

Table of Contents

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 and other hybrid forms of ADR

§ 1:7 Private judging

§ 1:8 Collaborative law and settlement counsel

III. FEDERAL AND STATE DEVELOPMENTS IN THE USE OF ADR

§ 1:9 Generally

§ 1:10 Court programs

§ 1:11 Federal legislation

§ 1:12 Federal agencies

IV. STATE DEVELOPMENTS

§ 1:13 State legislation and court programs

§ 1:14 Benevolent gestures

§ 1:15 State agencies

§ 1:16 ADR resources and updates

V. CONCLUSION

- § 1:17 The benefits of ADR
- § 1:18 Online Resources

PART II. ARBITRATION

CHAPTER 2. LEGAL OVERVIEW

- § 2:1 Introduction
- § 2:2 The Federal Arbitration Act (“FAA”)
- § 2:3 FAA jurisdiction
- § 2:4 Introduction to preemption: judicial commitment to enforce arbitration agreements under the FAA
- § 2:5 Preemption and choice of law
- § 2:6 Preemption and forum
- § 2:7 Preemption and statutory claims
- § 2:8 Protection of statutory claims
- § 2:9 Ancillary tort claims
- § 2:10 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
- § 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

TABLE OF CONTENTS

- § 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 General considerations
- § 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
- § 4:13 The option of a tribunal appeal

CHAPTER 5. REMEDIES AVAILABLE IN ARBITRATION

- § 5:1 General rule
- § 5:2 Interest and attorneys' fees
- § 5:3 Punitive and emotional distress damages
- § 5:4 Costs and other sanctions
- § 5:5 Provisional remedies and other equitable relief
- § 5:6 Default
- § 5:7 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
- § 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

TABLE OF CONTENTS

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: generally
- § 7:9 Administrative services offered: administrative style
- § 7:10 Administrative services offered: rules and rule flexibility
- § 7:11 Allocation of power between arbitrator (or parties) and forum
- § 7:12 Confidentiality
- § 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
- § 7:17 The option of a tribunal appeal

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 Content
- § 9:4 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 arbitral panel selection or selection procedures

II. CASE PANEL SELECTION OBJECTIVES AND CONSIDERATIONS

- § 10:4 The ideal arbitral panel
- § 10:5 Qualities that all arbitrators should have
- § 10:6 Arbitrator expertise
- § 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 Selecting the panel offered by an administrative organization
- § 10:11 Choosing a panel in an ad hoc arbitration
- § 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

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

TABLE OF CONTENTS

§ 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

§ 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
§ 12:6	Presentation of Evidence
§ 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 & the option of tribunal appeal
§ 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	The timing of the award
§ 13:2	Effect of the award if it is not made within proper time period
§ 13:3	Form of the award: “reasoned” or “standard” (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
- § 13:13 Collateral estoppel effect of the award
- § 13:14 Optional appellate rules

CHAPTER 14. POST-AWARD PROCEEDINGS AND APPEALS

I. INTRODUCTION

- § 14:1 Introduction
- § 14:2 Jurisdiction
- § 14:3 Venue
- § 14:4 Appeals under FAA Section 16
- § 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
- § 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

TABLE OF CONTENTS

- § 14:15 —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 *Hall Street* decision
- § 14:25 Circuit split regarding whether manifest disregard of the law standard remains viable after *Hall Street*
- § 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

- § 14:30 Confirmation of the award
- § 14:31 Timing to confirm
- § 14:32 Jurisdiction to Confirm
- § 14:33 Standard of review for reviewing District Court 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, MASS ARBITRATIONS, AND CONSOLIDATION

I. INTRODUCTION

§ 15:1 Context

II. CLASS-WIDE ARBITRATION

- § 15:2 Early Supreme Court response to class actions
- § 15:3 AT&T Mobility LLC v. Concepcion
- § 15:4 The Supreme Court following Concepcion
- § 15:5 American Express v. Italian Colors Restaurant
- § 15:6 Direct TV v. Imburgia & regulatory backlash
- § 15:7 Epic Systems v. Lewis
- § 15:8 Lamps Plus, Inc. v. Varela
- § 15:9 Subsequent mandates and Viking River Cruises
- § 15:10 Procedures for class-wide arbitrations by agreement
- § 15:11 Commencing the class arbitration process
- § 15:12 Certifying the class
- § 15:13 Notice to the class & process
- § 15:14 Mass arbitrations and consolidation: introduction
- § 15:15 Mass arbitrations and consolidation: judicial responses

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 Arbitration clauses
- § 16:6 Selection of arbitrators
- § 16:7 Non-lawyer representatives and arbitrators

TABLE OF CONTENTS

§ 16:8 Artificial intelligence in arbitration

III. PROCEDURAL ISSUES

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

CHAPTER 17. ARBITRATION OF EMPLOYMENT DISPUTES

I. INTRODUCTION

- § 17:1 Arbitration as a condition of employment: In General
- § 17:2 Exceptions to Mandatory Arbitration in Employment
- § 17:3 General background
- § 17:4 Costs of arbitration, Employer Promulgated Plan versus Individually Negotiated Agreement
- § 17:5 The preemptive effect of the Federal Arbitration Act
- § 17:6 Statutory claims
- § 17:7 Common law claims
- § 17:8 Sources of pre-dispute agreements to arbitrate
- § 17:9 Other Issues Affecting Enforcement of Arbitration Agreements

III. FACTORS TO CONSIDER IN THE ARBITRATION PROCEDURE

- § 17:10 Fairness
- § 17:11 Scope of the arbitration agreement
- § 17:12 Method of selecting the arbitrator
- § 17:13 The standards to be applied
- § 17:14 Burden of proof
- § 17:15 Period of limitations
- § 17:16 Severability provision: "Gateway" decisions concerning arbitrability

- § 17:17 Confidentiality
- § 17:18 Payment of attorneys' fees and sanctions
- § 17:19 Written awards
- § 17:20 Should mediation be a mandatory step in an arbitration agreement?
- § 17:21 Discovery
- § 17:22 Scope of remedies
- § 17:23 Place of hearing in the absence of agreement by the parties
- § 17:24 Judicial proceedings
- § 17:25 Optional appellate rules

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
- § 18:7 —WIPO—Arbitration Rules
- § 18:8 —The Unified Patent Court's Patent Mediation and Arbitration Center
- § 18:9 Other institutions and institutional arbitration and mediation rules and procedures for the resolution of intellectual property disputes—WIPO, and 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

TABLE OF CONTENTS

**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**

- § 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”)
 and UPC Patent Mediation and Arbitration
 Center (“PMAC”)
§ 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

IV. INTERNATIONAL RECOGNITION AND 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
- § 19:24 Recognition and enforcement

V. PROCEDURES IN INTERNATIONAL ARBITRATION

- § 19:25 Commencing arbitration
- § 19:26 Selection of arbitrators
- § 19:27 Statement of claim and answer
- § 19:28 Discovery
- § 19:29 Terms of reference
- § 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
- § 20:8 Arbitration providers
- § 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

TABLE OF CONTENTS

§ 20:17	Drafting arbitration provisions
§ 20:18	Enforceability of the arbitration agreement
§ 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
§ 20:25	Option for tribunal appeal

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

§ 22:27 Settlement

TABLE OF CONTENTS

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
- § 24:2 The lawyer's changing role
- § 24:3 Developing a negotiation strategy
- § 24:4 Why mediations succeed when face-to-face negotiations fail
- § 24:5 Mediation is more cost-effective than traditional litigation
- § 24:6 Early mediation is often productive
- § 24:7 Mediation late in the game
- § 24:8 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
- § 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

TABLE OF CONTENTS

- § 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 predispute mediation clause
- § 25:3 Drafting the predispute mediation clause
- § 25:4 If and when a dispute arises
- § 25:5 Issues to consider in the mediation agreement
- § 25:6 Using a mediation provider
- § 25:7 Enforceability of the agreement to mediate
- § 25:8 Conclusion

CHAPTER 26. SELECTED ESSAYS ON MEDIATION

- § 26:1 Introduction
- § 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 AND PRIVILEGE IN MEDIATION AND THE MEDIATED SETTLEMENT AGREEMENT

I. CONFIDENTIALITY DURING THE MEDIATION

- § 27:1 Introduction
- § 27:2 The opening (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

III. PROTECTION OF STATEMENTS IN CONNECTION WITH SETTLEMENT OFFERS

- § 27:10 State and Federal Rule(s) of Evidence 408

IV. OTHER PROTECTIONS

- § 27:11 Common law protection

TABLE OF CONTENTS

- § 27:12 Rule of Evidence 403
- § 27:13 Federal Rule of Civil Procedure 68
- § 27:14 Protection of “quasi-judicial proceedings”

V. THE EFFECT OF MEDIATION ON OTHER PRIVILEGES

- § 27:15 The attorney work-product doctrine and the attorney-client privilege

VI. REMEDIES

- § 27:16 Remedies for breach of confidentiality

VII. THE MEDIATED SETTLEMENT AGREEMENT

- § 27:17 Enforceability of the settlement agreement
- § 27:18 Enforceability of MOUs, Term Sheets, and unexecuted agreements
- § 27:19 *Res judicata* and collateral estoppel effects of the settlement agreement
- § 27:20 Limitations on the *res judicata* and collateral estoppel effects of the settlement agreement

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
- § 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 Example: factual background
- § 29:8 Example: issues to be resolved
- § 29:9 Example: the process

CHAPTER 30. ADMINISTRATIVE MEDIATION: ESSAYS FROM AN ENVIRONMENTAL MEDIATOR

I. INTRODUCTION

- § 30:1 Mediating with an environmental agency
- § 30:2 Can agency staff mediate their own disputes?

CHAPTER 31. FAMILY AND ESTATE MEDIATION

- § 31:1 Introduction
- § 31:2 What is family mediation?
- § 31:3 Confidentiality in family mediation
- § 31:4 Ethical standards in family mediation
- § 31:5 When is mediation appropriate?
- § 31:6 Power-balancing
- § 31:7 Role of counsel and selection of the mediator
- § 31:8 Court involvement in family mediation

TABLE OF CONTENTS

- § 31:9 Mediation in divorce and separation
- § 31:10 Intergenerational and elder mediation
- § 31:11 Trusts and estates mediation
- § 31:12 Mediation of shared family assets and family businesses
- § 31:13 Documenting and implementing mediated agreements
- § 31:14 Additional resources

CHAPTER 32. MEDIATION OF INSURANCE AND PERSONAL INJURY DISPUTES

I. INTRODUCTION

- § 32:1 In general
- § 32:2 The early ADR system
- § 32:3 Early private mediation programs
- § 32:4 Success rates
- § 32:5 Advantages of tort mediation

II. CONCLUSION

- § 32:6 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 —ICDR Mediation
- § 33:11 —LCIA Mediation
- § 33:12 —UNCITRAL Conciliation Rules and Model Law on International Commercial Mediation
- § 33:13 Investor—State Mediation

- § 33:14 Model mediation procedures—World Intellectual Property Organization (“WIPO”)
- § 33:15 Implications of enforcement of agreements to mediate
- § 33:16 Enforcement of agreements reached by mediation: The Singapore Convention
- § 33:17 Internationally acknowledged principles of evidentiary incompetence of mediation communications
- § 33:18 Cross-cultural negotiations

CHAPTER 34. EMPLOYMENT MEDIATION

- § 34:1 Common employment disputes
- § 34:2 The decision to mediate
- § 34:3 Broaching the topic of mediation
- § 34:4 Selecting the mediator
- § 34:5 Establishing the procedure
- § 34:6 Who should attend
- § 34:7 Mediator’s fees
- § 34:8 Confidentiality
- § 34:9 Pre-session mediation statements
- § 34:10 Opening session and procedure
- § 34:11 The mediator’s private sessions with the plaintiff
- § 34:12 The mediator’s private sessions with employer representatives
- § 34:13 Late-stage sessions
- § 34:14 Mediator’s proposals
- § 34:15 Memorialization of the outcome
- § 34:16 Disputes with current employees not seeking significant damages
- § 34:17 Disputes with current employees seeking significant damages

CHAPTER 35. MEDIATION OF SECURITIES DISPUTES

I. INTRODUCTION

- § 35:1 Options in securities disputes

TABLE OF CONTENTS

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 sessions

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 DRBs
- § 36:5 Advantages
- § 36:6 Single-member DRBs, project neutrals, and dispute resolution advisors
- § 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 DRB members or a single neutral
- § 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 CURRENT USE OF DRBS

- § 36:16 Why DRBs remain useful in modern
construction dispute resolution

CHAPTER 37. MED-ARB (MEDIATION- ARBITRATION) AND OTHER HYBRID FORMS OF ADR

- § 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 use of med-arb
- § 37:8 Other hybrid forms of ADR: med-then-arb
- § 37:9 Other hybrid forms of ADR: arb-med
- § 37:10 Other hybrid forms of ADR: shadow mediation
- § 37:11 Other hybrid forms of ADR: Co-med-arb
- § 37:12 Other hybrid forms of ADR: mini-trial
- § 37:13 Other hybrid forms of ADR: med-rec
- § 37:14 Other hybrid forms of ADR: forms of baseball
arbitration

CHAPTER 38. PRIVATE JUDGING

I. INTRODUCTION

- § 38:1 Private judging as a form of ADR

II. REPRESENTATIVE JURISDICTIONS PERMITTING USE OF REFEREES AND PRIVATE JUDGES

- § 38:2 Types of private judicial services

III. CHARACTERISTICS OF PRIVATE JUDGING

- § 38:3 Advantages
- § 38:4 Disadvantages

TABLE OF CONTENTS

**CHAPTER 39. COLLABORATIVE LAW
AND THE USE OF SETTLEMENT
COUNSEL**

I. INTRODUCTION

§ 39:1 Generally

II. COLLABORATIVE LAW

- § 39:2 Origins of collaborative law
- § 39:3 Collaborative family law
- § 39:4 Comparison with mediation
- § 39:5 The collaborative law process
- § 39:6 Collaborative law as a paradigm shift
- § 39:7 What is different about collaborative law?
- § 39:8 The importance of collaborative law training
- § 39:9 Advantages of collaborative law
- § 39:10 Disadvantages of collaborative law
- § 39:11 Ethical issues
- § 39:12 The use of collaborative law in other practice areas

III. SETTLEMENT COUNSEL

- § 39:13 Advantages and disadvantages of settlement counsel
- § 39:14 When to use settlement counsel

IV. CONCLUSION

§ 39:15 Generally

**CHAPTER 40. MANAGING FAMILY
BUSINESS CONFLICT: A
COLLABORATIVE APPROACH**

- § 40:1 Introduction
- § 40:2 Conflict or dispute?
- § 40:3 Why are family business conflicts so extreme?
- § 40:4 Why is conflict in a family business so difficult to manage?
- § 40:5 Identifying the underlying reasons for conflict
- § 40:6 Further complicating factors

§ 40:7	Identifying the trigger for conflict: the role of power
§ 40:8	The family factor
§ 40:9	Matching conflict factors with management resources
§ 40:10	Existing methods of conflict management
§ 40:11	Power based approaches (litigation, arbitration)
§ 40:12	Bargaining based approaches (negotiation, mediation, collaborative law)
§ 40:13	Development based approaches (consulting, coaching, therapy)
§ 40:14	A collaborative, multidisciplinary approach
§ 40:15	Conclusion

Volume 2

APPENDICES

APPENDIX II-1.	Uniform Arbitration Act
APPENDIX II-2.	State Arbitration Statutes
APPENDIX II-3.	AAA Commercial Arbitration Rules and Mediation Procedures
APPENDIX II-4.	Code of Arbitration Procedure
APPENDIX II-5.	Sample Standard Predispute Arbitration 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.	FINRA Arbitration Submission Agreement
APPENDIX II-13.	Revised Uniform Arbitration Act
APPENDIX II-14.	Sample Arbitration Submission Agreement

TABLE OF CONTENTS

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.	NAM Comprehensive Dispute Resolution Rules and Procedures
APPENDIX II-18.	NAM Mass Supplemental Dispute Resolution Rules and Procedures
APPENDIX II-19.	REBA Arbitration Guidelines
APPENDIX II-19A.	<i>[Reserved]</i>
APPENDIX II-20.	Sample Employee Problems and Complaints Dispute Settlement Procedure
APPENDIX II-21.	Sample Optional Appellate Clause
APPENDIX II-22.	Sample Employee Acknowledgment of Receipt of Handbook
APPENDIX II-23.	Employment Arbitration Rules and Mediation Procedures
APPENDIX II-24.	Employment Arbitration Rules & Procedures _ JAMS _ Mediation, Arbitration and ADR Services
APPENDIX II-25.	ICC Arbitration Rules and Mediation Rules
APPENDIX II-25A.	<i>[Reserved]</i>
APPENDIX II-26.	UNCITRAL Arbitration Rules
APPENDIX II-27.	ICDR International Dispute Resolution Procedures (Including Mediation and Arbitration Rules)
APPENDIX II-28.	<i>[Reserved]</i>
APPENDIX II-29.	Sample Conventional Arbitration Clause [Lease]
APPENDIX II-30.	<i>[Reserved]</i>
APPENDIX II-31.	<i>[Reserved]</i>
APPENDIX II-32.	Sample Arbitration Clause [Title Insurance Policies]
APPENDIX II-33.	Sample Predispute Arbitration Clause [General Real Estate]

ADR PRACTICE GUIDE

- 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-37. ALTA Title Insurance Arbitration
Rules 1-1-06 (1)
- APPENDIX II-38. Real Estate Industry Arbitration
Rules (Including a Mediation
Alternative)
- APPENDIX II-39. CPR Rules for Administered
Arbitration of International
Disputes
- APPENDIX II-40. *[Reserved]*
- APPENDIX II-41. ICANN Uniform Domain Name
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. AAA Mass Arbitration
Supplementary Rules
- APPENDIX II-48. JAMS Mass Arbitration Procedures
and Guidelines
- APPENDIX III-1. Sample Predispute Mediation Clause
- APPENDIX III-4. Stipulation and Order re Mediation
Process
- APPENDIX III-5. Mediation Confidentiality Agreement
- APPENDIX III-6. Sample Mediation Agreement
- APPENDIX III-7. Model Standards of Conduct for
Mediators

TABLE OF CONTENTS

APPENDIX III-8.	Uniform Mediation Act
APPENDIX IV-1.	Sample Contract Specifications for an American Arbitration Association Dispute Review Board
APPENDIX IV-2.	Sample Notice of Dispute Submission to Dispute Review Board
APPENDIX IV-3.	American Arbitration Association Request for a DRB or DRS
APPENDIX IV-4.	MED-ARB Agreement
APPENDIX IV-5.	Sample Med-then-arb (“Step”) Agreement
APPENDIX IV-6.	Sample Mini-Trial Clause
APPENDIX IV-7.	Collaborative Family Law Participation Agreement
APPENDIX IV-8.	Form of Baseball Arbitration Clause

Table of Laws and Rules

Table of Cases

Index