

## **“WHY ADR? WHY AAA?”**

**a seminar hosted by the American Arbitration Association and presented to the Mound City Bar Association on August 29, 2007. The written materials provide selected topics for possible inclusion in an arbitration agreement.**

**by**

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**The following are customized ADR provisions and topics for consideration in preparing an appropriate ADR clause within a contract:**

**1. The parties must select a forum for resolution of their dispute. Among the choices are:**

- a. American Arbitration Association**
- b. U.S. Arbitration & Mediation**
- c. Pinnacle**
- d. Other professional groups**
- e. Private**

**2. A critical item to consider is the scope of dispute or potential dispute that the parties wish to be subject to arbitration. The parties may decide that the agreement should be to arbitrate everything, no matter what is the dispute over the construction project. Or, they may want to limit the arbitration in one or more ways, such as:**

- a. Minimum or maximum dollar amount of dispute**
- b. Specific type of claims (fraud, tort, personal injury)**
- c. Claims involving non-parties to the arbitration agreement are excluded**
- d. Claims for emergency relief are excluded: TROs, injunctive relief.**

**3. Everyone should give thought to whether the agreement should include some provision on the applicable arbitration law that the parties wish to be in effect. Possible choices are:**

- a. To specify the law or leave silent**
- b. Federal law (Federal Arbitration Act, 9 U.S.C. §1-15)**
- c. Local law, such as Missouri Arbitration Act, Chapter 435 R.S.Mo. (modeled after the Uniform Arbitration Act)**
- d. If Missouri law applies, the draftsman needs to place the following language adjacent to or above the space provided for signature, in ten-point capital letters:**

**“THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.”**

**4. A determination should occur for the applicable substantive law. The choices include:**

- a. Federal**
- b. State**
- c. Silent (nothing is specified)**
- d. Declaration that the arbitrator does not have to follow any specific law**

**5. The arbitration provision can include specific procedural rules on how the arbitration will take place. Items to consider are:**

- a. Incorporation of the rules of a specific forum, such as AAA**
- b. Incorporation of rules of civil procedure of state or federal court**
- c. No rules (usually by being silent on this point)**
- d. Rules other than those specified above**

**6. Perhaps the most important decision in an arbitration is the selection of the arbitrator. Just like no lawyer actually “picks a jury,” arbitrators, while seemingly “selected” by the parties, typically are the product of elimination of potential arbitrators not acceptable to one of the parties, rather than the product of consensual choice and agreement. Even in those instances when the parties agree on an arbitrator and he or she is truly “selected,” the parties’ decision may be based more on culling out those rejected as unacceptable choices than on finding the one truly chosen by all concerned to be acceptable to all. Regardless, the opportunity is there to truly play a key role in finding the right arbitrator for everyone involved. Qualifications of the arbitrator that should be considered are:**

- a. Specific industry experience or license, such as lawyer, P.E., architect**
- b. Number of years' experience**
- c. Geographic location of arbitrator**
- d. Nationality of arbitrator**

**7. Generally, the number of arbitrators is determined by the parties’ agreement and their pre-determined choice on the financial threshold levels in moving from one to more than one arbitrator. The general choices in number of arbitrators are:**

- a. One
- b. Three
- c. If more than one, are any party appointed or are all of them truly independent
- d. Two out of three is enough or is a unanimous decision necessary?

8. There are many methods of selecting an arbitrator and to the extent possible, the agreement should so specify the method, so as to avoid later disagreement and possible stalemate. Possible choices include:

- a. Mutual agreement
- b. Ranking by parties with strikes from a pool of potential arbitrators
- c. Selection by court
- d. Selection by forum
- e. Selection by president of state or local bar associations

9. The location of the hearing is critical in many instances to a successful result, and certainly can aid in reducing costs and logistical considerations in having witnesses and other proof available on short notice at the hearing. All good advocates should request a specific location in the agreement where the arbitration will take place. Amazingly, many lawyers will not object, for they are focused on other items in the agreement or do not try many construction cases, so they view a venue provision to be unimportant or if important, it will be someone else's concern, at a later time. By contrast, others consider the hearing's location, much like the venue in a trial, to be an important factor in victory or defeat.

In reality, venue may be more important at a trial than at a hearing in arbitration. Arbitrators often travel from different states to hear cases, and they have a more national rather than local perspective, thus reducing the perception that the "locals" will win or the out-of-towners will be "home-towned." National arbitrators tend to be less focused on the place where the arbitration is occurring and more concentrated on deciding which party is entitled to a ruling in its favor. Regardless, location is still important and can be provided in the agreement as follows:

- a. Specified in the agreement
- b. Put into the demand for arbitration
- c. Provided by default as the location of the project

10. Discovery can be spelled out in the agreement, but it often is not mentioned or it is not given sufficient thought by lawyers prior to execution to the arbitration agreement. Possible options to consider on whether to include discovery requirements in the agreement are:

- a. None allowed
- b. No provision made
- c. As allowed by the Forum
- d. As allowed by federal or state rules
- e. Specific, defined discovery only such as five depositions, 8 hours each)

11. An arbitration agreement can address who will be the parties to the arbitration agreement. This sounds so simple, yet when not followed, leads to many problems. Possible parties to the agreement include:

- a. Corporations
- b. Individuals
- c. Incorporation by reference from another contract
- d. Third parties
- e. Assigns, successors

12. An arbitration agreement can include specific requirements on pre-hearing motions. This is not a typical provision but under the right conditions, it may be a very important item to include in the agreement.

13. The time for the hearing is seldom set out in the agreement. Invariably, one side wants the hearing to take place tomorrow and the other side is content with sometime in the next decade. The agreement can provide that this decision is:

- a. Left up to the arbitrators
- b. Specified in the agreement

14. What evidence should the arbitrator consider in reaching his or her decision? Unlike a traditional court of law, where the rules of evidence and the practices of the judge will dictate what goes into evidence, the parties to an arbitration agreement can make their own binding decisions about what evidence will be received. The agreement may include:

- a. No provision made
- b. All evidence allowed under the federal and/or state rules of evidence
- c. As allowed by the forum's rules, such as AAA
- d. Limited as decided by the arbitrators
- e. Use of subpoenas for evidence depositions of witnesses outside locale of hearing
- f. Hearsay
- g. Affidavits and declarations of witnesses

15. Although not typically an issue in Missouri construction disputes, some arbitration agreements spell out the language to be used at the hearing, such as:

- a. English
- b. Translators

16. The parties to the arbitration agreement should give consideration to the type of award they wish the arbitrator to render with his or her decision. There are several options from no explanation at all to a very detailed written opinion. Forms of the award can be:

- a. Standard (no reasons are provided for in the decision)
- b. Some reasoning provided in the written decision
- c. Complete findings of fact and conclusions of law

17. The agreement may also provide the time within which the arbitrator must render the decision after the evidence has been presented. A typical time period is 30 days. In addition, some parties wish to limit the arbitrator's decision to preset ranges such as

- a. Baseball (each side presents a number and the arbitrator must select one of the two numbers)
- b. High-low agreement (the parties agree but do not tell the arbitrators that no matter what the decision it will fit within the parties' preset range).

18. The arbitration agreement should cover the powers of the arbitrators. Possible considerations of what powers the arbitrator may have are:

- a. Same as judge
- b. "Just and equitable" result, per AAA Rules
- c. Specifically limit, such as no sanction power
- d. Interim relief, such as an accounting, TRO or preliminary injunction
- e. Specific performance
- f. Other non-monetary relief

19. The agreement may contain limitations on what can and cannot be awarded. Some parties wish to limit the scope of the award in one or more of the following ways:

- a. No punitive damages (except as allowed by statute)
- b. No consequential damages

**20. There are three ways that attorney fees can be awarded in an arbitration: They are:**

- a. By arbitration agreement**
- b. By statute**
- c. Request of all parties during arbitration**

**The parties should consider whether a specific provision should be included in the agreement to cover when and how the arbitrator can award attorney fees.**

**21. While typically not covered in the arbitration agreement, post-award relief is another consideration that parties should give after the award is rendered. Possible actions are:**

- a. Request to arbitrator for modification**
- b. Confirmation of Award in court per FAA, §9 or Chapter 435 R.S.Mo. (2000)**
- c. Convert award into judgment**

**22. An arbitration is not per se confidential, but the parties can make it confidential but incorporating such a provision into the agreement. Typically, the arbitrator is bound to confidentiality without the need for such a provision.**

**23. The parties may want to place a statute of limitations provision in the agreement.**