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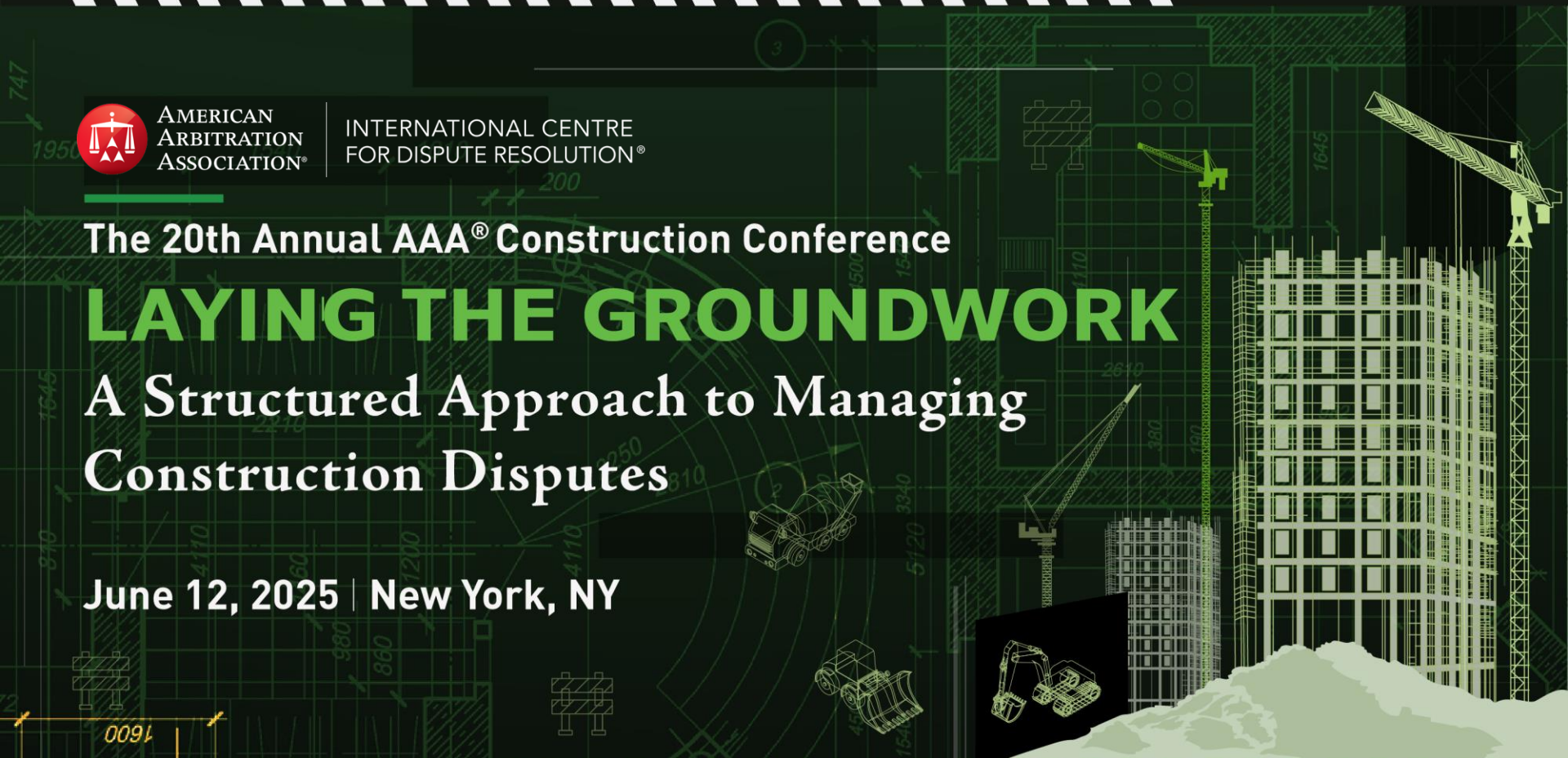
INTERNATIONAL CENTRE
FOR DISPUTE RESOLUTION®

The 20th Annual AAA® Construction Conference

LAYING THE GROUNDWORK

A Structured Approach to Managing
Construction Disputes

June 12, 2025 | New York, NY



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June 12, 2025
10:15-11:15 AM

Blueprints for Resolution: Designing ADR Clauses That Work





BLUEPRINTS FOR RESOLUTION:

DESIGNING ADR CLAUSES
THAT WORK

Meet Our Panelists

MODERATOR



Jacqueline Vega Citron

Regional Vice President,
American Arbitration Association®
New York, NY



Samantha L. Brutout

Partner,
Dingess, Foster, Luciana,
Davidson, & Chleboski LLP
Pittsburgh, PA



Y. Lisa Colon

Partner,
Saul Ewing LLP
Fort Lauderdale, FL



Eugene J. Heady

Partner,
Smith Currie Oles LLP
Atlanta, GA



Cara Peterson

SVP & General Counsel,
Adolfson & Peterson
Construction
Minneapolis, MN



Why do ADR Clauses Matter?

- Benefits of a Good Clause
- No Surprises
- Choice of Forum – Locale / Consider effect of “home state” laws
- Choice of Law – Consider effect of “home state” laws
- Choice of Administrator
- Ad Hoc Arbitration



Who Decides?

- Different perspectives when negotiating ADR Clauses
- Building a system internally for Contract Life Cycle Management
- Domestic vs. International



A Multi-Step Approach to ADR Clauses

DRBS

- Resolve disputes early at the project level

Negotiation

- Condition precedent to Mediation
- Tiered approach to structured settlement negotiations - with time limits
- Direct negotiation by Project Management Teams
- If claim is unresolved, escalate to stakeholders' Executives



A Multi-Step Approach to ADR Clauses

Mediation

- Condition precedent to Arbitration
- If Request for Mediation is coupled with Demand for Arbitration, allow Arbitrator selection to proceed concurrently

Arbitration

- If approached right, is much better than litigation to resolve complex construction claims quickly and efficiently



Things to Consider: **Discovery**

- AAA Discovery Best Practices for Construction Arbitration
Recommendations for AAA Construction Advocates and Arbitrators
- Incorporate by reference
- Striking the balance between too little and too much discussion of discovery in the arbitration clause
- What if Parties jointly agree to an increased scope of discovery?
- Establish a protocol for pre-hearing discovery and exchange of any electronically stored information
- Is discovery controlled by the jurisdiction, such as having to follow state rules of procedure for discovery?



Things to Consider: **Discovery**

- Are there issues that will complicate discovery?
- Cross-border or international data collection
- Privacy Rules such as the European Union's General Data Protection Regulation or the California Privacy Rights Act



Things to Consider: Prevailing Party Language

- Absent specific statutory authorization or agreement by the parties, the law is unsettled regarding whether arbitrators have the authority to award attorneys' fees.
- AAA Rule R-49. Scope of Award, Subsection (d)(ii) provides for “an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.”
- Empower the arbitrator to allocate or award attorneys' fees.
- Include the prevailing party fee-shifting provision within the four corners of the “arbitration agreement” itself or, at a minimum, include within the arbitration agreement a cross-reference to all fee-shifting or prevailing party attorneys' fees provisions that are contained in other sections of the contract.
- Generally, an arbitration provision survives the underlying contract.



Things to Consider: Prevailing Party Language

- AAA ClauseBuilder Tool provides the following typical language as a drafting guide:

The arbitrator(s) shall award to the prevailing party, if any, as determined by the arbitrator, all of their costs and fees. “Costs and fees” mean all reasonable pre-award expenses of the arbitration, including the arbitrator’s fees, administrative fees, travel expenses, out-of-pocket expenses such as copying and telephone, court costs, witness fees, and attorneys’ fees.

- State law may define “prevailing party” and such definition will likely guide the parties’ respective positions regarding how the arbitrator should decide who wins and who recovers attorneys’ fees.
- Absent any statutory guidance, provide the arbitrator with a detailed definition of “prevailing party” within the four corners of your arbitration provision.
- Prevailing party and other fee shifting provisions can be a powerful motivator in getting the parties to the negotiating table and encourage the early settlement of claims.

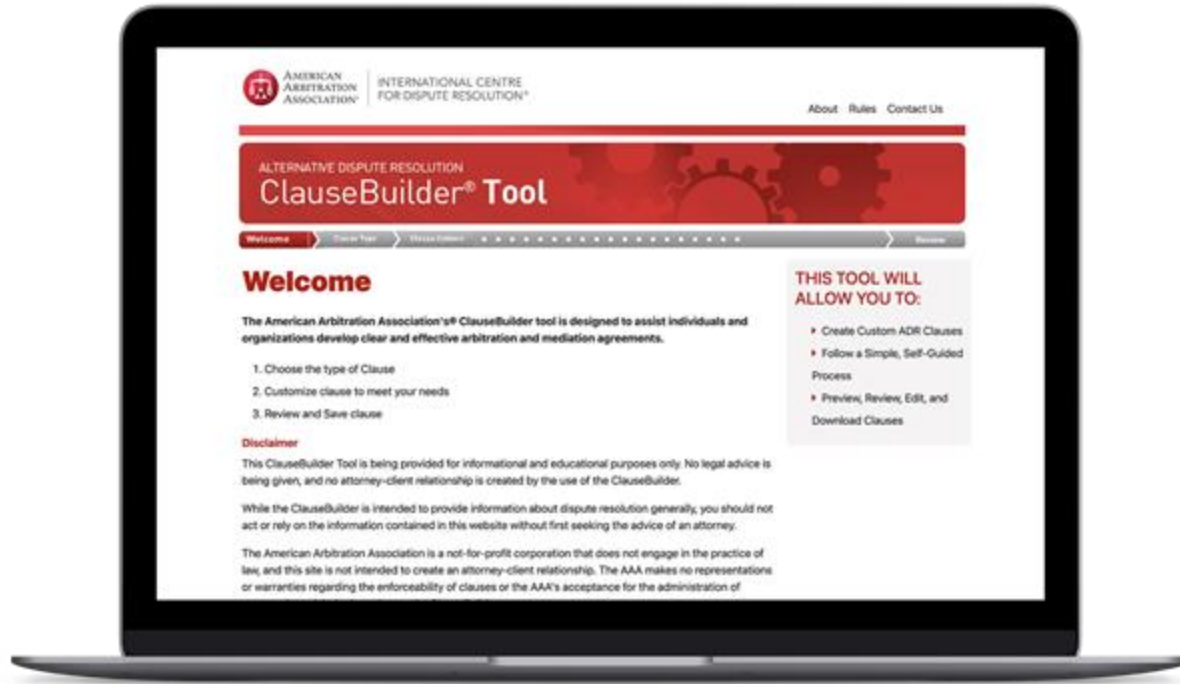


Things to Consider: Arbitrator Selection

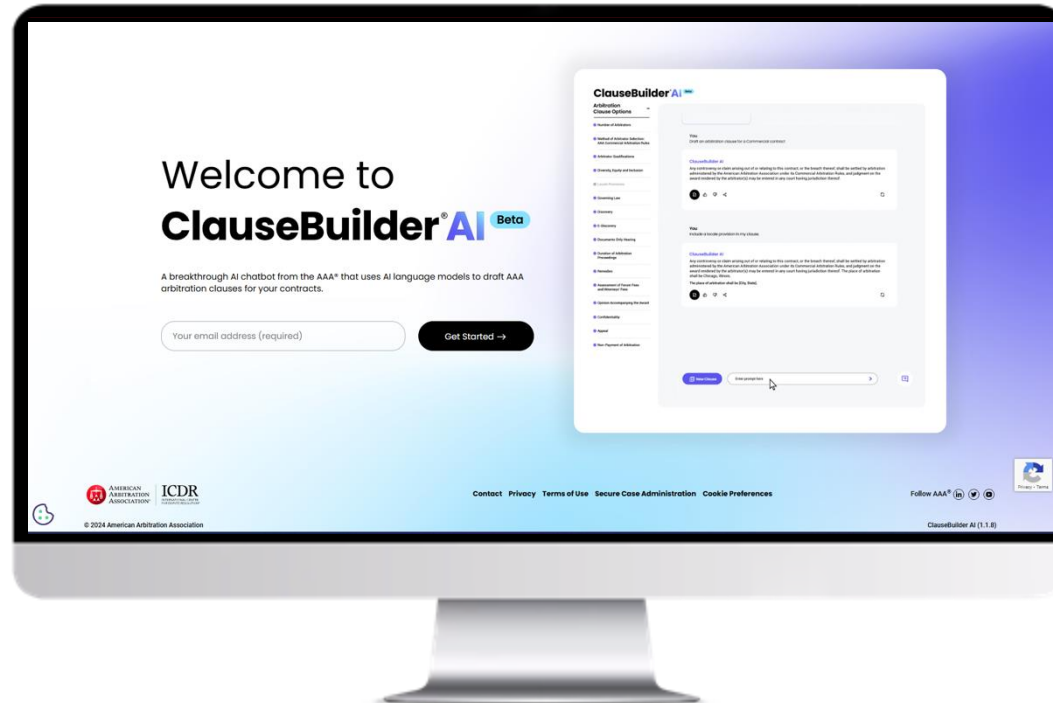
- 1 vs. 3 Arbitrators
- Arbitrator Qualifications – Also a major advantage over litigation, especially for Construction cases and the expertise necessary to understand case facts.
- Experienced Construction Attorneys
- Subject Matter Experts (Non-Attorneys)
- Arbitrator Selection process – Normal AAA process, party appoint process, block listing, mutual agreement or Double Blind.



ClauseBuilder



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THANK YOU



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