

Arbitration and Other Forms of ADR in Real Estate Deals

The Process, Drafting Considerations, and Making ADR Provisions Work

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An unresolved real estate business conflict will be resolved, one way or another. Traditionally, unless they settle, the parties resort to a lawsuit. Of course, the great majority of lawsuits over failed real estate deals or projects settle before trial—but after huge amounts of money and time have been spent.

To avoid those unnecessary expenses, the use of alternative dispute resolution (ADR) processes, such as nonbinding mediation and binding arbitration, has swept through the legal and business fields, including their use in contracts involving real estate deals and commercial projects. In fact, many state and federal courts mandate mediation before trial or even as a condition of obtaining a trial date. These courts have also lost their historical antagonism toward binding arbitration and go out of their way to enforce arbitration clauses. At the same time, law firms now tout their “litigators” as “dispute resolution specialists,” and many businesses and organizations, including the federal government, pledge to use ADR to resolve disputes.

ADR is certainly not a panacea, however, and the parties to a transaction should carefully consider whether to place an ADR clause in a real estate contract or agree to submit a real estate dispute to some form of ADR. Like any other method of dispute resolution, using ADR has advantages and disadvantages. This article discusses those pros and cons and includes some basic recommendations relating to drafting binding arbitration clauses.

Disadvantages of Litigating Disputes

There are many problems associated with resolving real estate disputes by using the conventional means of filing a lawsuit.

Costs of Litigation

Going to court is extremely expensive and time-consuming. Settlement often takes place on the courthouse steps, after the parties have already incurred the vast majority of the hard and soft costs of litigation. A company and its in-house counsel must consider the “hard costs” of litigation, such as attorney’s fees and expenses. Under most state laws, unless an attorney’s fees provision is in the contract, such expenses are not recoverable—even by the winning party. A company may win the battle in court but lose the war when it realizes that, after subtracting the fees and expenses spent on a litigated case, the bottom line is a net zero recovery and monies are owed to banks or other individuals. There are many horror stories in which the attorney’s fees and expenses incurred by all sides to a failed real estate deal far exceed the amounts at stake.

Anyone involved in any real estate deal also must consider, and managers and owners frequently do not consider (especially those who have not been through a major lawsuit), the substantial soft costs of litigation. This factor is also sometimes not even fully understood by trial counsel. Once a lawsuit is filed, it can take on a life of its own—counterclaims may be filed, and control lost. Also, time is money. In any lawsuit, management and other key employees must devote a considerable amount of time to the dispute in educating the lawyers, collecting evidence, responding to discovery, and being deposed, all of which absolutely disrupt the normal business operations of that business. It is difficult to find or invest in a brand new development deal when time must be spent on a failed deal.

There is also an emotional or psychological cost. Lenders, for example, frequently get involved in disputes citing onerous loan terms. Being accused of fraud, or breaching a contract, affects employees at the highest levels of any business—and has a psychological

effect on the company. One real estate developer client said it best: “While only 1% of my deals have ended up in a lawsuit, that one deal cost me 75% of the profit I made on 90% of the successful deals, and plenty of lost sleep and anxiety.”

Publicity and Public Filings

Litigation over real estate deals can damage reputations and cost jobs and often helps competitors. Local politics can intrude. Court filings are public records, and one cannot un-ring a bell. The filing of a lawsuit, even if frivolous, may make the front page of the newspaper or trade magazine or, in these days of social media, find its way to blogs, Facebook posts, and Twitter comments. By contrast, dismissal of the lawsuit or claim years later may not be reported.

All filings in court and transcripts of testimony at trial are open to any competitor seeking a competitive edge or inside information. In a case involving a failed real estate development, for instance, a claim for lost profits requires the developer to open up its financial books and records in the discovery process. There are ways, through protective orders, to try to limit access to confidential information, but sometimes the information leaks out to the public—or is released by the other side in the lawsuit—in an effort to gain leverage.

Time

Depending on court dockets, some lawsuits take years to actually get to trial, and then, even after a trial, the party has an automatic right to appeal, which may take another two to three years. Federal courts also must give deference to criminal trials. The fact is that any smart client and lawyer, if they want, can make the other side wait a considerable amount of time before paying the piper—which in some circumstances may be exactly what they intend. There are many instances in which an otherwise solvent defendant (developer, tenant, or contractor) has been able to delay a final hearing, and, by the time a judgment has been rendered, that company’s assets are gone or a bankruptcy has been filed. Although there are ways to trace the assets, that process can mean more lawsuits and more attorney’s fees. In the end, all a successful claimant may have left is a handful of legal fees and an uncollectible judgment that may be nice to look at but is virtually useless.

Unpredictable Results

There is no way to predict what a judge or jury may do in a civil case—much less a complicated real estate dispute in which industry-known terms are not commonly understood. More importantly, if the case involves complicated facts or expert testimony, the jury and even the judge can become confused and render an unfair judgment. It is also very difficult, in the short time of a trial, to educate the jury and judge about the particular subject matter of the dispute. Therefore, any time a business places a substantial real estate-related legal dispute, especially when the outcome of the business may be at stake, in the hands of a judge or jury, it is engaging in nothing less than pure legalized gambling. Even the best trial lawyers lose cases that they think should have been won. When the dust settles, and the outcome and all costs are known, hindsight comes into play about what decisions were and were not made that may have affected the outcome.

Nonbinding Mediation to Resolve Real Estate Disputes

Mediation is by far the fastest growing method of dispute resolution. In mediation the parties hire a neutral third party (a mediator) to help them negotiate a business settlement. Mediation is confidential and not open to the public. Statistics show that most disputes submitted to mediation actually settle. Mediation can be set up in a matter of weeks and normally does not take more than one business day. Mediation can take place at any time or place, before or after a lawsuit has been filed, and there is no need to obtain court approval. Lawyers also may or may not be involved in the process.

The role of the mediator is much different from that of an arbitrator or a judge. The mediator does *not* make or impose a decision. Mediation is nonbinding, meaning the parties do not give up any rights by participating in mediation. The sole purpose of mediation is to attempt to negotiate a settlement between the parties by breaking down the barriers to communication and encouraging offers and counteroffers.

Mediation can offer practical, business solutions that are not available in a litigation setting. In the typical case, all a court can do is decide who gets money and how much. Parties in mediation can agree to continue to do business together or settle the claim for something other than a monetary payment. In contrast to the winner-take-all scenario of litigation or arbitration, parties in mediation attempt to agree on a win-win scenario.

Mediation clauses can be placed in all types of real estate contracts and deals: development deals, commercial leases, and brokers, buy-sell, and construction contracts. It is most effective, however, when both parties have a genuine interest in settlement, have a history of cooperating with one another, and when the disagreement has not escalated to the point of real animosity.

Binding Arbitration

Binding arbitration is a different animal from mediation. Basically, it is the referral of the dispute to an impartial (third) person chosen by the parties, who agree in advance to abide by the arbitrator's award issued after an evidentiary hearing at which both parties have an opportunity to be heard. The arbitrator is usually a retired judge, lawyer, or someone with knowledge or expertise in the field being disputed, such as real estate. Legal considerations will not be disregarded in arbitration, but the rules of procedure and evidence followed in the courts are not strictly employed unless the parties agree otherwise.

The decision to place an arbitration clause in a contract, or to agree to arbitrate a claim after a dispute has arisen, is a vital business decision that cannot be taken lightly. Many fields, such as construction and securities, have determined that binding arbitration is a better method of dispute resolution and have incorporated arbitration clauses in their form contracts (such as the AIA form documents for construction). Arbitration clauses are now popping up in other real estate-related contracts. But many businesses and lawyers are firmly opposed to arbitration. For these reasons, especially when reviewing all of the disadvantages of litigation set out above, it is important for businesses making this decision to fully understand the pros and cons of arbitration.

Pros and Cons of Binding Arbitration

Some considerations when contemplating arbitration are as follows.

Predictability

Probably the most frequent complaint about litigation is that judges or juries do not understand complicated business disputes, often leading to unpredictable and unsatisfactory results. There can never be any real answer to why a jury or judge ruled the way it did in a case. In contrast, arbitration employs a third-party neutral who has extensive experience and knowledge in real estate. Arbitrators do not necessarily have to be lawyers. This characteristic of arbitration normally eliminates the substantial problems and costs of educating a judge or jury in the nuances of a specified business field like real estate. Properly selected arbitrators are able to understand and focus on the most relevant issues in the dispute. Moreover, an arbitration hearing is considerably less formal. For instance, strict adherence to conventional rules of evidence and procedure is not followed. Instead, the focus is on the facts and testimony and not any strict rule of evidence.

Time

Because there is no need to deal with a crowded court docket, even when millions of dollars are at stake, arbitrations normally can be set for hearing in a matter of months, not years. In addition, it is almost impossible to appeal an arbitration award, and so finality is the rule rather than the exception. The luxury of being able to schedule a hearing and have a dispute resolved quickly benefits all parties.

Costs

The costs and expenses of arbitration can be much less than litigation. Because litigation is most often criticized for the abuse of pre-trial discovery (that is, scores of unnecessary depositions), it is significant that, with a few exceptions, such discovery is *not* allowed in arbitration unless the arbitration provision permits it. In most arbitrations, the limits on discovery, as well as the finality of the decision, significantly reduce attorney's fees and costs. The normal rule is that one day of arbitration equals two to three days in court, again saving money for both parties because the parties have the arbitrator's complete attention, as opposed to a judge who has to juggle many issues during the day. Finally, arbitration reduces the prolonged personal involvement of crucial company officers and employees in depositions and discovery planning conferences, which minimizes their time away from the pursuit of other business.

Privacy

Unlike the public court system, arbitration is private and confidential. The proceedings are *not* subject to the civil litigation requirement for openness and accessibility of proceedings. Arbitrators and mediators maintain the privacy of the hearings unless some law provides to the contrary.

Arbitration and mediation are not panaceas, however, and in some instances parties are better off in court. A business should be aware of the availability of ADR in the event a legal claim arises and should address with its lawyer whether or not it wants to place ADR clauses into its contracts. A business should not charge headfirst into litigation blindly but should examine all the alternatives available to resolve the dispute. In many cases, going through an expensive, delay-ridden trial is not in the best interests of any business. If the dispute can be resolved through ADR, clients can be assured of proceedings that will be, in many instances, faster, more confidential, and less expensive than litigation.

Drafting Arbitration Clauses in Real Estate Contracts

Drafting Arbitration Clauses

ADR is purely a contractual matter, and the parties are free to determine not only what controversies can be submitted to arbitration but also the procedures and guidelines for the arbitration. The drafting goal, more so than with any other contractual provision, is to achieve clarity. The last thing any drafter wants is to create a sea of mini-litigation over the provision itself or the scope of the particular matters the parties intended to arbitrate. Both of the authors are litigators by trade and have been presented many times with arbitration provisions in real estate contracts drafted by transactional lawyers that are practically unworkable and defeat the intention to have disputes resolved quickly and efficiently.

Drafters should consider that most state and federal courts, including the U.S. Supreme Court, have held that any doubts concerning the scope of an arbitrable issue must be resolved in favor of arbitration. Most courts reason that it is their responsibility to give as broad a construction to an arbitration agreement as the words and intentions of the parties, drawn from their expressions, will warrant and to resolve any doubts in favor of arbitration.

When considering arbitration, it is also essential to be generally familiar with the terms of the Federal Arbitration Act, 9 U.S.C. § 1-8 (the "FAA") and any state version of the FAA. While the application of and any differences between these statutory schemes are beyond the scope of this article, both acts are usually specific about many vital issues, such as the procedure for compelling a party to arbitration and the enforcement of an arbitration award. The appellate standard of review of an arbitration award under the FAA is very stringent. Recently, courts have ruled that an award is enforceable even if the award was issued in manifest disregard of the law or the facts. This result makes binding arbitration a double-edged sword. If a party is risk adverse and always wants to maintain the ability to appeal, that party should not agree to arbitration.

What Procedural Rules Should Apply?

Most arbitration clauses incorporate by reference the rules and procedures of administrative agencies such as the American Arbitration Association, the National Arbitration Forum, the CPR Center for Dispute Resolution, JAMS, or the International Commerce Commission. These groups all offer ADR administrative services, including a roster of mediators/arbitrators and specific rules and procedures. One caveat is in order on this point: there can be considerable differences among agencies in their rules governing such critical issues as the costs of initiating an arbitration, arbitrator selection and compensation, the availability of discovery, and the procedures and evidentiary rules that will govern the arbitration hearing.

Currently, a tendency among some lawyers is to agree to a private arbitration, even if an ADR clause references a certain agency, without going through the agency. They argue that counsel should be able to agree on an arbitrator, and even use the procedural rules of an agency, and thus avoid possible delay and the costs involved with an agency-administered hearing. Agencies such as the AAA, however, offer many services, not the least of which is the designation of a case manager for the dispute and a nationwide panel of trained arbitrators in the particular field involved.

The primary point is that parties to a real estate deal should never agree to an arbitration clause without reviewing the actual rules that will apply if a dispute occurs. As an example, it would be embarrassing, after telling a client that an advantage of arbitration is the unavailability of discovery, especially depositions, to discover that the rules of the agency specifically allow for full-scale discovery. If a significant factor is to avoid costs, one agency may provide an arbitrator for \$3,000 to \$5,000 a day, and another may charge a high hourly fee for their arbitrator. Will there be a solo arbitrator or a panel of three? If there is a panel of three arbitrators and a multi-day hearing is planned, the costs can be substantial. If the primary reason for choosing arbitration is the ability to obtain an industry expert as an arbitrator, even a lawyer who practices in that field, the drafter is in for a rude surprise if the agency only offers retired judges as arbitrators.

Scope of Issues to Be Arbitrated

The parties may agree to arbitrate all disputes or only some disputes arising under a contract or relationship. In a real estate deal, for example, a commercial landlord may wish to arbitrate certain disputes but probably does not want to arbitrate over eviction of a tenant for nonpayment of rent or if the lease has expired. It may make sense, however, to arbitrate common area maintenance disputes or issues related to option agreements or future rent. The same analysis could apply to banks that want the ability to quickly foreclose in the event of a default. The parties also can limit arbitration to disputes over a certain dollar amount or for certain types of disputes. The lesson to be learned is that if the parties wish to limit the types of disputes that will be decided by arbitration, the clause must be very specific because any doubt will be resolved in favor of arbitration.

In some instances, when there are multiple common issues of fact or law, not all related parties may be subject to an ADR clause. For instance, an owner may believe that a contractor and an architect both contributed to a construction failure. If the owner's contract with one party does not mandate arbitration, the owner may not have any choice but to initiate both arbitration and litigation. Under these circumstances, a realistic possibility of inconsistent judgments and substantially increased fees and costs exists.

An ADR clause can address that problem through the following provision:

Upon application from either party, a court may relieve the parties of their duty to arbitrate claims, or may stay any arbitration hereunder, if ongoing litigation between one or both of the parties and a third party involves issues of fact or law common with those subject to arbitration hereunder and there exists a possibility of inconsistent judgments if such relief is not granted.

Location of the Hearing

An ADR clause can provide for the location of the mediation or arbitration hearing. The FAA provides that, "unless otherwise provided by the agreement," the arbitrators designate both the time and location of the hearing. Rule 11 of the AAA Commercial Rules provides:

Fixing of Locale. The parties may mutually agree on the locale where the arbitration is to be held. If any party requests that the hearing be held in a specific locale and the party files no objection thereto within 15 days after notice of the request has been sent to it by the AAA, the locale shall be the one requested. If a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale, and its decision shall be final and binding.

The choice of location can be a significant strategic advantage, especially if the parties are located in different states. An arbitration provision can state that the arbitration shall take place not at the site of the dispute but at the home office of one party. In such circumstances, although the dispute or project may arise in another state, one party will be forced to arbitrate in the home state or city of the other party. The locale gives jurisdiction to that party's courts to enforce or rule on the ADR clause. Enforcement or vacation of an award also must be sought in the jurisdiction where the arbitration took place. Because most arbitrators are local to the place of the hearing, they may be completely unfamiliar with the party who was forced to arbitrate in another state. Finally, the party forced to arbitrate in another state will usually not be familiar with the proposed arbitrators or the state statutes governing arbitration.

Selection and Qualifications of Arbitrators

One of the advantages of ADR in a real estate deal is the flexibility afforded to the parties, and nowhere is this more apparent than in the selection of arbitrators. The FAA provides that if the agreement does not provide for appointment, or if the agreed method fails, the court may, on application, appoint an arbitrator. The method for appointment should be agreed on in advance because it is difficult, if not impossible, to obtain agreement on such a fundamental issue after a dispute has arisen. The methods parties can use to select arbitrators are limited only by the parties' imaginations. For instance, they can select in advance a single arbitrator by agreement. They can decide to allow each side to appoint an arbitrator with a third arbitrator to be a neutral decision maker selected by the other two arbitrators. By incorporating into the contract the rules of an administrative agency such as the AAA, the parties agree to have the entire selection process performed by that agency, which has a prequalified panel of potential arbitrators. As an example, if the AAA rules are specified, after the demand for arbitration is made, the AAA will provide to both parties a list of potential arbitrators with resumes. The parties then strike the names they object to and indicate an order of preference for those remaining on the list. The parties' lists are compared on their return to the AAA, which then selects the arbitrator or arbitrators.

One caveat to relying solely on the limited panel of arbitrators previously qualified by an agency is that there may be no in-depth analysis or independent confirmation of qualifications. The biographical background information supplied is also sometimes sketchy. Accordingly, do *not* assume that an individual on a panel list provided by any agency is a highly skilled and experienced arbitrator.

For these reasons, some parties agree in advance on arbitrator qualifications. The qualifications can be as simple as requiring a certain experience level or as complex as requiring a multiple panel with each arbitrator from a particular profession. In situations that may involve the interpretation of contracts, for instance, it may be best that a retired judge or attorney be included in any panel. If an arbitration involves complex technical issues, one suggestion is to provide for selection of one attorney and two others with the requisite technical expertise.

An example of a clause requiring that an arbitrator have a certain level of expertise is as follows:

Any claim subject to arbitration shall be submitted to a single neutral arbitrator, who shall be a retired judge or an attorney admitted to practice for at least fifteen (15) years who principally practices in the area of real estate law and who is a member of the commercial panel of arbitrators of the American Arbitration Association.

A sample clause for selection of a three-member arbitration panel in which only the chair is a lawyer is as follows:

Any claim subject to arbitration shall be submitted to a panel of three (3) neutral arbitrators, who shall be selected in accordance with the Rules of the [agency], modified as follows:

- (a) The chairperson of the arbitration panel shall be either a retired judge or an attorney admitted to practice for at least fifteen (15) years; who principally practices in the area of real estate law; is a member of the commercial panel of arbitrators of the [agency]; and has previously served at least ten (10) times as an arbitrator; and
- (b) The remaining two members of the arbitration panel shall be persons with at least fifteen (15) prior years of experience in the real estate industry and who are not lawyers.

In situations in which parties wish to each select an arbitrator, with the selected arbitrators choosing the third arbitrator, the clause may be as follows:

Any claim subject to arbitration shall be submitted to a panel of three neutral arbitrators. Each party shall appoint one arbitrator within thirty (30) days after receipt by the respondent of notice of the arbitration. The two (2) arbitrators appointed by the parties shall, within thirty (30) days after their appointment, appoint a third presiding arbitrator. If either party fails to nominate an arbitrator, or the arbitrators appointed by the parties fail to appoint the presiding arbitrator within the stated period, the second or presiding arbitrator, as the case may be, shall be appointed by the American Arbitration Association [or other appointing agency].

Consolidation of Related Disputes

Real estate deals involve multiple, interrelated parties (such as in construction projects), and instances may arise when the parties make separate demands for arbitration in situations in which common issues of fact or law exist. The potential economic advantages to arbitration vanish if the parties are forced to risk inconsistent arbitration awards. One solution is to provide for arbitration of all claims in one project:

Upon application to a court of competent jurisdiction, the arbitration proceeding may be consolidated with one or more claims subject to arbitration involving the same project where there is a common issue of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators.

Another suggestion is for the parties to agree to use an identical version of the arbitration agreement in all contracts. To put some teeth into the agreement, a provision for attorney's fees could be included:

The parties wish to avoid the litigation or arbitration of claims arising out of the Project in more than one proceeding. Therefore, the parties hereby agree to incorporate by reference the following arbitration clause in any and all subcontracts, performance bonds, guarantees, or other agreements related to the project. The parties also agree to indemnify and hold each other harmless from any attorney's fees, costs or expenses incurred by the other party as a result of any failure to comply with the agreement to incorporate the arbitration clause.

As an aside, one issue that frequently arises is forcing surety companies or guarantors to arbitrate when the underlying contract is subject to arbitration but the surety agreement, bond, or guaranty is silent. In certain states, the law on this issue is relatively settled. When a contract incorporates by reference the terms of an agreement requiring arbitration, a court may order arbitration. At the minimum, however, the agreement should specifically incorporate by reference each provision, and thus the ADR clause, of the underlying contract.

Prehearing Discovery

The most frequently cited difference between arbitration and litigation is that, absent some agreement to the contrary, in arbitration the parties are not entitled to prehearing discovery such as depositions and interrogatories. This rule is somewhat misleading because most state law provides for prehearing discovery on specified grounds. Of course, the parties can always agree to conduct full-scale discovery, using all of the pretrial tools associated with litigation.

As a practicality, especially in large disputes, the parties informally agree to conduct limited pre-trial discovery. Some commentators and practitioners of ADR, however, believe in preserving the *right* to conduct limited discovery. In some instances, especially if the stakes are very high, the parties may not want to go into a binding hearing with little substantive knowledge of testimony of fact and expert witnesses. An example of a clause allowing discovery is as follows:

The parties shall be entitled to obtain discovery prior to the hearing through depositions and requests for the inspection and copying of documents and to obtain the issuance of a subpoena duces tecum from the arbitrator(s). As between the parties, the arbitrator [or chairperson of a panel] shall have the power to enforce the rights, remedies, duties, obligations, sanctions and penalties as may be imposed in civil action by a state court judge in accordance with the _____ Rules of Civil Procedure.

The clause also can provide for more limited discovery, such as limiting the number of depositions, allowing for the identification of expert witnesses, and the agreement to allow experts to be deposed.

Evidentiary Standards

Most attorneys dealing with arbitration for the first time are shocked to learn that an arbitrator need not comply with legal rules of evidence. Arbitration statutes and agency rules usually grant the arbitrator wide discretion to determine the weight and admissibility of evidence. The reason for such a rule is to avoid formal rules and encourage a wide-open hearing. For instance, the AAA rules provide as follows:

The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to the legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default, or has waived the right to be present.

Accordingly, when nonlawyer arbitrators conduct hearings, it is inevitable that evidentiary disputes arise, such as hearsay, relevancy, and qualifications of experts. One option is for the parties by agreement to expressly provide for the application at the hearing of the Federal Rules of Evidence: "The admission of all evidence or documents at the hearing shall be governed by the Federal Rules of Evidence," or the relevant state's evidence rules. If such a clause is included, however, it is more important that one or more retired judges or attorneys serve on the panel. A disadvantage is that adherence to such rules takes away from the informality of the hearing itself, as well as substantially increasing the costs of arbitration. In practice, however, arbitrators usually agree to hear any and all evidence, because one of the few statutory grounds (in some states) for vacating an arbitration award is that the arbitrator refused to hear evidence material to the controversy.

Availability of Injunctive Relief

One difficult question is whether a party is allowed to file an action in court for preliminary injunctive relief when the contract mandates arbitration but is silent on the issue of injunctive relief. The FAA provides that an award may be vacated when the arbitrator exceeds his or her powers. On the scope of relief available in an arbitration, the AAA rules provide that an arbitrator may:

- a. Grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the parties, including but limited to, specific performance of a contract.
- b. Make other decisions, including interim, interlocutory, or partial rulings, orders and awards.

It may take weeks to select an arbitrator, especially if a temporary injunction is necessary. The AAA does have “Optional Rules for Emergency Measures of Protection” and under these rules the AAA will appoint a single emergency arbitrator within one business day after the application. For these emergency rules to be applicable, however, parties must refer to these emergency rules in their agreement.

Federal courts disagree over whether preliminary injunctive relief necessary to preserve the status quo is available without waiving the right to arbitrate. Some state arbitration laws allow a party to file for an injunction in state court. Because the FAA has no such provision, the parties may wish to include the AAA’s emergency rules or the following:

Without waiving its right to arbitrate, each of the parties reserves the right to file with a court of competent jurisdiction an application for temporary or preliminary injunctive relief, attachment, writ of possession or appointment of a receiver on the grounds that the arbitration award to which the appellant may be entitled may be rendered ineffectual in the absence of such relief.

Punitive Damages

Just as parties can limit the scope of the issues to be arbitrated, they also can limit the types of relief that can be awarded, including punitive damages. Again the case law is divided. Courts generally have held that unless excluded, the arbitrator normally has the power to award punitive damages. Be aware that there is also an argument that if the power to award punitive damages is expressly excluded, the party that wins only compensatory damages in an arbitration may be entitled thereafter to seek punitive damages in court. To prevent the issue from arising, the parties can include the following provision: “The arbitrator shall have no jurisdiction or authority to award punitive damages for any reason.”

Conclusion

Using ADR provisions—particularly agreeing to binding arbitration of disputes in real estate deals—should not be considered in a vacuum. Mediation and binding arbitration can be useful to economically and efficiently resolve disputes. A drafter should consider the issues discussed in this article, however, before making the decision on whether to require ADR and, if so, what the terms of that ADR should be.