Volume 1

PART I. INTRODUCTION TO ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 1. AN ADR OVERVIEW

I. INTRODUCTION

§ 1:1 History and uses of ADR

II. CHOOSING FROM THE ADR OPTIONS

- § 1:2 Contractual arbitration
- § 1:3 Judicial arbitration
- § 1:4 Mediation
- § 1:5 Dispute review boards
- § 1:6 Med-arb
- § 1:7 Mini-trials
- § 1:8 Partnering
- § 1:9 Private judging
- § 1:10 Collaborative law and settlement counsel

III. FEDERAL DEVELOPMENTS

- § 1:11 Generally
- § 1:12 Court programs
- § 1:13 Federal legislation
- § 1:14 Federal agencies

IV. STATE DEVELOPMENTS

- § 1:15 State legislation and court programs
- § 1:16 Benevolent gestures
- § 1:17 State agencies

§ 1:18 ADR resources and updates

V. CONCLUSION

§ 1:19 The benefits of ADR

VI. APPENDIX

§ 1:20 Online Resources

PART II. ARBITRATION

CHAPTER 2. LEGAL OVERVIEW

- § 2:1 Introduction: a historical context
- § 2:2 The Federal Arbitration Act ("FAA")
- § 2:3 The Supreme Court
- § 2:4 Preemption and choice-of-law issues— Introduction
- § 2:5 —Arbitrability
- § 2:6 —Procedure
- § 2:7 —Forum
- § 2:8 —Substantive claims
- § 2:9 Preemption and common law claims
- § 2:10 Preemption and choice of law claims
- § 2:11 Preemption and statutory claims
- § 2:12 State arbitration statutes

CHAPTER 3. THE DECISION TO ARBITRATE

I. INTRODUCTION

- § 3:1 When to make the decision
- § 3:2 Decision by agreement before dispute has arisen
- § 3:3 Decision by agreement after dispute has arisen
- § 3:4 Decision before filing arbitration demand
- § 3:5 Terms of arbitration agreement
- § 3:6 Preliminary issues to consider

II. MAJOR FACTORS TO CONSIDER

- § 3:7 Time to final adjudication
- § 3:8 Relative costs

xviii

- § 3:9 Direct costs§ 3:10 Indirect costs§ 3:11 Discovery§ 3:12 The arbitrator
- § 3:13 Ad hoc arbitration
- § 3:14 Party-appointed arbitrators
- § 3:15 Informality—Generally
- § 3:16 —Rules of evidence
- § 3:17 —Substantive law
- § 3:18 —Form of the award
- § 3:19 Finality and appeal
- § 3:20 Privacy and Security

III. CONCLUSION

§ 3:21 Careful consideration

CHAPTER 4. THE ARBITRATION AGREEMENT

I. INTRODUCTION

- § 4:1 Is there a need for a written agreement?
- § 4:2 Predispute agreements
- § 4:3 Submission agreements

II. DRAFTING THE ARBITRATION AGREEMENT

- § 4:4 In general
- § 4:5 The arbitration forum
- § 4:6 Procedural rules
- § 4:7 The selection of the arbitrators
- § 4:8 Discovery
- § 4:9 Confidentiality
- § 4:10 Applicable law
- § 4:11 The form of the award
- § 4:12 The arbitrator's power to grant relief

CHAPTER 5. REMEDIES AVAILABLE IN ARBITRATION

- § 5:1 General rule
- § 5:2 Interest

§ 5:3	Attorney's fees
$\S 5:4$	Punitive damages and emotional distress damages
§ 5:5	Costs and sanctions
§ 5:6	Provisional remedies and other equitable relief
§ 5:7	Default

§ 5:8 Summary dispositions

CHAPTER 6. COMPELLING AND RESISTING ARBITRATION

I. INTRODUCTION

§ 6:1 Arbitrability, generally§ 6:2 Is arbitrability a question for the courts or the arbitrators?

II. COMPELLING ARBITRATION

§ 6:3	Compelling arbitration—Generally
§ 6:4	Threshold issues for consideration
§ 6:5	Is there an agreement to arbitrate?
§ 6:6	Is the dispute covered by the agreement?
§ 6:7	Mutuality and Notice
§ 6:8	Petitions and motions to compel arbitration
§ 6:9	Strategies to determine the enforceability of the arbitration agreement
8 6.10	Stay of proceedings

III. RESISTING ARBITRATION

§ 6:11	Generally
§ 6:12	Fraud in the inducement & other bases to void or sever claims
§ 6:13	Unwritten or unsigned arbitration agreement: preliminary questions
§ 6:14	Nonsignatories to the agreement
§ 6:15	Third-party beneficiaries and equitable estoppel
§ 6:16	Contracts of adhesion and unconscionability
§ 6:17	Waiver and estoppel
§ 6:18	Collateral estoppel and res judicata

CHAPTER 7. CHOOSING THE ARBITRATION FORUM

I. INTRODUCTION

- § 7:1 The significance of the choice of forum
- § 7:2 Differences among forums
- § 7:3 The choice of not choosing

II. THE PARTIES' OPPORTUNITIES TO CHOOSE THE FORUM

- § 7:4 The arbitration agreement
- § 7:5 The submission agreement

III. FACTORS DIFFERENTIATING FORUMS

- § 7:6 Location
- § 7:7 Fees and fee structures
- § 7:8 Administrative services offered
- § 7:9 —Administrative style
- § 7:10 —Rules and rule flexibility
- § 7:11 Allocation of power between arbitrator (or parties) and forum
- § 7:12 Privacy
- § 7:13 Representation

IV. ATTRIBUTES OF THE FORUM'S AVAILABLE ARBITRATORS

- § 7:14 Prime importance of the forum's available arbitrators (the "panel")
- § 7:15 Size and range of qualifications and experience
- § 7:16 Nature and extent of screening and training

CHAPTER 8. COMMENCING ARBITRATION

- § 8:1 Introduction
- § 8:2 Drafting the statement of claim
- § 8:3 Filing the claim
- § 8:4 The submission agreement
- § 8:5 Deposit of fees
- § 8:6 The hearing location

§ 8:7 Expedited procedures for small claims

CHAPTER 9. RESPONDING TO THE CLAIM

- § 9:1 The answer—Generally
- § 9:2 Filing the answer
- § 9:3 Counterclaims

CHAPTER 10. CHOOSING THE ARBITRATION PANEL

I. INTRODUCTION

- § 10:1 Importance of the makeup of the panel
- § 10:2 Differences among forums in panel selection procedures
- § 10:3 Parties' opportunities to determine or affect case panel selection or selection procedures

II. CASE PANEL SELECTION OBJECTIVES AND CONSIDERATIONS

- § 10:4 Constituting the ideal case panel
- § 10:5 Qualities that all case panelists should have
- § 10:6 Qualities desirable in some but not necessarily all case panelists
- § 10:7 Some personality types to avoid
- § 10:8 The sole arbitrator
- § 10:9 Cost consequences: Arbitrator compensation

III. CASE PANEL SELECTION TECHNIQUES

- § 10:10 Shaping the panel offered by an administrative organization
- § 10:11 Choosing a panel under an ad hoc administration
- § 10:12 The party-appointed arbitrator alternative
- § 10:13 Obtaining information about prospective case panelists
- § 10:14 Arbitrator conflicts of interest and disqualifications
- § 10:15 Party challenges of arbitrators

xxii

CHAPTER 11. PREPARING FOR THE HEARING

- § 11:1 Introduction—Factors to consider in preparing
- § 11:2 Representation in arbitration
- § 11:3 Investigation and preparation
- § 11:4 Prehearing discovery
- § 11:5 Preliminary hearing or scheduling conference
- § 11:6 Subpoenas of documents and witnesses
- § 11:7 Motion practice
- § 11:8 Depositions
- § 11:9 Use of experts
- § 11:10 Setting the hearing
- § 11:11 The opening brief and pre-hearing submissions

CHAPTER 12. THE HEARING

I. PRELIMINARY MATTERS

- § 12:1 Preliminary matters and consideration of virtual evidentiary hearings
- § 12:2 Formal opening
- § 12:3 Stipulations
- § 12:4 Order of proof
- § 12:5 Opening statements

II. PRESENTATION OF EVIDENCE

- § 12:6 Generally
- § 12:7 Order and number of witnesses
- § 12:8 Exclusion of witnesses
- § 12:9 Direct examination of witnesses
- § 12:10 Cross-examination of witnesses
- § 12:11 Impeaching witnesses
- § 12:12 Expert witnesses
- § 12:13 Use of affidavits
- § 12:14 Documents
- § 12:15 Rebuttal evidence
- § 12:16 Site inspection or investigation
- § 12:17 Standard of proof
- § 12:18 Record of proceedings

III. CONCLUSION OF HEARING

§ 12:19 Closing arguments

- § 12:20 Closing briefs § 12:21 Closing the hearing
- § 12:22 Reopening the hearing

CHAPTER 13. DELIBERATION AND AWARD

I. THE AWARD

§ 13:1	Timing
§ 13:2	Effect of the award if it is not made within
	proper time period
§ 13:3	Form of the award: "reasoned" or "short"
§ 13:4	Service of the award
§ 13:5	Summary judgment
§ 13:6	Award to be executed by majority of arbitrators
§ 13:7	Requirement of finality in the award
§ 13:8	Award that does not dispose of all questions
	presented to the arbitrator(s)
§ 13:9	Functus officio and retention of jurisdiction by arbitrators
§ 13:10	Award involving claims not submitted to the arbitrator(s)
§ 13:11	Legal effect of the award
§ 13:12	Res judicata effect of the award

Collateral estoppel effect of the award

CHAPTER 14. POST-AWARD PROCEEDINGS AND APPEALS

I. INTRODUCTION

- § 14:1 Introduction
- § 14:2 Jurisdiction
- § 14:3 Venue

§ 13:13

- § 14:4 Appeals under FAA Section 16
- $\S 14:5$ Finality of arbitrator decision for jurisdiction

II. COMPELLING ARBITRATION

- § 14:6 Petitions to compel/motions to stay
- § 14:7 —standard of review
- § 14:8 —effect of appeal

xxiv

§ 14:9 Petitions to compel/motions to stay-state law grounds

III. MODIFICATION AND VACATUR OF THE AWARD

§ 14:10	Motions to vacate or modify the final award- limitations on review
§ 14:11	Modification or correction-timing
§ 14:12	Grounds for modification
§ 14:13	Modification of arbitration award and doctrine of functus officio
§ 14:14	Vacating an award-generally
§ 14:15	Vacating an award—timing
§ 14:16	Grounds for vacatur-generally
§ 14:17	Partial vacatur
§ 14:18	Corruption, fraud, or undue means
§ 14:19	—perjured testimony as fraud
§ 14:20	Arbitrator corruption or partiality
§ 14:21	Arbitrator misconduct for refusing to postpone a hearing or hear evidence
§ 14:22	Exceeding arbitral powers—generally
§ 14:23	—scope of relief
§ 14:24	Manifest disregard of the law standard and the Supreme Court's 2008 <i>Hall Street</i> decision
§ 14:25	Circuit split Regarding Whether Manifest disregard of the law standard remains viable after <i>Hall Street</i>
§ 14:26	Other grounds to vacate: awards contrary to public policy & waiver of statutory rights
§ 14:27	Proceedings not authorized by underlying agreement
§ 14:28	Timing challenges and waiver
§ 14:29	Remand

IV. CONFIRMATION OF AWARD

- • • •	OTTI III MILITOIT OF THUMB
§ 14:30	Confirmation of the award
§ 14:31	Timing to confirm
§ 14:32	Jurisdiction to Confirm
§ 14:33	Standard of review for reviewing District Cour
	decision's confirming arbitration awards

V. UNIQUE APPELLATE ISSUES UNDER STATE ARBITRATION LAWS

§ 14:34 Unique appellate issues under state arbitration laws

VI. OPTIONAL APPELLATE RULES

§ 14:35 Optional appellate rules

CHAPTER 15. ARBITRATION OF CLASS ACTIONS

I. INTRODUCTION

§ 15:1 Predispute arbitration clauses in consumer and employment contracts and delegation issues

II. CLASS-WIDE ARBITRATION

§ 15:2	The FAA and RUAA neither require nor preclude class-wide arbitrations
§ 15:3	Early Supreme Court response to class actions
§ 15:4	Pre-Concepcion enforceability of arbitration clauses prohibiting class-wide arbitration
§ 15:5	AT&T Mobility LLC v. Concepcion
§ 15:6	The Supreme Court following Concepcion
§ 15:7	American Express v. Italian Colors Restaurant
§ 15:8	Direct TV v. Imburgia & Regulatory Backlash
§ 15:9	Epic Systems v. Lewis
§ 15:10	Lamps Plus, Inc. v. Varela
§ 15:11	Post Supreme Court mandates
§ 15:12	Class-wide arbitration by agreement

III. PROCEDURES FOR CLASS-WIDE ARBITRATION

§ 15:13	Generally
§ 15:14	Commencing the class arbitration process
§ 15:15	Certifying the class
§ 15:16	Notice to the class & process

xxvi

CHAPTER 16. ARBITRATION OF CONSTRUCTION DISPUTES

I. INTRODUCTION

- § 16:1 Generally
- § 16:2 Arguments for arbitration
- § 16:3 Arguments against arbitration
- § 16:4 —Responses to objections

II. SELECTION OF ARBITRATORS

- § 16:5 Generally
- § 16:6 Arbitration clauses
- § 16:7 Selection of arbitrators
- § 16:8 Non-lawyer arbitrators

III. PROCEDURAL ISSUES

- § 16:9 Generally
- § 16:10 Choice of law
- § 16:11 What parties will be involved?
- § 16:12 Venue
- § 16:13 Timetable
- § 16:14 Discovery
- § 16:15 Mechanic's lien rights
- § 16:16 Applicability of substantive law
- § 16:17 Explanation of decision
- § 16:18 Licensure

CHAPTER 17. ARBITRATION OF EMPLOYMENT DISPUTES

I. INTRODUCTION

§ 17:1 Arbitration as a condition of employment

II. HISTORIC OVERVIEW

- § 17:2 In general
- § 17:3 Costs of arbitration, Employer Promulgated Plan versus Individually Negotiated Agreement
- § 17:4 The preemptive effect of the Federal Arbitration Act

- § 17:5 Statutory claims
- § 17:6 Common law claims
- § 17:7 Sources of predispute agreements to arbitrate

III. FACTORS TO CONSIDER IN THE ARBITRATION PROCEDURE

- § 17:8 Fairness
- § 17:9 Scope of the arbitration agreement
- § 17:10 Method of selecting the arbitrator
- § 17:11 The standards to be applied
- § 17:12 Burden of proof
- § 17:13 Period of limitations
- § 17:14 Severability provision—"Gateway" decisions concerning arbitrability
- § 17:15 Confidentiality
- § 17:16 Payment of attorneys' fees and sanctions
- § 17:17 Written awards
- § 17:18 Should mediation be a mandatory step in an arbitration agreement?
- § 17:19 Discovery
- § 17:20 Scope of remedies
- § 17:21 Place of hearing in the absence of agreement by the parties
- § 17:22 Judicial proceedings

CHAPTER 18. UNIQUE PROBLEMS POSED BY INTELLECTUAL PROPERTY DISPUTES

- § 18:1 Introduction
- § 18:2 The arbitrability of intellectual property disputes within the United States
- § 18:3 The arbitrability of intellectual property rights outside the United States
- § 18:4 The enforcement of arbitration awards concerning intellectual property on an international basis
- § 18:5 The advantages of mediation and arbitration of intellectual property disputes
- § 18:6 Institutions and institutional arbitration and mediation rules and procedures for the resolution of intellectual property disputes—WIPO

xxviii

§ 18:7	——Arbitration Rules
§ 18:8	— — Mediation Rules
§ 18:9	— — The CPR Institute for Dispute Resolution
§ 18:10	The resolution of disputes between mark holders
	and domain name registrants
§ 18:11	Dispute resolution procedures for .eu
§ 18:12	The CASE Act-An alternative forum for small-
	claims copyright disputes

CHAPTER 19. ARBITRATION OF INTERNATIONAL DISPUTES

I. INTRODUCTION

§ 19:1 The need for a system of dispute resolution across national borders

II. INTERNATIONAL ARBITRAL INSTITUTIONS AND RULES

\$ 10.0	The International Chamber of Commence ("ICC")
§ 19:2	The International Chamber of Commerce ("ICC")
§ 19:3	UNCITRAL Arbitration Rules
§ 19:4	The International Centre for Dispute Resolution
§ 19:5	The London Court of International Arbitration ("LCIA")
§ 19:6	The Stockholm Chamber of Commerce Arbitration Institute ("SCC")
§ 19:7	The Singapore International Arbitration Centre ("SIAC")
§ 19:8	Hong Kong International Arbitration Centre ("HKIAC")
§ 19:9	The International Center for the Settlement of Investment Disputes ("ICSID")
§ 19:10	The Dubai International Arbitration Centre ("DIAC")
§ 19:11	Permanent Court of Arbitration ("PCA")
§ 19:12	The CPR Institute for Dispute Resolution ("CPR")
§ 19:13	The World Intellectual Property Organization Arbitration and Mediation Center ("WIPO")
§ 19:14	Iran-U.S. Claims Tribunal
§ 19:15	The pros and cons of institutional and ad hoc arbitration

III. INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES

§ 19:16 Applicable law § 19:17 Jurisdiction § 19:18 Arbitrability § 19:19 Subpoena power § 19:20 Consolidation of arbitrations § 19:21 Appellate review

INTERNATIONAL RECOGNITION AND IV. ENFORCEMENT OF AGREEMENTS TO ARBITRATE AND OF ARBITRAL AWARDS

- § 19:22 The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
- § 19:23 **Applicability**
- Recognition and enforcement § 19:24

V. PROCEDURES IN INTERNATIONAL ARBITRATION

- § 19:25 Commencing arbitration § 19:26 Selection of arbitrators § 19:27 Statement of claim and answer § 19:28 Discovery Terms of reference § 19:29 § 19:30 Applicable rules of law § 19:31 Provisional remedies § 19:32 Case presentation
- § 19:33 Awards

CHAPTER 20. REAL ESTATE ARBITRATION

- § 20:1 Introduction
- § 20:2 Federal and state court oversight of arbitration
- § 20:3 Arbitration agreements
- § 20:4 Ability to select the adjudicator
- § 20:5 Confidentiality of proceedings
- § 20:6 Finality of arbitrators' award
- § 20:7 Compromise decisions
- Arbitration providers § 20:8
- § 20:9 Arbitrator selection

§ 20:10	Arbitrators' powers
§ 20:11	Initiation of arbitration
§ 20:12	Efficiency v. discovery
§ 20:13	Preliminary conference
§ 20:14	The hearing
§ 20:15	Evidentiary attachments
§ 20:16	The arbitration award
§ 20:17	Drafting arbitration provisions
§ 20:18	Enforceability of the arbitration clause
§ 20:19	Tailoring arbitration provisions to the transaction
§ 20:20	Loan documents
§ 20:21	Title insurance
§ 20:22	Purchase and sale agreements
§ 20:23	Joint venture agreements
§ 20:24	Leases

CHAPTER 21. ARBITRATION OF SECURITIES DISPUTES

I. INTRODUCTION

- § 21:1 History of securities arbitration
- § 21:2 Industry case filings

II. THE ARBITRATION PROCESS

- § 21:3 Filing the claim
- § 21:4 The statement of claim
- § 21:5 The answer
- § 21:6 Amendment to claim or answer
- § 21:7 Representation by counsel
- § 21:8 Selection of arbitrators
- § 21:9 Injunctions
- § 21:10 Discovery
- § 21:11 The hearing

III. THE END OF THE PROCESS

- § 21:12 The award
- § 21:13 Disciplinary referrals

CHAPTER 22. JUDICIAL ARBITRATION

I. INTRODUCTION

§ 22:1 Definitions and distinctions

II. COMMENCING JUDICIAL ARBITRATION

- § 22:2 Compulsory (court-ordered) arbitration
- § 22:3 Voluntary arbitration

III. SELECTING THE ARBITRATOR

- § 22:4 Generally
- § 22:5 Obtaining information about potential arbitrators
- § 22:6 Selection considerations
- § 22:7 Arbitrator's powers

IV. PREHEARING PREPARATION

- § 22:8 Settlement
- § 22:9 Discovery
- § 22:10 Documentary evidence
- § 22:11 Depositions
- § 22:12 Technical requirements
- § 22:13 Organizing the presentation
- § 22:14 Preparing witnesses

V. THE HEARING

- § 22:15 Opening briefs
- § 22:16 Failure to appear or present evidence
- § 22:17 The hearing
- § 22:18 Prehearing conference
- § 22:19 Opening statements
- § 22:20 Documentary evidence
- § 22:21 Witnesses
- § 22:22 Closing argument
- § 22:23 Legal memoranda

VI. POSTHEARING PRACTICE

- § 22:24 Generally
- § 22:25 Request for trial de novo
- § 22:26 Costs and sanctions relating to trial de novo

xxxii

§ 22:27 Settlement

VII. CLIENT SATISFACTION

§ 22:28 Generally

PART III. MEDIATION

CHAPTER 23. INTRODUCTION TO MEDIATION: A FULL RESOLUTION APPROACH

I. THE STRUCTURE OF MEDIATION

§ 23:1	Introduction—A practical guide to mediation
§ 23:2	Mediated negotiation—A voluntary process

- § 23:3 The decision to mediate—Preliminary considerations
- § 23:4 Bringing the right people to the table
- § 23:5 Typical format
- § 23:6 —Joint meeting
- § 23:7 —Caucuses
- § 23:8 Alternative format using pre-session meetings
- § 23:9 The importance of confidentiality
- § 23:10 On giving opinions
- § 23:11 Suggesting a basis for settlement

II. MEDIATION STYLES—HOW AIM AFFECTS RESULTS

- § 23:12 Mediation styles vary from evaluative to facilitative
- § 23:13 The mediator's aim—Setting the goal
- § 23:14 How full-resolution orientation differs from compromise

III. A PRACTICAL FIVE STEP PROCESS

- § 23:15 The five steps—Shifting from polarizing debate to cooperative problem solving
- § 23:16 —Step 1: Identifying the problem
- § 23:17 —Step 2: Expanding information exchange
- § 23:18 —Step 3: Setting the goal—Aiming for resolution at the highest level

§ 23:19	—Step 4: Implementation—Finding the path to
	settlement
§ 23:20	—Step 5: Closure—Attending to all the details
§ 23:21	Final analysis, the importance of great
	expectations

CHAPTER 24. THE MEDIATION PROCESS

I. THE DECISION TO MEDIATE

§ 24	:1	Introduction
§ 24	l:2	The lawyer's changing role
§ 24	l:3	Developing a negotiation strategy
§ 24	l:4	Why mediations succeed when face-to-face negotiations fail
§ 24	l:5	Mediation is more cost-effective than traditional litigation
§ 24	l:6	Early mediation is often productive
§ 24	l:7	Mediation late in the game
§ 24	l:8	Can mediation be worthwhile if it is not binding?

II. INTRODUCING MEDIATION TO THE CLIENT

§ 24:9 Communicating with the client

III. THE ART OF CONVENING

§ 24:10	Generally
§ 24:11	Getting people to the mediation table
§ 24:12	The invitation to convene
§ 24:13	Sample invitation, responses, strategies

IV. THE MEDIATOR

§ 24:14	Selecting the mediator
§ 24:15	Using a technical co-mediator
§ 24:16	Sources of mediators
§ 24:17	Court settlement-conferencing
§ 24:18	Power-balancing

V. WHO SHOULD ATTEND THE MEDIATION

§ 24:19 All decision-makers should be present

xxxiv

§ 24:20 Who should be excluded from the mediation

VI. PREPARATION AND ADVANCE PLANNING

- § 24:21 Generally
- § 24:22 Use the mediator to help prepare
- § 24:23 Belief in settlement
- § 24:24 Clarify goals
- § 24:25 Evaluate the information needs in the case

VII. PRESENTING THE INFORMATION

- § 24:26 Mediation briefs and memoranda
- § 24:27 Timing and extent of disclosure
- § 24:28 Opening statements by the mediator
- § 24:29 Fact exchange at the joint session
- § 24:30 Private caucus sessions
- § 24:31 Tipping your hand: The element of surprise
- § 24:32 The mediation demeanor

VIII. MEDIATING SETTLEMENT WHERE MORE THAN MONEY CHANGES HANDS

- § 24:33 Generally
- § 24:34 Case study: Mediation of engineers' professional liability in dam construction

IX. AFTER AGREEMENT IS REACHED

- § 24:35 Capturing agreements reached in mediation
- § 24:36 Interim agreements
- § 24:37 Final agreements

X. CONCLUSION

§ 24:38 The parties' ability to control and choose

CHAPTER 25. MEDIATION AGREEMENTS

- § 25:1 Introduction
- § 25:2 The benefits of drafting a pre-dispute mediation clause
- § 25:3 Drafting the pre-dispute mediation clause
- § 25:4 If a dispute arises

- § 25:5 Checklist of terms to include in a "custom" prepared mediation agreement
 § 25:6 Putting "teeth" in the mediation agreement
 § 25:7 Using a mediation agency
 § 25:8 Enforceability of the agreement to mediate
- § 25:9 Conclusion

CHAPTER 26. SELECTED ESSAYS ON MEDIATION

- § 26:1 Introduction
- $\S~26:2$ From conflict to resolution: When to negotiate the litigated case
- § 26:3 A simple thank you
- § 26:4 Keys for a successful mediation
- § 26:5 Effective preparation for mediation
- § 26:6 Reading between the lines
- § 26:7 Taking risks and learning from conflict
- § 26:8 Do you mediate ethically?
- § 26:9 The use of apologies in mediations

CHAPTER 27. CONFIDENTIALITY IN MEDIATION AND THE MEDIATED SETTLEMENT AGREEMENT

I. CONFIDENTIALITY DURING THE MEDIATION

- § 27:1 Introduction
- § 27:2 The joint session
- § 27:3 The private caucus sessions

II. PROTECTION OF THE MEDIATION PROCESS

- § 27:4 The confidentiality agreement
- § 27:5 The Alternative Dispute Resolution Act of 1998 and court rules
- § 27:6 Comity and jurisprudence
- § 27:7 The Uniform Mediation Act
- § 27:8 State mediation statutes and benevolent gestures
- § 27:9 Interpretation and application of laws protecting confidentiality

xxxvi

§ 27:10 Mediation documents

III. PROTECTION OF STATEMENTS IN CONNECTION WITH SETTLEMENT OFFERS

- § 27:11 Rule(s) of Evidence 408
- § 27:12 Interpretation and application of Rule of Evidence 408

IV. OTHER PROTECTIONS

- § 27:13 Forum protection
- § 27:14 Common law protection
- § 27:15 Rule of Evidence 403
- § 27:16 Federal Rule of Civil Procedure 68
- § 27:17 Protection of "quasi-judicial proceedings"

V. THE EFFECT OF MEDIATION ON OTHER PRIVILEGES

§ 27:18 The attorney work-product doctrine and the attorney-client privilege

VI. REMEDIES

§ 27:19 Remedies for breach of confidentiality

VII. THE MEDIATED SETTLEMENT AGREEMENT

- § 27:20 Enforceability of the settlement agreement § 27:21 Enforceability of MOUs, Term Sheets, and unexecuted agreements
- § 27:22 Res judicata and collateral estoppel effects of the settlement agreement
- § 27:23 —limitations

CHAPTER 28. COMMERCIAL MEDIATION

- § 28:1 Introduction
- § 28:2 What business disputes should be mediated?
- § 28:3 At what stage in the litigation process should a case be mediated?
- § 28:4 General format of a mediation

ADR PRACTICE GUIDE

§ 28:5	Preparation for mediation
§ 28:6	Selecting the right mediator for the case
§ 28:7	Use of case administrators
§ 28:8	Preliminary conference
§ 28:9	Who will attend the mediation?
§ 28:10	Mediation statements
§ 28:11	Introductions
§ 28:12	Opening statements
§ 28:13	Caucuses
§ 28:14	The role of the mediator
§ 28:15	Closing the gap
§ 28:16	Collateral benefits of mediation
§ 28:17	Mediation clauses
§ 28:18	Approaching one's adversary about mediation

CHAPTER 29. CONSTRUCTION MEDIATION

I. INTRODUCTION

- § 29:1 Generally
- § 29:2 Mediation works well in the construction industry

II. PREPARATION FOR MEDIATION

- § 29:3 Preliminary preparation
- § 29:4 Who should attend the mediation sessions?
- § 29:5 Selecting the construction mediator
- § 29:6 What to expect at the construction mediation

III. A TYPICAL CONSTRUCTION DISPUTE

- § 29:7 Background
- § 29:8 Issues to be resolved
- § 29:9 The mediation

CHAPTER 30. ENVIRONMENTAL MEDIATION

I. INTRODUCTION

§ 30:1 Environmental mediation defined and distinguished

xxxviii

§ 30:2	Types of environmental mediation cases
§ 30:3	Policy dialogues
§ 30:4	Regulatory negotiation
§ 30:5	Site specific projects
§ 30:6	Settlement of environmental regulatory or other
	enforcement litigation

II. THE ENVIRONMENTAL MEDIATION PROCESS

§ 30:7	representatives to attend the mediation sessions
§ 30:8	Defining the problem
§ 30:9	Commencing the process
§ 30:10	Accountability of parties
§ 30:11	Differing levels of expertise
§ 30:12	Different forms of power
§ 30:13	Commitment of time

III. STEPS AND TASKS OF THE MEDIATOR

§ 30:14 In general	
§ 30:15 The assessment phase	
§ 30:16 Process design phase	
§ 30:17 Negotiation phase	
§ 30:18 Implementation of agreements	
§ 30:19 —Within formal government structur	es

IV. FORMATS FOR ENVIRONMENTAL MEDIATION

§ 30:20	In general
§ 30:21	Roundtables
§ 30:22	Team negotiation
§ 30:23	Workshop sessions
§ 30:24	Task groups

V. SPECIAL ISSUES TO CONSIDER IN ENVIRONMENTAL MEDIATION

§ 30:25	The role of the media
§ 30:26	Keeping constituents informed
§ 30:27	Relating to the general public

§ 30:28	Obtaining adequate administrative support
§ 30:29	Handling technical information
§ 30:30	Working in the context of federal and state laws
	and regulations

VI. NEW APPLICATIONS FOR ENVIRONMENTAL MEDIATION

§ 30:31 On-going collaboratives, consensus processes, and partnerships

CHAPTER 31. FAMILY LAW MEDIATION

§ 31:1	Introduction
§ 31:2	What is family law mediation?
§ 31:3	Encouraging the client to mediate
§ 31:4	When is mediation appropriate?
§ 31:5	Power-balancing
§ 31:6	The attorney's role in divorce mediation
§ 31:7	Selecting the mediator
§ 31:8	Court-ordered mediation and conciliation in divorce actions
§ 31:9	The division of marital property
§ 31:10	Mediation of child-based disputes
§ 31:11	Court-ordered mediation involving custody and visitation issues

CHAPTER 32. MEDIATION OF INSURANCE AND PERSONAL INJURY DISPUTES

§ 31:12 Family court conciliation vs. private mediation

I. INTRODUCTION

2	32.1	In conoral	
0	32.1	In general	

- § 32:2 The early ADR system
- § 32:3 The first pilot program involving mediation

II. MEDIATION TODAY

- § 32:4 Success rates
- § 32:5 Case examples
- § 32:6 Advantages of mediation

III. CONCLUSION

§ 32:7 Acceptance of ADR by insurers

CHAPTER 33. INTERNATIONAL MEDIATION AND CONCILIATION

§ 33:1	Definitions and distinctions
§ 33:2	Asia/Pacific view of mediation and conciliation
§ 33:3	Islamic view of mediation and conciliation
§ 33:4	European views of mediation and conciliation
§ 33:5	United States view on mediation and conciliation
§ 33:6	Mediation and conciliation in Africa
§ 33:7	Mediation and conciliation in Australia
§ 33:8	Mediation and conciliation in Latin America
§ 33:9	Model Mediation Procedures—ICC ADR
	Procedures
§ 33:10	—AAA/ICDR Mediation
§ 33:11	—LCIA Mediation
§ 33:12	—UNCITRAL Conciliation Rules and Model Law on International Commercial Mediation
§ 33:13	—World Bank/ICSID Conciliation
§ 33:14	IBA Rules for Investor—State Mediation
§ 33:15	Model mediation procedures—World Intellectual Property Organization (WIPO)
§ 33:16	Enforcement of agreements reached by mediation: The Singapore Convention
§ 33:17	Cross-cultural negotiations

CHAPTER 34. LABOR AND EMPLOYMENT MEDIATION

I. INDIVIDUAL EMPLOYMENT DISPUTES

§ 34:1	Typical disputes
§ 34:2	The decision to mediate
§ 34:3	Broaching the topic of settlement/mediation
§ 34:4	Selecting the mediator
§ 34:5	Establishing procedure
§ 34:6	Opening session and procedure
§ 34:7	Mediator's first private session with the plaintiff
§ 34:8	First session with employer representatives
§ 34:9	Further sessions
§ 34:10	Memorialization of any settlement
§ 34:11	Disputes with current employees
$\S 34:12$	Variations to the process

II. MEDIATION OF COLLECTIVE BARGAINING NEGOTIATIONS

- § 34:13 The desirability of mediation
- § 34:14 Sources for mediators

III. MEDIATION DURING THE TERM OF A UNION CONTRACT

§ 34:15 Contract grievance procedures

CHAPTER 35. MEDIATION OF SECURITIES DISPUTES

I. INTRODUCTION

§ 35:1 Options in securities disputes

II. PREPARING FOR BROKER-CUSTOMER MEDIATIONS

- § 35:2 Knowing the case
- § 35:3 Developing a mediation strategy
- § 35:4 Exhibits and evidence

III. THE MEDIATION PROCEEDING

- § 35:5 Joint sessions
- § 35:6 Private caucuses
- § 35:7 Closing joint session

PART IV. OTHER FORMS OF ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 36. DISPUTE REVIEW BOARDS

I. INTRODUCTION

- § 36:1 The need for ADR in the construction industry
- § 36:2 The industry's response
- § 36:3 The definition of a dispute review board ("DRB")

- § 36:4 The history and uses of DRB
 § 36:5 Advantages
 § 36:6 The dispute resolution specialist ("DRS")
 § 36:7 How DRB compares to arbitration
- § 36:8 The DRB members

II. THE DRB PROCESS

- § 36:9 The first step: The agreement to have a DRB
 § 36:10 The second step: The selection of the DRB or DRS
 § 36:11 The third step: The DRB meeting
 § 36:12 The fourth step: The DRB hearing
 § 36:13 The use of experts
- § 36:14 Costs
- § 36:15 The attorney's role

III. THE FUTURE OF DRBS

§ 36:16 Why the use of DRBs is growing rapidly

CHAPTER 37. MED-ARB (MEDIATION-ARBITRATION)

- § 37:1 Introduction
- § 37:2 Med-arb defined and distinguished
- § 37:3 The med-arb agreement
- § 37:4 Selecting the med-arbitrator
- § 37:5 The med-arb procedure
- § 37:6 Confidentiality and med-arb
- § 37:7 Legislative developments re the use of med-arb
- § 37:8 Variations on med-arb—Generally
- § 37:9 ——Arb-med
- § 37:10 ——Med-then-arb
- § 37:11 ——Shadow mediation
- § 37:12 ——Co-med-arb
- § 37:13 ——Med-rec
- § 37:14 ——Concilio-arbitration

CHAPTER 38. MINI-TRIALS AND SUMMARY JURY TRIALS

I. INTRODUCTION

§ 38:1 What is a "mini-trial"?

§ 38:2	Court-annexed variations and summary jury trials
§ 38:3	History and uses of the mini-trial
§ 38:4	Advantages and disadvantages
§ 38:5	When to use a mini-trial
§ 38:6	Timing
§ 38:7	Panel composition

II. THE PROCEDURE

§ 38:8	The agreement
§ 38:9	Impact on pending litigation
§ 38:10	Termination
§ 38:11	Confidentiality
§ 38:12	Selection of the panel
§ 38:13	Cost allocation
§ 38:14	Discovery
§ 38:15	Prehearing exchange
§ 38:16	The hearing
§ 38:17	The negotiation
§ 38:18	Cooling-off period
§ 38:19	Checklist for mini-trial agreements

III. CONCLUSION

§ 38:20 Consideration of the mini-trial option

CHAPTER 39. PARTNERING—NEW DIMENSIONS IN DISPUTE PREVENTION AND RESOLUTION

I. INTRODUCTION

§ 39:1	Generally
§ 39:2	A brief history of the development of partnering
§ 39:3	Partnering in government contracts/the corps

II. HOW PARTNERING WORKS

 $\S 39:4$ The agreement to partner

III. ELEMENTS OF PARTNERING

§ 39:5 The partnering retreat

xliv

§ 39:6	Who participates?
§ 39:7	Retreat facilitator
§ 39:8	Team/skill-building
§ 39:9	Focus on project concerns
§ 39:10	Total quality management (TQM)
§ 39:11	Value engineering
§ 39:12	Dispute resolution design
§ 39:13	Issue escalation
§ 39:14	Third-party ADR
§ 39:15	Project charter (compact)

IV. PROSPECTS FOR PARTNERING

§ 39:16 Generally

CHAPTER 40. PRIVATE JUDGING

I. INTRODUCTION

§ 40:1 Private judging as a form of ADR

II. REPRESENTATIVE JURISDICTIONS PERMITTING USE OF REFEREES AND PRIVATE JUDGES

- § 40:2 Types of private judicial services § 40:3 Specimen jurisdictions
- III. CHARACTERISTICS OF PRIVATE

JUDGING

§ 40:4 Advantages § 40:5 Disadvantages

CHAPTER 41. COLLABORATIVE LAW AND THE USE OF SETTLEMENT COUNSEL

I. INTRODUCTION

§ 41:1 Generally

II. COLLABORATIVE LAW

§ 41:2 Origins of collaborative law

ADR PRACTICE GUIDE

§ 41:3	Collaborative family law
§ 41:4	Comparison with mediation
§ 41:5	The collaborative law process
§ 41:6	Collaborative law as a paradigm shift
§ 41:7	What is different about collaborative law?
§ 41:8	The importance of collaborative law training
§ 41:9	Advantages of collaborative law
§ 41:10	Disadvantages of collaborative law
§ 41:11	Ethical issues
§ 41:12	The use of collaborative law in other practice
	areas

III. SETTLEMENT COUNSEL

- § 41:13 Advantages and disadvantages of settlement counsel
- § 41:14 When to use settlement counsel

IV. CONCLUSION

§ 41:15 Generally

CHAPTER 42. MANAGING FAMILY BUSINESS CONFLICT: A COLLABORATIVE APPROACH

42:1	Introduction
3 42:2	Conflict or dispute?
\$ 42:3	Why are family business conflicts so extreme?
§ 42:4	Why is conflict in a family business so difficult to manage?
\$ 42:5	Identifying the underlying reasons for conflict
42:6	Further complicating factors
§ 42:7	Identifying the trigger for conflict: the role of power
\$ 42:8	The family factor
3 42:9	Matching conflict factors with management resources
3 42:10	Existing methods of conflict management
3 42:11	Power based approaches (litigation, arbitration)
3 42:12	Bargaining based approaches (negotiation, mediation, collaborative law)
\$ 42:13	Development based approaches (consulting, coaching, therapy)

 $\S~42{:}14~$ A collaborative, multidisciplinary approach

§ 42:15 Conclusion

Volume 2

APPENDICES

APPENDIX II-20.

APPENDIX II-1.	Uniform Arbitration Act
APPENDIX II-2.	State Arbitration Statutes
APPENDIX II-3.	Reprinted with permission of the American Arbitration Association®, all rights reserved.
APPENDIX II-4.	Code of Arbitration Procedure
APPENDIX II-5.	Sample Standard Predispute Agreement
APPENDIX II-6.	Commercial Arbitration Rules Demand for Arbitration
APPENDIX II-7.	Sample Ad Hoc Arbitration Clause
APPENDIX II-8.	Sample Arbitration Discovery Clauses
APPENDIX II-9.	Sample Applicable Law Clauses
APPENDIX II-10.	Sample Remedies Clauses
APPENDIX II-11.	Sample Clauses for the Basis for the Award
APPENDIX II-12.	Uniform Submission Agreement
APPENDIX II-13.	Revised Uniform Arbitration Act
APPENDIX II-14. [F	Reserved]
APPENDIX II-15.	Sample Construction Arbitration Clauses
APPENDIX II-16.	Construction Industry Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Construction Disputes)
APPENDIX II-17. [F	Reserved]
APPENDIX II-18. [F	Reserved]
APPENDIX II-19A.	[Reserved]

Sample Employee Problems and

ADR PRACTICE GUIDE

Complaints Dispute Settlement Procedure

APPENDIX II-21. [Reserved]
APPENDIX II-22.	Sample Employee Acknowledgment of Receipt of Handbook
APPENDIX II-23.	Employment Arbitration Rules and Mediation Procedures
APPENDIX II-23A.	[Reserved]
APPENDIX II-24. [Reserved]
APPENDIX II-25.	ICC Mediation Rules
APPENDIX II-25A.	[Reserved]
APPENDIX II-26.	UNCITRAL Arbitration Rules
APPENDIX II-27.	International Dispute Resolution Procedures (Including Mediation and Arbitration Rules)
APPENDIX II-28.	Sample Arbitration Clause [Loan]
APPENDIX II-29.	Sample Conventional Arbitration Clause [Lease]

APPENDIX II-30. Sample Baseball Arbitration Clause [Lease]

APPENDIX II-31. Compromise Award [Lease]

APPENDIX II-32. Sample Arbitration Clause [Title Insurance Policies]

APPENDIX II-33. Sample Arbitration Clause [Purchase Agreement]

APPENDIX II-34. United States Code Annotated—Title 9. Arbitration—Chapter 1—General Provisions

APPENDIX II–35. American Arbitration Association— The Code of Ethics for Arbitrators in Commercial Disputes

APPENDIX II-36. Jams Comprehensive Arbitration Rules & Procedures

APPENDIX II-36B. [Reserved] APPENDIX II-37. [Reserved]

APPENDIX II-38. Real Estate Industry Arbitration Rules (Including a Mediation Alternative)

APPENDIX II-39. 2019 CPR Rules for Administered Arbitration of International Disputes APPENDIX II-40. Rules for Uniform Domain Name Dispute Resolution Policy ICANN Uniform Domain Name APPENDIX II-41. Dispute Resolution Policy APPENDIX II-42. [Reserved] APPENDIX II-43. [Reserved] APPENDIX II-44. Supplementary Rules for Class Arbitrations APPENDIX II-45. JAMS Class Action Procedures APPENDIX II-46. AAA—Consumer Due Process Protocol: Statement of Principles of the National Consumer Disputes Advisory Committee APPENDIX II-47. [Reserved] APPENDIX II-48. [Reserved] APPENDIX III-1. Sample American Arbitration Association Predispute Mediation Clause APPENDIX III-2. American Arbitration Association Commercial Mediation Rules (see Appendix II-3) APPENDIX III-3. Sample Form Mediation Agreement APPENDIX III-4. Stipulation and Order re Mediation Process APPENDIX III-5. Confidentiality Agreement APPENDIX III-6. Model Agreement to use Respectful Communication Agreement APPENDIX III-7. [Reserved] APPENDIX III-8. Uniform Mediation Act APPENDIX IV-1. Sample Contract Specifications for an American Arbitration Association Dispute Review Board APPENDIX IV-2. Submission to Dispute Resolution APPENDIX IV-3. American Arbitration Association Request for a DRB or DRS APPENDIX IV-4. MED-ARB Agreement

ADR PRACTICE GUIDE

APPENDIX IV-5. Med-Then-Arb Agreement APPENDIX IV-6. Sample Mini-Trial Clauses

Sample Partnering Agreement— American Arbitration Association APPENDIX IV-7.

Sample Partnering Agreement—U.S. Army Corps of Engineers APPENDIX IV-8.

APPENDIX IV-9. Sample Partnering Language—

Project Specifications and Contract

Clauses

Collaborative Family Law APPENDIX IV-10.

Participation Agreement

Table of Laws and Rules

Table of Cases

Index