

Alternative Dispute Resolution FAQs

1. What Is “Alternative Dispute Resolution” (“ADR”)?

ADR is a term covering the full range and array of techniques designed to resolve disputes early and with the goal of avoiding the time, expense and stress associated with going to trial in a public court of law. ADR does not replace the court system. Certain cases will always have to be tried in a public forum. ADR *complements* the court system by making methods available to resolve some disputes at less cost, in less time, and often without the win-lose outcome that characterizes conventional litigation.

2. Why ADR As Opposed To Court Litigation Or Trial?

It is now widely recognized that in many cases clients can obtain better overall results through ADR than through conventional litigation. With ADR, the parties can:

- a. Avoid delays and the expense of litigation
- b. Maintain confidentiality
- c. Maintain control over the process
- d. Achieve a better outcome without “collateral damage

3. What ADR Options Are Available?

The next step is to determine what form or forms of ADR may be appropriate for the particular case. There is an enormous array of private, voluntary ADR methods available to facilitate settlement or adjudicate the dispute out of court if settlement cannot be reached. These methods can be used separately or in combination, and their components can be modified and mixed at will to suit the circumstances of the particular case. They include, but are not limited to, the following: a) Negotiation Between The Parties/Their Counsel; b) Mediation; c) Arbitration-Binding & Non-Binding, Contractual and Non-Contractual; d) Court-Supervised Settlement Conferences (Voluntary and Mandatory); e) Court Administered Early-Neutral Evaluation Programs; f) Combined Mediation/Arbitration; g) Variations On The Above.

4. What Are The Pros & Cons Of Each ADR Option?

In the interests of space, I will address the two major types of ADR:

Mediation and Arbitration

A. Mediation: Mediation involves a neutral third party in the dispute resolution process who assists or “facilitates” the negotiating process. There are many types of mediation but in traditional mediation, the mediator's function is to assist the parties' to reach a final binding settlement. The mediator helps the parties define the issues, overcome barriers to communication, and explore alternative methods of resolving their dispute. Part of the mediator's function is to make sure each party is evaluating his or her position *realistically*. The mediator may deal directly with the parties or their attorneys or both depending on the ground rules in place. The mediator is NOT a decision-maker and he/she may not issue a ruling or decision in favor of either party and he/she may NOT take sides. The mediator does not assign blame or dictate solutions and has no authority to render binding decisions. The parties retain complete control over the process and make their own decisions about what solutions will work for them. Unless the parties agree otherwise, either party has the right to terminate the mediation at any time.

Pros & Cons: The potential advantages of mediation as a dispute resolution technique include:

- mediation is relatively inexpensive;
- the proceedings are confidential; any communications/documents exchanged in mediation are confidential and cannot be used in trial or discovery—with some limited exceptions;
- mediation reduces the emotional barriers to communication and helps parties focus on their *interests*;
- the parties control the process and *decide* the outcome;
- as a result of the parties direct involvement as opposed to a court process where the attorneys are principally involved, the process is

more likely than litigation to result in a solution satisfactory to both parties;

- Flexibility: Mediation, like arbitration, can be binding or non-binding—although I strongly urge parties to make it binding or it loses its effectiveness and is self-defeating in terms of cost saving;
- Preserving ongoing business relationships: Mediation also works well when the parties expect to deal with each other in the future. Examples: Disputes between landlord and tenant; between customer and supplier, and in domestic relations and neighborhood disputes. In such cases, the parties have an incentive to address their underlying problems and come to mutually satisfactory decisions. This is far more constructive to an ongoing relationship than the residual feelings of hostility or sense of having been treated “unfairly” that frequently result from court litigation;
- Where creative solutions are required: e.g., large-scale disputes; Because of its flexibility, mediation is useful in resolving large-scale disputes with multiple parties and issues, such as environmental, construction, land use and community disputes. The various interests at stake can be clustered in groups, and creative solutions to reconcile these interests can be created that are not available to a judge or jury;

The potential disadvantages of mediation include:

- participation cannot be compelled unless court ordered or mandated by contract, e.g., a real estate contract with an ADR clause;
- the results are not binding on the parties unless both parties agree that the results are binding;
- whether the mediation is successful depends to a significant extent on the mediator's skills;
- some attorneys/parties use mediation to discover the strengths and weaknesses of their opponent's case without any real intention to settle;

- it can be counter-productive if either side withholds information necessary to settlement; by contrast, if either side produces all of its “smoking guns” and crucial evidence, it may remove the element of surprise and give the opposition an advantage.

B. Arbitration: Arbitration is a dispute resolution process in which a neutral third party or panel hears a dispute between two or more parties and, after carefully reviewing all relevant information, issues a **decision** or judgment. Whether or not that decision becomes final depends on whether the arbitration is binding or not; and whether it is “judicial” arbitration or “contractual” arbitration—discussed below. Although arbitrators generally base their decisions on published rule sets and substantive law, the procedures and rules they follow may differ depending the nature of the arbitration—judicial or contractual— depending on the terms of the contract or agreement regarding arbitration (contractual arbitration) and depending on the organization conducting the arbitration. The arbitration decision may be either *binding*, in which case the decision is final, legally enforceable, and has limited grounds for appeal; or it may be *non-binding*, in which case either party may reject the arbitrator’s decision and opt to litigate (or pursue another form of ADR) to resolve the dispute.

Essential attributes of any arbitration: Although arbitration may take many procedural forms, discussed below, a dispute resolution mechanism is not an arbitration unless it has all of the following attributes:

- a third party decision maker chosen by the parties;
- a mechanism for ensuring neutrality in the rendering of the decision;
- an opportunity for both parties to be heard; and
- the rendering of a decision—either binding or non-binding-- depending on the type of arbitration and/or the parties agreement.

2. What Is The Difference Between Arbitration v. Mediation?

Mediation is a dispute resolution process where all parties must consent to participate in good faith and work toward a mutually agreeable resolution. Mediating parties are not bound to resolve their dispute (although mediated settlements, once reached, can be made binding if the parties decide to draft a contract called a *settlement agreement*). Mediations are not "decided" in

favor of one party or another; rather, the mediator simply facilitates the negotiation process. Mediators will counsel parties on the strengths and weaknesses of their case and gauge each party's likelihood of success if the dispute proceeds to arbitration or litigation. Arbitration, on the other hand, is a dispute resolution process in which a third-party (the *arbitrator*) hears a dispute between one or more parties and, after considering all relevant information, renders a final decision in favor of one of the parties. Arbitration decisions may be either binding or non-binding, depending on the terms of the arbitration agreement and whether it is judicially-mandated. Binding arbitration decisions may be confirmed by a court and carry the same significance as a court judgment. However, arbitration is generally **more** expensive than **mediation** because the parties must prepare and submit evidence (documents, witness testimony etc.), prepare oral argument, direct and cross-examination of witnesses--as they would in a court trial—and other tasks associated with a judicial hearing. (Note, despite these formalities, the parties usually can—by stipulation—agree to a more informal procedure for introducing evidence and, in some cases, can dispense altogether with calling witnesses other than the principals.) Mediation is far less costly since it requires far less preparation as there is no formal submission of evidence or testimony.

Pros & Cons: The potential advantages of arbitration as a dispute resolution technique include:

- a) **Flexibility:** Just about any type of dispute can be arbitrated, including contract disputes involving businesses and consumers, intellectual property disputes, employment and labor claims, real estate and construction issues, tort and civil rights.

- b) **Cost and Efficiency:** Arbitration is usually a faster, simpler, and less expensive alternative to trial litigation. Disputes are brought before a neutral third party (the arbitrator) who, after carefully reviewing all of the relevant information, issues a final decision in favor of one of the parties. Consumers, businesses and government departments—even courts themselves—often successfully use arbitration programs to resolve disputes.

- c) **Decisive Outcome:** Arbitration offers parties a decisive legal outcome to their dispute, often without the expense and inconvenience of protracted court proceeding.

The potential disadvantages of arbitration include:

- the arbitrator controls the outcome; therefore, whether the arbitration results in a “fair” decision depends to a significant extent on the arbitrator’s knowledge and willingness to apply and follow the law;
- if arbitration is non-binding, some attorneys/parties may arbitration to discover the strengths and weaknesses of their opponent’s case without any real intention to settle;
- Arbitration awards are generally not appealable except on narrow grounds, e.g. misconduct by arbitrator or blatant conflict of interest.

Caution: Even if there is a blatant conflict of interest, that *may* not be sufficient grounds for challenging award if the arbitration clause in the contract providing for ADR provides that one side may pick the arbitrator. Incredibly, in some cases, such one-sided language has been upheld by the court as enforceable. Also, unlike a court proceeding, unless the parties agree otherwise, a court reporter is not present during an arbitration proceeding. Hence, there is usually an insufficient record for an appellate court to review. So even if the arbitrator is dead wrong on his evidentiary or other rulings, good luck proving it.

- In a court trial, the attorneys can have more control over the process. They can “voir-dire” potential jurors for bias; they can object to improper questions; they can keep out evidence through pre-trial motions; they can check whether the jury is properly applying the law by submitting special verdict forms and/or questionnaires to the jury to ascertain whether the jury has properly applied the law to the facts. In an arbitration, the arbitrator usually has wide latitude to render the decision without adhering to evidentiary or other rules tied to court procedure. And, again, since there isn’t usually a record of the proceedings, there is virtually no check on the arbitrator’s decision or conduct during the proceeding.
- In arbitration, only one man/woman decides the outcome—in a jury trial, there are usually 12 jurors with 9 person majority required in civil court (California).

5. Can One Convert Mediation to Arbitration? Yes. The parties may agree to transform a mediation into a binding arbitration. If this agreement is reached in a mediation involving pending litigation, it may be enforced (i.e., the right to arbitrate may be specifically compelled) under CCP § 664.6 provided the requirements of that statute are met. On the other hand, an agreement reached in mediation to submit to “binding mediation,” a nonlegal term that may have a different meaning to different parties, is too vague to be enforced. [See *Lindsay v. Lewandowski* (2006) 139 CA4th 1618, 1623–1625, 43 CR3d 846, 849–850].

⇒ **PRACTICE POINTER:** Converting a mediation into an arbitration necessarily involves converting the role of the mediator to arbitrator. Unless waived, the arbitrator's obligation to make disclosures to the parties, the potential conflict of interest issues, and the rights of the parties to disqualify the arbitrator allow any party to undermine what was probably the goal of the mediation-arbitration process—to allow the mediator, who has knowledge of the dispute, to decide it as arbitrator. For this reason, most med-arbitration agreements made in the course of mediation must include appropriate waiver language.

6. What Is The difference Between Judicial Arbitration vs. Contractual Arbitration? These are very different procedures: There are fundamental differences between “judicial arbitration” and contractual arbitration. [See *Mercury Ins. Group v. Sup.Ct. (Wooster)* (1998) 19 C4th 332, 344, 79 CR2d 308, 314]:

- a) **“Contractual Arbitration,”** is a voluntary procedure for resolving disputes which arise from contract; it only comes into play when the parties to the dispute have agreed, usually in advance, to submit to it. [*Herman Feil, Inc. v. Design Center of Los Angeles* (1988) 204 CA3d 1406, 1414. Both state and federal law provide for enforcement of such agreements. [CCP § 1280 et seq.; 9 USC § 1 et seq.]. **Contractual arbitration requires an agreement by the parties to arbitrate their dispute; and can be enforced by staying any lawsuit filed in contravention of the agreement (CCP §§ 1281.2, 1281.4.**
- b) **Judicial arbitration** on the other hand is not dependent upon a contractual agreement between the parties. Rather, it **is usually ordered by the court** (although parties may also stipulate to

judicial arbitration in the course of litigation. [See *Brennan v. Tremco Inc.* (2001) 25 C4th 310, 316, 105 CR2d 790, 794].

c) **Civil Proceedings Subject to Judicial Arbitration:** The judicial arbitration law is applicable only in certain courts and, within those courts, to specified civil cases.

(1) **Mandatory in larger courts:** The judicial arbitration provisions apply on a mandatory basis to nonexempt unlimited civil cases in all courts having 18 or more judges if the amount in controversy will not exceed \$50,000 for each plaintiff. [CCP § 1141.11(a); CRC 3.811(a)(1)]

(2) **Mandatory in smaller counties and limited civil cases only if required by local rule:** Courts with fewer than 18 judges can decide for themselves whether to adopt the provisions for mandatory judicial arbitration: i.e., nonexempt unlimited civil cases that would otherwise qualify are diverted to mandatory arbitration only if the court so requires by local rule. [CCP § 1141.11(b); CRC 3.811(a)(2)]. Likewise, courts may adopt local rules that provide for mandatory judicial arbitration in nonexempt limited civil cases (see ¶ 4:40 ff.). [CCP § 1141.11(c); CRC 3.811(a)(3); see S.F. Uniform Rule 4.1(A).]

(3) **Limited civil cases:** Courts may adopt local rules that provide for mandatory judicial arbitration in all nonexempt limited civil cases. [CCP § 1141.11(c); CRC 3.811(a)(3)]. Limited civil cases include those in which the amount in controversy does not exceed \$25,000. [See CCP § 85]

(4) **Exempt cases:** Some limited civil cases are exempt from arbitration even in courts where local rules have been adopted:

- small claims actions;
- unlawful detainer actions (CCP § 1161); and consumer class actions (Civ.C. § 1781). [See CCP § 1141.11(c)]

(5) **Motor vehicle accident cases:** In courts that have adopted judicial arbitration, all limited civil cases involving auto

accident claims against a “single defendant” (except small claims actions) must be submitted to arbitration within 120 days after defendant's answer. (The court may extend the 120–day period for “good cause.”) [CCP § 1141.11(d)(1)].

- d) **Other Distinctions Between Contractual and Judicial Arbitration:** Contractual Arbitration is a private, informal proceeding that is inherently extrajudicial. The judiciary becomes involved only as necessary to enforce the resulting award. Judicial arbitration, by contrast, involves public, reported proceedings subject to appellate review and orchestrated by a judge according to strict rules designed to dispense and satisfy the appearance of justice. [Heenan v. Sobati, supra, 96 CA4th at 1002, 117 CR2d at 537]. A sitting judge is not privately retained or paid by the parties.
- e) **Award binding:** Contractual arbitration awards are usually binding on the parties and there is in practical effect no judicial review as to the correctness of the award. **By contrast, a judicial arbitration award is not binding** unless the parties either (1) stipulate for binding arbitration or (2) accept it as final (by not filing a timely request for trial de novo; CCP § 1141.20; CRC 3.826. [See Brennan v. Tremco Inc., supra, 25 C4th at 316].
- f) **Selection of arbitrator:** In contractual arbitrations, the arbitrator may be designated in the agreement or by a procedure specified therein. In judicial arbitration, the selection procedure is governed by state statute and local court rules. CCP § 1141.18(a); CRC 3.814–3.815.
- g) **Discovery:** Absent agreement, there generally is no right to discovery in contractual arbitration proceedings. (But there are some exceptions—e.g., claims for employment discrimination under the FEHA.) [See CCP §§ 1283.05–1283.1; Mercury Ins. Group v. Sup.Ct. (Wooster), supra, 19 C4th at 344, 79 CR2d at 314.
- h) **Judicial arbitration,** on the other hand, permits full and complete discovery before arbitration. [CRC 3.822; Mercury Ins. Group v. Sup.Ct. (Wooster), supra, 19 C4th at 344, 79 CR2d at 314]. To prevent the parties from using the arbitration hearing for discovery

purposes, usually discovery must be completed 15 days before the hearing.

- i) **Rules of Evidence:** Unless the arbitration agreement provides otherwise, courtroom **rules of evidence and procedure need not be observed in contractual arbitration** proceedings. [See CCP § 1282.2(d); Mercury Ins. Group v. Sup.Ct. (Wooster), supra, 19 C4th at 344–345]. Generally, the rules of evidence governing civil cases apply in judicial arbitration. [See CRC 3.823(b) & 3.824; Mercury Ins. Group v. Sup.Ct. (Wooster), supra, 19 C4th at 345, 79 CR2d at 314].
- j) **Rulings:** In contractual arbitration proceedings, the arbitrator generally has wide latitude and is not required to make a decision strictly in accordance with the law. [Mercury Ins. Group v. Sup.Ct. (Wooster), supra, 19 C4th at 345, 79 CR2d at 314]. In judicial arbitration proceedings, however, the arbitrator must “decide the law and facts of the case and make an award accordingly.” [CRC 3.824(a)(7); Mercury Ins. Group v. Sup.Ct. (Wooster), supra, 19 C4th at 345, 79 CR2d at 314].
- k) **Costs, prejudgment interest:** Prejudgment interest and costs may be generally recoverable in judicial arbitration proceedings (CCP § 1287.4) unless otherwise agreed by parties. [See Caro v. Smith (1997) 59 CA4th 725, 736–737, 69 CR2d 306, 313–314—arbitrator awarded “statutorily recoverable fees and costs”; in proceeding to confirm award, plaintiff was entitled to statutory interest (her § 998 offer had been rejected) and statutory costs. On the other hand, prejudgment interest and costs are not recoverable in contractual arbitrations where the underlying arbitration agreement precludes postarbitration judicial proceedings. [Parker v. Babcock (1995) 37 CA4th 1682, 1687–1688, 44 CR2d 602, 604—agreement required plaintiff to dismiss action once there was compliance with arbitration award].
- l) **Judicial arbitrations necessarily result in court proceedings if either party rejects the award**—i.e., a trial de novo. CCP § 998 and Civ.C. § 3291 apply in those court proceedings. [Parker v. Babcock, supra, 37 CA4th at 1687; contractual arbitrations do not result in further proceedings if they are binding. Compare—

“judicial arbitration”: California and some other states require that certain actions (e.g., superior court “unlimited civil cases” where the amount in controversy is \$50,000 or less) be diverted before trial to “judicial arbitration.” [See CCP § 1141.10 et seq.] This procedure is quite different from contractual arbitration: First, there is no preexisting agreement to arbitrate. Equally important, a judicial arbitration award is not binding on the parties; either may demand a trial de novo, by judge or jury (CCP § 1141.20).

m) **Arbitrator’s Fees:** Unless the court sets a higher level (or the arbitrator waives a fee), the arbitrator's fee in Judicial arbitrations is \$150 per day or \$150 per case, whichever is greater. The fee is payable upon filing of the award or settlement of the case by the parties. [CCP § 1141.18(b)]. Unless otherwise set by local rules, or agreed by parties, in a judicial arbitration, the arbitrators' fees are paid by the court, not by the parties. [CCP § 1141.28(a)]. Exception: Parties *stipulating* to judicial arbitration—as opposed to being ordered to arbitrate—are required to split the arbitrator's fees unless this would cause substantial hardship to either party, in which event the court will pay that party's share of the fees. [CCP § 1141.28(b)].

7. Drafting ADR Agreements: What Types Of ADR Agreements Exist And What Factors Should I Consider When Deciding To Incorporate ADR Language In A Contract?

A. **Pre-Dispute ADR Agreements:** Most ADR agreements are entered into as part of an underlying contract (e.g., arbitration clauses in insurance policies or sales or construction contracts) before any dispute has arisen.

Advantages: There are several obvious advantages to such agreements: *Best time to negotiate ADR:* The best time to negotiate an ADR agreement is when the contract is entered into. At that point, there is usually a collaborative effort to establish a contractual or business relationship that will be mutually satisfactory. The parties therefore are usually receptive to suggestions that they include an appropriate ADR mechanism to resolve any disputes that might impair their relationship. This is particularly true where the relationship is such that future disputes are likely to arise (e.g., labor management contracts, health insurance contracts, etc.). *Prevents future disputes:* The mere fact the contract

contains a dispute resolution mechanism tends to encourage negotiation and settlement. Even if the ADR mechanism is nonbinding, it requires the parties to negotiate areas of disagreement before hostilities escalate and positions harden. If this does not resolve the dispute altogether, it may at least focus and perhaps narrow the issues remaining in dispute.

Disadvantage: The only real downside to a pre-dispute ADR agreement is that the parties never know the precise nature of the dispute that may arise under their contract. Thus, even an elaborately drawn dispute resolution agreement may need to be revised to better suit the particular dispute that ultimately arises.

B. **“Customizing” ADR agreement:** The most important drafting consideration is to design an ADR *process* that is customized to the parties' needs and interests. Sometimes it will require **combining procedures:** For example, for insurance claims, it is foreseeable that the insurer and insured may disagree regarding the amount of damage claimed by an insured, and whether there is coverage under the policy for the loss incurred. Accordingly, the ADR agreement may require the insurer and insured *first to arbitrate* the coverage issue; and then (if the arbitrator finds coverage) to submit the damage issue to neutral fact-finding process (such as an appraisal process).

C. **Multi-Step ADR Agreements:** Depending on the nature of the dispute and the client's resources, a multi-step dispute resolution agreement, with fixed time limits for each stage, may be appropriate. Such an agreement keeps the settlement process going. If earlier mechanisms do not produce a settlement, others kick in automatically. **Time limits for each step:** To keep the process moving forward, the ADR agreement should establish a starting point (e.g., written notice) and limit the duration of each phase of the multi-step process. For example, a multi-step agreement might provide for a 30-day period for negotiations after written notice from either party, followed by a 30-day period for mediation, before the adjudicatory phase. The agreement should then provide that at the conclusion of the specified time period, the next phase automatically begins unless the parties agree to the contrary.

1. **Deferring ADR decisions:** A multi-step agreement may be drafted so as to *defer* key ADR decisions until some time in the future when the dispute arises.

a. **Advantages:** Deferring certain ADR decisions until the dispute arises provides more flexibility in choosing the appropriate ADR processes. This is particularly important when the nature and complexity of future disputes cannot be anticipated with accuracy at the same time the agreement is drafted. Preliminary negotiations and mediation will be required in all cases, so that the cost and time of adjudicatory procedures (e.g., arbitration) may be avoided. Then, if negotiations and mediation fail, the parties may specify arbitration.

b. **Disadvantage:** The major drawback to this approach is that implementation of a multi-step agreement requires more negotiations than fixed-step ADR agreements. Alternatively, **further negotiations may be avoided by including a “fail-safe” provision: a simple agreement to arbitrate before an institution with well-established rules (AAA or JAMS) if no other agreement is reached.**

2. **Example:** The following is an example of a multi-step ADR agreement that defers key decisions re the ADR process:

“(1) *Good faith negotiations:* If a controversy or claim should arise, the parties will meet at least once and attempt, in good faith, to resolve the matter. Either party may request the other to meet within ... days at a mutually agreed time.

“(2) *Appointment of neutral:* If the parties have not settled such claim or controversy within ... days after such meeting, they will jointly appoint a mutually acceptable neutral person not affiliated with either party (the ” neutral“) to assist in settlement negotiations. If the parties are unable to agree upon such neutral within the time period stated above, they shall refer the matter of selecting a neutral to ... [AAA, JAMS, or other ADR provider]. The neutral's fees shall be shared equally by the parties.

“(3) *Nonbinding ADR procedures:* In consultation with the neutral, the parties will select or devise a nonbinding alternative dispute resolution procedure (”ADR“) by which they will attempt to resolve the dispute, and a time and/or place for such nonbinding ADR to be conducted. If the parties are unable to agree on any of these matters within ... days after initial consultation with the neutral, the neutral

shall make the decision and notify the parties accordingly. The parties agree to participate in good faith in the nonbinding ADR to its conclusion as designated by the neutral.

“(4) *Binding ADR procedures*: If the parties are not successful in resolving their dispute through the ADR described above, they agree to submit any matters remaining in dispute to binding arbitration or some other form of binding ADR in accordance with rules *to be agreed upon in consultation with the neutral*. If the parties are unable to agree on the form of binding ADR or the rules to govern such procedure within ... days after initial consultation with the neutral, the neutral shall make the decision on these matters and notify the parties accordingly.”

=>**PRACTICE POINTER**: In drafting such agreements, make sure you give the neutral *very clear and specific* power to make the ultimate decision on any matter left open to future agreement. Otherwise, one party or the other may dig in its heels and stall the ADR process, and the matter will end up in litigation.

3. Institutional vs. Self-Administration Agreements: The next decision is whether the parties want to administer the ADR process themselves or instead utilize an institutional provider of dispute resolution services (e.g., AAA, JAMS, etc.) to do so.

A. Self-administered agreements (“non-administered” or “ad hoc” proceedings): If the parties so choose, they can certainly administer the ADR proceedings themselves; i.e., they can hire the neutral, develop their own procedural rules, rent the hearing room, give required notices, etc. (Such proceedings are called “nonadministered” because they are not administered by an institutional provider.)

In such event, the parties' agreement should provide the necessary procedural guidelines, including:

- how to initiate the ADR procedure;
- procedures for selection of the neutral;
- rules governing the proceedings (i.e., discovery, evidence, award, etc.);
- whether the neutral's decision is to be binding or merely advisory, etc.

- ⇒ **PRACTICE POINTER:** Self-administration may be suitable for business entities with counsel or staff experienced in ADR procedures. Contracting parties with limited resources and limited ADR experience are usually better off designating an institutional provider (AAA, JAMS, etc.) to administer their disputes; see below.
- ⇒ Also, the institutional process is usually advisable where a party lacks confidence in the opposing party's willingness to cooperate in dispute resolution. Obstruction of the process is less likely in an institutional setting.

B. Agreements using institutional providers: More commonly, the parties designate an institutional provider of dispute resolution services to administer whatever ADR procedures they have selected, either directly or by incorporating its procedural rules by reference.

(1) **Example—“short form” arbitration agreements:** By far the most common ADR agreement is the “short form” arbitration agreement whereby the parties simply *incorporate by reference* the rules of one of the national providers of ADR services (AAA, JAMS, etc.).

(2) **Institutional clauses as “self-executing”:** A demand by either party is sufficient to start the process whenever an institutional provider is designated, whereas a self-administered arbitration must be compelled by a court, on motion, if the respondent fails to cooperate. This is true of key subsequent steps as well.

Choices available: Some institutions provide specialized ADR services (e.g., various services specialize in mediation/arbitration). Others provide ADR services in particular substantive areas (e.g., the National Association of Securities Dealers, Inc. hears only industry-related arbitrations, such as claims by a brokerage firm customer against a NASD member firm). Others provide specially qualified neutrals (e.g., JAMS offers the services of retired judges to handle any kind of ADR procedure, in any kind of case; and AAA offers experienced arbitrators in several specialized areas (e.g., employment, intellectual property, construction, etc.).

C. Advantages Of Designating An Institutional Provider:

i) **Simplifies drafting:** Designating an institutional provider simplifies drafting the dispute resolution clause. The institutional provider will have panels of qualified persons from whom the neutral may be selected and standardized rules for proceedings they administer.

ii) **Simplifies administration:** Institutional providers perform a number of services that would otherwise fall on the parties. They generally provide:

- an administrative staff to process and handle the case, distribute documents and notices, act as an intermediary with the neutral, etc.;
- administrative determinations (venue, proper parties, disqualification of neutrals prior to the appointment of the arbitrator or panel);
- panels of approved neutrals with expertise in the particular ADR proceedings which the institution administers;
- a check on conflict of interests for the neutral selected, plus rules for disclosures by neutrals and procedures for removing neutrals;
- an established set of ground rules under which the ADR proceeding may be conducted unless the parties agree otherwise;
- hearing rooms;
- billing and collection of fees for services.

D. Disadvantages Of Designating An Institutional Provider:

i) **Costs:** The administrative costs and the neutral's hourly rate tend to be much higher when an institutional provider is selected. They can be so high as to defeat the purpose of ADR in the first place.

ii) **Practicality:** many disputes are relatively straight-forward and can be resolved by a competent attorney or private judge with far less red-tape and with more flexibility.