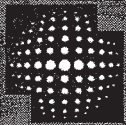


CPR GUIDELINES

International Institute for
Conflict Prevention & Resolution

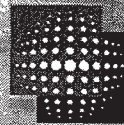
GUIDELINES FOR ARBITRATORS CONDUCTING COMPLEX ARBITRATIONS



CPR

International Institute for
Conflict Prevention & Resolution

575 Lexington Avenue
New York, NY 10022
tel: +1 212 949 6490
fax: +1 212 449 8859
www.cpradr.org



CPR

International Institute for
Conflict Prevention & Resolution

CPR**International Institute for Conflict
Prevention & Resolution**

1.212.949.6490 - Fax 1.212.949.8859

www.cpradr.org

Kathleen A. Bryan, President & CEO

*Changing the Way the World Resolves Conflict***ABOUT CPR**

CPR Mission: — CPR is the leading independent resource helping global business and their lawyers resolve complex commercial disputes more cost effectively and efficiently.

About CPR: — CPR is the only independent non-profit organization whose mission is to help global business and their lawyers resolve complex commercial disputes more cost effectively and efficiently. For over 30 years, the legal community has trusted CPR to deliver superior arbitrators and mediators and innovative solutions to business conflict.

CPR Members: — CPR's membership comprises an elite group of ADR trailblazers, including executives and legal counsel from the world's most successful companies and global law firms, government officials, retired judges, highly experienced neutrals, and leading academics. CPR accomplishes its mission by harnessing the expertise of these leading legal minds to change the way the world resolves conflict for generations to come.

CPR Pledge: — In 1979, CPR started this legacy by being the first to bring together Corporate Counsel and their firms to find ways to lower the cost of litigation. Since that time, CPR has changed the way the world resolves conflict by being the first to develop an ADR Pledge. Today, this Pledge obliges over 4,000 operating companies and 1,500 law firms to explore alternative dispute resolution options before pursuing litigation.

CPR 21st Century Pledge: — CPR is once again challenging the way the world resolves conflict by introducing the 21st Century Corporate ADR Pledge. This new Pledge will systemically change the way global business and their leaders resolve complex commercial disputes.

CPR's Clauses and Distinguished Neutrals: — CPR's rules and clauses allow for a self-administered ADR process, enabling practitioners to maintain control and flexibility while minimizing costs. CPR members have unlimited access to a highly qualified panel of more than 600 distinguished neutrals, specializing in over 20 practice areas. CPR employs a highly competitive vetting and evaluation process to ensure that the highest quality and most experienced neutrals are available without administrative expenses.



Guidelines for Arbitrators Conducting Complex Arbitrations

CPR INTERNATIONAL COMMITTEE
ON ARBITRATION

GUIDELINES FOR ARBITRATORS CONDUCTING COMPLEX ARBITRATIONS

Introduction

Arbitration historically had the reputation of providing an efficient, speedy and economical process for the resolution of business disputes. Of late, however, there has been a perception, often expressed in writings and conferences, that arbitration has lost some its appeal to businesses because it has become too formalistic or procedural, too slow and, as a result, too expensive.

Whether or not the perception of a by-gone golden age of arbitration is correct, there is nonetheless a need to address ways in which arbitration proceedings can be dealt with so as to increase speed, efficiency and economy without a sacrifice in procedural fairness.

Much of the responsibility for any improvements lies with the arbitrators, who have the authority, granted to them by the parties, to organize the proceedings before them and to run them.

These Guidelines have as their governing principle the achievement by the arbitrators of a fair award, arrived at efficiently. Thus, the Guidelines urge arbitrators to conduct proceedings in a way that is, from the outset, mindful of what and how the parties will have to present to them that will enable them to deliver a prompt award that takes fully into account the parties' presentations.

The Guidelines are the result of discussions and comments on drafts prepared by the Chairman and represent what all of us who have been involved hope will be regarded as a useful product.

Lawrence W. Newman
Chairman of the CPR Arbitration Committee



GUIDELINES FOR ARBITRATORS CONDUCTING COMPLEX ARBITRATIONS

Preface

These Guidelines are intended to provide to arbitrators conducting complex arbitrations suggestions and recommendations that lead to awards that are promptly rendered, deal fairly and carefully with the issues and (of course) are free of deficiencies that may give rise to judicial challenges.

Running through the Guidelines is the theme, implicit if not expressed, that the arbitrators should bear in mind, from the outset of the case, how actions that are taken by participants in the proceeding will affect the tribunal in its mission to deliver efficiently a fair and soundly reasoned award. Consistent with this approach, the Guidelines suggest or recommend measures that focus not only on the award itself but also on ways in which the conduct of the proceedings may lead most effectively to the issuance of an award that is not only fair and thoughtful but also expeditiously delivered.

The Guidelines are intended to apply to complex cases in which organization and management of the process are of critical importance. Depending on the complexity, nature and needs of the case before them, arbitrators may wish to make use of as many of the procedural measures recommended herein as they deem appropriate. The Guidelines assume a three-person tribunal, as is ordinarily appointed in complex cases.

1. ORGANIZATION AMONG THE ARBITRATORS

The arbitrators should, early in the proceedings, discuss among themselves the roles they will play in the proceedings leading up to the award. Arrangements among the arbitrators should be such as to assure that their capabilities and time are most effectively utilized. There should be a



chairperson of the tribunal. The parties and the arbitrators should agree at the outset of the arbitration the extent to which the chairperson may rule alone on specified procedural matters, conferring, in his or her discretion, or as agreed on, with the other two arbitrators.

The tribunal should also consider, as the case proceeds, whether it is appropriate, in view of the circumstances of the case, to allocate specific duties to the co-arbitrators. For instance, in certain cases it might make sense to have each co-arbitrator assume initial responsibility for the consideration and analysis of particular components or elements of the case, such as certain legal or technical issues. The purpose would be for the tribunal to assure itself that it has, by the end of the case, a thorough understanding of all material factual and legal issues, it being understood that it is not intended that any arbitrator will assume the role of advocate for any party and that all arbitrators must obtain a thorough understanding of all material factual and legal issues in the case.

Should the tribunal wish to be assisted by a secretary or clerk, it should, before employing such person, inform the parties of its desire to have such assistance, disclose the background of and other material facts concerning any such person, check conflicts, propose to the parties how such person might be compensated and state clearly the role that it is proposed that he or she might play.

As the case moves forward, the tribunal may decide that certain arbitrators should take responsibility for drafting particular portions of the award. Thus, one arbitrator might assume responsibility for preparing, as the case proceeds, a description of the procedural events taking place. Similarly, another arbitrator might be given responsibility for developing, as the case moves along, a draft of the portion of the award that deals with the claims and positions of the parties. Such early work can expedite the drafting process and can enable the tribunal to obtain a

clearer understanding of the importance of evidence they are receiving for their ultimate decision-making, and possibly to guide the parties accordingly.

The tribunal should ordinarily not consider itself obliged to apprise the parties of any assignments of the kinds set forth above that are internal within the tribunal.

2. ARRANGEMENTS BETWEEN THE TRIBUNAL AND THE PARTIES THAT WILL FACILITATE PREPARATION OF THE AWARD

In order to assure that the tribunal is in a position to issue an award expeditiously, the tribunal should give consideration to the following measures.

Early in the proceedings, the tribunal should discuss with the parties the denomination and organization of the exhibits, with a view to making them as accessible as possible and avoiding duplication. Consideration should be given to having all exhibits be made part of a single body of "key exhibits" or a "core bundle". The parties should be requested, early in the proceedings, to list the exhibits in a table of contents containing a clear identification of each exhibit, including date, originator and recipient. The tribunal may wish to place time limits on when exhibits may be presented to the tribunal (specifying whether the exhibits are to include those to be used for cross-examination and/or rebuttal) and to arrange for such exhibits to be made part of the record in advance of hearings so that discussions of admissibility at the hearings may be avoided.

In all cases, the arbitrators will be aided in their analysis if the parties are required to include in their briefs detailed citations to the record (exhibits, legal authorities, witness statements, expert reports and transcripts in the event of post-hearing briefs). The tribunal should consider requiring the parties to submit their briefs in Word or searchable PDF format so that the arbitrators may make efficient

use of them. The tribunal should also consider requiring that the parties provide it with electronic versions of the hearing transcripts, searchable across all transcripts. In appropriate cases, it may make sense to request that the parties submit electronic briefs that contain hyperlinks to exhibits, legal authorities, witness statements, expert reports, and/or transcripts.

The tribunal should ordinarily hold a status conference with the parties shortly before merits hearings are to be held, or earlier as appropriate, at which there may be discussion of such matters as the witnesses, including experts, who will be called, the order in which they will be called, the amounts of time needed for their examination and cross-examination, any witness conferencing (see below) that may be done, the extent to which there will be opening statements or briefs, whether and/or how audio-visual aids will be employed, whether there are to be post-hearing briefs and/or oral arguments before or in place of post-hearing briefs and other relevant matters.

3. PRESENTATIONS BY EXPERTS

Although presentations of expert evidence are frequently an important part of arbitral proceedings, they can also have limited value, raising costs and wasting time. The arbitrators should take an active role in ensuring that the expert evidence they receive is useful and that it comes from persons with genuine expertise.

Therefore, the arbitrators should, preferably at the first scheduling conference, elicit from the parties the extent to which they will be relying on expert presentations. The tribunal should consider requiring that the parties submit, at this time, brief memoranda outlining the nature of the expert evidence they wish to present and the relevance of that evidence to the issues in the case. The arbitrators should discuss with the parties whether



there is a need for expert presentations with regard to particular issues, or whether the arbitrators will be able to rule on those issues without expert help and with the aid of the parties' counsel.

The arbitrators should require that expert evidence be presented in written reports earlier rather than later in the proceedings. In order to facilitate the creation of a clear record and to be fair to both parties, the tribunal should set deadlines for the submission of the written reports prior to the hearing in which the experts will testify. The reports should be required to be complete and to include sources of data, calculations and all recent developments, so that there will be no (or limited) need for oral corrections or supplements to the reports at the hearing.

The arbitrators should emphasize to the parties that, in order to be useful to the tribunal in preparing its award, the expert reports should be clearly written, without the use of undefined terminology and with clearly articulated assumptions, and should, where appropriate, include analyses that permit the arbitrators, with respect to damages and other quantitative evidence, to understand the impact of changes in assumptions and to make adjustments they consider warranted.

Ordinarily, expert testimony should be presented by a person who played a substantial role in the preparation of the reports and the identity of the person who will testify in support of the report should be disclosed in advance of the hearing.

The arbitrators should consider the use of techniques that will enable them to assess expert evidence more efficiently. Such techniques include having experts confer together apart from the tribunal and counsel and thereafter reporting on their areas of agreement and disagreement, and having experts on the same subject present oral testimony together for questioning by the tribunal

and the parties (“witness conferencing” or “hot-tubbing”). Generally, the tribunal should emphasize to the parties that it wishes the evidence of the experts not to be an extension of the advocates’ briefs but rather to be presented in such a way as to be of maximum value to the tribunal in assessing the issues and preparing its award.

The arbitrators should consider, as early as feasible in the proceedings, whether they believe that they may need their own expert to assist them in their analysis of the issues that are the subject of expertise. Since the employment of a tribunal expert entails considerable expense and adds to the complexity of the proceedings, the tribunal should consider carefully whether it will be able to render its award without such assistance.

Should the arbitrators wish to retain their own expert, they should make clear arrangements, agreed on with the parties, as to how the tribunal expert is to be compensated and to proceed, including whether he or she is to be the only expert in the case on the subject or in addition to party-selected experts. The arrangements for the tribunal expert should afford the parties an opportunity to provide information to, or question, the tribunal expert. The tribunal expert should not be involved in the tribunal’s deliberations or its drafting of the award.

4. HEARING AND POST-HEARING MEASURES

Prior to the hearing, the arbitrators should review the record and consult with one another on such matters as the issues to be decided, factual points that require clarification and legal issues that need to be explained. In conducting the hearings, the tribunal should give consideration to how the record being made will facilitate it in rendering its award efficiently. Thus, as the hearings proceed, the tribunal should not hesitate to provide guidance to the parties in their presentation of witnesses to avoid receiving redundant or



otherwise unnecessary evidence. In hearing witnesses, arbitrators should take care to ensure that the record being made is clear, with, for example, exhibits being specifically identified as they are discussed and unclear questions and answers being clarified on the spot.

In its deliberations, the tribunal should take care that all arbitrators are included in discussions of issues to be decided. Each arbitrator should make himself or herself fully familiar with the record and not delegate decision-making to secretaries, clerks or other persons not members of the tribunal.

The tribunal may, in appropriate cases of voluminous records, request that the parties submit proposed findings of fact, including calculations of damages. Prior to drafting their award, in cases where many exhibits have been submitted on which the parties do not appear to rely, the tribunal may wish to request that the parties identify the exhibits in the record on which they rely, with the understanding that the arbitrators will consider only those exhibits. In this way, the arbitrators will be able to deal more efficiently with the record and can provide assurance to all concerned that the tribunal will, at the conclusion of the proceeding, have referred to it all of the evidence that the parties deem pertinent for determination of the issues. The tribunal may also find it useful to ask the parties to provide proposed decretal language to assure that there is clarity as to the relief sought and that all issues are dealt with.

Should the tribunal find itself considering a factual, legal or damages theory not explicitly advanced by the parties that is material to their award, it should communicate with the parties to request their views and positions on the theory.

5. MEETINGS OF THE ARBITRATORS

The arbitrators should consider themselves free to discuss among themselves, in the course of the proceedings, any issues in the case. They should

consider the advisability of meeting, even if briefly, at the end of each hearing day, to exchange views on the case. At the end of the hearings or post-hearing arguments, when they are last physically together, the arbitrators should try to meet then to discuss how the issues should be decided, responsibilities for drafting the award and the scheduling of any further conferences and exchanges of drafts.

6. FINAL AND NON-FINAL AWARDS: THEIR NATURE AND SCOPE

The tribunal should, at the inception of the proceedings, or thereafter, take up with the parties the nature and scope of the award they desire. Only in unusual cases, and with the express agreement of all parties, should the award not be reasoned – that is, without explanation as to the basis for the outcome reached.

Subject to the applicable arbitration rules and the parties' agreement, the tribunal may wish to invite the parties to consider the possibility of its issuing either of two kinds of reasoned awards – (1) a full award, including a description of all procedural events in the case and of the contentions of the parties, or (2) a more limited award that focuses primarily on the outcome and provides a brief statement of the tribunal's reasons for reaching it. In appropriate cases of great complexity, the tribunal may wish, in order to assure itself that it has given consideration to all material facts and that it has not misconstrued or failed to consider certain evidence, make available, with the parties' consent, a non-final draft award for their comments, within a short period of time, on the understanding that the tribunal's fundamental conclusions are not, other than in extraordinary circumstances, open for reconsideration.



The tribunal should, after consultation with or at the request of the parties, consider issuing, in an appropriate case, a partial final award, where there is, for instance, a need for an early ruling on a particular issue.

The arbitrators should endeavor in good faith to reach agreement on the content of their award but, in the event of disagreement, the majority should make their determination on the merits and not be influenced by a desire to avoid the filing of a dissent. An arbitrator disagreeing with the majority should issue a dissent only in the event of a failure to agree on a material matter and only after earnestly seeking to reach a common position with the other arbitrators.

In all events, the tribunal should, with the assistance of the parties, assure itself that all formal and other legal requirements for the award are complied with.

7. AWARD OF COSTS AND INTEREST

Where the parties' agreement or the applicable arbitration rules require or permit the award of interest or legal and other costs, the tribunal should consider them with the same degree of thoroughness that it gives to issues of liability and damages.

The tribunal should consider carefully as of what time any pre-award interest should run, at what rate and whether it should be simple or compound interest, taking into consideration, in making such determinations, the parties' agreement and contractual performance as well as applicable law. The tribunal may wish to issue a non-final award determining liability, damages and interest, and allowing the parties to present subsequent submissions on costs. In this way, the tribunal will be able to give separate consideration to costs after all other matters have been resolved and all costs have been incurred.

Working Group on the Guidelines for Arbitrators Conducting Complex Arbitrations

Chair:

Lawrence W. Newman
Baker & McKenzie LLP

Sherman Kahn

Morrison & Foerster LLP

Jack P. Levin

Incoming Chair:

Ank A. Santens
White & Case LLP

John Pinney

Graydon, Head
& Ritchey LLP

Jeffrey Barist

Richard H. Sayler

Richard H. Sayler Co., LPA

John Basinger

Baker & McKenzie LLP

Edna Sussman

SussmanADR LLC

Charles A. Beach

James H. Carter

WilmerHale

David Zaslowsky

Baker & McKenzie LLP

Dr. Bernardo M. Cremades

B. Cremades y Asociados

CPR Staff Liaison

Helena Tavares Erickson

Senior Vice President &
Secretary

Walter G. Gans