-dispute clause or a submission agreement, that if either party brings an action in court or resumes litigation which has already been filed, in violation of the agreement, the non-breaching party is entitled to indemnification for its costs and attorney's fees.

Indemnification. Except as otherwise provided in this Agreement, the parties shall rely solely on the procedures set forth herein to resolve any dispute arising from or related to this Agreement or the breach thereof. If any party to this Agreement files an action in court, or proceeds with litigation that has already been filed, in violation of this Agreement, that party shall indemnify the other party(ies) for their costs and attorney's fees incurred as a result of such violation.

24. Waiver Of Claims Against The Neutral

Most ADR proceedings are conducted either in accordance with rules incorporated by reference in the parties' agreement or pursuant to a submission agreement which sets forth the ground rules for the proceeding. In the rules promulgated by the AAA, CPR and other ADR organizations, a waiver of any claims against the neutral is included as a condition that the parties accept when they proceed under the rules. See, e.g., Rule 47(d) of the AAA Commercial Arbitration Rules ("Neither the AAA nor any arbitrator shall be liable to any party for any act or omissions in connection with any arbitration conducted under these rules."). In cases where the parties execute a submission agreement, the neutral is likely to insist on a waiver provision.

Waiver of Claims Against Neutral. The parties agree that [name of neutral and/or provider organization] shall not be liable to any party for any act or omission in connection with the services provided under this Agreement.

25. Miscellaneous Formal Requirements

Most pre-dispute clauses are contained in agreements which include "boilerplate" provisions dealing with such issues as merger, severability, waiver, modification, assignment and the formalities of execution of the agreement. Such provisions are worth including in post-dispute agreements as well. As in any agreement, drafters should consider which of these "boilerplate" provisions really need to be in the agreement. Some sample provisions are suggested below:

Entire Agreement. This Agreement constitutes the entire agreement of the parties as to the subject matter hereof and supersedes all previous oral or written agreements between the parties as to the subject matter hereof.

Modifications. No change, alteration or modification of this Agreement may be made except in a writing signed by the parties hereto.

Assignment. The rights and obligations of this Agreement shall be binding upon and inure to the benefit of the parties, and their respective heirs, successors and assigns. Neither party shall, without the prior written consent of the other, assign this Agreement or any rights or obligations hereunder.

Severability. If any term or provision of this Agreement shall be held or deemed to be invalid, inoperative or unenforceable to any extent by a court of competent jurisdiction, such circumstance shall in no way affect any other term or provision of this Agreement, the application of such term or provision in any other circumstances, or the validity or enforceability of this Agreement.

Jurisdiction. The parties to this Agreement hereby submit themselves to the personal jurisdiction of the [courts of the Commonwealth of Massachusetts] [federal District Court of Massachusetts] for purposes of the enforcement of a judgment on any claim arising from or relating to this Agreement or a breach thereof.

Language. Any [arbitration] [mediation] conducted under this Agreement shall be conducted in [English].

Captions. The captions herein have been inserted solely for convenience of reference and shall in no way define, limit or describe the scope or substance of any provision of this Agreement.

Notices. All notices and other communications hereunder shall be in writing and shall be deemed to have been given three days after having been mailed by first-class, registered or certified mail, or 12 hours after having been delivered or sent by facsimile, to the addresses shown at the head of this Agreement or to such other addresses as the parties shall have furnished to each other in writing.

Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, and all of which together shall be deemed to be one and the same instrument.

Conclusion

There is no "ideal" dispute resolution clause for every contract. Neither the parties to an agreement nor their attorneys can know in advance what disputes might arise, and even if a dispute has already arisen and the parties have agreed to submit the matter to some form of ADR, the parties cannot anticipate unerringly the manner in which the resolution of the dispute will

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Life Insurance Trustees Discover Unexpected Professional Liability

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protection is the systematic and professional fulfillment of the duties of trusteeship. Some procedures that you may implement include:

1. Obtain an outside consultant to review all current and future insurance policies held in trust.

2. Ask agents for an inforce ledger of all policies annually, at both the current dividend rate and 1 percent below current dividends.

3. Carefully document and retain all records related to Crummey notices.

4. Systematically notify both beneficiaries and grantors of any financial downgradings of insurance companies and dividend rate reductions that may occur on policies owned.

5. Carefully review the trust document, its specific powers and exculpatory clause before accepting the role as trustee.

6. Avoid all transactions that could have the appearance of a conflict of interest.

7. Permanently retain correspondence, illustrations and analysis related to policy design, company selection and the amount of insurance benefit purchased, particularly if you were directly involved in this process.

While it may be five or 10 years before an increasing number of trustee liability cases manifest, it is important today for trustees to take precautions to protect themselves from professional liability. Through better understanding of the full risks of trusteeship along with the inherent complexity of life insurance policies, you will be better prepared to fulfill your duties. Properly designed, funded and administered, irrevocable life insurance trusts are an outstanding tax and liquidity planning vehicle. As such, their continued popularity is likely to expand. Those trustees who are fully versed in the responsibilities and complexities of insurance trusts will be most successful and certainly will be able to sleep with greater peace of mind.

The author is conducting a study on legal cases that have been filed concerning life insurance trusts. Anyone interested in providing cases for the study should contact Mark Donohue at (617) 731-4000.

Lawyers Ponder Impact Of $47M Tax Refund

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billion, would take place in September 1983 or earlier if the company so requested with a 24-hour written notice.

On Monday, June 6, 1983, Charles Koch deposited $200 million in an escrow fund. That same day, William Koch moved to establish 25 Delaware corporations. By Thursday, June 9, William had transferred his Koch Industries stock to the so-called Subchapter S corporations; that afternoon, he learned that Koch Industries had sent notice of a closing the next day, June 10.

The Massachusetts Department of Revenue, in its pursuit of what it claimed was $19 million in state taxes owed by Koch (interest brought that amount to the $47 million awarded him six weeks ago), contended that Koch's assignment of his shares of Koch Industries stock to the Delaware corporations made the agreement he had with his brother "a done deal," which was subject to Massachusetts taxes.

But the Appellate Tax Board concluded that Koch's transfer of the shares of stock "was not just a formality, but was done in pursuit of [his] long-range investment and business objectives" and that he had not received payment for the shares and owed no state income tax for the capital gain attributable to the amount Koch Industries paid for them.

The Appeals Court disagreed and overturned the ATB ruling, but the SJC held that the board's findings were based on "substantial evidence" and supported the conclusion that the Delaware corporations, not Koch, had sold the stock.

DOR General Counsel Frederick D. Herberich argues otherwise. "We say that when he [William Koch] purported to assign his share of Koch Industries to his Delaware S corporations, nothing of substance changed in the deal," he says. "And, indeed, his so-called business plan, which was that he wanted to diversify his investments, couldn't have been carried out except for cash. ... It did not further the business plan to transfer those stocks to the Delaware corporations because the business plan needed cash, not stocks, to be implemented."

Further evidence of "a done deal," Herberich states, was provided by Charles Koch's deposit of $200 million in escrow to pay for William Koch's stock. "Would you put $200 million on deposit if you didn't mean to carry out the deal?" he asks.

For Herberich, Koch's actions were "solely a case of tax avoidance." To demonstrate his point, the DOR counsel poses and then answers his own rhetorical question: "At what point do we permit the taxpayer to change the form of his transaction that has no economic substance whatsoever? The only reason for the change in form is to avoid taxes."

Herberich expects that the effect of the SJC decision in Koch's favor will be to "foment a tremendous amount of litigation. We [DOR] are going to insist that substance over form prevails, and the taxpayers and their representatives will challenge us every time."

Not unexpectedly, Hines' interpretation of the SJC decision and its impact differs from Herberich's.

Hines sees the case raising the question — "To what extent are you safe in locating your intangibles [assets] in Delaware?" — and the SJC answering it this way: "As long as you get them out of this state before the sale is a done deal."

The question is being asked frequently, Hines reports. "The cutting edge of state tax law these days is what can be moved out of state," he says. "A loss in this case would have chilled the use of Delaware holding companies [as an out-of-state destination]. A victory makes them more desirable than ever."

Delaware, Hines explains, does not tax companies whose sole assets are intangible. If Massachusetts-based multinational companies transfer their intangible assets to Delaware before they are sold, they are not subject to Massachusetts taxes, he says.

Still, he cautions against overreliance on the SJC decision. "I wouldn't encourage anybody to rely on this case as saying you can transfer anytime before the final deal," he says. "In most cases, after the P&S is signed, it's too late."

Hines also notes that in 1983, when Koch transferred his assets to the Delaware corporations, Massachusetts was taxing S corporations, whose income is taxed to the shareholders and not the companies, the same way it taxed C corporations, which do pay taxes.

"While Koch's gain on the redemption passed through to his individual return for federal purposes, it did not flow through for Massachusetts purposes," Hines says. "And since the Delaware corporations had no nexus with the commonwealth, these gains escaped tax altogether in the commonwealth." In 1986, the state amended its law to recognize S corporations but did not make the change retroactive to 1983.

Like Hines, Boston tax specialist John S. Brown advises caution in interpreting the ramifications of the Koch case for corporate practice in this state.

"It's a bit of an overstatement to say that this case is creating a new pattern of behavior," Brown said in an interview 10 days ago. "The point of the decision is that it looks like transfers that are made very close to the time of sale may be effective for tax purposes."

Brown acknowledges nonetheless that, in the wake of the SJC decision, "any large company that is going to sell a subsidiary or an asset might think, 'Shouldn't we put it in a Delaware subsidiary?'" If that company looks to the decision in Koch for guidance, it should do so, Brown says, mindful that it was "timing" in that case that "created an inference."

In the end, the decision itself could create "a drawback," Brown suggests, "a tightening of the rules in reaction.

"This is a very favorable decision to the taxpayer. Will they [the SJC] be as favorable the next time? Who knows?"

Drafting ADR Contract Provisions: Part 2

(Continued from page 50)

unfold. Nevertheless, in drafting pre-dispute clauses and submission agreements, one can often create a structure which accomplishes the client's major objectives (e.g., specifying the location of proceeding or the qualifications of the neutrals).

While not every case is suitable for alternative dispute resolution,[31] in most cases ADR should be considered as an option. In many contracts, a mediation/arbitration ("med/arb") provision, which gives the parties an opportunity to resolve disputes in a flexible manner but assures them the certainty of a final resolution if mediation fails, should be considered. If the parties to a dispute already have a contract with a dispute resolution provision (e.g., an AAA arbitration clause), their attorneys should consider "tailoring" the process, by further agreement, to the specifics of the dispute.

In short, ADR contract clauses can be used in a variety of ways to structure the ground rules for dispute resolution so that the client not only saves time and expense, but also achieves a more satisfactory result.

Endnotes

[11]The recent case of *White v. Holton* (Middlesex Superior Court No. 92-7915-E, Lawyers Weekly No. 12-215-93), suggests that the provisions of §23C will be strictly construed. In *White*, the court ruled that a mediation conducted without a written agreement, by a mediator who lacked 30 hours of training, was not entitled to the protection of the statute.

[12]*See* P. Liacos, "Handbook of Massachusetts Evidence," §4.6 (M. Brodin & M. Avery, eds. 1994). Although the parties' conduct and statements made in the course of settlement discussions (as distinct from the "offers" themselves) are inadmissible under Fed. R. Evid. 408 on the issue of liability, "Massachusetts law is to the contrary." Id. at 190. In addition, neither Rule 408 nor the common law rule is a bar to discovery since Rule 26 of both the Federal and Massachusetts Rules of Civil Procedure permit discovery of non-admissible information if it is "reasonably calculated to lead to the discovery of admissible evidence." If G.L.c. 233, §23C applies, however, the evidence should be immune from discovery.

[13]Disclosure by the arbitrator is generally prohibited by ethical rules. *See, e.g.*, AAA Code of Ethics, Canon VI(B). In addition, the AAA Rules state that the arbitrator "shall maintain the privacy of the hearings." Commercial Arbitration Rule 25.

[14]G.L.c. 251, §12 provides that an arbitration award may be vacated if the arbitrator refused to hear material evidence. Section 10 of the Federal Arbitration Act contains a similar provision. *See* 9 U.S.C. §10(c).

[15]*See* C. Sapers & D. Hoffman, "Dispositive Motions in Arbitration Proceedings," 47 Arb. J. 36 (March 1992).

[16]Much of the discussion in this section is based on insights contained in C. Sapers, "Legal Cases and Materials for the Construction Professional," chapter 12 (unpublished manuscript 1993).

[17]*See* G.L.c. 251, §2A.

[18]*See* C. Sapers, "Cases and Materials," 827 (1993) (citing *Baesler v. Continental Grain Co.*, 900 F.2d 1193 (8th Cir. 1990); *Protective Life Insurance Corp. v. Lincoln National Life Insurance Corp.*, 873 F.2d 281 (11th Cir. 1989); *Weyerhauser Company v. Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984); contra, *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (3d Cir. 1975).

[19]In *New England Energy, Inc. v. Keystone Shipping*, 855 F.2d 1 (1st Cir. 1988), the court (applying Massachusetts law) did not have to reach this issue because the parties' contracts were silent on the issue of consolidation. Accordingly, the Massachusetts statute could be enforced without violating the Supremacy Clause, and the court held that the two arbitrations should be consolidated.

[20]*See Volt Info. Sci., Inc. v. Board of Trustees of Leland Stanford, Jr., Univ.*, 489 U.S. 468 (1989) (upholding the parties' election of "the law of the place where the Project is located" as a deliberate choice of California over federal law).

[21]California, Florida and Georgia have laws similar to the Massachusetts statute. *See, e.g.*, Calif. Title 9, Section 1281.3.

[22]G.L.c. 251, §2A.

[23]*See Volt Info. Sci., Inc. v. Board of Trustees of Leland Stanford, Jr., Univ., 489 U.S. 468 (1989).*

[24]In a variant called "night baseball," the arbitrator does not know about the parties' arrangement and issues an award, that amount is then adjusted, as per the parties' agreement, to whichever final offer is closer to the arbitrator's award. Bracketing of an arbitration award can also be done without informing the arbitrators so as not to influence their decisionmaking.

[25]*See, e.g., Raytheon Co. v. Automated Business Systems, Inc.*, 882 F.2d 6 (1st Cir. 1989) (upholding arbitral award of punitive damages).

[26]*See, e.g., Raytheon Co. v. Automated Business Systems, Inc.*, 882 F.2d 6 (1st Cir. 1989).

[27]*See id.*, 882 F.2d at 12 ("Parties that [] wish arbitration provisions to exclude punitive damages claims are free to draft agreements that do so explicitly.")

[28]*See* J. Myers, "Arbitration Awards," in Commercial Arbitration for the 1990s, 83 (R. Medalie, ed. 1991).

[29]*See Floors, Inc. v. B.G. Davis of New England, Inc.*, 380 Mass. 91 (1980).

[30]*See Sansone v. Metropolitan Property & Liability Insurance Co.*, 30 Mass. App. Ct. 660 (1991).

[31]For example, ADR is often unsuitable for civil rights and civil liberties matters or other cases in which the parties may need a determination by a court as to what the law is. For a general discussion concerning the suitability of particular cases for various ADR processes, *see* F. Sander & S. Goldberg, "Making the Right Choice," 79 ABA Journal 66 (November, 1993).

TRIAL REPORTS

(Continued from page 47)

nals and 3 1/2 years of litigation.

* * *

Negligence

Legal Malpractice — Insurer's Failure To Settle

Type of injuries: Legal malpractice

Court/case #: Superior Court (docket number withheld)

Judge or jury: N/A

Damages awarded or settled: Settled

Amount: $500,000

Attorney for the plaintiff: Herbert Abrams, Barry C. Klickstein, Boston

Attorney for the defendant: Withheld

Insurance carrier: N/A

Name of case: Withheld

Other useful information: G.L., a New York lawyer, was engaged in 1967 to represent M.H.C., Inc., to file an antitrust suit in U.S. District Court. An order of dismissal was entered in 1970 as a result of G.L.'s failure to notify the clerk of court of his change of address when he moved his law offices in 1968 from Yonkers to New York City. In G.L.'s affidavit filed in the U.S. Circuit Court of Appeals requesting that the order of dismissal be vacated, he admitted that he failed to notify the clerk of his change of address resulting in the dismissal, claiming his failure to notify was the result of inadvertence and excusable neglect. G.L.'s motion to vacate the order of dismissal was denied on appeal. In 1968, G.L. had a $500,000 "occurrence type" malpractice policy covering him for all errors or omissions which occurred during the policy term. In 1970, G.L. ceased to carry malpractice insurance, having entered public service.

M.H.C., Inc., did not learn of the dismissal until sometime after denial of relief by the Court of Appeals, and commenced suit through an assignee against G.L. and his partners in New York, which was dismissed on a technicality after years of delay. In the interim, in 1979 G.L. died intestate. Letters of administration issued in 1989 (14 years later) to a public administrator, against whom the assignee filed a complaint in 1990 in New York alleging that G.L. was negligent in failing to notify the clerk of the court of his change of address, which resulted in the dismissal of M.H.C., Inc.'s, antitrust suit. The insurer refused to defend on behalf of the public administrator, claiming that it did not insure G.L. for malpractice at the time the malpractice suit arose. In November 1990, a default was entered against the public administrator, and after a hearing on damages, judgment was entered in June 1991. Subsequently, the public administrator assigned all his rights, claims and choses in action against the insurer to M.H.C., Inc.'s, assignee who further assigned its rights against the insurer to the plaintiff.

In February 1993, local counsel was engaged with authority to commence suit on the judgment against the insurer, alleging its bad faith failure to defend and/or settle within the policy limits. Counsel faced the obvious problems of adverse decisions in prior New York proceedings as well as a 25-year-old case-in-chief and gaps in G.L.'s insurance coverage. Even more troubling was a notation in the docket of a prior New York proceeding against the insurer indicating "dismissed with prejudice."

Prior to the actual complaint being filed, counsel for the plaintiff delivered a copy of the proposed complaint to insurer's general counsel, who referred the controversy to local defense counsel with whom settlement discussions began. During the initial course of these discussions, plaintiff provided defense counsel with a comprehensive review of the law. The complaint was filed in May 1993, and after further negotiations and an appearance before the court on a preliminary discovery matter, a settlement was reached upon full payment of the $500,000 policy issued by the insurer in 1968, 25 years earlier.