Excerpts from:

GUIDE TO DRAFTING INTERNATIONAL DISPUTE RESOLUTION CLAUSES

MODEL STAND-ALONE MEDIATION CLAUSE

Parties can adopt mediation as a stand-alone dispute settlement procedure. In the event that mediation does not result in settlement, the parties can agree to utilize other dispute resolution procedures or default to national courts for the resolution of their dispute.

The ICDR Model Stand-Alone Mediation Clause is as follows:

“In the event of any controversy or claim arising out of or relating to this contract, or a breach thereof, the parties hereto agree first to try and settle the dispute by mediation, administered by the International Centre for Dispute Resolution under its Mediation Rules, before resorting to arbitration, litigation or some other dispute resolution procedure.”

The parties should consider adding:

- “The number of mediators shall be (one or two);”
- “The place of mediation shall be (city and/or country);”
- “The language(s) of the mediation shall be ___.”

MODEL “STEP” DISPUTE RESOLUTION CLAUSES

Contracting parties may wish to include a provision requiring negotiation or mediation before arbitration is initiated. Such clauses, which are often referred to as "step-clauses", are particularly appropriate where the parties have a long-standing and on-going commercial relationship, and where there may be factors to consider other than the narrow scope of a particular dispute. While those factors are missing in a commercial relationship arising out of a single transaction, it is the rare case that would not benefit from settlement discussions.

A legitimate concern about the use of "step clauses" is the potential for a party to unnecessarily delay an adverse decision. However, this problem can be addressed by providing time limits on each step. These limits are, at best, an educated guess regarding appropriate timing for negotiations or a mediation to be completed by the disputing parties. Alternatively, the clause might be drafted to allow each party to demand arbitration without recourse to the previous step(s), or by permitting mediation and arbitration to proceed concurrently. Otherwise, having agreed to a series of conditions precedent, parties should be prepared to go through each required dispute resolution process.

There are various examples of "step-clauses". They may require parties to seek resolution of the dispute by negotiation and/or mediation before resorting to arbitration.

For the benefit of parties drafting commercial contracts who wish to include an express obligation to seek resolution of disputes by negotiation and/or mediation prior to arbitration, the International Centre for Dispute Resolution (ICDR) offers the following model Negotiation-Arbitration, Mediation-Arbitration, and Negotiation-Mediation-Arbitration “step” clauses:
NEGOTIATION-ARBITRATION CLAUSE

"In the event of any controversy or claim arising out of or relating to this contract, or a breach thereof, the parties hereto shall consult and negotiate with each other and, recognizing their mutual interests, attempt to reach a satisfactory solution. If they do not reach settlement within a period of 60 days, then, upon notice by any party to the other(s), any unresolved controversy or claim shall be settled by arbitration administered by the International Centre for Dispute Resolution in accordance with the provisions of its International Arbitration Rules."

The parties should consider adding:

- "The number of arbitrators shall be (one or three);"
- "The place of arbitration shall be (city and/or country);"
- "The language(s) of the arbitration shall be ___."

The model negotiation-arbitration clause above provides a single negotiation "step". Parties sometimes provide multiple steps, by way of an "issue escalation" clause, in an attempt to encourage the surfacing and resolution of problems quickly during an ongoing project. Again, parties in those circumstances should be careful to provide time frames for moving the negotiation to the next level to avoid delay.

MEDIATION-ARBITRATION CLAUSE

Use of the Mediation process is growing globally. In mediation, parties are free to negotiate business solutions not constrained by law or contract. Parties to ICDR/AAA administered mediations have historically enjoyed a settlement rate exceeding 85%.

Increasingly, parties perceive that mediation is more effective if an unresolved dispute is to be followed, and resolved, by arbitration. Since the requirement to mediate may be seen as a condition precedent to arbitration, a deadline should be established allowing parties to move from mediation to arbitration if necessary to avoid delay.

The ICDR Model "Step-Clause" for mediation-arbitration is as follows:

"In the event of any controversy or claim arising out of or relating to this contract, or a breach thereof, the parties hereto agree first to try and settle the dispute by mediation, administered by the International Centre for Dispute Resolution under its Mediation Rules. If settlement is not reached within 60 days after service of a written demand for mediation, any unresolved controversy or claim arising out of or relating to this contract shall be settled by arbitration in accordance with the International Arbitration Rules of the International Centre for Dispute Resolution."

The parties should consider adding:

- "The number of arbitrators shall be (one or three);"
- "The place of arbitration shall be (city and/or country);"
- "The language(s) of the arbitration shall be ___."

It should be noted that parties could agree to mediate at any time, even in the absence of a future disputes clause providing for mediation. Indeed, disputing parties frequently find that
mediation is particularly effective when conducted against the deadline of a pending arbitration hearing.

MODEL NEGOTIATION-MEDIATION-ARBITRATION CLAUSE

Parties to commercial contracts, most particularly those involving strategic commercial relationships, will sometimes provide for both negotiation and mediation as precursors to arbitration. The intent is that the parties should try to solve the problem themselves first, and, if that proves difficult, utilize the services of a third party mediator, before resorting to a third party decision-maker/arbitrator.

Once again, time limits or an opt-out provision should be considered to avoid delay tactics.

The ICDR Model "Step-Clause" for Negotiation-Mediation-Arbitration is as follows:

"In the event of any controversy or claim arising out of or relating to this contract, or the breach thereof, the parties hereto shall consult and negotiate with each other and, recognizing their mutual interests, attempt to reach a solution satisfactory to both parties. If they do not reach settlement within a period of 60 days, then either party may, by notice to the other party and the International Centre for Dispute Resolution, demand mediation under the Mediation Rules of the International Centre for Dispute Resolution. If settlement is not reached within 60 days after service of a written demand for mediation, any unresolved controversy or claim arising out of or relating to this contract shall be settled by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules."

The parties should consider adding:

- "The number of arbitrators shall be (one or three)"
- "The place of arbitration shall be (city and/or country)"
- "The language(s) of the arbitration shall be ___"

MODEL CONCURRENT ARBITRATION-MEDIATION CLAUSE

Some parties prefer not to obligate themselves to mediate as a condition precedent to the filing of arbitration. They could be concerned that early mediation will not allow them sufficient time to understand the case, so making negotiation more perilous. That said, not providing for mediation in the dispute resolution clause may result in a lost opportunity to make clear the parties' preference for a negotiated settlement. With those countervailing concerns in mind, ICDR has developed a model “Concurrent Arbitration-Mediation” Clause. The Clause obligates the parties to mediate, but does so after the initiation of arbitration, when the parties are presumably more informed regarding both the matters in dispute and their respective needs and interests.

The ICDR Model Concurrent Arbitration-Mediation Clause is as follows:

"Any controversy or claim arising out of or related to this contract, or a breach thereof, shall be resolved by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules. Once the
demand for arbitration is initiated, the parties agree to attempt to settle any controversy or claim arising out of or relating to this contract or a breach thereof by mediation administered by the International Centre for Dispute Resolution under its International Mediation Rules. Mediation will proceed concurrently with arbitration and shall not be a condition precedent to any stage of the arbitration process.”

The parties should consider adding:

- “The number of arbitrators shall be (one or three)”;
- “The number of mediators shall be (one or two)”;
- “The place of arbitration shall be (city and/or country)”;
- “The place of mediation shall be (city and/or country)”;
- “The language(s) of the arbitration shall be ___.”;
- “The language(s) of the mediation shall be ___.”

To view the full version of the Guide to Drafting International Dispute Resolution Clauses, please visit our website at www.icdr.org, or specifically the following link: http://www.adr.org/si.asp?id=4945