Preface xv
About the Authors xvii
Acknowledgments xxiii
About the Editors xxv

CHAPTER 1
Binding Alternative Dispute Resolution and Insurance Claims 1

CLIFF BLOOMFIELD
MICHAEL D. YOUNG

I.  Introduction 2
II.  Arbitration 3
   A.  Overview 3
   B.  Brief History of Arbitration in the Insurance Context 3
      1.  Reinsurance Arbitration 4
      2.  Bermuda Form Arbitrations 5
   C.  Advantages of Arbitration in Insurance Claim Disputes 6
   D.  Arbitration Law and Procedure 9
      1.  Federal Arbitration Act, Preemption, and the McCarran-Ferguson Act 9
      2.  Discovery 11
      3.  Hearings 11
      4.  Awards 12
   E.  Drafting Arbitration Agreements 14
      1.  Scope 15
      2.  Forum, Governing Law, and Rules 16
      3.  Arbitrators: Number, Type, and Selection 17
      4.  Consolidation and Confidentiality 17
      5.  Form of Award 18
III. Appraisal 18
    A.  Overview 18
    B.  Advantages of Appraisal 19
    C.  Appraisal Provisions 19
    D.  Ripeness and Procedure 21
       1.  Ripeness 21
       2.  Selecting Appraisers and Umpires 24
### TABLE OF CONTENTS

3. Procedures 27  
4. Awards 30  
E. Court Involvement 30  
   1. Compelling Appraisal 30  
   2. Award Enforcement 32

#### CHAPTER 2

Selected Topics in Mediating Insurance Cases 35  
JEFF KICHAVEN

I. Introduction 36  
II. As Defendant/Policyholder, Pick an Insurance-Savvy Mediator 36  
III. As Carrier, Call the Mediator as Soon as You Can 37  
IV. As Carrier, Write a Brief and Frame the Issues; as Defendant/Policyholder, Respond 38  
V. As Carrier, Call the Mediator Again 39  
VI. Should Insurance Issues Be Highlighted in an Opening Session? 39  
VII. Simultaneous Resolution of Liability and Coverage/Allocation Issues 40  
VIII. Documenting the Deal(s) 41  
IX. How Do You Break an Impasse at Mediation? 42  
X. Catalyzing the Breakthrough in Bargaining 45  
   A. A Suggestion of Simultaneous Interim Moves (“Bracketing”) 45  
   B. An Invitation of Phantom Counteroffer 46  
   C. An Invitation of Both a Phantom Offer and a Phantom Counteroffer 48  
XI. Closing the Deal 49  
   A. The Philosophy of Commitment 49  
   B. The Appreciation of Trade-Offs 50  
   C. The Mediator’s Proposal 51  
      1. Defined 51  
      2. Why the Mediator’s Proposal Exists 52  
      3. Risks of the Mediator’s Proposal 52  
      4. How to Maximize the Mediator’s Proposal’s Chances of Success 53  
XII. What If the Case Does Not Settle on the Day of Mediation? 53

#### CHAPTER 3

Ethics in Arbitration and Mediation 55  
HON. MICHAEL R. PANTER (RET.)

I. Introduction 56  
II. Arbitration 56  
   A. Duties of Arbitrators 56  
      1. Duty to Accurately Present Qualifications and Experience 58  
      2. Duty of Disclosure 58  
      3. Duty to Set Out the Rules, Initial Sessions 61  
      4. Duty to Avoid Ex Parte Communications 61
CHAPTER 4
Introduction to Alternative Dispute Resolution in International Business Transactions

PERRY S. GRANOF

I. International Arbitration versus Litigation 76
II. Relevant Treaties and Conventions 77
   A. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 77
   B. Federal Arbitration Act, Section 10 78
   C. Manifest Disregard as Grounds for Vacatur 79
   D. Lack of Capacity 80
   E. Public Policy as Grounds for Enforcement or Vacatur of Arbitral Awards 81
III. Relevant Procedural Rules and Practices 83
   B. Common Law versus Civil Law Jurisdictions 84
   C. International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration 84
IV. International Arbitral Institutions 85
   A. Overview 85
TABLE OF CONTENTS

B. International Court of Arbitration—International Chamber of Commerce (ICC Court) 86
C. London Court of International Arbitration (LCIA) 86
D. American Arbitration Association—International Center for Dispute Resolution (ICDR) 87
E. Regional and Specialized Arbitral Institutions 87
F. Other Arbitration Venues, Legal Regiments, and Courts for Arbitral Awards Enforcement 89

V. Drafting International Arbitration Provisions 90
VI. Commencing International Arbitral Proceedings 91
A. Notice or Request for Arbitration 91
B. Number of Arbitrators and Their Impartiality 92
C. Representation, Witness Testimony, and Experts 93
D. Apportionment of Costs 94
E. Language of the Proceedings and the Lex Arbitri 94

VII. Mediation 95
A. Overview 95
B. International Institute for Conflict Prevention and Resolution—International Reinsurance Industry Dispute Resolution Protocol 96
C. Drafting Mediation Provisions 97

VIII. Conclusion 98

CHAPTER 5
Automobile Liability Claims 99

JAMES A. HOLMES
ROBERT A. MALONEY
BRIAN J. Pokrywka
KIRSTEN SOTO

I. Overview 100

II. Defendant Approach 100
A. Strategies for Success 101
1. Know the Claim 101
2. Know the Client 101
3. Choose the Correct Dispute Resolution Method 102
4. Know the Dispute Resolution Professional 102
5. Frame the Issues Clearly and Concisely 103
6. Understand Your Adversary’s Goals 103
B. Measuring Success 104
C. Mediation: From Initial Preparation to Settlement 105
1. Readiness for Mediation 105
2. Mediator Selection 105
3. Managing Client Expectations 106
# Table of Contents

4. Preparation—Key to Success 106  
5. Settlement Agreements 108  

III. Plaintiff Approach 108  
A. Differentiate Your Claim 108  
B. Know and Trust the Mediator 109  
C. Prepare the Client for the Procedure 109  
D. Evaluate the Claim with the Client 110  
E. Be Willing to Take the Claim to Trial 110  
F. Negotiate Liens in Advance 110  

IV. Conclusion 111  

## Chapter 6  
Commercial General Liability Claims 121  
CHRISTOPHER L. LYNCH  

I. Overview 122  
II. Determining Resolution Strategy 122  
A. Identifying the Appropriate Resolution 122  
B. Evaluation Factors 123  
   1. Merits of the Parties’ Coverage Positions 123  
   2. Risks of Trial for the Parties 125  
   3. Status of the Underlying Lawsuit 126  
   4. “Peace of Mind” Considerations 127  
   5. Influence of Other Parties 127  
III. Resolution Process Selection 130  
A. Negotiation 130  
B. Mediation 131  
C. Arbitration 132  
D. Dispositive Motion Practice 134  
IV. Primer on CGL Coverage 134  
A. Overview 134  
B. CGL Coverage Agreements 135  
   1. Coverage A: Bodily Injury and Property Damage Liability 135  
   2. Coverage B: Personal and Advertising Injury Liability 135  
   3. Coverage C: Medical Payments 136  
C. Duty to Indemnify versus Duty to Defend 136  
D. Claims-Made Coverage versus Occurrence-Based Coverage 137  
E. CGL Exclusions 138  
F. Qualifying as an Insured Entitled to Coverage 138  
G. Limits of Insurance 138  
H. CGL Conditions 139  
I. CGL Definitions 140  
V. Conclusion 140
# TABLE OF CONTENTS

## CHAPTER 7
Health and Disability Benefit or Insurance Claims 141

JOANN DALRYMPLE
JENNIFER M. DANISH

<table>
<thead>
<tr>
<th>I. Introduction</th>
<th>142</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Similarities between Health Claims and Disability Claims</td>
<td>142</td>
</tr>
<tr>
<td>B. Differences between Health Claims and Disability Claims</td>
<td>143</td>
</tr>
<tr>
<td>C. Common ADR Options</td>
<td>145</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>II. Health and Disability Claims under ERISA</th>
<th>145</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Early Assessment and Informal Resolution</td>
<td>145</td>
</tr>
<tr>
<td>1. Determining Potential Relief</td>
<td>145</td>
</tr>
<tr>
<td>2. Judicial Review Considerations</td>
<td>147</td>
</tr>
<tr>
<td>B. Mediation</td>
<td>148</td>
</tr>
<tr>
<td>1. Overview</td>
<td>148</td>
</tr>
<tr>
<td>2. Timing</td>
<td>149</td>
</tr>
<tr>
<td>3. Mediator Selection</td>
<td>150</td>
</tr>
<tr>
<td>4. Mediation Preparation</td>
<td>150</td>
</tr>
<tr>
<td>5. Negotiation Strategy</td>
<td>150</td>
</tr>
<tr>
<td>C. Court-Ordered Settlement Conferences</td>
<td>151</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>III. Health and Disability Claims under State Laws</th>
<th>152</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Early Assessment and Informal Resolution</td>
<td>152</td>
</tr>
<tr>
<td>B. State Statutory Pre-Suit Settlement Requirements</td>
<td>153</td>
</tr>
<tr>
<td>C. Mediation</td>
<td>153</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>IV. Healthcare Provider Claims</th>
<th>154</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Overview</td>
<td>154</td>
</tr>
<tr>
<td>B. Additional Considerations</td>
<td>155</td>
</tr>
<tr>
<td>1. Volume</td>
<td>155</td>
</tr>
<tr>
<td>2. Party Dynamics</td>
<td>155</td>
</tr>
<tr>
<td>3. Contract and Settlement Agreements</td>
<td>156</td>
</tr>
<tr>
<td>4. Counterclaims</td>
<td>157</td>
</tr>
<tr>
<td>5. ERISA Considerations</td>
<td>157</td>
</tr>
<tr>
<td>C. Mediation</td>
<td>158</td>
</tr>
<tr>
<td>1. Timing and Mediator Selection</td>
<td>158</td>
</tr>
<tr>
<td>2. Negotiation and Settlement Considerations</td>
<td>158</td>
</tr>
<tr>
<td>D. Arbitration</td>
<td>159</td>
</tr>
<tr>
<td>1. Overview</td>
<td>159</td>
</tr>
<tr>
<td>2. Arbitrator Selection</td>
<td>160</td>
</tr>
<tr>
<td>3. Arbitration Procedure</td>
<td>161</td>
</tr>
<tr>
<td>4. Strategy in Approaching Arbitration</td>
<td>162</td>
</tr>
</tbody>
</table>

| V. Conclusion | 163 |

## CHAPTER 8
Construction Claims: A Mediator’s Perspective 165

RICHARD P. BYRNE

| I. Introduction | 166 |
II. Mediating Construction Defect Claims 166
   A. Aggregating the Parties and Their Issues 166
      1. Owner/Developer 166
      2. General Contractor 167
      3. Subcontractors 167
   B. Design versus Construction 168
   C. Experts 168
   D. Insurance Coverage 169
III. Delay/Extras Claims 170
   A. Organization of Information and Documentation 170
   B. Delay Damage Experts 171
IV. Injured Construction Worker Claims 171
   A. Introduction of Laypeople 171
   B. Risk Transfer 172
   C. Volatility and Variables 174
V. The Mediation Alternative 174

CHAPTER 9
Life Insurance Claims 175
JOSEPH M. HAMILTON
AMBRIA L. LANKFORD

I. Introduction 176
II. Mediation 177
   A. Overview 177
      1. Private and Nonbinding 177
      2. Voluntary or Court-Ordered 177
      3. Pros and Cons versus Litigation and Other ADR Mechanisms 177
   B. Timing 178
      1. Ripeness 178
      2. Considerations before Agreeing to Mediate 178
   C. Mediator Selection 178
      1. Neutrality and Impartiality 178
      2. Mediator Personalities 179
      3. Other Considerations 179
   D. Preparation and Strategy 180
      1. Client Preparation 180
      2. Pre-Mediation Meetings 180
      3. Pre-Mediation Demands and Offers 180
      4. Joint Sessions and Opening Statements 181
   E. Position Papers 181
   F. Negotiation Strategy 182
      1. Settlement Demands and Offers 182
      2. Using the Mediator to Assist with Clients 183
      3. Mediator Settlement Proposals 183
      4. Negotiation of Nonmonetary Terms 183
   G. Settlement 184
H. Releases 184

III. Arbitration 185
   A. Overview 185
      1. Differences between Arbitration and Other ADR Methods 185
      2. Pros and Cons of Arbitration 186
   B. Policy Arbitration Provisions 186
   C. Enforceability of Policy Arbitration Provisions 187
      1. Federal Arbitration Act 187
      2. State Arbitration Statutes 188
   D. Procedural Rules 188
   E. Arbitrator Selection 189
      1. Qualifications 189
      2. Neutrality and Impartiality 189
   F. Pre-Hearing Proceedings 189
      1. Preliminary Hearings 189
      2. Discovery 190
      3. Motion Practice 190
   G. Arbitration Hearings 191
      1. Evidentiary Submissions 191
      2. Opening Statements, Witness Examinations, and Closing Arguments 191
   H. Awards 191
      1. Form and Content 191
      2. Enforceability 191
      3. Challenges 192

IV. Settlement Conferences 192
   A. Overview 192
   B. Timing 193

V. Conclusion 194

CHAPTER 10
Products Liability Personal Injury Claims 195
BRAD J. SAFON
LANCE B. WILLIAMS

I. Introduction 196

II. Mediation 196
   A. Preparation and Strategy 196
      1. Pre-Mediation Briefs, Letters, Memoranda, or Position Papers 196
      2. Settlement Authority 198
   B. Necessary Participants 198
   C. Joint Sessions and Opening Statements 199
      1. Pros and Cons of Joint Sessions 199
      2. Professional Appearance 200
      3. Opening Statements 200
D. Negotiation Strategy
   1. Motivations of the Parties
   2. Dealing with Emotions
   3. Settlement Demands and Offers
   4. Continuing Negotiations after Mediation Ends
E. Settlement Agreements

III. Conclusion

CHAPTER 11
Professional Liability Claims
TIMOTHY J. ROWAN
LOUIS A. RUSSO

I. Introduction to Common Dispute Resolution Mechanisms
II. Mediation
   A. Overview
      1. Private and Nonbinding
      2. Voluntary or Court-Ordered
      3. Policy Requirement
      4. Advantages and Disadvantages
   B. Timing
   C. Other Pre-Mediation Considerations
   D. Selection of a Mediator
      1. Neutrality and Impartiality
      2. Mediator Personalities
      3. Other Considerations
   E. Mediation Preparation and Strategy
      1. Client Preparation
      2. Pre-Mediation Meetings
      3. Pre-Mediation Demands and Offers
      4. Position Papers
   F. Mediation Process
      1. Opening Statements
      2. Negotiation Strategy
      3. Settlements
      4. Releases
      5. Remedies for Breach of Release Terms
III. Arbitration
IV. Settlement Conferences
   A. Overview
   B. Timing
   C. Pre-Trial Conferences
   D. Without Third-Party Involvement
V. Conclusion
CHAPTER 12
Property Insurance Claims

CELESTE A. HILL
CHRISTINA M. PHILLIPS

I. Introduction to Major Property Insurance Dispute Resolution Mechanisms 227
II. Appraisal 228
   A. Overview 228
   B. Scope of Appraisal 230
   C. Court Involvement 231
   D. Appointing Appraisers 233
   E. Appointing an Umpire 234
   F. Appraisal Format 235
   G. Awards 235
      1. Form 235
      2. Enforcement 236
      3. Payment 236
III. Mediation 236
   A. Overview 236
   B. Timing 237
      1. Ripeness 237
      2. Considerations before Agreeing to Mediate 238
   C. Selecting a Mediator 238
      1. Neutrality and Impartiality 238
      2. Mediator Personalities 238
      3. Other Considerations 239
   D. Preparation and Strategy 239
      1. Client Preparation 239
      2. Pre-Mediation Meetings 240
      3. Pre-Mediation Demands and Offers 241
      4. Position Papers 241
      5. Joint Sessions and Opening Statements 242
   E. Negotiation Strategy 242
      1. Settlement Offers and Demands 242
      2. Using the Mediator to Assist with Clients 242
      3. Mediator Settlement Proposals 243
      4. Nonmonetary Terms 243
   F. Settlement 243
      1. Written Confirmation at Close of Mediation 243
      2. Releases 244
      3. Remedies for Breach of Settlement Agreement 246
IV. Arbitration 247
   A. Overview 247
   B. Policy Requirements 247
   C. Bermuda Form Policies 248
### Table of Contents

D. Arbitration Law and Procedure  
  1. Federal Arbitration Act 249  
  2. State Arbitration Statutes 250  
E. Selecting Arbitrators 250  
  1. Tripartite Panel 250  
  2. Qualifications 250  
  3. Neutrality and Impartiality 250  
  4. Objections to Arbitrators 251  
  5. Selecting Arbitration Chair or Neutral 251  
F. Pre-Hearing Discovery 251  
G. Motion Practice 252  
H. Hearings 252  
  1. Evidentiary Submissions 252  
  2. Opening Statements, Witness Examinations, Closing Arguments 252  
I. Awards 253  
  1. Form and Content 253  
  2. Enforceability 253  
  3. Challenges 253  
V. Settlement Conferences 254  
  A. Overview 254  
  B. Timing 255  
  C. Pre-Conference Submissions 255  
  D. Without Third Party 256  
VI. Conclusion 256

**CHAPTER 13**

**Workers’ Compensation Insurance Claims** 257  
DAVID B. TORREY  
MICHAEL C. DUFF  

I. Introduction 258  
II. Mediation as the Predominant ADR Model 260  
III. Settlement Conferences and Mediation 263  
  A. In General 263  
  B. Mandatory Settlement Conferences 265  
    1. California (Settlement Conference) 265  
    2. Massachusetts (Conciliation) 266  
    3. Texas (Benefit Review Conference) 268  
  C. Mediation 269  
    1. Mandatory Programs 269  
    2. Voluntary Programs 274  
  D. Informal Negotiations 278  
IV. Practical Considerations 280  
  A. Preparation for Mediation 280  
  B. Adjustment of Client Expectations 282
# TABLE OF CONTENTS

C. Resignation Demands and Reemployment Rights Waivers 283  
D. Specific Enforcement of Mediation Settlement Agreements 284  
E. Workers' Compensation and the Pro Se Injured Worker 284  
V. Arbitration and Carve-Outs 286  
VI. Conclusion 288

## Table of Cases

Page 301

## Index

Page 313