

# ARBITRATION AND MEDIATION

*GGI Litigation & Dispute Resolution (LDR)  
Extraordinary Practice Group Meeting*

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# ADR CLAUSES IN CONTRACTS

- The potential benefits of ADR:
  - Cost savings
  - Efficiency
  - Privacy
  - Customized Resolution
- To realize these benefits, make sure your ADR clauses address these issues and are enforceable.
- Do not forget about mediation on the front end. Consider using a mandatory mediation clause.

# Interpreting Mediation Clauses

- Is your client required to mediate the dispute before filing suit?
- Is mediation really a condition precedent to such litigation?
- Has the mandatory mediation provision been waived?
- Is the mediation clause really just a “cooling off” provision?

# Sample Mediation Clause

“If, despite the Parties’ attempts to mediate a dispute, such dispute remains unresolved 30 days after referral of the dispute to the senior officers of the Parties, as described in Section 23.1 (‘Administrative Committee Procedure’) (or such longer period as the Parties may agree to in writing), then the Parties may pursue litigation or other such rights and remedies as may be available under applicable laws and codes.”

# Interpreting ADR Clauses

- (Note: Different jurisdictions take different views.)
- The Eastern District of Virginia recently considered a contract dispute involving change orders in a construction project.
  - *Dominion Transmission, Inc. v. Precision Pipeline, Inc.*, 2013 U.S. Dist. LEXIS 159164 (E.D. Va. Nov. 6, 2013).

# Interpreting ADR Clauses

- In *Dominion Transmission*, the defendant moved to dismiss the plaintiff's contract claims for lack of subject matter jurisdiction because the plaintiff failed to submit the dispute to formal mediation pursuant to a "mandatory" mediation clause in the parties' contract.
  - *Dominion Transmission, Inc. v. Precision Pipeline, Inc.*, 2013 U.S. Dist. LEXIS 159164 (E.D. Va. Nov. 6, 2013).

**23.2 Mediation.** Provided that the Parties have been unable to resolve a dispute pursuant to the procedures set forth in Section 23.1 (Administrative Committee Procedure), the Parties will attempt to mediate a resolution of the dispute with the assistance of a qualified mediator to be chosen by agreement of the Parties. In the event that the Parties are unable to agree upon a qualified mediator, a mediator will be designated by the American Arbitration Association (“AAA”). Any such mediation will be held in Clarksburg, West Virginia (or another mutually agreed upon location) and conducted in accordance with the Construction Industry Mediation Rules of the AAA or by such other standards as established by the mediator.

# Interpreting ADR Clauses

- The district court dismissed the case, holding that the plaintiff had not abided by its contractual obligation to submit the dispute to formal mediation.
  - *Dominion Transmission, Inc. v. Precision Pipeline, Inc.*, 2013 U.S. Dist. LEXIS 159164 (E.D. Va. Nov. 6, 2013).



# ADR - Sample Clause

- In the event that a Dispute arises between Employer and Employee, the Party raising the Dispute hereby agrees to provide Notice of the basis for its Dispute to the other Party. To the extent that the Parties are unable to resolve the Dispute between themselves within 30 days of Notice of the Dispute being provided, the Parties agree to mediate the Dispute in \_\_\_\_\_, \_\_\_\_\_, and to employ the services of a mutually selected neutral affiliated with \_\_\_\_\_.

# ADR Clauses - Recap

- Mandatory ADR Clauses
  - Multi-Tiered, “Progressive” ADR Clauses
- Enforceability
  - Don’t leave it to chance

# FEDERAL ARBITRATION ACT

# Federal Arbitration Act (“FAA”)

- Codified at 9 U.S.C. §§ 1-16.
- Enacted in 1925, most recently amended in 1990.
- “A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable . . . .” (§ 2)
  - Embodies national policy favoring arbitration

# FAA Highlights

- Validity and enforcement of agreements to arbitrate (§ 2)
- Appointment of arbitrators or umpire (§ 5)
- Award of arbitrators; confirmation; jurisdiction; procedure (§ 9)
- Appeals (§ 16)

# FAA Preemption

- Preemption doctrine originates in Supremacy Clause
  - Validly enacted federal law supersedes inconsistent state law – federal preemption
- No express preemption clause in the FAA, but SCOTUS routinely holds that the FAA supersedes state requirements against binding arbitration agreements
  - In response to states' unequal treatment of these clauses

# FAA Preemption

- “In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”
  - *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S. Ct. 852, 858, 79 L. Ed. 2d 1 (1984).

# FAA Procedural Rules

- The FAA does not prevent “the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself.”
  - *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S. Ct. 1248, 1255–56, 103 L. Ed. 2d 488 (1989).
- Parties can still decide which procedural rules apply to their arbitration (such as state arbitration rules).
  - To be safe, express clear intent



# **VIRGINIA UNIFORM ARBITRATION ACT**

# Intersection of VUAA and FAA

- In order to determine whether parties have an agreement to arbitrate, Virginia courts apply Virginia contract law.
  - *Amchem Prod., Inc. v. Newport News Circuit Court Asbestos Cases*, 264 Va. 89, 96, 563 S.E.2d 739, 743 (2002).
- If an agreement falls under the FAA, courts apply the federal standard instead.
  - *Southland Corp. v. Keating*, 465 U.S. 1, 12, 104 S. Ct. 852, 859, 79 L. Ed. 2d 1 (1984).

# Virginia Uniform Arbitration Act

- Codified at Va. Code. §§ 8.01-577-581.016.
- Based on the Uniform Arbitration Act
- “A written agreement to submit any existing controversy to arbitration . . . is valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract.” (§ 8.01-581.01)

# Virginia Uniform Arbitration Act

## Arbitrator Selection

“If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and his successor has not been duly appointed, the court on application of a party shall appoint one or more arbitrators.”

Virginia Code § 8.01-581.03.

# Arbitrator Selection – Sample Clauses

- If the parties are unable to agree upon the selection of an arbitrator, a party may apply to the Circuit Court of the City of Richmond, Virginia, for the appointment of an arbitrator from The McCammon Group as provided by Section 8.01-581.03, Code of Virginia, as amended.
- The place of arbitration shall be the City of Richmond, Virginia. Except as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.

# AMERICAN ARBITRATION ASSOCIATION

# American Arbitration Association

- Founded in 1926 by merger
- “Faster and more cost effective than litigation”
- Does not itself arbitrate disputes, but provides a panel of potential arbitrators and administrative support

# AAA – Arbitrator Selection

- Helps parties select arbitrator based on type of case and preferences of parties
  - “vetted national roster of arbitrators”
- Parties rank and use “strike” system
- AAA can appoint arbitrator when parties cannot agree
- AAA facilitates conflict checks



# AAA – Standard Fee Schedule

Amount of Claim	Initial Filing Fee	Final Fee
Less than \$75,000	\$925	\$800
\$75,000 to less than \$150,000	\$1,925	\$1,375
\$150,000 to less than \$300,000	\$2,900	\$2,200
\$300,000 to less than \$500,000	\$4,400	\$3,850
\$500,000 to less than \$1,000,000	\$5,500	\$6,825
\$1,000,000 to less than \$10,000,000	\$7,700	\$8,475
\$10,000,000 and above	\$11,000 plus .01% of the claim amount above \$10,000,000 up to \$65,000	\$13,750
Undetermined Monetary Claims	\$7,700	\$8,475
Nonmonetary Claims*	\$3,500	\$2,750
Deficient Filing Fee	\$500	
Additional Party Fees	If there are more than two separately represented parties in the arbitration, an additional 10% of each fee contained in these fee schedules will be charged for each additional separately represented party. However, Additional Party Fees will not exceed 50% of the base fees contained in these fee schedules unless there are more than 10 separately represented parties. See below for additional details.	

# AAA – Flexible Fee Schedule

Amount of Claim	Initial Filing Fee	Proceed Fee	Final Fee
Less than \$75,000	Only available for claims \$150,000 and above		
\$75,000 to less than \$150,000			
\$150,000 to less than \$300,000	\$1,825	\$1,875	\$2,200
\$300,000 to less than \$500,000	\$2,200	\$3,300	\$3,850
\$500,000 to less than \$1,000,000	\$2,750	\$4,725	\$6,825
\$1,000,000 to less than \$10,000,000	\$3,850	\$6,275	\$8,475
\$10,000,000 and above	\$5,500	\$10,000 plus .01% of the claim amount above \$10,000,000 up to \$65,000	\$13,750
Undetermined Monetary Claims	\$3,850	\$6,275	\$8,475
Nonmonetary Claims*	\$2,200	\$2,475	\$2,750
Deficient Filing Fee	\$500		
Additional Party Fees	<p>If there are more than two separately represented parties in the arbitration, an additional 10% of each fee contained in these fee schedules will be charged for each additional separately represented party. However, Additional Party Fees will not exceed 50% of the base fees contained in these fee schedules unless there are more than 10 separately represented parties. See below for additional details.</p>		

# **JAMS (JUDICIAL ARBITRATION AND MEDIATION SERVICES)**

# JAMS

- Founded in 1979
- 26 “resolution centers” around the country
  - One in London
- Offers optional “Expedited Arbitration”
  - Limited discovery
  - One deposition per side
- Provides template clauses invoking JAMS

# JAMS - Costs

## Administrative Fees

For two-party matters, JAMS charges a \$1,500 Filing Fee, to be paid by the party initiating the Arbitration. JAMS also charges a \$1,500 Filing Fee for counterclaims. For matters involving three or more parties, the Filing Fee is \$2,000. A Case Management Fee of 12% will be assessed against all Professional Fees, including time spent for hearings, pre- and post-hearing reading and research and award preparation.

JAMS neutrals set their own hourly, partial and full-day rates. For information on individual neutrals' rates and the administrative fees, please contact JAMS at 800.352.5267. The fee structure is subject to change.



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# Thank you



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