Drafting an Effective ADR Clause @ 11/5/13

"*A cautionary note – we spend too much time trying to make sense out of arbitration agreements precisely because litigants spend too little time in drafting them. Increasingly we have been presented with incoherent hybrids and bizarre mutations of supposed agreements for judicial or contractual arbitration. Oftentimes the 'remedy' is worse than the disease. We can only warn: Read the label before applying.*"

in National Union v. Nationwide Insurance, 69 Cal. App. 4th 709 (01/28/99)

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A. Four Items Which Govern the Arbitration Proceeding

1. Parties Agreement
2. AAA Rules (Commercial or Construction Rules)
3. State and U.S. Arbitration Statutes (§ 12-3001complex or 9 U.S.C. § 1)
4. Case Law

B. Advantages to Having a Well Written ADR Clause

1. Makes it clear which disputes are arbitrable (can set "tiers").
2. If self-executing, it sets time limits and puts action dates on the calendar.
3. Provides for a complete set of rules and regulations (AAA Rules or some other).
4. Eliminates disputes over the locale of the proceeding. The clause can be explicit re: locale, or if through AAA, per AAA Rules, the Association will decide the locale.
5. May limit parameters for remedies available in arbitration (watch out for *Armendariz*).
6. Can allow for an administrative conference, which usually helps expedite the process (if AAA Rules are employed). Such a conference will:
   a. Clarify issues and claims;
   b. ID witnesses, exhibits, schedule document exchange or possible discovery;
   c. Estimate number of days for hearings; decide if there is to be a court reporter;

d. Establishes tone of proceedings, get to know arbitrator; and
e. Pin down what type of award you want.

C. Customize Your Arbitration Agreement to Meet Personalized Needs: Issues to Consider

1. Mediation. It can be a condition precedent to filing to arbitrate, or specified to be concurrent.

2. Mediation-Arbitration (Med-Arb)
   a. If not resolved through mediation, go directly into arbitration.
   b. Generally, smart folks don't recommend that the mediator become the arbitrator.

3. Governing Law
   a. Some agreements state they will be governed and interpreted in accordance with State laws.
   b. Make sure to be familiar with those laws. A California footnote: hostility to Arbitration in California.
   c. It is crucial that the clause state that the arbitration is to be conducted under the RUAA, thus avoiding the FAA.

4. Locale Provisions
   a. If stating locale, consider convenience for lawyers, parties, witnesses, and maybe court reporters.
   b. Check if there is a pool of qualified arbitrators in that area.
   c. Be familiar with the chosen governing law (i.e., NY-- no punitive damages allowed, whereas Arizona allows punitives).

5. Arbitrator Selection Criteria / Number of Arbitrators
   a. Require a retired judge? Lawyer? CPA? Structural Engineer? Years of experience?
   b. Consider costs.
   c. Party-appointed panel members. Not highly recommended: cost and delays.
6. Five Basic Essentials Which You Should Not Tamper With. (The *Armendariz* case from California): Lawyer representation, fee imposition, remedy limitation, evidence restriction, damage restriction. Substantive or procedural unconscionability.

7. Consolidation (a Big "bugaboo" in Construction) (The 2007 of the AIA 201 version relaxes this somewhat.)
   a. Consider when there may be multiple parties with disputes arising from the same transaction.
   b. Are the witnesses the same?
   c. Allows one omnibus resolution for all, avoids conflicting rulings.
   d. How about giving the arbitrator discretion on consolidation?

8. Remedies
   a. Delineate scope of arbitrator's authority in award.
   b. Broad: "Any remedy or relief that the arbitrator deems just and equitable."
   c. Yes or No on punitive damages, allow interest, attorney's fees, etc.
   d. Be careful on exclusions of fees or remedies that they would be able to receive in court. (*Armendariz* case from California.)

9. Discovery
   a. Some say the AAA Rules forbid discovery. Not true. The Rules don't encourage it, but here's the way to get it: Suggesting hearing time savings.
   b. If you want it, determine scope (i.e., 2 depositions each + RFP for 10 categories of documents), and establish time limits.
   c. Allow arbitrator to resolve all other outstanding discovery issues and to enter sanctions.

10. Written Opinions (Reasoned Award vs. Detailed Award)
   a. A Detailed Award is not usually provided, but we see it more and more.
   b. Pros: You know why it forces a thoughtful approach.
   c. Cons: If award is not written well, it might encourage an appeal attack on the award.

11. Appeals of Awards to Courts:
   a. Essentially only for bias, refusal of legitimate postponement, refusal to accept evidence, etc.
   b. May want to provide for some provisions under which loser can appeal, i.e. Complex cases.
   c. Mixed results in courts, but recent U. S. Supreme Court case simply does not allow parties to create appeal rights. War-story.
   d. Can provide for review panel of arbitrators. Give time limits, reasons by which award can be overturned, make it final and binding after review.

12. Large Complex Case Program (LCCP by AAA), cases over $500,000
    a. Number of Arbitrators (3).
    b. Expertise and Qualifications of Arbitrator, rigorous criteria.
    c. Supplemental Procedures, mandatory administrative conference and preliminary hearing, consideration of reasoned awards.

D. Conclusion

1. KISS = Keep it simple, straightforward.
2. Avoid delay, sidebar litigation, extra expense, frustration.