

# General Contract Clauses: Alternative Dispute Resolution (Multi-Tiered) (TN)

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This Standard Clause requires the parties to resolve their disputes by alternative dispute resolution (ADR) under Tennessee law, including a period of negotiation and then mediation before submitting the dispute to litigation or arbitration. This type of clause is sometimes referred to as an escalation clause. This Standard Clause has integrated notes with important explanations and drafting tips.

## DRAFTING NOTE: READ THIS BEFORE USING DOCUMENT

### SCOPE OF STANDARD CLAUSE

Contract parties sometimes include a multi-tiered alternative dispute resolution (ADR) clause, also known as an escalation clause, that either requires or permits the parties to pursue some form of non-binding ADR mechanism, such as mediation, before embarking on the binding mechanism (arbitration or litigation) they have chosen. These clauses usually require the parties to:

- Negotiate among themselves at the operations level to resolve any dispute.
- Submit the dispute to negotiations at the designated senior executive level if the parties cannot resolve the dispute at the operations level.
- Submit the dispute to mediation if the parties cannot amicably resolve the dispute by negotiations.
- Submit the dispute to either litigation or arbitration if the parties:
  - choose to continue the dispute; and
  - cannot resolve the dispute by mediation.

### ADVANTAGES AND DISADVANTAGES OF MULTI-TIERED DISPUTE RESOLUTION CLAUSES

There are potential advantages and disadvantages in including a multi-tiered dispute resolution clause in a commercial contract. A properly drafted multi-tiered ADR clause can:

- Provide the parties with the opportunity to resolve disputes first in a forum that is:
  - private; and
  - less adversarial than arbitration or litigation.
- Preserve ongoing commercial relationships.
- Save significant amounts of time and expense if the parties reach an amicable settlement to avoid the cost, expense, and negative publicity of litigation or arbitration.

However, a multi-tiered ADR clause can also:

- Allow contract parties to defer their obligations by delaying the ultimate binding resolution of the dispute.

- Increase the cost of resolving the dispute if the mediation does not result in a settlement because the parties incur attorneys' and mediation fees.

### ENFORCEABILITY AND DRAFTING CONSIDERATIONS

While there is not a lot of case law on this point, including in Tennessee, most courts in the US generally enforce multi-tiered ADR clauses if they clearly express the preliminary negotiations and mediation as conditions precedent to the right to escalate the dispute to litigation (see *RCR Bldg. Corp. v. Pinnacle Hospitality Partners*, 2012 WL 5830587, at \*13 (Tenn. Ct. App. Nov. 15, 2013) (relying on a party's failure to satisfy the condition precedent as a bar to recovery)). Where the final stage is arbitration, rather than litigation, courts generally refer the issue of satisfaction of the condition precedent to arbitrators (see Restatement (Third) of U.S. Law of Int'l Comm. Arb. § 2-18 TD No 4 (2015) (discussing US law)).

In the absence of clear language, Tennessee courts generally disfavor conditions precedent (see *Harlan v. Hardaway*, 796 S.W.2d 953, 957-58 (Tenn. Ct. App. 1990)). For example, if the court examines a clause and determines that there is another reasonable interpretation, it views the clause as a covenant, not a condition precedent, to avoid any forfeiture (*Law v. Bioheart, Inc.*, 2009 WL 693149, at \*14 (W.D. Tenn. Mar. 13, 2009) (citing *Harlan*, 796 S.W.2d at 957-58)).

Although no particular language is mandatory, Tennessee courts look to the terms of the clause to see if the parties used conditional terms, such as:

- "If."
- "Provided that."
- "When"."
- "After."
- "As soon as."
- "Subject to."

(*Harlan*, 796 S.W. 2d at 958.)

When drafting a multi-tiered ADR procedure clause, the parties should:

- State that they intend for the negotiation and mediation steps to be preconditions to litigation or arbitration. Without express language, a party risks that the other party may successfully attempt to commence arbitration or litigation without taking the preliminary steps.
- Consider to which person within their respective organizations the dispute should be referred, because negotiations are most likely to be successful when the individuals in question:
  - are familiar with and have responsibility for the products or services that are the subject of the dispute; and
  - have sufficient authority within the organization to make the decisions necessary to resolve or escalate the matter or dispute.
- Set a timetable for the informal phases of the procedure to prevent the parties from deliberately delaying any resolution.
- Clearly state the scope, application, and terms of any dispute resolution mechanism.
- Consider whether:
  - the dispute resolution clause should apply to all disputes or whether any carve-outs are needed;
  - the dispute resolution clause should apply when a claim arises under a separate contract between the same parties related to a similar subject; and
  - the provisions relating to the timing of negotiations and mediation are realistic.
- Consider including terms tolling the running of any statute of limitations for the disputed claim during the pre-suit negotiation or meditation process.

### Tennessee Alternative Dispute Resolution Statutes and Rules

In Tennessee, ADR is governed by:

- The Rules of the Supreme Court, specifically Rule 31 (TN R S CT Rule 31, § 1). This rule:
  - authorizes judges to order the parties of many types of civil actions to participate in ADR, including mediation and non-binding arbitration; and

- generally only applies to court-ordered ADR proceedings and does not govern private, contractually agreed-upon provisions for arbitration (*Glassman, Edwards, Wyatt, Tuttle & Cox, P.C. v. Wade*, 404 S.W.3d 464, 468 (Tenn. 2013)).
- The Tennessee Uniform Arbitration Act (TUAA) (T.C.A. § 29-5-301 et seq.), which covers most private arbitration agreements. The TUAA:
  - is comprehensive, addressing most issues concerning an arbitration, including venue selection, enforcing agreements, hearings, awards, judgments, and appeals; and
  - provides that arbitration agreements are generally enforceable unless grounds for their revocation exist in equity or in contract law (see *Buraczynski v. Eyring*, 919 S.W.2d 314, 318 (Tenn. 1996); also see T.C.A. § 29-5-302(a)).

For application of the overlap between the Federal Arbitration Act (FAA) and state arbitration law, see Practice Notes:

- Understanding US Arbitration Law: State Arbitration Law ([4-500-4468](#)).
- Arbitration Procedures and Practice in the United States: Overview: Applicable Legislation ([0-502-1714](#)).

### ASSUMPTIONS USED IN THE STANDARD CLAUSE

This Standard Clause assumes that:

- **The agreement contains a separate provision relating to litigation or arbitration.** This Standard Clause creates the framework for alternative dispute resolution methods the parties must employ before they resort to litigation or arbitration under a separate provision referred to in Section 4 of this Standard Clause.
- **The parties have selected either arbitration or litigation as a means to resolve their disputes if the negotiations and mediation do not result in a settlement.** Arbitration can either be ad hoc arbitration or administered arbitration. For an analysis of the

advantages and disadvantages of ad hoc versus institutional arbitration, see Practice Note, Ad hoc Arbitrations Without Institutional Support ([8-204-1373](#)). Many ADR organizations, such as the American Arbitration Association (AAA), recommend that the parties use the organization's alternative dispute resolution provision if the parties want to try to settle disputes by mediation and/or arbitration administered by those organizations.

- **The parties to the agreement are US entities and the transaction takes place in the US.** If any party is organized or operates in, or any part of the transaction takes place in a foreign jurisdiction, these terms may have to be modified to comply with applicable laws in the relevant foreign jurisdiction.
- **The agreement is governed by Tennessee law.** If the law of another state applies, these terms may have to be modified to comply with the laws of the applicable jurisdiction.
- **These terms are being used in a business-to-business transaction.** This Standard Clause should not be used in a consumer contract, which may involve legal and regulatory requirements and practical considerations that are beyond the scope of this resource.
- **These terms are not industry-specific.** This Standard Clause does not account for any industry-specific laws, rules, or regulations that may apply to certain transactions, products, or services.
- **Capitalized terms are defined elsewhere in the agreement.** Certain terms are capitalized but not defined in this Standard Clause because they are defined elsewhere in the agreement (for example, Agreement).

### BRACKETED ITEMS

Bracketed items in ALL CAPS should be completed with the facts of the transaction. Bracketed items in sentence case are either optional provisions or include alternative language choices to be selected, added, or deleted at the drafter's discretion.

1. Exclusive Dispute Resolution Mechanism. The parties shall resolve any dispute, controversy, or claim arising out of or relating to this Agreement, or the breach, termination, or invalidity hereof (each, a “**Dispute**”), under the provisions of Sections [NUMBER] through [NUMBER]. The procedures set forth in Sections [NUMBER] through [NUMBER] shall be the exclusive mechanism for resolving any Dispute that may arise from time to time, and Section[s] [NUMBER][ through [NUMBER]] [is an/ are] express condition[s] precedent to [litigation/binding arbitration] of the Dispute.

**DRAFTING NOTE: EXCLUSIVE DISPUTE RESOLUTION MECHANISM**

This provision encourages the resolution of potential disputes without litigation or arbitration by requiring the parties to engage in the exclusive ADR mechanism set out in this Standard Clause before resorting to a binding mechanism like arbitration or litigation. As the exclusive dispute resolution mechanism, the parties must take these steps to resolve any dispute in the following order, as described below in Sections 2, 3, and 4:

- **Party-to-party negotiation.** The parties must first attempt to resolve the dispute at the operational level before escalating the dispute to the executive level.
- **Escalation to executive level negotiation.** If operational level negotiations do not result in a resolution, the parties can escalate the negotiations to executives who may be:

- better positioned to evaluate the dispute within the bigger picture of the parties’ overall business arrangement; and
- more removed and therefore more objective about the incident triggering the dispute.
- **Escalation to mediation.** If executive level negotiations do not result in a resolution, the parties can escalate the dispute to mediation under Section 3.
- **Escalation to litigation or arbitration.** If the mediation does not result in a resolution, the parties can submit the dispute to litigation or arbitration. This Standard Clause mandates an exclusive dispute resolution sequence so the parties cannot commence a lawsuit or arbitration until they have attempted to resolve the dispute by negotiations and mediation.

2. Negotiations. A party shall send written notice to the other party of any Dispute (“**Dispute Notice**”). The parties shall first attempt in good faith to resolve any Dispute set forth in the Dispute Notice by negotiation and consultation between themselves, including without limitation not fewer than [NUMBER] negotiation sessions [attended by the [TITLE/ROLE] for [NAME OF PARTY] and by the [TITLE/ROLE] for the [NAME OF OTHER PARTY]]. In the event that such Dispute is not resolved on an informal basis within [NUMBER] Business Days after one party delivers the Dispute Notice to the other party, whether the negotiation sessions take place or not, either party may, by written notice to the other party (“**Escalation to Executive Notice**”), refer such Dispute to the executives of each party set out below (or to such other person of equivalent or superior position designated by such party in a written notice to the other party (“**Executive(s)**”).

Executive of [NAME OF PARTY]:	[EXECUTIVE NAME], [TITLE]
	[ADDRESS]
	[Email: [EMAIL ADDRESS]]
Executive of [NAME OF OTHER PARTY]:	[EXECUTIVE NAME], [TITLE]
	[ADDRESS]
	[Email: [EMAIL ADDRESS]]

For purposes of clarification, the party sending the Dispute Notice and the Escalation to Executive Notice shall send such notices in compliance with this Agreement's notice provisions (Section [NUMBER]), provided that the party sending an Escalation to Executive Notice shall also send a copy of such notice to the executives designated above.

If the Executives cannot resolve any Dispute during the time period ending [NUMBER] [days/ Business Days] after the date of the Escalation to Executive Notice (the last day of such time period, the "**Escalation to Mediation Date**"), either party may initiate mediation under Section 3.

### DRAFTING NOTE: NEGOTIATIONS

This provision requires that the parties attempt in good faith to resolve any dispute by negotiation and consultation between themselves. While Tennessee courts have not directly addressed this issue, some courts only enforce agreements to negotiate in "good faith" or using "best efforts" where the agreement provides definite, objective guidelines for determining whether a sufficient negotiation took place (see, for example, *Jillyc Film Enterprises, Inc. v. Home Box Office, Inc.*, 593 F. Supp. 515, 520-21 (S.D.N.Y. 1984)).

Tennessee courts have not directly addressed the precise contours of an agreement to negotiate in "good faith" or using "best efforts." Nevertheless, definitive, objective guidelines should be used to provide clarity regarding the parties obligations (see *Wholesale Tape & Supply Co. v. iCode, Inc.*, 2005 WL 3535148, at \*2-3 (E.D. Tenn. Dec. 22, 2005); see also *Kendel v. Ctr. for Urological Treatment & Research, P.C.*, 2002 WL 598567, at \*5 (Tenn. Ct. App. Apr. 17, 2002) (noting the lack of clarity regarding the enforcement of agreements to "negotiate in good faith" and concluding that Tennessee courts would recognize a cause of action based on such a provision, the defendants did not breached their duty)).

Therefore, this provision specifies the required number of negotiation sessions and the limited duration of the initial negotiation. This provision also contemplates that the parties send two notices, including:

- A dispute notice to initiate operational level negotiations.
- A special notice to escalate the negotiations to the executive level.

The parties should ensure that there are no notice-related requirements set out in this Standard Clause that are inconsistent with the contract's general notice provision regarding:

- The effective dates of notices dispatched under the agreement, for example, whether notice is effective on dispatch or receipt.
- The method of notice, whether by US mail, email, or other method. For example, the parties should ensure that the types of addresses set out in the table above are consistent with the types set out in the notice provision.
- What constitutes the delivery or receipt of a notice.

For a sample notice provision, see Standard Clause, General Contract Clauses: Notice ([6-533-1025](#)).

The parties should avoid naming individuals in this provision if possible. It is better to refer to their function (for example, purchasing manager) in case the individual concerned leaves the company.

This provision sets a deadline (the escalation to mediation date) to resolve the dispute by executive negotiations to set a clear point of transition to allow the parties to:

- Mediate under Section 3.
- Commence formal binding proceedings under either litigation or ad hoc arbitration under Section 4 if mediation is unsuccessful.

For additional information on the key dates and time periods related to a multi-tiered alternative dispute resolution clause, see Alternative Dispute Resolution: Key Escalation Dates Timeline ([6-568-6587](#)).

The parties may wish to specify the personnel expected to attend the sessions and to provide for how many negotiation sessions must be had before a party may escalate to mediation, including the minimum number of negotiation sessions for the Executives.

### 3. Mediation.

3.1 Subject to Section 2, the parties may, at any time after the Escalation to Mediation Date, submit the Dispute to any mutually agreed to mediation service for mediation by providing to the mediation service a joint, written request for mediation, setting forth the subject of the dispute and the relief requested. The parties shall cooperate with one another in selecting a mediation service, and shall cooperate with the mediation service and with one another in selecting a neutral mediator and in scheduling the mediation proceedings. The parties covenant that they will use commercially reasonable efforts in participating in the mediation. The parties agree that the mediator's fees and expenses and the costs incidental to the mediation will be shared equally between the parties.

#### DRAFTING NOTE: MEDIATION

Mediation is a flexible, non-binding form of ADR in which a neutral third party helps the parties work toward a negotiated settlement of their dispute. The neutral third party conducts discussions among the disputing parties to help them reach a mutually acceptable agreement among themselves on all or any part of the issues in dispute (TN R S C T Rule 31, § 2(j); see also *Ledbetter v. Ledbetter*, 163 S.W.3d 681, 685 (Tenn. 2005)).

If the parties agree to settle the dispute, they usually enter into a settlement agreement to:

- Memorialize the terms for resolving the dispute, including setting out the consideration for the settlement, such as by the exchange of money, goods, or services.
- Release each party from further liability related to the dispute.

- Require that the parties take action to withdraw or dismiss any claims or court filings related to the dispute. While under certain circumstances the plaintiff may voluntarily dismiss a case after settlement, generally the settlement agreement should specify that the parties will file a stipulation of dismissal (signed by all affected parties) with the court, which specifies whether the dismissal is with or without prejudice. The parties should also review the procedural rules, the court's local rules, and governing statutes to determine if any additional steps are necessary to voluntarily dismiss the case.

For a sample settlement agreement, see Standard Document, Settlement Agreement and Release ([2-503-1929](#)). For more information about mediation, see Mediation Toolkit ([1-505-0918](#)).

3.2 The parties further agree that all offers, promises, conduct, and statements, whether oral or written, made in the course of the mediation by any of the parties, their agents, employees, experts, and attorneys, and by the mediator and any employees of the mediation service, are confidential, privileged, and inadmissible for any purpose, including impeachment, in any litigation, arbitration, or other proceeding involving the parties, provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the mediation.

**DRAFTING NOTE: MEDIATION CONFIDENTIALITY**

Sometimes, the need for transparency during mediation may lead a party to voluntarily reveal confidential communications or documents to the mediator and the other mediating party that otherwise would be protected by the attorney-client privilege, work product doctrine, or some other recognized privilege or protection.

Tennessee, like many states, has recognized the need for mediation privilege. For example, conduct and statements made (with certain exceptions) during the course of any court-ordered ADR are inadmissible (TN R S CT Rule 31, § 7). Additionally, neutrals in all court-ordered ADR proceedings are bound by certain confidentiality restrictions (TN R S CT Rule

31, § 10(d)). The TUAA, however, which covers most private arbitration agreements, does not contain a mediation privilege.

The only other provision under Tennessee law applicable to commercial contract proceedings is found in the Rules of Evidence, which generally prohibits or otherwise limits the discoverability or admissibility of statements made during compromise negotiations (which presumably includes mediation proceedings) (Tenn. R. Evid. 408; see also *Ledbetter*, 163 S.W.3d at 686).

The parties can include Section 3.2 to clearly evidence their intention to protect communications and disclosure of documents made during mediation.

4. Litigation or Arbitration as a Final Resort. If the Parties cannot resolve any Dispute for any reason, including, but not limited to, the failure of either party to agree to enter into mediation or agree to any settlement proposed by the mediator, within [NUMBER] [days/Business Days] after the Escalation to Mediation Date, either Party may [file suit in a court of competent jurisdiction/commence binding arbitration] in accordance with the provisions of [CHOICE OF FORUM PROVISION/ARBITRATION PROVISION].

**DRAFTING NOTE: LITIGATION OR ARBITRATION AS A FINAL RESORT**

Because mediation is a non-binding dispute resolution method, neither the mediator nor any party can force any other party to:

- Agree to any settlement proposed by the mediator.
- Enter into mediation in the first place. A court, however, has the authority to order the parties to certain ADR proceedings (TN R S CT Rule 31, § 1).

Therefore, Section 4 allows the parties to escalate the dispute by filing a lawsuit or commencing ad hoc arbitration if the parties fail to resolve the dispute by the specified deadline, whether the failure is caused by:

- Any party refusing or otherwise failing to participate in negotiations or the mediation.

- The mediation otherwise failing to produce a resolution to the dispute.

If a party files suit before complying with the ADR requirements under the agreement, that party may waive the right to later invoke the ADR procedures under the agreement (see *S. Sys., Inc. v. Torrid Oven Ltd.*, 105 F. Supp. 2d 848, 854 (W.D. Tenn. 2000) (discussing waiver of the right to arbitration for failure to follow procedures set out in a contract)).

For a sample choice of forum clause, see Standard Clause, General Contract Clauses: Choice of Forum (TN) ([W-000-2783](#)). For an overview of the choice of law and choice of forum issues the parties should consider when drafting contracts, see Practice

Note, Choice of Law and Choice of Forum: Key Issues ([7-509-6876](#)) and Drafting Contractual Dispute Provisions Toolkit (TN) ([W-012-2401](#)).

If the parties wish to select arbitration, they should include an arbitration clause in their agreement instead of a choice of forum clause. For more information about arbitration clauses, see:

- US Arbitration Toolkit ([5-503-6770](#)).

- Practice Note, Drafting Arbitration Agreements Calling for Arbitration in the US ([2-500-4624](#)).
- Clauses for the AAA, ICDR, ICC, and UNCITRAL Arbitration ([6-502-3569](#)).
- US: ad hoc Arbitration Clause ([5-519-2015](#)).

For a comparison between arbitration versus litigation, see Practice Note, Arbitration vs. Litigation in the US ([W-006-5897](#)).

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