



SELECTED ADR PROVISIONS

A SIMPLE, BROAD 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 [insert ADR service of your choice] in accordance with its commercial [or other] Arbitration Rules and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

TWO-STEP ADR CLAUSE (MEDIATION / ADJUDICATION)

We, the undersigned, do hereby agree to submit all manner of disputes, controversies, differences, claims or demands of any kind relating to or arising out of this contract to a two-step dispute resolution process administered by [insert ADR service of your choice].

This two-step process shall begin with mediation before a member of the [insert ADR service of your choice] panel followed, if necessary, by (select either) final and binding arbitration (OR) trial on order of reference pursuant to CCP §638(1) before a [insert ADR service of your choice] panelist to be agreed upon by the parties.

A reference can often be thought of as practically the same as court in that all rules of evidence and rights of appeal apply - it's just done privately, scheduled conveniently for the parties and in a private office. The following is proposed by a major ADR service. What are its positive and negative aspects?

Except as provided herein, no civil action with respect to any dispute, claim or controversy arising out of or relating to this Agreement may be commenced until the matter has been submitted to [insert ADR service of your choice] , or its successor, for mediation. Either party may commence mediation by providing to [insert ADR service of your choice] and the other party a written request for mediation, setting forth the subject of the dispute and the relief requested. The parties will cooperate with [insert ADR service of your choice] and with one another in selecting a mediator from [insert ADR service of your choice] ' panel of neutrals, and in scheduling the mediation proceedings. The parties covenant that they will participate in the mediation in good faith, and that they will share equally in its costs. All offers, promises, conduct and statements, whether oral or written, made in the course of the mediation by any of the parties, their agents, employees, experts and attorneys, and by the mediator and any [insert ADR service of your choice] employees, are confidential, privileged and inadmissible for any purpose, including impeachment, in any litigation or other proceeding involving the parties, provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the mediation. Either party may seek equitable relief prior to the mediation to preserve the status quo pending the completion of that process. Except for such an action to obtain equitable relief, neither party may commence a civil action with respect to the matters submitted to mediation until after the completion of the initial mediation session, or 45 days after the date of filing the written request for mediation, whichever occurs first. Mediation may continue after the commencement of a civil action, if the parties so desire.

This Clause may be enforced by any Court of competent jurisdiction, and the party seeking enforcement shall be entitled to an award of all costs, fees and expenses, including attorney's fees, to be paid by the

party against whom enforcement is ordered. Do you prefer the current standard real estate mediation / arbitration clause which has the 'teeth' of taking away from the party who does not appear in mediation rights of an attorney fees recovery even if he becomes the prevailing party. Do you think a "penalty" to require a party to come to a mediation makes sense? Are you surprised to learn that many disputants who initially think the fulfilling of a mediation clause is a waste of time end up settling by the end of the mediation? Why do you think that's the case? Does that change any of your views?

MED-ARB

MED / ARB Clause recommended Submission Agreement for WIPO [World Intellectual Property Organization based in Geneva] Mediation followed, in the absence of a settlement, by Arbitration.

"We, the undersigned parties, hereby agree to submit to mediation in accordance with the WIPO Mediation Rules the following dispute: [Brief description of the dispute] The place of mediation shall be ... The language to be used in the mediation shall be ..We further agree that, if, and to the extent that, the dispute has not been settled pursuant to the mediation within [60][90] days of the commencement of the mediation, it shall, upon the filing of a Request for Arbitration by either party, be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules. Alternatively, if, before the expiration of the said period of [60][90] days, either party fails to participate or to continue to participate in the mediation, the dispute shall, upon the filing of a Request for Arbitration by the other party, be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules. The arbitral tribunal shall consist of [three arbitrators][a sole arbitrator]. The place of arbitration shall be .. The language to be used in the arbitral proceedings shall be ... The dispute referred to arbitration shall be decided in accordance with the law of .."

BASEBALL VARIANT

If a monetary dispute arises from or relates to this contract, the parties agree first to submit it to mediation administered by the [insert ADR service of your choice] under its Mediation Rules and, if unable to agree on a settlement amount, to submit their dispute to a neutral person appointed by the [insert ADR service of your choice] who shall select between their final negotiated positions, that selection being binding on the parties.

NIGHT BASEBALL

In the event that the arbitrator denies the claim or awards an amount less than the minimum amount of [specify], then this minimum amount shall be paid to the claimant. Should the arbitrator's award exceed the maximum amount of [specify], then only this maximum amount shall be paid to the claimant. It is further understood between the parties that, if the arbitrator awards an amount between the minimum and the maximum stipulated range, then the exact awarded amount will be paid to the claimant. The parties further agree that this agreement is private between them and will not be disclosed to the arbitrator.

HIGH / LOW

Any award of the arbitrator in favor of [specify party] and against [specify party] shall be at least [specify a dollar amount] but shall not exceed [specify a dollar amount]. [Specify a party] expressly waives any claim in

excess of [specify a dollar amount] and agrees that its recovery shall not exceed that amount. Any such award shall be in satisfaction of all claims by [specify a party] against [specify a party].

Do you prefer that the Arbitrator knows initially the High / Low numbers or only discovers the selected High / Low numbers after his or her award? Would you be concerned that if the Arbitrator knew the numbers, he or she would tend to want to "split the baby."

ARBITRATION-MEDIATION (rarely used)

Any controversy or claim arising from or relating to this contract or the breach thereof shall first be submitted to arbitration administered by the [insert ADR service of your choice] in accordance with its [applicable] rules. The award rendered by the arbitrator under the rules shall be sealed for [a specified number] days while the parties attempt to mediate the dispute. The mediation shall be administered by the [insert ADR service of your choice] under its [applicable] mediation rules. The mediator [shall] [shall not] be the arbitrator previously appointed to hear the dispute. If the mediation is successful, the parties agree that the award of the arbitrator shall be [destroyed/ transmitted to the parties for their information]. If the mediation is unsuccessful, the award of the arbitrator shall be issued and transmitted to the parties, and judgment on the award may be entered in any court having jurisdiction thereof.

DISCOVERY — DEPOSITIONS

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 deems such additional discovery relevant and appropriate. Depositions shall be limited to a maximum of [three] [insert number] per party 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)] [chair of the arbitration panel], and for good cause shown. Each deposition shall be limited to a maximum of [three hours] [six hours] [one day's] duration. All objections are reserved for the arbitration hearing except for objections based on privilege and proprietary or confidential information.

DISCOVERY - DOCUMENTS (no sanction power provided)

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 documents [relevant to the issues raised by any claim or counter-claim] [on which the producing party may rely in support of or in opposition to any claim or defense]. Any dispute regarding discovery, or the relevance or scope thereof, shall be determined by the [arbitrator(s)] [chair of the arbitration panel], which determination shall be conclusive. All discovery shall be completed within [45] [60] days following the appointment of the arbitrator(s).

REMEDY LIMITATION EXAMPLES

1. The arbitrators 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.
2. In no event shall an award in an arbitration initiated under this clause exceed \$_____.
3. In no event shall an award in an arbitration initiated under this clause exceed \$_____ for any claimant.
4. The arbitrator(s) shall not award consequential damages in any arbitration initiated under this section.
5. Any award in an arbitration initiated under this clause 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.
6. If the arbitrator(s) find liability in any arbitration initiated under this clause, they shall award liquidated damages in the amount of \$_____.
7. Any monetary award in an arbitration initiated under this clause shall include pre-award interest at the rate of ___% from the time of the act or acts giving rise to the award.

APPEAL (usually none)

Within 30 days of receipt of any award (which shall not be binding if an appeal is taken), any party may notify the [insert ADR service of your choice] of an intention to appeal to a second arbitral tribunal, constituted in the same manner as the initial tribunal. The appeal tribunal shall be entitled to adopt the initial award as its own, modify the initial award or substitute its own award for the initial award. The appeal tribunal shall not modify or replace the initial award except [for manifest disregard of law or facts] [for clear errors of law or because of clear and convincing factual errors]. The award of the appeal tribunal shall be final and binding, and judgment may be entered by a court having jurisdiction thereof.