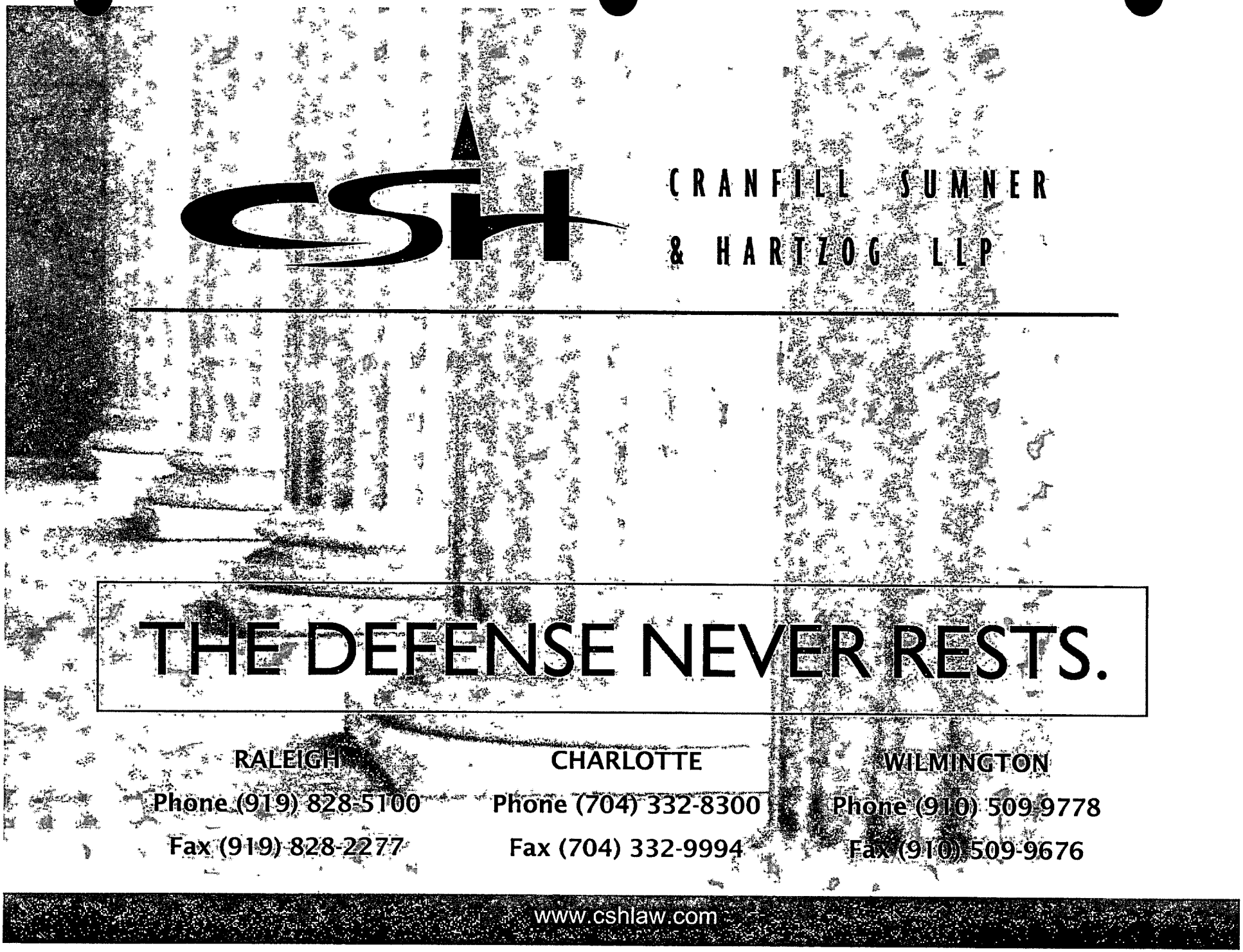
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Clause Drafting in ADR Agreements

Campbell Law Review Symposium

February 22, 2008

Richard T. Boyette

Why ADR?

- Only 1-2% of lawsuits end up with a jury verdict.
- Costs and time involved drive most disputes to settle.
- Disputes are resolved with:
  - privately negotiated settlement
  -facilitated settlement (mediation)
  -arbitrated settlement
  (or a combination of these methods)

Types of ADR

1. Arbitration

- Final and binding
- Decided by "experienced neutrals"
- Rules and procedures can be tailored to suit the specific industry or dispute
- Provides an expedited process with minimal discovery and less formality than litigation.

Types of ADR

1. Arbitration (continued)

- Federal Arbitration Act **9 U.S.C. § 1-16 (1994)** applies if it involves a maritime transaction or interstate commerce
- If not, see Revised Uniform Arbitration Act **N.C.G.S. 1-569.1-31 (2004)**
- Under both statutes arbitration clauses are "valid, irrevocable and enforceable save upon such ground as exist at law or equity for the revocation of any contract." **9 U.S.C. § 2; N.C.G.S. §1-569.6(a)**

Types of ADR

2. Mediation

- Usually voluntary (but see, **N.C. G. S. § 7A-38.1**)
- Non-binding
- Neutral mediator helps the parties negotiate and resolve disputes
- "Facilitated Settlement Negotiations"
- Non-adversarial

Types of ADR

2. Mediation (continued)

- Often helps preserve an on-going relationship
- Can provide creative solutions outside win/lose of courtroom
- Compromise is the focus
- Can provide preview of litigation or reality check for clients

Types of ADR

3. **Other Forms of ADR**

   A. Step Clauses specify deadlines for negotiation, mediation, and arbitration

   – Gives firm timeline with defined trigger points

   – allows for voluntary settlement and/or mediation before required arbitration

   B. Appraisal/Valuation

   – Used when there is a transfer of ownership interest

   – Anytime there is a desire for independent determination of value

Types of ADR

3. **Other Forms of ADR (continued)**

C. Other types of ADR mentioned in the mediation rules

1)Neutral Evaluation –Rule 11

- Done early on, gives value, identifies strengths/weaknesses

RULE 11. RULES FOR NEUTRAL EVALUATION

A. **Nature of Neutral Evaluation.** Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing candid assessment of liability, settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

B. **When Conference is to be Held.** As a guiding principle, the neutral evaluation conference should be held at an early stage of the case after the time for the filing of answers has expired but in advance of the expiration of the discovery period.

C. **Pre-Conference Submissions.** No later than twenty (20) days prior to the date established for the neutral evaluation conference to begin, each party shall furnish the evaluator with written information about the case, and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the party's case, shall not be more than five (5) pages in length, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the Court.

D. **Replies to Pre-Conference Submissions.** No later than ten (10) days prior to the date established for the neutral evaluation conference to begin any party may, but is not required to, send additional written information not exceeding three (3) pages in length to the evaluator, responding to the submission of an opposing party. The response shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the Court.

E. **Conference Procedure.** Prior to a neutral evaluation conference, the evaluator may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. **Modification of Procedure.** Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. **Evaluator's Duties.**

(1) *Evaluator's opening statement.* At the beginning of the conference the evaluator shall define and describe the following points to the parties in addition to those matters set out in Rule 10.C.(2)(b):

(a) The fact that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party, and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the Parties.

(2) *Oral report to parties by evaluator.* In addition to the written report to the Court required under these rules, at the conclusion of the neutral evaluation conference the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case. Such opinion shall include a candid assessment of liability, estimated settlement value, and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefore. The evaluator shall not reduce his or her oral report to writing, and shall not inform the Court thereof.

(3) *Report of evaluator to court.* Within ten (10) days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the Court using an AOC form. The evaluator's report shall inform the court when and where the evaluation was held, the names of those who attended, and the names of any party, attorney, or insurance company representative known to the evaluator to have been absent from the neutral evaluation without permission. The report shall also inform the court whether or not an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the court. Local rules shall not require the evaluator to send a copy of any agreement reached by the parties to the court.

H. **Evaluator's Authority to Assist Negotiations.** If all parties to the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions.

[Adopted effective November 21, 2002; Amended Effective March 4, 2004.]

Rule 11

RULE 11. RULES FOR NEUTRAL EVALUATION

modify the procedures required by these rules for neutral evaluation.

G. Evaluator's Duties

A. Nature of Neutral Evaluation. Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing candid assessment of liability, settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

other parties pursuant to this paragraph shall not

conference, the evaluator shall file a written report

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[Adopted effective November 21, 2002; Amended Effective March 4, 2004.]

F. Modification of Procedure. Subject to approval of the evaluator, the parties may agree to

[Adopted effective November 21, 2002; Amended Effective March 4, 2004.]

Types of ADR

3. **Other Forms of ADR (continued)**

C. Other types of ADR mentioned in the mediation rules

2)Summary Trials-Rule 13

- Jury or "Judge"; combine with settlement conference

RULE 13. RULES FOR SUMMARY TRIALS

In a summary bench trial, evidence is presented in a summary fashion to a presiding officer, who shall render a verdict. In a summary jury trial, evidence is presented in—summary fashion to a privately procured jury, which shall render a verdict. The goal of summary trials is to obtain an accurate prediction of the ultimate verdict of a full civil trial as an aid to the parties and their settlement efforts.

Rule 23 of the General Rules of Practice also provide for summary jury trials. While parties may request of the Court permission to utilize that process, it may not be substituted in lieu of mediated settlement conferences or other procedures outlined in these rules.

A. Pre-Summary Trial Conference.

Prior to the summary trial, counsel for the parties shall attend a conference with the presiding officer selected by the parties pursuant to Rule 10.C.(10). That presiding officer shall issue an order which shall:

(1) Confirm the completion of discovery or set a date for the completion;

(2) Order that all statements made by counsel in the summary trial shall be founded on admissible evidence, either documented by deposition or other discovery previously filed and served, or by affidavits of the witnesses;

(3) Schedule all outstanding motions for hearing;

(4) Set dates by which the parties exchange:

(a) A list of parties' respective issues and contentions for trial;

(b) A preview of the party's presentation, including notations as to the document (e.g. deposition, affidavit, letter, contract) which supports that evidentiary statement;

(c) All documents or other evidence upon which each party will rely in making its presentation; and

(d) All exhibits to be presented at the summary trial.

(5) Set the date by which the parties shall enter a stipulation, subject to the presiding officer's approval, detailing the time allowable for jury selection, opening statements, the presentation of evidence, and closing arguments (total time is usually limited to one day);

(6) Establish a procedure by which private, paid jurors will be located and assembled by the parties if a summary jury trial is to held and set the date by which the parties shall submit agreed upon jury instructions, jury selection questionnaire, and the number of potential jurors to be questioned and seated;

(7) Set a date for the summary jury trial; and

(8) Address such other matters as are necessary to place the matter in a posture for summary trial.

B. **Presiding Officer to Issue Order if Parties Unable to Agree.** If the parties are unable to agree upon the dates and procedures set out in Section A. of this Rule, the presiding officer shall issue an order which addresses all matters necessary to place the case in a posture for summary trial.

C. **Stipulation to a Binding Summary Trial.** At any time prior to the rendering of the verdict, the parties may stipulate that the summary trial be binding and the verdict become a final judgment. The parties may also make a binding high/low agreement, wherein a verdict below a stipulated floor or above a stipulated ceiling would be rejected in favor of the floor or ceiling.

D. **Evidentiary Motions.** Counsel shall exchange and file motion in limine and other evidentiary matters, which shall be heard prior to the trial. Counsel shall agree prior to the hearing of said motions as to whether the presiding officer's rulings will be binding in all subsequent hearings or non-binding and limited to the summary trial.

E. **Jury Selection.** In the case of a summary jury trial, potential jurors shall be selected in accordance with the procedure set out in the pre-summary trial order. These jurors shall complete a questionnaire previously stipulated to by the parties. Eighteen jurors or such lesser number as the parties agree shall submit to questioning by the presiding officer and each party for such time as is allowed pursuant to the Summary Trial Pre-trial Order. Each party shall then have three peremptory challenges, to be taken alternately, beginning with the plaintiff. Following the exercise of all peremptory challenges, the first twelve seated jurors, or such lesser number as the parties may agree, shall constitute the panel.

After the jury is seated, the presiding officer in his/her discretion, may describe the issues and procedures to be used in presenting the summary jury trial. The jury shall not be informed of the non-binding nature of the proceeding, so as not to diminish the seriousness with which they consider the matter and in the event the parties later stipulate to a binding proceeding.

F. **Presentation of Evidence and Arguments of Counsel.** Each party may make a brief opening statement, following which each side shall present its case within the time limits set in the Summary Trial Pre-trial Order. Each party may reserve a portion of its time for rebuttal or surrebuttal evidence. Although closing arguments are generally omitted, subject to the presiding officer's discretion and the parties' agreement, each party may be allowed to make closing arguments within the time limits previously established.

Evidence shall be presented in summary fashion by the attorneys for each party without live testimony. Where the credibility of a witness is important the witness may testify in person or by video deposition. All statements of counsel shall be founded on evidence that would be admissible at trial and documented by prior discovery.

Affidavits offered into evidence shall be served upon opposing parties far enough in advance of the proceeding to allow time for affiants to be deposed. Counsel may read portions of the deposition to the jury. Photographs, exhibits, documentary evidence and accurate summaries of evidence through charts, diagrams, evidence notebooks, or other visual means are encouraged, but shall be stipulated by both parties or approved by the presiding officer.

G. **Jury Charge.** In a summary jury trial, following the presentation of evidence by both parties, the presiding officer shall give a brief charge to the jury, relying on predetermined jury instructions and such additional instructions as the presiding officer deems appropriate.

H. **Deliberation and Verdict.** In a summary jury trial, the presiding officer shall inform the jurors that they should attempt to return a unanimous verdict. The jury shall be given a verdict form stipulated to by the parties or approved by the presiding officer. The

Rule 13

form may include specific interrogatories, a general liability inquiry and/or an inquiry as to damages. If, after diligent efforts and a reasonable time, the jury is unable to reach a unanimous verdict, the presiding officer may recall the jurors and encourage them to reach a verdict quickly, and/or inform them that they may return separate verdicts, for which purpose the presiding officer may distribute separate forms.

In a summary bench trial, at the close of the presentation of evidence and arguments of counsel and after allowing time for settlement discussions and consideration of the evidence by the presiding officer, the presiding officer shall render a decision. Upon a party's request, the presiding officer may allow three business days for the filing of post-hearing briefs. If the presiding officer takes the matter under advisement or allows post-hearing briefs, the decision shall be rendered no later than ten days after the close of the hearing or filing of briefs whichever is longer.

I. **Jury Questioning.** In a summary jury trial the presiding officer may allow a brief conference with the jurors in open court after a verdict has been returned, in order to determine the basis of the jury's verdict. However, if such a conference is used, it should be limited to general impressions. The presiding officer should not allow counsel to ask detailed questions of jurors to prevent altering the summary trial from a settlement technique to a form of pre-trial rehearsal. Jurors shall not be required to submit to counsels' questioning and shall be informed of the option to depart.

J. **Settlement Discussions.** Upon the retirement of the jury in summary jury trials or the presiding officer in summary bench trials, the parties and/or their counsel shall meet for settlement discussions. Following the verdict or decision, the parties and/or their counsel shall meet to explore further settlement possibilities. The parties may request that the presiding officer remain available to provide such input or guidance as the presiding officer deems appropriate.

K. **Modification of Procedure.** Subject to approval of the presiding officer, the parties may agree to modify the procedures set forth in these Rules for summary trial.

L. **Report of Presiding Officer.** The presiding officer shall file a written report no later than ten (10) days after the verdict. The report shall be signed by the presiding officer and filed with the Clerk of the Superior Court in the County where the action is

Rule 13

pending, with a copy to the Senior Resident Court Judge. The presiding officer's report shall inform the court of the absence of any party, attorney, or insurance company representative known to the presiding officer to have been absent from the summary jury or summary bench trial without permission. The report may be used to record the verdict. The report shall also inform the court in the event that an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the court. Local rules shall not require the presiding officer to send a copy of any agreement reached by the parties.

[Adopted Effective November 21, 2002; Amended Effective March 4, 2004.]

RULE 13. RULES FOR SUMMARY TRIALS

Rule 13

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date for the completion;

Drafting Considerations

1. Arbitration

   A. Rule 12,Revised and Federal Acts good starting places

      1) One arbitrator or panel? Agree or each pick one (they pick a third)

      2) How selected?

      3) What qualifications?

      4) Who pays? Split costs or does loser pay?

Drafting Considerations

1. Arbitration (continued)

5) What rules apply?

- AAA?
- Other private services like JAMS or Endispute?
- Rules specific to industry?

Arbitration & Mediation

Arbitration and mediation are time-tested, cost-effective alternatives to litigation. Arbitration is the submission of a dispute to one or more impartial persons for a final and binding decision, known as an "award." Awards are made in writing and are generally final and binding on the parties in the case. Mediation, on the other hand, is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute. This process can be effective for resolving disputes prior to arbitration or litigation.

The AAA's arbitration and mediation services include access to its superior case management services, well-screened expert neutrals who undergo continuous training, and the AAA's Rules and Procedures that govern the various ADR processes.

AAA neutrals--mediators and arbitrators--possess years of industry-specific knowledge and experience. The AAA's National Roster of Arbitrators and Mediators includes more than 7,000 neutrals located throughout the world. Their conduct is guided by the Association's Code of Ethics, and information about AAA neutrals is available to parties who have already filed a case.

The AAA's Rules and Procedures cover arbitrations and mediations across a wide variety of industries and case types. These rules and procedures detail the steps in the resolution process and ensure that all parties to a case are treated fairly and equitably. The commercial, consumer, employment and labor rules, as well as the rules for state programs can be found in this section of the website.

FILE A CASE | CONTACT US

- AAA MISSION & PRINCIPLES
- PRIVACY POLICY
- TERMS OF USE
- TECHNICAL RECOMMENDATIONS

Commercial RULES

- CLAIMS PROGRAMS
- CLASS ARBITRATION
- COMMERCIAL
- COMMERCIAL FINANCE
- CONSTRUCTION
- ENERGY
- HEALTHCARE
- INSURANCE
- INTELLECTUAL PROPERTY
- INTERNATIONAL
- INTERNET
- OLYMPIC AND PROFESSIONAL SPORTS
- REAL ESTATE
- SECURITIES
- WILLS AND TRUSTS
- WIRELESS
- ARCHIVED RULES

COMMERCIAL SERVICES

Each year, any single company may deal with hundreds, even thousands of customers, vendors and partners as well as regulators and others in the course of doing business. Occasionally, disagreements develop and, when that happens, it is important that the organization resolve these as quickly and equitably as possible. Arbitration has proven to be an effective way to resolve disputes privately, promptly, and economically.

AAA arbitrations and mediations address a variety of industry-specific situations through general commercial and industry-specific commercial rules.

Drafting Considerations

1. Arbitration (continued)

6) Specify procedural issues or default to the Act? (N.C.G.S. §1-69.15)

- Discovery limited but may subpoena people/documents to hearing (N.C.G.S. §1-569.17)
- Time limits
- Pre-hearing motion practice not affected or delayed
- Appeal process, procedure and cost

Drafting Considerations

1. Arbitration (continued)

7) Venue (consider N.C.G.S. § 22B-3)
8) Any disputes excluded from arbitration?
9) Is joinder allowed?
10) Sample arbitration clause

procedures that have been crafted to suit various types of commercial disputes. JAMS Streamlined Arbitration Rules and Procedures provide for an expedited process with minimal discovery and less formality. JAMS Comprehensive Arbitration Rules and Procedures provide for a more formal process, including more complete -- yet still expedited -- information exchange. We recommend that you use the Streamlined Arbitration Rules when the amount in controversy is likely to be less than $250,000, and that you use the Comprehensive Arbitration Rules when the amount in controversy is likely to exceed that figure. However, you may agree to use either set of Arbitration Rules, regardless of the amounts in dispute.

Standard Commercial Arbitration Clause *

> *Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in (insert the desired place of arbitration), before (one) (three) arbitrator(s). The arbitration shall be administered by JAMS pursuant to its (Comprehensive Arbitration Rules and Procedures) (Streamlined Arbitration Rules and Procedures). Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.*
>
> *(Optional) Allocation of Fees and Costs: The arbitrator may, in the Award, allocate all or part of the costs of the arbitration, including the fees of the arbitrator and the reasonable attorneys' fees of the prevailing party.*

Sometimes contracting parties may want their agreement to allow a choice of provider organizations (JAMS being one) that can be used if a dispute arises. The following clause permits a choice between JAMS or another provider organization at the option of the first party to file the arbitration.

Standard Commercial Arbitration Clause Naming JAMS or Another Provider *

> *Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in (insert the desired place of arbitration), before (one) (three) arbitrator(s). At the option of the first to commence an arbitration, the arbitration shall be administered either by JAMS pursuant to its (Comprehensive Arbitration Rules and Procedures) (Streamlined Arbitration Rules and Procedures), or by (name an alternate provider) pursuant to its (identify the rules that will govern). Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.*
>
> *(Optional) Allocation of Fees and Costs: The arbitrator may, in the Award, allocate all or part of the costs of the arbitration, including the fees of the arbitrator and the reasonable attorneys' fees of the prevailing party.*

JAMS Model International Arbitration Clause *

> *Any dispute, controversy or claim arising out of or relating to this contract, including the formation, interpretation, breach or termination thereof, including whether the claims asserted are arbitrable, will be referred to and finally determined by arbitration in accordance with the JAMS International Arbitration Rules. The tribunal will consist of (three arbitrators) (a sole arbitrator). The place of arbitration will be (location). The language to be used in the arbitral proceedings will be (language). Judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof.*

* The drafter should select the desired option from those provided in the parentheses.

procedures that have been crafted to suit various types of commercial disputes. JAMS Streamlined Arbitration Rules and Procedures provide for an expedited process with minimal discovery and less formality. JAMS Comprehensive Arbitration Rules and Procedures provide for a more formal process, including more complete — yet still expedited — information exchange. We recommend that you use the Streamlined Arbitration Rules when the amount in controversy is likely to be less than $250,000, and that you use the Comprehensive Arbitration Rules when the amount in controversy is likely to exceed that figure. However, you may agree to use either set of Arbitration Rules, regardless of the amounts in dispute.

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* The drafter should select the desired option from those provided in the parentheses.

Drafting Considerations

1. Arbitration (continued)

   B. Challenges to enforceability

      1) Negotiated or unilateral?

      2) Unconscionability or Fraud?

Tillman v. Commercial Credit Loans, Inc., 2008 Westlaw 201750

- **NC Supreme Court found procedural and substantive unconscionability:**

- **Procedural-"Bargaining Naughtiness", unilateral contract, only defendant could avoid arbitration, rushed**
- **Substantive-costs prohibitive for plaintiff, no joinder or class actions allowed**
- **Severability-despite a severability provision in the agreement the entire contract was struck down. The Court also refused to re-write the agreement in light of favorable AAA rules change.**

Drafting Considerations

2. Mediation

A. Do court rules apply? Should they? If so, which rules?

B. How will you select mediator?
- Certification under Rule 8
- Lawyer/Non-Lawyer
- Other training or expertise

Drafting Considerations

2. Mediation (continued)

C. Compensation of mediator-costs usually shared equally

D. Who attends? Must have authority to settle (Rule 4)

E. Timing—when is best time to mediate?

- Investigation/fact gathering
- Preparation/seriousness

Drafting Considerations

2. Mediation (continued)

F. Venue

G. Confidentiality/Inadmissibility at later trial

H. Enforceability in court

I. Sample mediation clause