Many enterprises and lawyers that handle financial, M&A and joint venture transactions are now turning to alternative dispute resolution (ADR) as an effective way to resolve disputes. Over the last few years, ADR institutions have seen a significant increase in these types of disputes. Oftentimes the drafters fail to appreciate all of the nuances of ADR or the various options that should be considered at the front end to set the table for a possible dispute down the road. Business corporate lawyers should include the litigators in their firms in this process, especially since if there is a dispute down the road as it is the litigators who will be in charge of any form of ADR process, be it mediation or arbitration. Consequently, drafting a dispute resolution clause can resemble the retelling of childhood tale of the Three Pigs: too vague, too specific, or just right.

This interactive program brings together experts that draft clauses with litigators, arbitrators and arbitral institutions that have to work with these ADR clauses after a dispute has arisen. The panelists will share their different perspectives and insights on how to avoid ADR clause drafting pitfalls and discuss what tools/resources are available. The speakers will analyze a number of ADR clauses with the audience and provide the attendees with a list of practical considerations – including if and when to use expert determinations or mediation, whether to carve out certain types of disputes for litigation, and how to avoid common pitfalls – when drafting a dispute resolution clause. Considerations of ethical issues and cross-border implications will be discussed – and the audience can come with its own questions. This session is equally appropriate for litigators, in-house and transactional attorneys, and anyone interested in understanding the power of a well drafted ADR clause.

Furthermore, as one of the institutional ADR providers, JAMS notes: “Planning is the key to avoiding the adverse effects of litigation. The optimal time for businesses to implement strategies for avoidance of those adverse effects is before any dispute arises. We at JAMS recommend, therefore, that whenever you negotiate or enter into a contract, you should carefully consider and decide on the procedures that will govern the resolution of any disputes that may arise in the course of the contractual relationship. By doing this before any dispute arises, you avoid the difficulties of attempting to negotiate dispute resolution procedures when you are already in the midst of a substantive dispute that may have engendered a lack of trust on both sides.”

In addition, as another ADR institutional provider, the American Arbitration Association (AAA) states: “Alternative dispute resolution (ADR) allows parties to customize their dispute
resolution process. Parties can insert the standard arbitration or mediation clause in their contract and can further customize their clause with options that control for time and cost.

A well-written dispute resolution clause is the foundation of an effective dispute resolution process.

The AAA developed the ClauseBuilder® online tool—a simple, self-guided process—to assist individuals and organizations in developing clear and effective arbitration and mediation agreements.”

In this regard, for M&A transactions the Business Law Section of the American Bar Association offers the Model Asset Purchase Agreement and the Model Stock Purchase Agreement with commentary which are available as practice aids for attorneys negotiating and documenting a deal. Those publications include model language, commentary and explain related substantive law regarding many issues. ADR clauses and purchase price dispute resolution clauses in M&A agreements are also covered.

The panel speakers in our program include:

- Andrew Barton, American Arbitration Association (AAA)-International Centre for Dispute Resolution, Commercial VP, San Antonio, TX;
- Leslie A. Berkoff, Esq., Moritt Hock & Hamroff, Partner, Bankruptcy and Litigation, New York, NY;
- Peter Day, Esq., Mercer Island Arbitration Chambers International, AAA arbitrator (and former in-house counsel at Boeing,) Mercer Island, WA; and
- Serena Lee, Esq., JAMS, Inc., General Manager, San Francisco & Santa Rosa, CA;
- John Levitske, Ankura, CPA, ASA, JD, Senior Managing Director, Business Valuation, Complex Commercial & Post-M&A Disputes, Chicago, IL;

The interactive program will feature a discussion of the following:

**The Big Picture**

- Why and when include an ADR Clause?
- Step/waterfall clauses: negotiation / expert determination / mediation first?
- General elements to consider:
  - Locale (especially in international contracts)
  - Choice of law
  - Enforceability
  - Confidentiality
  - Time & Cost
The “Standard Clause”

- Benefits of a “standard” clause: what’s included and what is not defined?
  - National / international ADR clauses
  - Administered vs. “ad hoc” arbitration
- Selection & number of arbitrators
- Discovery / Disclosure / Exchange of Information
- Form of Award
- Optional language to consider
  - Choice of law
  - Seat of arbitration
  - Deadlines
  - Language
  - Carve outs

**Sample ADR Clauses**: The Good, the Bad, and the Vague & Confusing: An Interactive Discussion