

# Frank ADR

Alternative Dispute Resolution Chambers  
Of J William Frank III, FCI Arb

## Agreement ADR Clause Issue Checklists Page 1: Should I Include an ADR Clause?

### Issues to Consider Relative to Including an ADR Clause in this Agreement

**Assumption:** *The Agreement is being negotiated prior to any dispute between the parties or the Agreement is settling a dispute between the parties; the parties are willing to consider ADR; and neither party is a Government entity.*

### Considerations

1. Does the use of ADR facilitate the business purpose of the agreement?
  - a. Is this agreement strategic or tactical (Tactical – Neutral relative to ADR; Strategic – Tends to favor ADR as you may want an expert decision maker)?
  - b. Is the agreement time horizon long term or short term (Long term agreements favor ADR to resolve disputes during term of the Agreement; Short term - Neutral relative to ADR)?
  - c. Is this a single deal or “one of many” related to the same subject (Single deal – Neutral relative to ADR; Multiple deals – Tends to favor ADR)?
  
2. Is a confidential resolution of any dispute relative to the Agreement important or desirable?
  - a. Are there trade secrets involved, including business plans? (Involvement of Trade Secrets tends to favor ADR)
  - b. Is there a risk of adverse publicity? (ADR is confidential – less opportunity for adverse Publicity)
  
3. Is speed of resolving the dispute necessary or important?
  - a. Is a quick decision needed or even helpful? (ADR resolution tends to be quicker on average – Need for speed favors ADR, but consider the availability of an expedited judicial option)
  - b. Will this decision impact other deals? (ADR has no *res judicata* effect – If needed, tends to disfavor ADR)
  
4. Is the cost of resolving a dispute important – especially where the value of the deal is low?
  - a. Will “enforcement” costs overwhelm the value of the deal? (For small value deals ADR is a good way to get an efficient resolution; For high value deals cost is not likely a concern)  
*Caution – Sometimes ADR can be just as expensive as a judicial option*
  - b. Consider costs involved in judicial enforcement of Arbitration Award, if needed.
  
5. Is Control of the dispute resolution process important?
  - a. Is having someone knowledgeable resolve the dispute important? (Need for an expert decision maker favors ADR)
  - b. Are there difficult discovery issues? (ADR tends to have more limited discovery – If this is important, use care in crafting the ADR clause and include specifics for discovery)
  - c. Are there international issues, different legal systems, involved? (International nature tends to favor ADR – able to have choice of language and familiar forum)
  
6. Is there an important business relationship to be maintained?
  - a. Is the other party someone that you may need to deal with on repeated deals?
    - i. Is there a relationship to be preserved? (Favors ADR)
    - ii. Is this a one-time deal? (Neutral relative to ADR)
  - b. Is the other party agreeable to ADR?

## Agreement ADR Clause Issue Checklist Page 2: What Issues should be Included in the ADR Clause?

1. Scope of ADR Clause
  - a. Broad Clause
    - i. Covers all possible disputes that relate to the Agreement
    - ii. Like to include issues ancillary to the agreement
    - iii. Less of an issue for non-binding ADR (Mediation)
  - b. Narrow Clause
    - i. For binding ADR (arbitration) consider issues you want to be arbitrated vs. litigated (if any)
    - ii. Are there reasons to litigate a specific issue? (Precedential value for instance)
    - iii. List specific issues that are not to be subject to clause
2. Type of ADR, Steps and Timing
  - a. Mediation vs. Arbitration
  - b. Single type or step
    - i. Can reduce the time to resolution
    - ii. Places parties under pressure to resolve the dispute using that step.
  - c. Multi-step (i.e. Mediation followed by arbitration)
    - i. Can lead to deferral to a later more binding step
    - ii. Can increase to time to resolution, especially if the time periods between steps are long
    - iii. Can add to the cost
  - d. Be clear about time limits relative to agreement breach
3. Choice of ADR Rules
  - a. Rule choice can have a significant impact on cost and even outcome
  - b. Choose Rules that fit the present agreement
  - c. Consider modifications to the Rules to fit the present situation
4. Choice of Law, Location, and Language
  - a. Consider linking the location and the law covering the procedural aspects of the ADR (Can be different than the law of the agreement)
  - b. Choose a location, likely neutral, that is convenient to the parties and supports ADR, particularly arbitration
  - c. Consider a language for the proceedings that is cost effective and efficient. Consider the effect on language choice on identity of pool of neutrals.
5. Arbitrators (Number, Qualifications, How appointed)
  - a. Number of arbitrators
    - i. One arbitrator will lower the cost but can be riskier based on choice of arbitrator
    - ii. Three arbitrators are more costly but can minimize the risk of an out-layer decision
  - b. Set qualifications for arbitrators that maximize the pool but provide arbitrators that are familiar with the areas of dispute
    - i. Don't list too many qualifications as this limits the pool
  - c. Consider the chosen Rules relative to the appointment of the arbitrator. Consider modifying the Rules to meet the parties' needs.
6. Confidentiality
  - a. Be clear about confidentiality
    - i. Consider having the confidentiality clause in the main part of the agreement also apply to any ADR proceeding, even after termination of the agreement
7. Awards, Fees, Enforcement, and Appeal
  - a. Do you want or need a reasoned award (Likely will add to the cost)
  - b. Especially in International agreements consider that fee shifting is normal outside the US. Consider fee shifting for domestic agreements as well (Can lower costs).
    - i. Be clear about the arbitrator's ability to grant these fees
  - c. Specifically provide that any award can be enforced in a court of competent jurisdiction.
  - d. If desired, opt in to optional appeal process if allowed by Rules.
  - e. While most rules allow this, be clear about interim relief, including the appointment of an emergency arbitrator.
8. Necessary Parties
  - a. Are all necessary parties to any ADR proceeding signatories to agreement?
    - i. If Not, make sure there is a secondary agreement in place that commits these other parties to the ADR process