BEFORE CLOSING THAT KILLER DEAL:
CONSIDERATIONS FOR NEGOTIATING AND DRAFTING
APPROPRIATE AND ENFORCEABLE ARBITRATION PROVISIONS

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INDEX TO NEGOTIATING ARBITRATION CLAUSES

I. OVERVIEW

II. THE “STANDARD” ARBITRATION CLAUSE

III. PRELIMINARY DRAFTING CONSIDERATIONS

1. The “Pros” And “Cons” Of Traditional Arbitration
2. The “Pros” And “Cons” Of Mediation
3. The “Pros” And “Cons” Of Judicial Reference Proceedings
4. Stand-Alone Jury Waiver Clauses Compared
5. An Overarching Concern: Unconscionability

IV. ANALYSIS OF THE KEY COMPONENTS CONTAINED WITHIN THE “STANDARD” ARBITRATION CLAUSE

1. Scope of the Arbitrator’s Jurisdiction
2. Conclusiveness
3. Forum
4. Rules
5. Qualifications of the Arbitrator
6. Venue
7. Choice of Law
8. Entry of Judgment

V. OTHER ISSUES THAT MIGHT BE ADDRESSED IN YOUR CLAUSE

1. Discovery
2. Evidence
3. The Form of the Award
4. Award of Fees and Costs to the Prevailing Party
VI. OTHER CONSIDERATIONS

1. Is Small Claims an Alternative?
2. Is There a Language or Nationality Issue?
4. Termination
5. Interim Measures
6. Punitive Damages
7. Limitation of Liability
8. Arbitration Submission Agreements
9. Review of Arbitration Awards

VII. CONCLUSION

EXHIBITS
Arbitration Clause Samples
Arbitration Clause Checklist

APPENDIX

BIBLIOGRAPHY

ARBITRATION DECISIONS OF NOTE
NEGOTIATING AND DRAFTING KILLER ARBITRATION CLAUSES

I. Overview

Entertainment litigation is a very active area of the law. Much of entertainment litigation arises because of disputes related to the terms contained in written contracts. While most domestic entertainment contract disputes historically have been resolved in state or federal court, depending on the circumstances alternate dispute resolution (ADR) have proven to provide faster, less expensive results and as well provide a process that conforms to and is congruent with the expectations of the parties. In this regard, it should be noted that ADR comes in multiple forms, and thus allows for great flexibility. Depending on how a particular ADR clause is written, parties can select a single or multiple trier(s)-of-fact. They can arrange for some or all of the triers-of-fact to be neutral or non-neutral. They can ensure triers-of-fact are entertainment specialists who understand the customs, practices and jargon of the entertainment industry. To a certain extent, parties can “pick and choose” which body of law will apply. They can require each other to exhaust steps to mediate or attempt to settle before resorting to a full blown evidentiary hearing. They can significantly limit or expand, or otherwise provide an agreed upon procedure for the parties’ discovery rights. ADR can also provide something most entertainment clients want that court actions most definitely usually cannot – confidentiality.

On the other hand, poorly written ADR clauses can backfire. They can result in protracted, expensive, non-confidential proceedings before triers-of-fact with no entertainment expertise, allow disputes to be resolved without regard for the law and leave the parties without any effective appellate recourse. It all depends on what the parties agree to – or fail to agree to – in their contract negotiations.

Yet, despite the fact ADR clauses dictate how, before whom, where and when an entertainment dispute will be resolved; they are frequently not given much, if any, thought in the negotiation process. They are regarded by the unwary as boilerplate “one-size-fits-all” provisions. All too often litigation attorneys are forced to explain to their disappointed entertainment clients the consequences of these hitherto overlooked clauses. This can create tension between clients and counsel. In extreme cases, it can also lead to malpractice claims.

The purpose of this section of the Syllabus is to review points to consider in negotiating and drafting ADR clauses in entertainment agreements. The article is not intended to be exhaustive. It is designed merely to highlight some of the more critical issues competent counsel should consider and, where at all appropriate, discuss with their entertainment clients before a contract is signed.

Please note that in 2010, the College of Commercial Arbitrators published its Protocols for Expeditious, cost-effective Commercial Arbitration. Counsel and other attendees might wish to read this document.
II. The “Standard” Arbitration Clause

Here is a “standard” arbitration clause recommended by the American Arbitration Association (“AAA”):

*Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by final, binding arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.*

In transactions likely to require interim or emergency relief (e.g., the issuance of a temporary restraining order, preliminary injunction, issuance of a writ of attachment, etc.), the AAA also suggests the parties add:

*The parties also agree that the AAA Optional Rules for Emergency Measures of Protection shall apply to the proceedings.*

Here is a “standard domestic arbitration clause” recommended by JAMS:

*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 (and in accordance with the Expedited Procedures in those Rules) (or pursuant to JAMS’ 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.*

Here is the “standard domestic arbitration clause” recommended by IFTA:

*Any dispute under this Agreement will be resolved by final and binding arbitration under the IFTA™ Rules for International Arbitration in effect as of the Effective Date of this Agreement (“IFTA™ Rules”). Each Party waives any right to adjudicate any dispute in any other court or forum, except that a Party may seek interim relief before the start of arbitration as allowed by the IFTA™ Rules. The arbitration will be held in the Forum and under the Governing Law designated in this Agreement, or, if none is designated, as determined by the IFTA™ Rules. The Parties will abide by any decision in the arbitration and any court having jurisdiction may enforce it. The Parties submit to the jurisdiction of the courts in the Forum, with respect to interim relief, to compel arbitration or to confirm*
an arbitration award. The Parties agree to accept service of process in accordance with the IFTA™ Rules and agree that service in accordance with the IFTA™ Rules satisfies all requirements to establish personal jurisdiction over the Parties. Both Parties waive application of the procedures for service of process pursuant to the Hague Convention for Service Abroad of Judicial and Extrajudicial arbitration award that is confirmed by a court of competent jurisdiction, the prevailing Party may request that the other Party be barred from attendance at the American Film Market® in accordance with the arbitration and barring provisions of the most current AFM® Guidelines.”

Even though the foregoing language from the three providers is considered “standard,” it is not suitable for use in all contracts. Indeed, there are important issues to consider in connection with virtually every phrase in these paragraphs. In other words, counsel should not propose or accept any of this language without understanding its effect and giving due consideration to how it will affect his or her client’s rights in the event of a future dispute. (JAMS publish a Clause Drafting Workbook; please see the Appendix for a reference.)

This article will break down and explain these considerations. Section III discusses preliminary considerations, including an overview of the three major types of ADR: i.e., traditional arbitration, mediation and judicial reference proceedings. Section IV discusses drafting considerations at greater length. For illustrative purposes, Section IV breaks down the various components of the “standard” arbitration clauses quoted immediately above and discusses the “pros” and “cons” of this recommended language.

III. PRELIMINARY DRAFTING CONSIDERATIONS

The first question counsel should ask, and discuss with his or her client in the drafting phase, is whether the client would prefer a less formal and flexible ADR forum rather than a traditional court proceeding to resolve future disputes related to the particular business deal being negotiated. The correct answer is not always “yes.” For practical and economic reasons, some clients believe they may have a tactical advantage over potential adversaries in court. Similarly, some attorneys believe their client(s) have a better chance trying certain disputes in a public forum in the presence of a jury. Since ADR is a creature of contract – i.e., absent a contractual ADR provision, future disputes will be resolved in court – both sides must agree to arbitration to avoid court proceedings.

The primary benefits of traditional court proceedings are that parties typically have extensive statutory pleading and discovery rights; the protection of formalized rules of evidence; in certain (but not all) instances the right to a jury trial; generally speaking a better chance of obtaining punitive damages in cases involving intentional wrongdoing; and the protection of interlocutory or post-judgment appellate review if either party believes his or her legal rights have been abridged.
However, what some attorneys and clients consider benefits others consider problems to be avoided. Indeed, the very premise of ADR is that most clients, if given the choice, would prefer to have their disputes heard in a faster, less expensive, non-public forum. The pursuit of such laudable goals, however, necessarily means the abandonment of corollary rights. The early discussion between attorney and client, then, should focus on what rights are to be forfeited to secure perceived benefits.

**ADR Myth # 1**: It’s all of nothing: a client cannot avoid a costly, public trial without giving up the right to conduct full discovery, require the trier-of-fact to follow the rules of evidence and appeal an adverse outcome. *False*. Since ADR is a “creature of contract,” it is fully customizable. In drafting an ADR clause, counsel can preserve whatever rights their respective clients agree to preserve, and agree upon procedures that serve that process. This includes, among other things, the right to have certain procedural rules apply as well as the right to review of the award for legal error (although due consideration must be given to how and before whom such review might take place.)

Assuming both sides want and are willing to accept ADR for any or all of the possible reasons they might consider advantageous to their own self-interests, the next question to ask is what type of ADR is desirable? Should ADR take the form of arbitration? Should either party be able to initiate arbitration at will, or should it be a two-step, mediation then arbitration only-if-necessary process? Alternatively, should ADR take the form of a judicial reference to decide only specified issues? If so, which issues (e.g., an accounting to determine copyright infringement or royalty damages)? In either case, what qualifications should the arbitrator(s) or referee(s) have? How should the arbitrator(s) or referee(s) be selected? Should the parties vest a sole arbitrator with complete power to decide the case, or should they appoint (and incur the expense) of a panel of three arbitrators? In the case of a hypothetical three-member arbitration panel, should the parties each be allowed to appoint one of the three panel members? If so, should those party appointed arbitrators be “neutral” or “non neutral”? Regardless of the number of decision makers appointed, should the parties require the arbitrator(s) to follow a particular set of laws or industry regulations? Should they permit limited or expansive discovery? Should they limit or enhance the review of the award or create an appellate process? Should they require their ADR proceedings be kept confidential or should they allow documents and hearing transcripts to be used for other purposes?

There are extensive rules, and legal precedents in every United States jurisdiction, covering each of these considerations.

Before an attorney can assist his or her client make informed choices in answering the foregoing questions, the attorney must first understand the fundamental differences between traditional arbitration, mediation and judicial reference proceedings. In other words, the attorney must understand, and be able to readily explain, the “pros” and “cons” of each type of ADR clause, as well as the parties’ ability to customize the same to accommodate their individual needs and interests. The attorney should also be familiar with types of problems that parties commonly encounter in attempting to implement
and/or enforce ADR. The best way to avoid a problem is to anticipate and guard against it beforehand.

1. The “Pros” And “Cons” Of Traditional Arbitration

Arbitration actually was in widespread use in the United States almost three centuries before modern arbitration statutes were passed in the 1920s; its history traces back to the early colonial period. Professor John R. Aiken, in his article *New Netherlands; Arbitration in the 17th Century*, 29 Arbitration Journal 145-60 (1974), explored records from the Dutch period in New York (1624-1664) and explains: “Arbitration in New Netherlands in the 17th century ... was frequent, swift, and relatively simple compared to the English common law.”¹ In the 1920’s, however, the first “modern” arbitration statutes appeared in New York (1920), New Jersey (1923), the federal government (1925), Oregon (1925), Massachusetts (1925), Pennsylvania (1927) and California (1927). Unlike their predecessors, the new statutes commanded courts – previously sometimes hostile to arbitration as a perceived threat to the orderly pursuit of justice – to treat executory agreements to arbitrate as irrevocable and fully enforceable. The advent of judicially enforceable arbitration clauses is then credited for spawning a new business: *i.e.*, that of for-hire, private dispute resolution providers. Not coincidentally, AAA was founded in 1926.

Many historians consider these modern-day arbitration statutes, and arbitration in the form it is now practiced, to be the result of societal upheavals of the early 20th Century. They argue the delay and cost (both public and private) of resolving commercial disputes in court was incompatible with the demands of fast-paced economic expansion brought about by the industrial revolution. Some claim better funded entrepreneurs benefited from the new “justice for hire” system. Others claim exactly the opposite. Notwithstanding this continuing dispute, the fundamental premise of arbitration, then and today, is it often preferable to have a matter resolved quickly and inexpensively than with the purported exactitude and procedural safeguards available in court.

With this in mind, as suggested above, the benefits of arbitration can be manifold, including: (i) expeditious proceedings, potentially saving years of litigation; (ii) a cost effective hearing; (iii) greater control over the time and place of the hearing; (iv) avoidance of excessive pre-hearing discovery; (iv) a hearing before one or more trier(s)-of-fact with specialized training or credentials; (v) greater control over the selection of those trier(s)-of-fact; (vii) a relaxed approach towards the receipt and admissibility of evidence; (vii) avoidance of the delay and uncertainly associated with protracted appeals; and (vi) greater flexibility allowing arbitrators to do “what is right” as opposed to rigidly following the law.

Also, absent extraordinary circumstances, court proceedings are open to the public and media scrutiny. On the other hand, provided certain language is included in the operative ADR clause, mediation and arbitration proceedings and results can be kept confidential.

**ADR Myth # 2:** By default, ADR proceedings are confidential. *False.* In certain jurisdictions, including California, ADR proceedings are not automatically confidential. Absent an express confidentiality agreement or a stipulated protective order, parties may freely use evidence proffered in arbitration and the arbitration award in other proceedings and for other purposes. *Universal City Studios, Inc. v. Superior Court*, 110 Cal.App.4th 1273, 1274–1275 (2003). Also, arbitration awards must be confirmed by a court to make them enforceable, so it is particularly difficult to screen awards from public view.

**Contrast:** AAA Commercial, JAMS Comprehensive and JAMS International Arbitration Rules provide for the confidentiality of arbitration proceedings, as does The Code of Ethics for Arbitrators in Commercial Disputes. However, while arbitrators are bound by these provisions to maintain confidentiality, no such requirement is imposed on the parties.

Of course, the “pros” described above could be considered “cons” by any client who would not benefit from having a future dispute resolved quickly; who, for a variety of conceivable tactical or competitive reasons, might prefer to preserve full discovery rights; who would benefit from rigid adherence to the rules of evidence; who would want to preserve the right to pursue an appeal; or who would prefer to have any future dispute resolved in a public forum.

Perhaps the biggest “con” associated with traditional arbitration was aptly summed up by a former President of the AAA himself: “An arbitrator is given awesome powers by the parties and by the law.” *Advanced Micro Devices, Inc. v. Intel Corp.*, 9 Cal.4th 362, 386 (1994), citing, Coulson, *Business Arbitration: What You Need to Know* (1980) p. 21. This is because, generally speaking, arbitration awards may be contested only on narrow grounds and are thus nearly incontestable. As explained in *Luce, Forward, Hamilton & Scripps, LLP v. Koch*, 162 Cal. App. 4th 720, 728 (2008) (disapproved on other grounds in *Haworth v. Superior Court*, 50 Cal.4th 372 (2010):

California favors arbitration as a speedy means of settling disputes, and to facilitate the policy it is essential that arbitration judgments are binding and final. *(A.M. Classic Construction, Inc. v. Tri–Build Development Co. (1999) 70 Cal.App.4th 1470, 1474–1475, 83 Cal.Rptr.2d 449.) Accordingly, arbitration judgments are subject to extremely narrow judicial review and the exclusive grounds for vacating an arbitration award are the statutory grounds set forth in section 1286.2 *(Marsch v. Williams* (1994) 23 Cal.App.4th 238, 243–244, 28 Cal.Rptr.2d 402, citing *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 10 Cal.Rptr.2d 183, 832 P.2d 899), such as the “award was procured by corruption, fraud or other undue means,” or the arbitrator exceeded his or her powers. *(§ 1286.2, subd. (a)(1) & (4.)∗ “Unless one of the enumerated grounds exists, a court
may not vacate an award even if it contains a legal or factual error on its face which results in substantial injustice.” (Marsch v. Williams, supra, at pp. 243–244, 28 Cal.Rptr.2d 402.)

Adding to the “con” side is that it is “[p]recisely because arbitrators wield such mighty and largely unchecked power, the Legislature has taken an increasingly more active role in protecting the fairness of the process.” Luce Forward, 162 Cal.App.4th at 729; citing, Azteca Construction, Inc. v. ADR Consulting, Inc., 121 Cal.App.4th 1156, 1165 (2004). Besides adding section 1281.9 to the California Arbitration Act – which statute, as amended in 2001, requires a proposed neutral arbitrator to “disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial” – by law parties can now exercise “an unqualified right to remove a proposed arbitrator based on any disclosure required by law which could affect his or her neutrality. [Citation.] There is no good faith or good cause requirement for the exercise of this right, nor is there a limit on the number of proposed neutrals who may be disqualified in this manner. [Citation.] As long as the objection is based on a required disclosure, a party's right to remove the proposed neutral by giving timely notice is absolute.’ ” Luce Forward, 162 Cal.App.4th at 729 (italics added); see also, Coffman Specialties, Inc. v. Dep't of Transp., 176 Cal.App.4th 1135, 1150 (2009).

ADR Myth # 3: AAA Commercial Rules, JAMS Comprehensive Rules and the rules of any other ADR provider usually specify a process for the selection of the arbitrator(s), typically directing parties to use a “strike list,” which permits striking not to exceed a certain number and ranking the rest. The arbitrator who is appointed may be challenged based on disclosures made after the appointment. The rules may restrict the parties’ right to exercise more than a certain number of challenges to a proposed Neutral, and/or require such challenges to be exercised in good faith and only on certain grounds. This does not necessarily limit their right to object to the selection of Neutrals.

Under the holding in Azteca Const., Inc. v. ADR Consulting, Inc., 121 Cal.App.4th 1156 (2004), parties cannot waive California’s statutory provisions pertaining to arbitrator disqualification by adopting an ADR provider’s rules, as such disqualification provisions were “enacted primarily for public purpose, and neutrality of arbitrator was of such crucial importance that state legislature could not have intended that its regulation be delegable to unfettered discretion of private business.”

Accordingly, built into traditional arbitration, at least as it exists in California today, is the opportunity for either party to delay the commencement of arbitration proceedings by interposing a continuing series of objections to various proposed arbitrators. The institutional provider will usually make an administrative appointment where the parties cannot agree on a neutral. In non-institutional (“ad hoc”) arbitration, the failure of the parties to agree on an arbitrator will result in the application to a Court to appoint a Neutral. Even then, however, the parties may still each be entitled to one “preemptory” challenge to any court-appointed arbitrator (under the California Arbitration Act (“CAA”), but not under the FAA).
Practice Note: If each side is entitled to appoint a party arbitrator, and the party arbitrators are to appoint the third arbitrator, it is usually the case that the party arbitrators will agree on the chair even where parties would not have been able to agree on an arbitrator.

2. The “Pros” And “Cons” Of Mediation

As suggested above, another threshold question to consider is whether the client would prefer an opportunity to engage in conciliation, mediation or settlement discussions before engaging counsel to fight a full-blown arbitration or judicial reference proceeding. Of course, such clauses necessarily operate both ways. Here is a sample Mediation clause:

In the event of any controversy or claim arising out of or relating to this contract or the breach thereof: (A) the parties hereto agree first to try and settle the dispute by mediation, administered by ___________ under its mediation rules. If settlement is not reached within ___ days after service of a written demand for mediation, or in the event the mediation is not commenced and/or does not reach an agreed settlement between the parties by the end of said ___ days, then (B) any unresolved claims shall be settled by final and binding arbitration under the terms and conditions which follow...

The concept of mediation is that, if given the opportunity and forum to do so, the parties might be able to quickly de-escalate their dispute – and in the process avoid the cost, distraction and potential destruction of their business relationship in fighting a protracted “battle” over who is “right and wrong” – if they had the benefit of the services of a skilled mediator. Mediators, unlike arbitrators or judicial referees, are not charged with deciding who is right and wrong. Rather, as explained by the AAA:

Mediation is a non-binding process where a neutral third-party (the mediator) works with the parties to reach a mutually agreeable settlement. If a settlement is not reached, the mediator has no authority to impose one. In arbitration, the arbitrator hears evidence and receives testimony, much like a judge and makes a decision that is binding on the parties.

There are many advantages to mediation. Among them, the mediation process allows parties to gain a better understanding of each other’s underlying interests and concerns. The process can also help clarify your own understanding of the matter. The civil nature of the process fosters continued productive relationships between the parties to the dispute. Furthermore, mediation opens the door for sustainable and creative party driven resolutions.
As the foregoing suggests, the skill-set employed of a successful mediator is different from that of an arbitrator. A mediator’s mission is to build consensus and promote settlement or clarify areas of disagreement that may serve as a basis for resolution at a later date. Frequently, this is accomplished by emphasizing that the parties have more to gain by compromising than pursuing a final, enforceable decision (judgment) as to who is right and wrong. In other words, mediators often focus on the “big picture” as opposed to facts or law pertaining to a given dispute. An arbitrator, on the other hand, is not charged with encouraging settlement. To the contrary, the job of an arbitrator – like that of a judge or jury – is to hear evidence, apply the law and decide who should win and lose. Most ADR providers believe an arbitrator should not simultaneously (or sequentially) provide mediation services precisely because the two tasks are fundamentally different and create ethical conflicts between the two roles.

With the foregoing in mind, an attorney should ask his or her client: Given the nature of the particular contract being negotiated, if we include a mandatory mediation clause, will that help or hurt in the event of a dispute? Can we reasonably assume the other side will mediate in good faith? Alternatively, is it possible the other side will use mediation as a way of dragging out a future dispute and, in the process, driving up costs while delaying and/or thwarting the client’s ability to seek timely relief?

Once again, obviously there is no “one-size-fits-all” answer to these questions. The decision to require, or accept, a pre-arbitration or pre-lawsuit mediation clause necessarily comes down to a judgment call. One must consider the unique circumstances in every business relationship, including the client’s past history – if any – with the other party, the client’s possible need to settle as opposed to fight a potential future dispute, the two parties’ potentially disparate financial circumstances, the other party’s reputation for fair dealing and/or litigiousness, etc.

**Practice Note**: Assuming the client wants to include a mediation provision, keep in mind such a clause should incorporate objective performance standards that might easily be met, and as well provide if mediation does not occur within a certain time frame and/or proves unsuccessful by objective criteria (e.g., fails to result in a fully signed settlement agreement within a certain number of days) arbitration and/or a lawsuit will commence immediately thereafter. For example, a clause requiring the selection of a particular mediator (e.g., one experienced in sports agreements with the NBA or a Nobel prize winning physicist) might inadvertently create a de facto dispute resolution roadblock as such individual(s) might not be readily available. Similarly, clauses that simply state mediation “shall” occur before an arbitration or lawsuit proceeds, albeit commonly used, invite gamesmanship and delay. In other words, they invite parties to move slowly in selecting a suitable mediator, as well as in scheduling and/or completing mediations. Finally, excessively complex, cumbersome or unclear provisions frequently wind up in court to interpret or enforce – thus creating, not avoiding, expense and delay.
Further Practice Note: Although, unlike arbitration, mediation is considered a confidential proceeding in the sense that communications occurring in the course of the mediation are not admissible in court or an arbitration, communications relating to, but not necessarily occurring during, a scheduled mediation conference may not be considered confidential. Thus, parties should take care to include language in their mediation agreement, or execute a separate written agreement before engaging in mediation, clearly setting forth the parameters of what communications will, and will not, be considered confidential and whether the scope of confidentiality is broader than just later court proceedings.

In sum, mediation, unlike arbitration or other forms of ADR, is non-binding. Depending on the parties and dispute involved, it can be highly beneficial. Caution should be exercised, however, to ensure that it is not employed for dilatory purposes.

3. The “Pros” And “Cons” Of Judicial Reference Proceedings

An alternative to both traditional arbitration and mediation is a judicial reference (referee) proceeding. General references resemble trials (Code Civ. Proc. § 638). Temporary Judge appointments (Cal. Const. Art VI, § 21) are similar to general references but may not be agreed predispute. Special references are usually made for determination of discovery disputes. Code Civ. Proc. § 639. A referee, unlike an arbitrator, operates as an “arm” of the court. A referee under a general reference hears and determines the case and reports a decision to the trial court which must enter a judgment consistent with the referee’s Report. The matter may then be appealed as any other judgment and is reviewable on appeal to the same extent they would be if entered by the court in the first instance. In other words, unlike traditional arbitration, reference proceedings operate much like court proceedings, meaning the rules of evidence and other substantive legal principles apply, and the results are subject to reversal to the extent the aggrieved party can show prejudicial error.

The parties may agree to the appointment of a referee after a dispute has arisen by asking the judge or court clerk to enter (confirm) such an oral or written agreement in the court’s minutes or docket. They can also agree to such a proceeding pre-dispute in “a written contract or lease that provides that any controversy arising therefrom shall be heard by a referee ...” Code Civ. Proc. § 638. A court can appoint a general referee pursuant to an agreement of the parties (Code Civ. Proc. § 638). This Syllabus discusses only a sampling of the relevant considerations applicable to the negotiation of pre-dispute judicial reference clauses.

Such pre-dispute clauses can call for the appointment of a general reference. A general reference gives the referee power to make a binding decision, while special references (typically for discovery disputes and the like) are merely advisory and nonbinding on the court. Code Civ. Proc. § 644; see Aetna Life Ins. Co. v. Superior Court, 182 Cal.App.3d 431 (1982). More particularly, a “general reference” empowers a referee to “hear and determine any or all of the issues in an action or proceeding, whether of fact or of law ...” Code Civ. Proc. § 638(a). A general reference thus empowers the referee to make
binding determinations that “must stand as the decision of the court.” Code Civ. Proc. § 644(a). In the case of special references, the referee is merely charged with “ascertain[ing] fact[s] necessary to enable the court to determine an action or proceeding.” Code Civ. Proc. § 638(b) (emphasis added). Thus, in a special reference proceeding the court is technically free to reject recommendations it finds to be unsupported by substantial evidence and/or the law. However, practically speaking, trial courts rarely reject a special referee’s recommendations.

In either instance, referees can be appointed to decide “all or part of a matter.” Aetna Life, 182 Cal.App.3d at 436. In other words, parties may agree in advance to have a referee or private judge decide the entirety of any dispute that arises among them, or simply decide specific disputes or questions: e.g., a dispute over whether a licensing agreement has been breached, whether a copyright has been infringed, the inspection of books of accounting or the amount of a party’s alleged damages.

Finally, as in the case of contractual clauses calling for traditional arbitration, within prescribed limits parties may agree to limit or expand procedural rights in a reference proceeding: e.g., such clauses typically recognize that referees do not conduct jury trials (Temporary Judges may do so) and often impose limitations on the right to conduct discovery.

For the foregoing reasons, reference proceedings are sometimes considered hybrids of arbitration and traditional litigation. They offer parties the opportunity to select, or at least have some say in, the selection of a trier-of-fact with expertise in a particular subject area. They further offer the parties the flexibility of having the ability to schedule evidentiary and other hearings before a “private judge” outside of the courthouse and the limitations of the congested court calendars. Finally, they allow the parties, to some extent at least, to control the rules applicable to the disposition of their dispute.

Because referees operate within the confines of the court system, however, reference proceedings do not allow for confidentiality. This is because a referee’s recommendations are subject to review, confirmation and/or rejection by both the trial and appellate courts – meaning parties are free to offer evidence and argument in a public forum supporting or opposing a referee’s findings and/or legal conclusions. Moreover, a referee cannot be appointed in the absence of a pending lawsuit – meaning the existence of the dispute necessarily must be disclosed in advance to the public. Finally, appellate review for a judgment based on a general reference is far more extensive than the limited review available for contractual arbitration awards. National Union Fire Ins. Co. v. Nationwide Ins. Co., 69 Cal.App.4th 709, 723–724 (1999) (J. Rylaarsdam dissent. opn.) In other words, judgments resulting from reference proceedings are subject to the cost, delay and risks of the appellate process.

Again, depending on the particular deal points under negotiation, and circumstances governing a particular client’s preferences, these attributes may be desirable. Hence, some form of reference proceeding should at least be considered as an alternative to traditional arbitration in the negotiation process.
**Practice Note:** A pre-dispute agreement for appointment of a referee is statutorily enforceable only if part of a “written contract or lease.” Code Civ. Proc. § 638 (emphasis added); see *Treo v. Kettner Homeowners Ass’n v. Superior Court*, 166 Cal.App.4th 1055, 1067 (2008). Parties must be careful in such written agreements to clarify the nature of the process contemplated. In at least two known instances clauses calling for the appointment of a judicial reference under Code Civ. Proc. § 638, but simultaneously calling for the AAA Commercial Arbitration Rules to apply, were deemed to constitute agreements to arbitrate, thus forfeiting the right of judicial review and/or appeal. See *Sy First Family Ltd. Partnership v. Cheung*, 70 Cal.App.4th 1334, 1341 (1999) and *National Union Fire Ins. Co. v. Nationwide Ins. Co.*, 69 Cal.App.4th 709, 715–716 (1999).

A sample judicial reference clause might read as follows:

(A) **THE PARTIES AGREE THAT IN ANY CIVIL ACTION OR PROCEEDING INVOLVING A DISPUTE ARISING OUT OF OR RELATING TO THIS AGREEMENT, THE ACTION OR PROCEEDING SHALL BE HEARD BY A JUDICIAL REFERENCE AS PROVIDED IN CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 638-645.1. SUCH DISPUTES INCLUDE, BUT ARE NOT NECESSARILY LIMITED TO, {insert list describing anticipated areas of future dispute}.**

(B) **THE PARTIES AGREE TO THE APPOINTMENT OF A SINGLE REFEREE AND SHALL USE THEIR BEST EFFORTS TO AGREE ON THE APPOINTMENT OF A SINGLE REFEREE AND SHALL USE THEIR BEST EFFORTS TO AGREE ON THE SELECTION OF THE REFEREE WITHIN TEN CALENDAR DAYS OF WRITTEN REQUEST TO DO SO BY EITHER PARTY, EITHER PARTY MAY THEREAFTER SEEK TO HAVE A REFEREE APPOINTED UNDER CALIFORNIA CODE OF CIVIL PROCEDURE SECTIONS 638 AND 640. {Alternatively, the preceding sentence might call for the parties’ selection of a referee with special qualifications or, indeed, in rare instances a specific individual identified by the parties in advance/}**

(C) **THE PARTIES AGREE THAT THE SELECTED OR APPOINTED REFEREE SHALL HAVE THE POWER TO DECIDE ALL ISSUES IN THE ACTION OR PROCEEDING, WHETHER OF FACT OR LAW, AND SHALL REPORT A STATEMENT OF DECISION THEREON.**

(D) **BY INITIALING THE SPACE BELOW, EACH PARTY WAIVES ANY AND ALL RIGHTS TO A TRIAL BY JURY FOR ALL CIVIL ACTIONS OR PROCEEDINGS INVOLVING A DISPUTE ARISING OR RELATING TO THIS AGREEMENT.**
4. Stand-Alone Jury Waiver Clauses Compared

Some clients would prefer to retain the safeguards and procedural trappings of a court action, yet avoid having a jury decide their fate. With this in mind, in lieu of ADR many commercial and entertainment agreements in use today contain clauses purporting to waive both sides’ right to a jury trial. These clauses are outdated. Agreements purporting to waive in advance of litigation the right to a jury trial, and providing that any lawsuit will be adjudicated before a court alone, are now considered *unenforceable* as a matter of public policy. There can be no non-statutory methods of jury trial waiver. *Grafton Partners L.P. v. Superior Court*, 36 Cal.4th 944, 958–961 (2005). The operative term is “non-statutory.” Both arbitration and judicial reference proceedings dispensing with the right to a jury trial are statutorily authorized. Hence, a pre-dispute arbitration or general reference clause unambiguously resulting in jury trial waiver (e.g., see the samples above) is enforceable. *Treo @Kettner Homeowners Ass’n v. Superior Court*, 166 Cal.App.4th 1055, 1063–1065 (2008).

In short, this issue alone can be a compelling argument to include an ADR clause in an entertainment contract. In light of the California Supreme Court’s 2005 holding in *Grafton*, ADR is probably the only enforceable way to avoid a jury trial – assuming this is indeed what a particular client wants.

Even these clauses, however, have their limits … see the discussion of unconscionability immediately below.

5. An Overarching Concern: Unconscionability


Unconscionability has a procedural and a substantive element, *the former focusing on ‘oppression’ or ‘surprise’ due to unequal bargaining power, the latter on ‘overly harsh’ or ‘one-sided’ results.* ... While both elements must be present to constitute unconscionability, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable and *vice versa*. *Pardee*, 100 Cal. App 4th at 1088 (emphasis added).

Most commercial agreements are not contracts of adhesion because the parties are free to negotiate their terms, including whether there shall be an arbitration clause or not. Thus, most commercial contracts are not found to be procedurally unconscionable and therefore will not be found to be unenforceable. But there is no “bright line.” In most instances, the procedural and substantive considerations turn on facts particular to a given business relationship. It is possible in the context of a business relationship, where the facts of that relationship suggest one party has little or no power to reject a proposed ADR clause and the clause subjects the disenfranchised party to substantively unfair conditions – *e.g.*, ...
having to submit resolution of a dispute to a particular neutral with ongoing economic ties or allegiances to the other party, or having to pay fees the aggrieved party could ill afford – courts may find the clause unenforceable. See Bolter v. Superior Court, 87 Cal.App.4th 900 (2001) (franchise agreement) Pokorny v. Quixtar, Inc., 601 F.3d 987 (9th Cir. 2010) (multi-level selling organization).

IV. ANALYSIS OF THE KEY COMPONENTS CONTAINED WITHIN THE “STANDARD” ARBITRATION CLAUSE

As suggested above, the “standard” arbitration clause can be broken down into several parts: i.e.:

1. Any controversy or claim arising out of or relating to this contract, or the breach thereof,
2. shall be settled by final, binding arbitration before a sole arbitrator
3. administered by AAA, IFTA, JAMS or ______________,
4. under its Commercial Arbitration Rules [Comprehensive Arbitration Rules and Procedures] or ______________,
5. Before a sole arbitrator,
6. In ______________, California
7. The law of the state of California for agreements entered into and to be performed therein shall be applied by the arbitrator
8. and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.
9. If using AAA Rules, the parties also agree that the AAA Optional Rules for Emergency Measures of Protection shall apply to the proceedings.

The balance of this Syllabus focuses on the meaning, and foreseeable consequences, of each of the foregoing parts.

1. Scope of the Arbitrator’s Jurisdiction

“Any controversy or claim arising out of or relating to this contract, or the breach thereof ...”

As stated at the outset, ADR is a “creature of contract.” With this in mind, the scope of an arbitrator or referee’s power (jurisdiction) to decide a given matter necessarily must come from the parties themselves. Absent an agreement to have a given matter decided by an arbitrator, the matter must be resolved in court.

Hence, the importance of understanding and unambiguously expressing in writing, the scope of the power the parties intend to confer on a neutral cannot be overstated. This is usually referred to as “arbitrability.” This important consideration is often ignored in
contract negotiations and as a result the scope of arbitration is either undefined, ambiguous or incomplete.

The basic formulation of the scope of arbitration, “all disputes arising out of or relating to . . . [the subject contract or relationship]” is usually referred to as a “broad form” clause and signifies the parties’ intent that all matters arising under the agreement as well as the economic relationship, whether contractual in nature or based on tort or statutory rights, is subject to arbitration. Parties can choose to draft a narrow clause (“all disputes concerning ¶ 17 of this agreement as to the calculation of bad debt reserves shall be arbitrated”), but often the scope of arbitration becomes a disputed issue of contract interpretation when the dispute arises, and may require a court determination as to that issue, so the prudent course is usually to draft a broad form clause.

The use of variants of the broad form clause is also risky – “all disputes,” “all disputes under this contract,” “all disputes relating to the contract,” and the like, also may result in fights about scope and the parties’ contractual intent.

There is no “one-size-fits-all” solution. Rather, one should carefully consider a particular client’s needs and preferences in light of the anticipated risks associated with a particular contractual relationship and the nature of likely claims which may arise. In other words, there is a need to help the client avoid unwelcome surprises.

The scope of arbitration also includes issues of who is a proper party to the arbitration. Due consideration must be given to who is intended to covered by an ADR clause. This is particularly true where there are multiple agreements. For example, if a sale of assets includes a guarantee of payment by the parent corporation of the buyer, the Guarantee should include an arbitration clause identical to that contained in the Purchase and Sale Agreement and a provision authorizing consolidation of the two separate arbitrations. Non-parties cannot be forced to arbitrate disputes; however, case law suggests that certain kinds of non-signatories (assigns, principals of undisclosed agents, third party beneficiaries, etc.) both may be compelled to arbitrate and may have the right to seek arbitration.

2. Conclusiveness

“shall be settled by final, binding arbitration ...”

As noted above, an arbitration clause presumes the arbitration to result in a binding award. Arbitration is traditionally “final” and “binding” subject to review by a court of a petition to confirm or vacate the award. Parties may, however, agree to an “appeal” of the award to other arbitrators (the appeal panel) which review may alter the outcome. The JAMS Optional Arbitration Appeal Procedure is an example of such a process. See Optional Arbitration Appeal Procedure, attached as an Exhibit.

Parties may also expressly provide for non-binding arbitration as a means to obtain a third party’s view of the merits of a dispute that might provide the basis for the parties to reach a settlement of the dispute. This is an unusual (and expensive) settlement process,
but a court will enforce such a provision if the parties’ agreement clearly calls for it. See Wolsey, Ltd. v. Foodmaker, Inc., 144 F.3d 1205 (9th Cir. 1998).

The question for counsel to ask and decide in advance, then is something like “…is this what the client truly wants?”

3. Forum

“…administered by (JAMS, IFTA, or the American Arbitration Association …)"

Another important issue to consider is which ADR provider to use? Parties may choose not to have their arbitration administered by an arbitral institution (a non-administered or “ad hoc” arbitration), but the advantages of institutional administration (and the risks of ad hoc arbitration) usually motivate parties to choose administered arbitration. If the clause does not specify a provider (“All disputes arising out of this agreement shall be arbitrated”) the parties have in effect agreed to non-administered arbitration.

If the arbitration is administered, the process is commenced by filing a demand for arbitration with the provider organization. In ad hoc arbitrations, one must get a court to compel arbitration unless the parties are willing to submit to arbitration voluntarily. In administered arbitrations, the arbitrator is selected in accordance with the rules and the clause. If disputes arise, the institution determines them. In ad hoc arbitration, if there is a problem with the selection of the arbitrator, a court must determine the issue.

Factors attorneys and clients should consider in selecting an institution include the reputation of the organization for effective administration; the make-up of the organization’s arbitration panels; the cost of the typical neutral’s services; the cost of the provider’s administrative services; the availability of, and need for, a particular provider’s hearing facilities; the quality of the provider’s advertised panel of neutrals in a given geographic area and/or subject matter; the provider’s unique procedural rules; the provider’s reputation for quick (or not so quick) resolution of disputes in accordance with the parties’ reasonable expectations; and the provider’s overall reputation for providing knowledgeable, professional and fair-minded neutrals. Sadly, however, often none of these criteria are considered, and parties simply agree to whatever ADR provider happens to be listed in the “boilerplate” provision submitted for their consideration.

Clearly, nothing could possibly be of greater importance to a client confronted with an emerging commercial dispute than having the right neutral (whether mediator, arbitrator or referee) assigned to the matter. Moreover, as in certain instances there are important differences to consider between the standard rules offered by different ADR providers – a matter beyond the purview of this Syllabus – these differences should be carefully considered beforehand as well.

Practice Note: A clause that fails to specify a particular ADR provider, but incorporates by reference a particular provider’s rules (e.g., the AAA’s oft-cited Commercial Arbitration Rules), will, as a matter of law in California, be considered an agreement requiring the provider of said

4. **Rules**

> "Under its Commercial Arbitration Rules [Comprehensive Arbitration Rules and Procedures] or ______ Rules,..."

The clause will ordinarily specify the rules of the provider organization which shall apply to the arbitration. For example, AAA has Commercial Rules as well as Expedited Procedures and Supplemental Procedures for Large, Complex Commercial Disputes. The AAA has internal guidelines as to which rules will be followed based on the amount in dispute, but the parties may in their clause direct use of one or another set of rules. JAMS has Comprehensive Rules, Streamlined Rules and Expedited Procedures. JAMS also has administrative practices directing use of particular sets of rules, but the parties are free to agree to use any of them, and that agreement will override any internal administrative practice.

These rules typically provide for application of that version of the rules in effect at the time the matter is commenced, but the parties’ clause may provide for application of the rules in effect when the contract was formed. This avoids the surprise of the adoption of different rules subsequent to the date of the agreement to arbitrate, but the authors prefer a clause which allows the rules in effect when the matter is commenced to control.

5. **Qualifications of the Arbitrator**

> "Before a sole arbitrator..."

Are the parties interested in specifying any type of qualification for the Arbitrator? Usually subject matter expertise is specified. Sometimes experience as an arbitrator is called out (particularly for the chair of a tripartite panel whose job it will be to make sure the process is organized properly and runs efficiently). This provision should not be so specific as to make it difficult to find a neutral (i.e. an Academy Award winner for Cinematography from the North of England specializing in black and white films). Often, the qualification is defined as a person experienced in a specific area, such as entertainment law, without being so detailed as to make the selection of the Neutral difficult if not impossible.

How many arbitrators are desired? The preference should be stated; if multiple, recognize the cost differential for a panel of one versus three. Under some Rules, cases over a certain dollar threshold (e.g., $1 million) are assigned to a panel of three neutral arbitrators (unless the clause requires a sole arbitrator). Larger matters benefit from a tripartite process but the cost and delay inherent in using three arbitrators must be weighed against the benefits. The JAMS default is a sole arbitrator. AAA is the same, but it reserves the discretion to appoint three (unless the clause requires a sole arbitrator). AAA Commercial Rules, Rule R-15,
If there is to be a panel, some clauses provide that each side picks an arbitrator, and those two in turn select the third. These arbitrators are “neutral” unless the clause specifies “non-neutral” arbitrators. AAA Rules R-12(b), R-17(a); JAMS Rule 7(c). The nuances of party arbitrator practice and ethics is beyond the scope of this Syllabus, but counsel should be aware of the distinction between neutral and non-neutral party arbitrators and the Code of Ethics for Arbitrators in Commercial Disputes (available on the AAA web site at www.adr.org).

Rule 7(c) of the JAMS Comprehensive Arbitration Rules and Procedures requires that party-appointed arbitrators “shall be neutral and independent of the appointing Party unless the Parties have agreed that they shall be non-neutral.”

JAMS suggest this language:

\[
\text{Within 15 days after the commencement of arbitration, each party shall select one person to act as arbitrator, and the two so selected shall select a third arbitrator within 30 days of the commencement of the arbitration. If the arbitrators selected by the parties are unable or fail to agree upon the third arbitrator within the allotted time, the third arbitrator shall be appointed by JAMS in accordance with its rules. All arbitrators shall serve as neutral, independent and impartial arbitrators.}
\]

Do not prescribe too much in the selection language, or you will be handcuffing the arbitrator or the panel of arbitrators, or you might have to go to Court to have a determination made on impaneling the arbitrators.

6. Venue

“In Los Angeles, California...”

The parties usually will agree on the place of arbitration. If they do not, the provider organization or the arbitrator will make that decision. It is permissible to choose a venue that has nothing to do with the parties, or their business, such as a Chicago venue in a contract between New York and Los Angeles parties. Whatever the parties choose will be enforced by the arbitrator (unlike the scrutiny of forum selection clauses in court litigation, where legal principles sometimes trump the parties’ agreement). (In consumer or employment contracts, the venue must be fair to the consumer or the employee or the clause may be found to be unconscionable. E.g., Patterson v. ITT Financial Corp., 14 Cal. App. 4th 1659 (1993).)

7. Choice of Law

“The law of the state of California for agreements entered into and to be performed therein shall be applied by the arbitrator...”

It is prudent to choose the governing substantive law in the clause because the determination of governing law will otherwise be left to the arbitrator.
The procedural law that applies to the proceeding (FAA or CAA for cases in California) may be specified or may be presumed by the parties’ choice of California law and a California venue.

The language should state “for agreements entered into and to be wholly performed therein” to avoid any confusion, and as well, “…without reference to the law of any other jurisdiction for any perceived conflict of law.”

8. **Entry of Judgment**

“...and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof...”

The services of the arbitrator and the provider are generally concluded with the issuance and service of the award. Although there is voluntary compliance with the majority of awards, judgment on the award may be entered in a court having appropriate jurisdiction as the arbitration forum does not have enforcement mechanisms. Language to this effect is usually included in the clause (even though the provider’s rules may so state) because a few older cases have held that without this language a court has no power to consider a petition to confirm the award.

V. **Other Issues That Might Be Addressed In Your Clause**

1. **Discovery**

Provider rules specify some right to obtain information necessary to present the parties’ case or defense. All rules generally provide for document exchange, some address obtaining documents from third parties, and some permit limited depositions, subject to the discretion of the arbitrator. No rules authorize interrogatories or requests for admission unless the parties agree on those discovery devices.

The parties may specify the right to additional discovery in the clause. In California, the CAA permits incorporation of the California Discovery Act into the arbitration process. Cal. Code Civ. Proc. §§ 1283.05, 1283.1. Generally, such a device encourages additional expense and delay with minimal offsetting benefits. The expectation is that in commercial arbitrations there will be less discovery than in court, and particularly that discovery will at least be limited to what is necessary in relation to the size and complexity of the case. See JAMS Discovery Protocols (available on the JAMS web site, www.jamsadr.com), which suggest exercise of discretion by the arbitrator to limit discovery in order to achieve an effective and efficient process.

One can draft provisions limiting discovery, for example, to three depositions and two expert witnesses per party. Again, it is best to leave this to the discretion of the arbitrator. Here is suggested language from JAMS:
In any arbitration arising out of or related to this Agreement, each side may take three (3) discovery depositions. Each side’s depositions are to consume no more than fifteen (15) hours. There are to be no speaking objections at the depositions, except to preserve privilege. The total period for taking of depositions shall not exceed six (6) weeks.

2. Evidence

JAMS Rule 22(d) provides:

Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product. The Arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate. The Arbitrator may be guided in that determination by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence. The Arbitrator may limit testimony to exclude evidence that would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence.

This rule embodies the prevailing attitude of arbitrators regarding the receipt of evidence and the handling of evidentiary objections. Hearsay is generally admitted and given the weight it deserves; objections to foundation are generally overruled. Documents are usually admitted by stipulation unless there is a genuine dispute about their authenticity. Occasionally parties will agree that the arbitrator shall apply the California Evidence Code or the Federal Rules of Evidence, but that is usually a poor process choice.

3. The Form of the Award

Awards are either reasoned or bare. AAA Rules provide for bare awards (who won, without reasons why); JAMS Rules provide for reasoned awards. The default choice can be changed by the parties in their clause or by agreement after the arbitration has commenced. In larger commercial matters, the reasoned award is standard.

4. Award of Fees and Costs to the Prevailing Party

A “prevailing party clause” tends to discourage frivolous claims, counterclaims, and defenses, as well as “scorched earth” discovery.

Suggested language from JAMS is the following:

“In any arbitration arising out of or relating to this Agreement, the Arbitrator(s) shall award to the prevailing party, if any, the costs and attorneys’ fees reasonably incurred by that party in connection with the arbitration.
If the arbitrator(s) determine a party to be the prevailing party under circumstances where the prevailing party won on some but not all of the claims and counterclaims, the arbitrator(s) may award the prevailing party an appropriate percentage of the costs and attorneys’ fees reasonably incurred by the prevailing party in connection with the arbitration”.

All institutional rules also give the arbitrator discretion to shift all fees and costs of the arbitration. If the parties want to divide these fees and costs equally, regardless of the outcome of the arbitration, they may say so in their clause.

VI. OTHER CONSIDERATIONS

1. Is Small Claims an Alternative?

Sometimes, one drafts the provisions for arbitration, but the actual dispute is relatively minor and the parties should not have to go to the expense of an arbitration to resolve. One of the authors sometimes includes this provision for a dispute which is too small to submit to arbitration:

“Notwithstanding the foregoing, in the event the amount in controversy is $10,000 or less, it will not be submitted to arbitration as above provided, but instead will be submitted to the jurisdiction of the Small Claims Court in ________, applying California law for agreements entered into and to be performed therein, which Court has full authority to determine the outcome of the dispute.”

2. Is There a Language or Nationality Issue?

In some entertainment cases, an item often omitted with international entities is the language to be used in the filings and indeed in the Hearing itself. Generally, the preference is that the filing and subsequent papers, and the Hearing, be in English.

Also, consideration should be given to the decision of whether the Neutral needs to be of a certain nationality or be fluent in another language. Clauses where the arbitrator had to be of a certain religious belief have been rejected by courts in the UK.


This issue arises occasionally, covering the circumstance where there are multiple agreements (such as a principal agreement and an Operating Agreement) where the two provisions for arbitration are in conflict. The fully negotiated provision in the principal agreement should govern in this circumstance.
“In the event of conflicting arbitration provisions between this Agreement and other documents between the parties hereto, the provisions of this paragraph will control.”

Of course, best practice is to be sure that the dispute resolution provisions of the various agreements are not in conflict.

4. Termination

One might want to cover the issue of what happens after the Agreement terminates under its own terms or by process of law.

Here is suggested language:

“This arbitration provision survives the termination of this Agreement, and governs any disputes between the parties hereto, whenever said dispute(s) may arise.”

5. Interim Measures

AAA and JAMS rules provide that the appointed arbitrator may issue provisional relief such as a preliminary injunction. But what may one do before the arbitrator is appointed (which may take weeks)? One option is to go to court to seek provisional relief. This is permitted under all arbitration rules and expressly will not constitute a waiver of the right to arbitrate. Alternately, AAA has a procedure for the expedited appointment of an arbitrator solely to deal with an emergent issue before an arbitrator is agreed on by the parties:

“The parties also agree that the AAA Optional Rules for Emergency Measures of Protection shall apply to the proceedings.”

The AAA Optional Rules allow that once the matter is filed, an Arbitrator can be appointed within one day, to allow that Arbitrator within two days to schedule a hearing to deal with the requested form of immediate relief. (The Optional Rules may be found in the Appendix to follow.)

6. Punitive Damages

It is not clear whether punitive damages can be awarded in an arbitration where the ADR clause makes no mention, but the law in most jurisdictions permits such an award. Thus, if the parties want to preclude punitive damages, there needs to be language drafted. JAMS suggest this language:

“In any arbitration arising out of or related to this Agreement, the arbitrator(s) are not empowered to award punitive or exemplary damages,
except where permitted by statute, and the parties waive any right to recover any such damages."

7. Limitation of Liability

Similarly, one might consider this language to cover the issue of liability limitations:

“In any arbitration arising out of or related to this Agreement, the arbitrator(s) may not award any incidental, indirect or consequential damages, including damages for lost profits.”

8. Arbitration Submission Agreements

If there is no arbitration clause in the Agreement, the parties may nevertheless agree to submit the matter to arbitration. This is not always possible because once the parties are embroiled in a dispute the negotiation of an arbitration agreement can be complicated by the strategic interests of the two sides.

Sample:

We, the undersigned parties, our successors and assigns, hereby agree to submit to final and binding arbitration administered by (JAMS, IFTA, the American Arbitration Association (“AAA”)) under its Commercial [Comprehensive] Arbitration Rules in effect as of the date of this document, the following controversy: (describe).

We further agree that the above controversy be submitted to (one) (three) arbitrator(s) experienced in entertainment law. The Arbitrator will have the discretion to award legal fees and costs to the prevailing party.

The arbitration will be held in Los Angeles, CA, using California law for agreements entered into and to be performed wholly therein, without reference to the law of any other jurisdiction for any perceived conflict of law.

We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrator(s), and that a judgment of any court having jurisdiction may be entered on the award.

9. Review of Arbitration Awards

An arbitration award is a contract right which is not enforceable until a court reviews and confirms it as a judgment. The FAA and the CAA provide limited grounds to vacate an award, such as evident partiality of the arbitrator, that the award exceeds the arbitrator’s jurisdiction, or that the arbitrator failed to consider material evidence. Legal error is not a ground for vacatur.
In *Hall Street Associates v Mattel, Inc.*, 552 US 576 (2008), the U.S. Supreme Court held that grounds for a court’s vacating an arbitration award under the Federal Arbitration Act (FAA) are limited to those specified in the FAA (9 USC § 10). The additional (non-statutory) ground of manifest disregard of the law may or may not be a basis for vacatur of an award. *Hall Street* was unclear on this point and federal circuits have gone both ways on this issue since *Hall Street* was decided.

In federal court parties may not impose on the reviewing court the duty to apply a different standard for review and confirmation of an award (such as reviewing the award for legal error). *Hall Street, supra.* In California such enhanced review is possible (*Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal. 4th 1334 (2008)), but it is rarely used.

Parties may agree (in the clause) on an internal appeal of the award such as in the JAMS Optional Arbitration Appeal Procedure, where a panel of arbitrators reviews the award rendered by the initial arbitrator and makes any correction as an appellate court would do for a trial court decision. This procedure is also rarely invoked,

**VII. CONCLUSION**

Again, this article is not intended to be exhaustive, but instead is designed to facilitate greater attention in the negotiation and drafting of arbitration provisions in entertainment agreements.

We hope this article clarifies some issues and explains others in the considerations for negotiating and drafting the ADR provisions in your Killer Deal. What is clear from the discussion of the choices parties have in establishing the procedure and process elements for the resolution of their dispute, YOU GET THE PROCESS YOU DESERVE.

January 15, 2012

The Authors.

**NB: For a more in depth discussion, please refer to the attached bibliography, particularly the case reference, and to the websites of the major providers:**

AAA: www.adr.org
ADR Services: www.adrservices.org
JAMS: www.jamsadr.com
IFTA: www.ifta.org

**EXHIBITS, APPENDIX, BIBLIOGRAPHY AND SUGGESTED CASES FOLLOW.**
EXHIBIT A

Sample Arbitration Clause:

“Any controversy or claim arising out of or relating to this contract, or the breach thereof, by and between the named parties, their successors, assigns, officers, shareholders and directors, shall be settled by final and binding arbitration administered by the American Arbitration Association (‘AAA’), under its Commercial Arbitration Rules, in effect as of the time of filing the arbitration, with a single arbitrator. The AAA arbitrator selected shall be experienced in entertainment business/law. The arbitration shall take place in Los Angeles, CA, using California State law for agreements entered into and to be performed therein, without reference to the law of any other jurisdiction for any perceived conflict of law. The arbitrator shall have discretion to award legal fees and costs to the prevailing party. Judgment on the award rendered by the AAA arbitrator may be entered in any court having jurisdiction thereof. The parties also agree that the AAA Optional Rules for Emergency Measures of Protection shall apply to the proceedings.

In the event of conflicting arbitration provisions between this Agreement and other documents between the parties hereto, the provisions of this paragraph will control.

This arbitration provision survives the termination of this Agreement, and governs any disputes between the parties hereto, whenever said dispute(s) may arise.

Notwithstanding the foregoing, in the event the amount in controversy is $10,000 or less, it will not be submitted to arbitration as above provided, but instead will be submitted to the jurisdiction of the Small Claims Court in [insert the desired place of arbitration], applying California law for agreements entered into and to be performed therein, which Court has full authority to determine the outcome of the dispute and the above listed provisions for arbitration are deemed waived by the parties.”

JAMS Standard Arbitration Clause for Domestic Commercial Contracts:

“All 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 [and in accordance with the Expedited Procedures in those Rules] [or pursuant to JAMS’ 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.”
**Sample IFTA Domestic Arbitration Clause:**

“Any dispute under this Agreement will be resolved by final and binding arbitration under the IFTA™ Rules for International Arbitration in effect as of the Effective Date of this Agreement (“IFTA™ Rules”). Each Party waives any right to adjudicate any dispute in any other court or forum, except that a Party may seek interim relief before the start of arbitration as allowed by the IFTA™ Rules. The arbitration will be held in the Forum and under the Governing Law designated in this Agreement, or, if none is designated, as determined by the IFTA™ Rules. The Parties will abide by any decision in the arbitration and any court having jurisdiction may enforce it. The Parties submit to the jurisdiction of the courts in the Forum, with respect to interim relief, to compel arbitration or to confirm an arbitration award. The Parties agree to accept service of process in accordance with the IFTA™ Rules and agree that service in accordance with the IFTA™ Rules satisfies all requirements to establish personal jurisdiction over the Parties. Both Parties waive application of the procedures for service of process pursuant to the Hague Convention for Service Abroad of Judicial and Extrajudicial arbitration award that is confirmed by a court of competent jurisdiction, the prevailing Party may request that the other Party be barred from attendance at the American Film Market® in accordance with the arbitration and barring provisions of the most current AFM® Guidelines.”

**Sample JAMS Arbitration Clause:**

“1. **Governing Law/Dispute Resolution:** This Agreement shall be governed by the laws of the State of California applicable to agreements entered into and to be wholly performed therein. All controversies, claims or disputes between the parties to this Agreement arising out of or related to this Agreement or the interpretation, performance or breach thereof, including, but not limited to, alleged violations of state or federal statutory or common law rights or duties, and the determination of the scope or applicability of this agreement to arbitrate (“Dispute”), except as set forth in Paragraphs 1(b) and 1(c) below, shall be resolved according to the procedures set forth in Paragraph 1(a) below, which shall constitute the sole dispute resolution mechanism hereunder:

(a) **Arbitration:** All Disputes shall be submitted to final and binding arbitration. The arbitration shall be initiated and conducted according to either the JAMS Streamlined (for claims under USD $250,000) or the JAMS Comprehensive (for claims over USD $250,000) Arbitration Rules and Procedures, except as modified herein, including the Optional Appeal Procedure, at the Los Angeles office of JAMS, or its successor (“JAMS”) in effect at the time the request for arbitration is made (the “Arbitration Rules”). The arbitration shall be conducted in Los Angeles County before a single neutral arbitrator appointed in accordance with the Arbitration Rules. The arbitrator shall follow California law and the Federal Rules of Evidence in adjudicating the Dispute. The parties waive the right to seek punitive damages and the arbitrator shall have no authority to award such damages. The arbitrator will provide a detailed written statement of decision, which will be part of the arbitration award and admissible in any judicial proceeding to confirm, correct or vacate the award. Unless the parties agree otherwise, the neutral arbitrator and the members of any appeal panel shall be former or
retired judges or justices of any California state or federal court with experience in matters involving the entertainment industry. Judgment upon the award may be entered in any court of competent jurisdiction. The parties shall be responsible for payment of their own attorneys’ fees in connection with any proceedings under this Paragraph 1(a).

(b) **Jurisdiction and Venue:** Any Dispute or part thereof, or any claim for a particular form of relief (not otherwise precluded by any other provision of this Agreement), that may not be arbitrated pursuant to applicable law may be heard only in a court of competent jurisdiction in Los Angeles County. The parties hereby submit to the exclusive jurisdiction and venue of the local, state and federal courts located in Los Angeles County.

(c) **Guild Arbitration:** To the extent that an applicable guild agreement requires that a Dispute be resolved pursuant to such guild’s arbitration provisions, such Dispute shall be resolved in accordance with the applicable guild’s arbitration provisions.”

**Sample IFTA International Arbitration Clause:** Sample clauses from the IFTA Model International Licensing Agreement, 3rd and 4th Editions, are available at www.ifta-online.org/sample-arbitration-clauses.

**Further AAA Sample Arbitration Clause:**

“In the event of any dispute concerning any claim of any kind or nature whatsoever regarding the Picture or this Agreement, arising in connection with the Picture or arising in connection with this Agreement, such dispute will be submitted to binding arbitration. The Parties hereby waive any and all rights and benefits which it may otherwise have or be entitled to under the laws of California to litigate any such dispute in court, it being the intention of both to arbitrate, according to the provisions hereof, all such disputes. Either party may commence arbitration proceedings by giving the other written notice in accordance with the rules and procedures of the American Arbitration Association ("AAA"). The arbitration shall be conducted in the County of Los Angeles, State of California and shall be governed by and subject to the laws of the State of California and the then prevailing rules of the American Arbitration Association. The AAA arbitration shall employ a single arbitrator experienced in the film industry who may order discovery. The AAA arbitrators' award shall be final and binding and a judgment upon the award may be enforced by any court of competent jurisdiction. The prevailing party shall be entitled to reimbursement for costs and reasonable attorneys' fees.”

**Sample IFTA/AAA Hybrid Clause (where provider refuses to accept matter):**

“This Agreement shall be construed in accordance with the laws of the State of California applicable to agreements which are executed and to be fully performed within said State. Any controversy or claim arising out of or in relation to this Agreement or the validity, construction or performance of this Agreement, or the breach thereof, shall be resolved by arbitration in accordance with the rules and procedures of the International Film and
Television Alliance (IFTA), as said rules may be amended from time to time with rights of discovery to be allowed by the Arbitrator in conformity with the California Code of Civil Procedure. Such rules and procedures are incorporated and made a part of this Agreement by reference. If IFTA shall refuse to accept jurisdiction of such dispute, then the parties agree to arbitrate such matter before and in accordance with the rules of the American Arbitration Association (AAA) under its jurisdiction in California before a single arbitrator familiar with entertainment law, and subject to discovery rights as enumerated above. The parties agree hereto that they will abide by and perform any award rendered in any arbitration conducted pursuant hereto, that any court having jurisdiction thereof may issue a judgment based upon such award and that the prevailing party in such arbitration and/or confirmation proceeding shall be entitled to recover its reasonable attorneys’ fees and expenses. The arbitration will be held in Los Angeles and any award shall be final, binding and non-appealable. The Parties agree to accept service of process in accordance with IFTA or AAA Rules, as applicable.”

Sample Special Multi-Step Dispute Resolution Clause:

NB: This multi-step dispute resolution clause is designed to strongly and economically encourage the parties to fully attempt resolution between themselves before resorting to formal litigation, with each unresolved step escalating to ever more formal means of resolving the parties’ dispute. In the event that initial informal means are exhausted by the parties, its incorporation of C.C.P. Sec. 1281.6 allows the parties to jointly select an arbitrator at their election or to propose their own arbitrator nominees for court consideration and appointment. Even if court intervention later becomes necessary, this process allows the parties themselves to propose nominees with expertise in the area of the particular dispute and to consider fee rates commensurate with the amount in dispute, and outside of formal dispute resolution tribunals if appropriate. As a practical matter, although C.C.P. Sec. 1281.6 calls for joint submission of nominees, Courts considering such petitions to appoint arbitrators nevertheless typically request submission of separate slates of nominees in the absence of agreement on a joint list of candidates.

“In the event that any controversy, claim, or dispute arises out of or related to this Agreement or the interpretation, performance, or breach hereof, including but not limited to alleged violations of state or federal statutory or common law rights or duties (a “Dispute”), then such Dispute shall be resolved according to the procedures set forth in this paragraph which shall constitute the sole dispute resolution mechanism hereunder. In the event that the parties are unable to resolve any Dispute after meeting and attempting in good faith to reach a negotiated resolution, such Dispute(s) shall first be mediated by a reputable mediation service, for mediation in Los Angeles County before a mediator who is an experienced entertainment attorney or a retired judge experienced in mediating entertainment matters. If the parties are unable to resolve one or more Disputes(s) by mediation, then either of us may petition the Superior Court of Los Angeles to initiate arbitration pursuant to C.C.P. Sec. 1281.2 and to appoint an arbitrator pursuant to C.C.P. Sec. 1281.6. The arbitration shall be conducted in Los Angeles County before a single neutral arbitrator appointed in accordance with C.C.P. Sec. 1281.6. If either party refuses to perform any or all of our obligations under the final arbitration award within thirty (30) days of such award being rendered, then the other
may enforce the final award in any court of competent jurisdiction in Los Angeles County.” (Introduction and clause drafted by Costa, Abrams & Coate, LLP and used with permission).
EXHIBIT B

Arbitration Clause Checklist

- Scope of arbitration (broad or narrow)
- Delegation of authority to determine arbitrability to arbitrator
- Sole/tripartite arbitration
- Institutional arbitration or ad hoc
- Choice of rules
- Venue (place) of arbitration
- Special discovery provisions or limitations
- Governing and procedural law
- Mediation first?
- Allocation of fees and costs
- Attorneys Fee Clause or not

Borrowed with permission from the presentation entitled “Drafting Arbitration Clauses: Deconstructing an Arbitration Clause”, presented by Richard Chernick and Jay Welsh at JAMS.
APPENDIX

AAA OPTIONAL RULES FOR EMERGENCY MEASURES

O-1. Applicability
Where parties by special agreement or in their arbitration clause have adopted these rules for emergency measures of protection, a party in need of emergency relief prior to the constitution of the panel shall notify the AAA and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by facsimile transmission, or other reliable means, but must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties.

O-2. Appointment of Emergency Arbitrator
Within one business day of receipt of notice as provided in Section O-1, the AAA shall appoint a single emergency arbitrator from a special AAA panel of emergency arbitrators designated to rule on emergency applications. The emergency arbitrator shall immediately disclose any circumstance likely, on the basis of the facts disclosed in the application, to affect such arbitrator's impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the AAA to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.

O-3. Schedule
The emergency arbitrator shall as soon as possible, but in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceeding by telephone conference or on written submissions as alternatives to a formal hearing.

O-4. Interim Award
If after consideration, the emergency arbitrator is satisfied that the party seeking the emergency relief has shown that immediate and irreparable loss or damage will result in the absence of emergency relief, and that such party is entitled to such relief, the emergency arbitrator may enter an interim award granting the relief and stating the reasons therefore.

O-5. Constitution of the Panel
Any application to modify an interim award of emergency relief must be based on changed circumstances and may be made to the emergency arbitrator until the panel is constituted; thereafter such a request shall be addressed to the panel. The emergency arbitrator shall have no further power to act after the panel is constituted unless the parties agree that the emergency arbitrator is named as a member of
O-6. Security
Any interim award of emergency relief may be conditioned on provision by the party seeking such relief of appropriate security.

O-7. Special Master
A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate. If the AAA is directed by a judicial authority to nominate a special master to consider and report on an application for emergency relief, the AAA shall proceed as provided in Section O-1 of this article and the references to the emergency arbitrator shall be read to mean the special master, except that the special master shall issue a report rather than an interim award.

O-8. Costs
The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator or special master, subject to the power of the panel to determine finally the apportionment of such costs.
Here are a few sources to which the reader may wish to refer.


“Alternative Dispute Resolution for Copyright and Trademark Matters.” IP Law 360. Author Elizabeth Shampnoi.


“Reimagining Arbitration.” Litigation, Volume 37, Number 4, Summer 2011. Authors Richard Chernick and Zela Claiborne.


“Drafting Dispute Resolution Clauses”, the “Code of Ethics for Arbitrators” and “JAMS Optional Arbitration Appeal Procedure” can be found at the JAMS website.
ARBITRATION DECISIONS OF NOTE

**United States Supreme Court**
- AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011)
- Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968)

**Ninth Circuit Court of Appeals**
- Fidelity Federal Bank FSB v. Durga Ma, 386 F.3d 1309 (9th Cir. 2005)
- Simula, Inc. v. Autoliv, Inc., 175 F.3d 716 (9th Cir. 1999)
- Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056 (9th Cir. 1991)
- Tracer Research Corp. v. Nat. Environmental Services Co., 42 F.3d 1292 (9th Cir. 1994)

**Other Federal Circuits**
- Advanced Bodycare Solutions, LLC v. Thione Int’l, Inc., 524 F.3d 1235 (11th Cir. 2008)
- Delta Mines Holding Co. v. Coal Properties, Inc., 280 F.3d 815 (8th Cir. 2002)
- Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404 (3d Cir. 2004)
- Kemiron Atlantic, Inc. v. Aguachem Int’l., Inc., 290 F.3d 1287, 1291 (11th Cir. 2002)
- Life Receivables Trust v. Syndicate 102 at Lloyd’s of London, 549 F.3d 210 (2d Cir. 2008)
- Lumbermens Mut. Cas. Co. v. Broadspire Mgmt Services, 623 F.3d 476 (7th Cir. 2010)
- Prestige Ford v. Ford Dealer Computer Services, Inc., 324 F.3d 391 (5th Cir. 2003)
- Shaw Group v. Triplefine Int’l Corp., 322 F.3d 115 (2d Cir. 2003)
- STMicroelectronics, NV v. Credit Suisse Sec. (USA) LLC, 2011 WL 2151008 (2d Cir.)
- Sphere Drake Ins. Co. Ltd v. All American Life Ins. Co., 307 F.3d 617 (7th Cir. 2002)
- Trustmark Ins. Co. v. John Hancock Life Ins. Co. (USA), 631 F.3d 869 (7th Cir. 2011)

**California Supreme Court**
- Broughton v. CIGNA HealthPlans of California, 21 Cal. 4th 1066 (1999)
- Cable Connection, Inc. v. DIRECTV, Inc., 44 Cal. 4th 1334 (2008)
- Cronus Investments, Inc. v. Concierge Services, 35 Cal. 4th 376 (2005)
- Cruz v. PacifiCare, 30 Cal. 4th 303 (2003)
- Discover Bank v. Superior Court, 36 Cal. 4th 148 (2005)