NEW YORK STATE BAR ASSOCIATION
Dispute Resolution Section
BENJAMIN N. CARDOZO SCHOOL OF LAW

COMMERCIAL ARBITRATION TRAINING
June 17-19, 2019

BENJAMIN N. CARDOZO SCHOOL OF LAW
55 Fifth Avenue
New York, NY 10003

Day I

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NEW YORK STATE BAR ASSOCIATION
The Dispute Resolution Section
BENJAMIN N. CARDOZO SCHOOL OF LAW

3 DAY COMMERCIAL ARBITRATION TRAINING: ***Comprehensive Training for the Conducting of Commercial Arbitrations Pursuant to Contemporary Best Practices***
25.5 CLE credits

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Arbitration Scenario – Fact Pattern

In 2006, Hi-Life, LLC ("Hi-Life"), an entity organized by a group of young writers, created a weekly hour-long television series for XBO depicting life among the young, rich and pampered in Manhattan. The television series, entitled *The Well-Designed Life*, was a continuing series with numerous story lines and, despite having an extremely literate – almost literary – script, became a hit with the viewing public.

Under Hi-Life's agreement with XBO (the "Agreement"), the writers of Hi-Life wrote and delivered scripts for use in the television series to XBO. Although the Agreement conferred on XBO the final authority to make changes, the writers, caring about the quality of their language, in practice exercise substantial control over the scripts consistent with XBO's authority, and only minor changes were permitted without prior consultation with the writers. Hi-Life retained the copyright in the scripts.

The Agreement, rather unusually, further provided that XBO could grant a theatrical producer the right to produce a two-hour play, using any two consecutive hourly weekly programs in the XBO series as the story. The Agreement provided,

however, that such a play could not be merely patterned upon the storyline. Rather, the scripts for the two television shows were to be strung together and enacted "live", thereby maintaining, insofar as possible, the integrity of the television scripts written by the Hi-Life writers.

XBO, in 2008, licensed to Jim Snark ("Snark"), a theatrical producer, the right to produce such a play, pursuant to an agreement (the "Theatrical Agreement") that did not provide for arbitration, although a copy of the Hi-Life/XBO Agreement, which did provide for arbitration, was attached as an exhibit.

In 2009, the play, entitled *The Well-Designed **Wife***, debuted on Broadway. While the play was indeed two hours in length and recognizably based on two one-hour consecutive programs in *The Well-Designed Life* series, large portions of the script were deleted. Inserted in place of the omitted language were tasteless songs, bordering on the pornographic. Moreover, the script was heavily sprinkled with four-letter words and the actress playing the role of the "Wife" bore a remarkable likeness to one of the writers of Hi-Life, Carole X. Cougar, a celebrity in her own right whose divorce over infidelity was highly publicized. (In the Snark production, the Wife was a serial adultress.)

There was no indication that *The Well-Designed Wife* was intended to be a parody. Moreover, Jim Snark claimed that he wanted the show to be a commercial hit – and that the added songs and changed language were designed to accomplish just that. His intention was to have a long-running sell-out show and to donate all the proceeds to create low-cost housing for unemployed actors. And indeed, with the ticket proceeds, Snark was able to create such housing for three hundred actors, who looked upon Snark as a life-saver and philanthropist.

Enraged with Snark's production, however, the writers of Hi-Life commenced what become an *ad hoc* arbitration in New York City against XBO and Snark, seeking to enjoin further presentations of the play, alleging that the stage production caused irreparable harm to their reputations as high-brow writers, and seeking declaratory judgment that the license to Snark was invalid and unenforceable as a matter of law and under the Agreement. The Hi-Life writers also sought damages, including punitive damages, from both XBO and Snark, on a variety of theories, including violation of the federal Lanham Act (on an unfair competition theory), damages for copyright infringement, as well as violation of rights of privacy and publicity.

The play, *The Well-Designed Wife*, was a smashing success, opening to, and maintaining, a full house, almost every night. Following the opening of the play, the viewership of the XBO television series, *The Well-Designed Life*, skyrocketed, yielding substantial advertising revenues to XBO and royalties to Hi-Life,. However, notwithstanding this commercial success, the "serious" critics continued scaldingly to criticize the play and lament the fact that the young writers making up Hi-Life had "sold out."

The Agreement contained the following choice of law and arbitration clauses:

> Choice of Law: This Agreement and any dispute arising hereunder shall be governed by the law of New York.
>
> Arbitration: Any dispute relating to this Agreement shall be resolved by arbitration pursuant to the CPR Rules for Non-Administered Arbitration. The Federal Arbitration Act ("FAA") shall apply to any arbitration conducted hereunder. The Parties specifically agree that, if XBO grants to a theatrical producer the right to produce a play hereunder, any such producer shall be bound by this Arbitration Agreement.

Arbitration Practice

Tips for CEOs and CFOs from
40 experienced commercial arbitrators.

THE TOP 10 ways to make ARBITRATION FASTER and more cost effective

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Forty experienced arbitrators from across the United States were asked what ten things they would tell CEOs and CFOs in order to maximize the benefits of commercial arbitration. The arbitrators represent a broad range of legal and business experience throughout the spectrum of commercial and governmental law. Experience as an arbitrator ranged from two years to forty years.

Arbitrators responding to the survey possessed wide experience in both business and law:

- Partners in large and small law firms
- General Counsel
- Executive Vice Presidents
- Corporate Secretaries in large and small companies, including family owned enterprises
- Law Professors
- Transaction Attorneys
- Litigation Attorneys
- Former Judges
- Legal Aid Attorneys
- Public Defenders
- US Attorneys
- State Attorneys
- International Law and Business
- State and Federal Agencies
- State Government Elected and Appointed Officials

The top 10 ways to make arbitration faster and more cost effective

By:
David L. Evans, Esquire
Murphy & King
Boston

India Johnson, President and CEO
American Arbitration Association®
New York

But for arbitration to fulfill these expectations, companies and their counsel must evaluate their practices and take steps to ensure that arbitration does not become the functional equivalent of a trip to court. These "top ten tips," gleaned from the experiences of seasoned AAA® arbitrators, are a good starting point for the true stakeholders – the parties – to understand how to use the arbitration process to further their objectives.

1 Pay Attention to Your Arbitration Clause

Thoughtlessly inserting a boilerplate arbitration clause into your contract can turn a manageable dispute into a more time consuming, expensive and disruptive case. Companies and their transactional lawyers carefully evaluate the business terms in their contracts, but they often reflexively insert a boilerplate arbitration clause from other contracts or a form book. This oversight jeopardizes the inherent benefits of arbitration and could result in a more expensive, disruptive and inefficient proceeding. It is vital to give up-front consideration to the details of the procedures most suitable to any likely disputes under a contract and not simply hope for the best once hostilities have arisen. While an entire article could be written on clause drafting (a checklist of issues is included in the side bar), some key issues to address are:

- Case deadlines
- Discovery limits
- Arbitrator selection and qualifications
- Confidentiality

Courts have fixed rules of procedure regulating most aspects of a case. Arbitration is a creature of contract, enabling the parties to tailor the process to fit their needs and bypass litigation procedures. If you do not take advantage of this critical distinction, you may well be relegated to a more cumbersome and costly proceeding. As an arbitration administrator, the AAA has broad experience in these clause components, but you must include AAA in the clause to access its expertise.

2 Select Attorneys Experienced in Arbitration

While arbitration should be economical and efficient, less experienced attorneys often unnecessarily apply time-consuming litigation processes. While arbitration and litigation are both adversarial proceedings, there are important differences between the two and understanding those differences is critical to the cost- effective presentation of a case. Lawyers unfamiliar with the arbitration process tend to treat arbitration as though it were a court proceeding, resulting in requests (or even stipulations) for extensive discovery, evidentiary skirmishes and unnecessary motion practice. Critically, since arbitration should not be burdened with full blown litigation discovery, you should hire a lawyer unafraid to try a case without having deposed every conceivable witness or unearthed every document. And, it is totally appropriate to ask prospective counsel how many arbitrations they have actually tried to conclusion! Make sure counsel understands your business objectives and is prepared to take the straightest path towards the fulfillment of those objectives.

Checklist for Arbitration Clauses:

- Number and qualifications of arbitrators
- Hearing locale
- Time (case duration) limits
- Discovery (including e-discovery) limits
- Attorney's fees and arbitration costs (divide equally or prevailing party)
- Phased ADR regime (meet and confer, mediation, med/arb hybrid)
- Confidentiality (documents, testimony, award)
- Dispositive motions (summary judgment)
- Form of award (reasoned or standard)
- Interim or injunctive relief
- Governing law and rules

> *"Arbitration is a creature of contract, enabling the parties to tailor the process to fit their needs and bypass litigation procedures."*

3 Request and Enforce Budgets

Your arbitration decisions should be based on traditional cost-benefit or ROI analyses. How many important business projects are launched without a budget? Arbitration should be treated no differently. Companies should require their lawyers to prepare and regularly update a budget for the various phases of the case (i.e. claim/answer, discovery, witness preparation, experts, hearings, motions, and briefs), justify the line items and track billings against the budget. Alternative fee arrangements such as blended hourly rates, contingent fees or fixed fees should also be considered. Overall, and absent special circumstances (e.g. customer relations or precedential concerns), your arbitration decisions should be based on traditional cost-benefit or ROI analyses familiar to most businesses.

4 Choose the "Right" Arbitrator

Researching an arbitrator with the right expertise, temperament and background is an often overlooked yet essential step. Every arbitration award is rendered by a human being, or panel of them, each with his or her own backgrounds and experiences. Yet, it is surprising how little attention parties devote to the arbitrator selection process, and specifically to identifying an arbitrator with the substantive expertise, temperament and training to be receptive to the evidence. The first opportunity to narrow the field begins with the arbitration clause itself. Ask yourself: if there is a dispute under the contract, what will be the likely claim(s)? Do I want a lawyer to decide the claims, or an accountant, or an engineer? Once the demand is filed, and the case administrator has disseminated a list of arbitrator candidates (subject to any requirements specified in the arbitration clause), businesses should review the arbitrators' biographies, search the internet and any public data bases, and, if appropriate, solicit feedback from those with experience with the arbitrator. In short, conduct due diligence as you would with any important business decision.

An entire seminar could be dedicated to arbitrator selection, but three additional points are worth noting. First, the AAA's Enhanced Neutral Selection Process enables the parties to interview potential arbitrators or pose mutually agreeable written questions to ascertain whether the arbitrator has the proper experience and disposition. The process helps winnow the field to those arbitrators with the ability to exert requisite management skills and handle any unique issues in the case. Second, parties should vet carefully any clause which requires a three person panel and avoid whenever possible a tripartite panel comprised of two party-appointed arbitrators. The running costs of a panel case can be substantial and scheduling becomes more problematic. Third, if there are a flurry of claims under your standard form contract, analyze what is wrong and fix it. An arbitrator cannot be expected to provide relief from a bad agreement.

"Every arbitration award is rendered by a human being, or panel of them, each with his or her own backgrounds and experiences."

5 Limit Discovery to What is Essential for the Arbitrator

Establish a strict discovery schedule focused on the exchange of necessary information. Discovery costs are often the largest part of any litigation budget. But this should not be the case in arbitration, especially if the arbitration clause specifies that discovery will be limited to reasonable procedures consistent with the contours of the dispute. Even if the clause is silent, it is in the parties' mutual interests (and is the duty of the arbitrator) to develop a discovery schedule that is restricted to the exchange of information necessary (not merely desired) for the arbitrator to understand and fairly decide the case. Written discovery requests (interrogatories or requests for admissions) are rarely appropriate. Depositions of witnesses who will testify at the hearings should be avoided, or at least confined to the key decision maker(s). Document exchange is commonplace, but that practice must be given special attention in this age of electronically stored information (ESI). E-discovery has spawned its own cottage industry of consultants and experts, and budgets can easily be exhausted in endless fields of back-up tapes, metadata, .pst files, and TIFF images. Unless the parties can work out an ESI treaty on their own, the issue should be presented to the arbitrator at the preliminary hearing. Even before a case is actually filed, it is prudent to investigate the burden of producing ESI because it could influence the decision on whether to file in the first instance.

6 Participate in the Preliminary Hearing

Gauge the arbitrator, hear the other side's position and have a say in developing the schedule. The preliminary conference is the first occasion for the parties to present their positions to the arbitrator and discuss a case schedule. This need not be a lawyers-only gathering. Clients have the right to be present at the preliminary hearing (most are conducted by conference call), and by participating you have the ability to gauge the arbitrator, hear the other side's unfiltered position and react to the schedule being developed. The product of the conference is a case management or scheduling order which codifies the arrangements from initial discovery through issuance of the award. Be sure to review its terms. Thereafter, monitor any requests for continuances or extensions of the deadlines, as you would with any business project.

7 Limit Motion Practice

Potential motions must be scrutinized, as they are time-consuming and may not have any practical significance. Companies and their counsel should consider whether any potential motion truly "advances the ball." Motions designed to restrict evidence at the hearings (so-called motions in limine) may be inappropriate because the formal rules of evidence do not apply in arbitration, and the arbitrator should rightfully consider evidence designed to further his or her understanding of the case. Similarly, arbitrators may be reluctant to grant dispositive (summary judgment) motions absent a stipulation by the parties because one of the few grounds for vacating an award under the Federal Arbitration Act is a refusal to hear material evidence. Consider suggesting to the arbitrator that any party wishing to file a motion first seek permission so the arbitrator can assess its potential effect on the case. At a minimum, have your attorneys explain the rationale for any motion, and evaluate its possible efficacy in comparison to the risks and costs.

> *"Monitor any requests for continuances or extensions of the deadlines, as you would with any business project"*

8 Remain Open to Settlement

Keep an open mind and set aside emotions during the case as opportunities for settlement develop. Few lawsuits proceed as scripted, and arbitration is no different. Businesses need to be alert to case developments, and evaluate whether any new information affects the value of the case. Leave your emotions aside. Consider direct talks with the adverse party's management or the use of a mediator, and reassess the options throughout the proceeding. Indeed, many cases settle during or after the hearings. As arbitration administrator, the AAA usually attempts to include a voluntary mediation step during your arbitration and, when adopted, many cases are settled or partially settled prior to hearing. Even settling some of the disputes in a case can make the hearings less expensive and quicker.

9 Trust the Expertise of the Arbitrator

Arbitrators have specialized knowledge in your field and are more receptive to the facts of your case than to generalized pleas for fairness and equity. Attorneys who regularly represent clients in arbitration recognize the differences between a jury case and arbitration before someone knowledgeable about the industry or subject matter. Arbitrators want to understand how your case fits into a framework which they already have experienced. Present your claims in the clearest possible manner, with an eye towards demonstrating how the particular facts of your situation warrant relief. Focus on the key issues in dispute. Generalized pleas for fairness or equity are less likely to resonate with the arbitrator.

10 Present the Case Efficiently and Professionally

You play a critical role in completing the arbitration as efficiently and persuasively as possible. By the time the first witness is sworn, procedures should be in place to ensure that the hearings flow smoothly. Time limits should be considered. Exhibits books containing stipulated exhibits should be pre-marked, with copies available for all participants, including witnesses. Slides or demonstrative exhibits can be effective presentation tools, particularly for opening statements or complicated technical or damages matters. The parties should have discussed any witness sequencing issues, considered the use of video or web testimony and affidavits, and presented any witness disputes to the arbitrator for disposition. Do have a party representative at the hearings. Do not groan, scoff or chortle during an opponent's case or slump in your chair after an unfavorable ruling or testimony. When testifying, direct your comments to the arbitrator and avoid unnecessary sparring with counsel during cross-examination.

As the stakeholders with the greatest economic interest, the parties have the most to gain from an efficient, fair and expeditious resolution of their dispute. Businesses, in consultation with in-house and outside counsel, must assume ownership of the arbitration process to leverage the unique benefits of arbitration over court. With a customized arbitration clause and careful monitoring of the proceeding, the parties are uniquely situated to rein in costs and produce speedy outcomes. Attention to these ten tips will put the parties on the path towards better outcomes.

"Few lawsuits proceed as scripted, and arbitration is no different."

AMERICAN ARBITRATION ASSOCIATION®

NYSBA/Fordham Law School
Arbitration 2019: Commercial Arbitration at Its Best
March 25, 2019

The 10 Most Important Things for Arbitrators
Charles J. Moxley, Jr.

1. Diligent and full disclosure through a well-thought out and reliable conflicts system
2. Overriding mental orientation: humility and sense of the honor of the role
3. Diligence––being fully familiar with the procedural and ethical rules and working as hard as the attorneys from the outset of the case in addressing the substantive issues raised and managing the process, including through
    a. Being up-to-speed on all phases of the case at each conference in the case
    b. Being available to counsel on short notice
    c. Papering every decision, providing reasons, albeit in short form, for all decisions that could be the basis of a vacatur application
4. Communicating and implementing the arbitration difference—the distinctive differences between arbitration and court-based litigation, including as to such matters as the following, usually addressed in the first instance through one's "Arbitration Speech" and "Discovery Speech"):
    a. Time factors—including the general expectation that the hearing will be scheduled 6-9 months from the preliminary hearing
    b. The "architectural" preliminary hearing, establishing the design of the case, including an overall schedule for all matters likely to come up (*See e.g.* the AAA's Checklist at P-2 of the Revised Commercial Arbitration Rules)
    c. The active management of discovery
    d. Limits on substantive motion practice
    e. Status conferences, to keep the case on track
    f. The conducting of the hearing
    g. Advising the parties as to what, if anything, to include in any post-hearing briefs or oral argument
    h. Eliciting the parties' agreement at the end of the hearing that they have had full and fair opportunity to present their case
    i. The form and extent of the award, addressing all issues raised in the case

5. Protecting the award from the beginning of the process—one area where the parties do *not* "own the process"
6. Proactively, creatively, and collaboratively designing the process most appropriate for the individual case, delivering on the flexibility that is intended to be a hallmark of arbitration
7. The Managerial Arbitrator---being proactive throughout the case, albeit essentially within the framework of letting the parties present the case they want to present for hearing
8. Proactively managing discovery/disclosure, including particularly ESI
9. Heuristics—developing awareness and proactively managing potential unconscious influences on one's perception and evaluation of the case in all its phases
10. Open, candid, and continuous communications among panel members as to all aspects of the case

Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings

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By
Roy Weinstein, Cullen Edes, Joe Hale and Nels Pearsall

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EFFICIENCY AND ECONOMIC BENEFITS OF DISPUTE RESOLUTION THROUGH ARBITRATION COMPARED WITH U.S. DISTRICT COURT PROCEEDINGS

By

Roy Weinstein, Cullen Edes, Joe Hale and Nels Pearsall

I. INTRODUCTION AND EXECUTIVE SUMMARY

In 2009, Micronomics was asked by the Presiding Judge of the Los Angeles Superior Court to calculate the economic impact of significant funding cutbacks facing the judiciary. Hundreds of millions of dollars had been cut from California's judicial budget, the effect of which included closed courtrooms and lost staff positions. These cuts produced crippling reductions in court services at a time when caseloads were increasing. Similar cutbacks have taken place throughout the country, producing layoffs and reduced operating hours in multiple states.

The consequences of these cutbacks have included significant delays in adjudication of pending litigation and increased burdens on our courts. Between 2009 and 2013, the economic impact in California of these cutbacks and delays includes approximately 150,000 lost jobs and $30 billion in lost economic output.

In light of this experience, Micronomics has been engaged to compare the length of time to adjudicate disputes associated with U.S. district court proceedings on the one hand versus length of time to adjudicate disputes associated with arbitration administered by the American Arbitration Association ("AAA") on the other in order to ascertain whether significant differences exist between the two forms of dispute resolution with respect to the amount of time required to administer disputes. In addition, to the extent that we determine such differences exist, we have been asked to estimate the cost to business associated with delays in obtaining adjudication.

We recognize that factors other than time required for adjudication enter into decisions as to whether arbitration or litigation provides the best forum to resolve disputes. These factors are not addressed in this discussion.

Based on our analyses, we found that on average, U.S. district court cases took more than 12 months *longer* to get to *trial* than cases adjudicated by arbitration (24.2 months v. 11.6 months); when the comparison involved time through *appeal*, U.S. district and circuit court cases required at least 21 months *longer* than arbitration to resolve (33.6 months v. 11.6 months).[1] We also

[1] We compare median times required from filing to trial and from filing through appeal in federal court cases with median times required from filing to award in AAA arbitration cases. In our analyses, we make use of median data because statistically, medians better account for outliers, which can skew means in the direction of the

found it useful to conduct the same analysis for eight of the ten states that had the highest caseload in 2015 with respect to both AAA arbitration and U.S. district court proceedings. These eight states (California, New York, Texas, Florida, Pennsylvania, Georgia, New Jersey, and Illinois) account for more than half of the AAA arbitration caseload and more than half of the U.S. district court caseload in 2015. With respect to these states, U.S. district court cases took about 15-17 months *longer* to get to trial than cases adjudicated by arbitration (27.3 months v. 11.8 months); when the time for appeals is added (for the associated U.S. circuit courts), federal cases required about 24-26 months *longer* than arbitration to resolve (36.5 months v. 11.8 months).

The situation in state courts is likely to be even worse: According to our prior investigation, in recent years, 39 state courts have suspended filling clerk vacancies; 36 state courts have reported layoffs or furloughs; 28 state courts are facing increased case backlogs; 23 state courts have reduced operating hours; and ten state courts have reported furloughing judges.[2] An inevitable impact has been an increase in the amount of time required to adjudicate cases. Although state court data on time from filing the complaint to trial are largely unavailable, our prior work in this area leads us to expect that the amount of time required to adjudicate disputes through the state court system is greater than cases tried in federal courts. Accordingly, our conclusions regarding differences in the length of time associated with dispute resolution in the court system on the one hand compared with arbitration on the other are conservative.

Delays to adjudication are not without cost. During the period required to resolve disputes, resources at issue between litigants can be thought of as removed from circulation. When litigation takes longer to resolve, these resources remain unavailable in the sense that neither party can count on receiving them and putting them to use. By way of example: A dispute between a supplier and purchaser in which the supplier claims the purchaser owes $1 million leaves both supplier and purchaser uncertain as to which party will retain the funds after the dispute has been adjudicated. The purchaser cannot comfortably invest the $1 million to hire new

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outlier(s). An outlier is an observation point in a data set that is distant (sometimes drastically distant) from other observation points. Moreover, U.S. District Courts and U.S. Courts of Appeals report time intervals as median values, not means. The use of median values enables a valid comparison.

Median, mean, and mode are statistical measurements of data sets. "Median" is the middle value in a data set, meaning that half of the observations in the data set are greater than the median while half the observations are less than the median; "mean" is the average value of all observations in a data set, computed by summing the individual observations and dividing by the number of observations; and "mode" is the observation that occurs most often in a data set.

Consider the following example data set: 195, 197, 199, 200, 204, 204, and 5003. The median is 200 (i.e. half of the observations are greater than 200 and half are less) while the mean is 886 (average of the range). In this example, 200 (the median) better represents six of the seven observations and is not impacted by "5003" (the outlier). In fact, if we exclude the outlier and calculate the mean of all remaining data points, we get 199.8, which is nearly equal to 200, or the median of the entire data set. As this example demonstrates, the presence of an outlier can significantly skew the mean one way or the other; use of the median allows one to avoid the influence of outliers.

[2] Micronomics publication, *Economic Impact of Reduced Judiciary Funding and Resulting Delays in State Civil Litigation, March 2012*, pp. 46-47.

employees since it may be required to pay the supplier once the dispute has been adjudicated. Likewise, the supplier cannot use the funds to purchase new equipment because it may never receive the money. Both parties are thus constrained; the funds are unavailable to either; both parties experience a loss until the dispute is resolved.

Other things equal, the greater the amount at issue, the greater the loss associated with delay. To calculate the direct economic cost of delays to adjudication, we relied on a conservative estimate of the minimum amount at issue in district court cases and on a corresponding minimum amount for arbitration cases. These figures represent resources that neither party can rely upon until the dispute is resolved.

- Based on minimum average estimated amounts at issue in district court cases and on a corresponding minimum amount for arbitration cases, direct losses associated with *additional time to trial* required for district court cases compared with AAA arbitration are approximately **$10.9 - $13.6 billion** between 2011 and 2015 (i.e. more than **$180 million per month**).
- The direct minimum losses associated with *additional time through appeal* required for district and circuit court cases compared with arbitration are approximately **$20.0 - $22.9 billion** over the same period (i.e. more than **$330 million per month**).

These direct losses represent lost resources solely to the parties involved in said disputes and are only the beginning. Economists and others have long recognized that a given change in economic activity (e.g. in this case, "direct" lost resources) produces benefits or costs in excess of that initial change. Often referred to as "multiplier effects," these benefits or costs are based on the initial change and ultimately reflect secondary impacts on the economy at large. In the language of economic multipliers, secondary losses associated with resources unavailable to litigants due to delay are referred to as "indirect" and "induced" losses. We are able to estimate "indirect" and "induced" losses by utilizing an economic model known as IMPLAN, which is described later in this report. These secondary losses, together with the "direct" losses, reflect an estimate for the overall negative impact to society of delays associated with the district court system relative to arbitration.

- Based on the direct, indirect, and induced losses associated with *additional time to trial* for district court cases compared with AAA arbitration, estimated total losses are approximately **$28.3 - $35.3 billion** between 2011 and 2015 (i.e. more than **$470 million per month**).
- The estimated total losses associated with *additional time through appeal* required for district and circuit court cases compared with arbitration are approximately **$51.9 - $59.2 billion** over the same period (i.e. more than **$860 million per month**).

Given the size of these estimates, the conclusion is inescapable: Delays in civil justice carry very real consequences for litigants and our economy. This message should resonate as lawmakers contemplate budget cuts for the judiciary and leave judicial vacancies unfilled. The availability of arbitration as a means of dispute resolution represents one way for litigants to mitigate this impact.

II. DISCUSSION

A. IMPACTS OF ADJUDICATORY DELAYS

The connection between efficient operation of the judiciary and economic well-being of the community is widely recognized:

- "The importance of legal institutions and governance for economic growth is now relatively well-accepted in the economics profession. The association has been well-demonstrated both theoretically and empirically."[3]
- "The role of the judiciary is to set up a framework in which the bargaining for property rights follow predetermined rules…and provides a clear and quick decision in cases of doubt….The anticipated future enforcement of rights is extremely important for current decisions, contracts and future activities of all participants."[4]
- "Judicial slowness may reduce incentives to start businesses by deteriorating the security of property rights. It may also limit possibilities of obtaining loans. Finding ways to speed up judiciaries is thus fundamental to economic growth."[5]
- "The insecurity created by a weak judiciary changes economic behavior in two ways. First, the overall cost structure of the economy increases….Increased collateral to make up for the risk associated with the poor performance of property rights increases the consumer price….Second, not all risk can be covered by higher premiums. If the risk is considered too high, certain transactions simply do not take place."[6]

It also should be noted that since legal work often is clustered around settlement or adjudication of pending cases, if case processing is delayed, less legal work results.[7]

Arbitration, mediation, and negotiation represent alternative dispute resolution ("ADR") methods for settling conflicts without litigation.[8] In this report, we compare cases litigated in federal courts with cases heard and determined in arbitration at the American Arbitration Association.

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3 Cross, F.B., "Law and Economic Growth," *Texas Law Review*, 80 (2002), pp. 1737-1775.

4 Kohling, W.K.C., "The Economic Consequences of a Weak Judiciary," Center for Development Research, University of Bonn (November 2000).

5 Chemin, Matthieu, "The Impact of the Judiciary on Entrepreneurship: Evaluation of Pakistan's 'Access to Justice Programme'," *Journal of Public Economics*, 93 (2009), pp. 114-125.

6 Kohling, W.K.C., "The Economic Consequences of a Weak Judiciary," Center for Development Research, University of Bonn (November 2000).

7 Spier, Kathryn, "The Dynamics of Pretrial Negotiation," *The Review of Economic Studies*, Vol. 59, No. 1 (Jan. 1992), pp. 93-108.

See also the Micronomics publication, *Economic Impact on the County of Los Angeles and the State of California of Funding Cutbacks Affecting the Los Angeles Superior Court, December 2009*.

The not-for-profit American Arbitration Association (AAA) has administered approximately 4.7 million alternative dispute resolution (ADR) cases since its founding in 1926. With 23 offices in the United States and one in Singapore, the AAA provides organizations of all sizes in virtually every industry with ADR services and products. The AAA's global component, the International Centre for Dispute Resolution ("ICDR"), extends the AAA's legacy globally.[9]

In undertaking this study, we relied on information available from the United States District Courts and United States Courts of Appeals, which report statistical data on the operations of the federal judiciary. These data are available on the U.S. Courts website.[10] We also made use of information provided to Micronomics by the American Arbitration Association. With respect to median time intervals for both arbitration and court proceedings, we limit our analysis to those data that reflect arbitrations that went to award and court proceedings that went to trial or through appeal. These data are described in the Appendix.

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8 "Alternative Dispute Resolution," Legal Information Institute, Cornell University Law School (https://www.law.cornell.edu/wex/alternative_dispute_resolution).

"What is Alternative Dispute Resolution?" *Thomson Reuters FindLaw* (http://hirealawyer.findlaw.com/choosing-the-right-lawyer/alternative-dispute-resolution.html).

9 For more information, visit www.adr.org.

10 *See* http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables.

B. THE CASELOADS

A useful starting point for any analysis of the length of time required to adjudicate disputes associated with AAA arbitration on the one hand and U.S. district court civil proceedings on the other involves an examination of the caseload by state. Table 1 sets forth this information in 2015 for arbitration by the AAA and U.S. district courts. Figure 1 (below) shows 2015 AAA arbitration and district court data for (a) the top-ten states based on caseload; (b) the eight states that overlap within the top-ten caseload for both AAA arbitration and district courts (i.e. California, New York, Texas, Florida, Pennsylvania, Georgia, New Jersey, and Illinois); and (c) the overall U.S. total.[11] The only non-overlapping states within the top-ten caseload are Maryland and Michigan from the AAA arbitration data and West Virginia and Ohio from the district court data.

Figure 1: Caseload for Top 10 States, AAA Arbitration Cases Going to Award and U.S. District Court Civil Cases, 2015 (Reflected in Table 1)

	Arbitration				U.S. District Courts		
	State or Territory	Caseload	Percent of Total		State or Territory	Caseload	Percent of Total
1.	California	191	14%	1.	California	22,451	10%
2.	New York	167	12%	2.	New York	19,233	9%
3.	Texas	156	11%	3.	Florida	16,011	7%
4.	Florida	76	6%	4.	Illinois	13,962	6%
5.	Pennsylvania	68	5%	5.	West Virginia	13,813	6%
6.	Maryland	52	4%	6.	Pennsylvania	13,770	6%
7.	Georgia	47	3%	7.	Texas	13,406	6%
8.	New Jersey	47	3%	8.	Ohio	8,956	4%
9.	Michigan	41	3%	9.	New Jersey	8,089	4%
10.	Illinois	37	3%	10.	Georgia	5,531	3%
11.	**Top-10 States Total**	**882**	**64%**	**11.**	**Top-10 States Total**	**135,222**	**62%**
12.	**Overlapping States within Top-10 Total**	**789**	**57%**	**12.**	**Overlapping States within Top-10 Total**	**112,453**	**52%**
13.	**U.S. Total**	**1,375**	**100%**	**13.**	**U.S. Total**	**217,288**	**100%**

[11] U.S. district court caseload in 2015 is comprised of civil cases disposed of by trial or some other method. See Table 1 for additional details.

It is noteworthy that in 2015, the eight overlapping states within the top-ten account for more than half of the entire U.S. caseload for both AAA arbitration and district court data (see Line 12 in Figure 1). Given the substantial weight that the eight overlapping states contribute to the nationwide total, it is useful to calculate the *additional time* required to trial and through appeal in federal courts compared with AAA arbitration for those eight states alone as well as for the entire United States. These analyses are described below.

C. ADDITIONAL TIME TO TRIAL

Table 2 sets forth annual comparisons of the median number of months required on a state by state basis, U.S. district courts v. AAA arbitration, between 2011 and 2015. Figures shown in Table 2 demonstrate that almost without exception (i.e. regardless of the state or territory in which the action is brought), cases going to award at arbitration are fully adjudicated in less time than it takes district court cases to get to trial. For example, in New York, the state with the second highest caseload, the median time required from filing to trial in U.S. district courts was 30.9 months in 2015; the median time required from filing to award with cases administered by the AAA was 12.5 months in the same year. In other words, it took more than 18.4 months *longer* (i.e. more than one and a half years *longer*) for civil cases to get to trial in New York than required for final adjudication of arbitration cases in New York (Table 2.5, Line 34). Federal cases in California, the state with the highest caseload in 2015, similarly took much longer to get to trial when compared with cases fully adjudicated by AAA arbitration. In 2015, for example, getting to trial in district court took nearly 15 months *longer* (i.e. more than one year *longer*) than the time required for final adjudication by AAA arbitration in California (28.1 months v. 13.2 months; Table 2.5, Line 5). These differences are tremendously significant to litigants interested in resolving their dispute and moving on.

Table 3 depicts a summary of the length of time required during the period 2011 through 2015, filing to trial, for the eight overlapping states (i.e. eight states that had both the highest AAA arbitration caseload and highest district court caseload in 2015). For example, the median number of months from filing to trial for civil cases brought in district court in New York fluctuated between 30.9 months in 2015 and 41.2 months in 2013 (Table 3, Line 2). Even in Texas, known as the "rocket docket" for intellectual property cases,[12] the median time to trial was never less than 20 months (Table 3, Line 3).

Table 4 sets forth a summary of the median time required for final adjudication (i.e. filing to award) via arbitration during the period 2011 through 2015 in the same states shown in Table 3, i.e. eight states with the highest caseload in 2015. The differences between the district court system and arbitration are dramatic. In California, where civil cases take at least 25 months to get to trial (Table 3, Line 1), time required for final adjudication with AAA arbitration is on average less than 13 months (Table 4, Line 1). In New Jersey, civil cases required at least 32 months to get to trial (Table 3, Line 7), while final adjudication with AAA arbitration was less than 14 months (Table 4, Line 7).

Table 5 depicts a summary of *additional time* required, district court civil cases going to trial v. AAA arbitration cases going to award, for the same states shown in Tables 3 and 4. The differences (i.e. the *extra time* required to get to trial compared with final adjudication through AAA arbitration) are significant – typically in excess of 12 months and sometimes greater than

[12] *See, for example*, Bell, Jacqueline, "Texas Rocket Docket Faces New Surge of Patent Suits," *Law360,* September 28, 2015 (https://www.law360.com/articles/707840/texas-rocket-docket-faces-new-surge-of-patent-suits).

See also "Rocket Docket Law and Legal Definition," U.S. Legal (https://definitions.uslegal.com/r/rocket-docket/).

24 months (i.e. New York and New Jersey in 2013). Figure 2 below sets forth the *additional time* required (district courts going to trial v. AAA arbitration going to award) from 2011 through 2015 for the eight states with the highest caseload in 2015.

Figure 2: Additional Time Required, U.S. District Court Civil Cases Going to Trial v. AAA Arbitration Cases Going to Award, States with Highest Caseload in 2015, 2011 – 2015 (Reflected in Table 5)

State	Additional Time Required to Trial				
	2011	2012	2013	2014	2015
	(Months)				
1. California	14.6	13.8	12.3	16.3	14.9
2. New York	19.8	22.6	29.4	21.8	18.4
3. Texas	10.8	7.6	8.8	11.9	9.9
4. Florida	6.9	7.4	9.3	6.4	6.3
5. Pennsylvania	17.2	15.4	9.8	16.6	12.9
6. Georgia	16.7	15.5	12.9	18.1	13.4
7. New Jersey	25.0	22.2	24.9	23.2	25.5
8. Illinois	12.6	17.4	14.5	20.4	18.6
9. Average	**15.5**	**15.2**	**15.2**	**16.8**	**15.0**

D. ADDITIONAL TIME THROUGH APPEAL

Table 6 sets forth a summary of the median time required for adjudication taking into account a conservative estimate of time required for appeals from outcomes at the district court level. Entries in Table 6 reflect the combined time required (a) from filing of an action in lower court (i.e. district court) to start of trial in the eight overlapping states with the highest caseload in 2015 plus (b) from filing of notice of appeal through last opinion or final order in each appellate court (i.e. circuit court) associated with the eight overlapping states with the highest caseload in 2015. For example, the median time required from the onset of litigation through appeal in New York (which is part of the Second Circuit) was 43 months in 2011 (i.e. more than three and a half years; Table 6, Line 2, Column 1). Even in Texas (the "rocket docket" for intellectual property cases), the median time required from initial filing through appeal was more than 30 months on average (i.e. approximately two and a half years).

Table 7 presents a summary of *additional time* required in district court cases that are appealed in the eight overlapping states with the highest caseload in 2015 v. AAA arbitration. For example, in New York, where appeals are heard in the Second Circuit, the length of time required for adjudication through appeal was 29-40 months *longer* than dispute resolution administered by AAA (45.7 months v. 12.2 months; Table 7, Line 2). Data for California, where appeals are heard in the Ninth Circuit, indicate that the length of time required for adjudication through appeal was 26-32 months *longer* than final adjudication through AAA arbitration (41.5 months v. 12.6 months; Table 7, Line 1). In other words, district court cases that went to trial in California and appealed in the Ninth Circuit (which includes California) took more than two years *longer* for adjudication through appeals v. resolution for AAA arbitration cases going to award. Regardless of the state or circuit, adjudication through appeal of district court cases took significantly longer than arbitration, as summarized in Figure 3 below.

Figure 3: Additional Time Required, U.S. District and Appellate Court Cases Going through Appeal v. AAA Arbitration Cases Going to Award, States with Highest Caseload in 2015, 2011 – 2015 (Reflected in Table 7)

State	Circuit	Additional Time Required through Appeal (Months)				
		2011	2012	2013	2014	2015
1. California	9th	32.0	29.1	25.6	28.7	29.0
2. New York	2nd	31.9	34.8	39.8	32.4	28.6
3. Texas	5th	21.0	16.6	18.1	20.8	19.3
4. Florida	11th	15.5	14.6	16.9	13.5	13.7
5. Pennsylvania	3rd	26.9	23.1	16.1	23.0	21.3
6. Georgia	11th	25.3	22.7	20.5	25.2	20.8
7. New Jersey	3rd	34.7	29.9	31.2	29.6	33.9
8. Illinois	7th	22.2	25.7	22.5	27.5	25.8
9. Average		**26.2**	**24.6**	**23.8**	**25.1**	**24.1**

E. SUMMARY OF ADDITIONAL TIME TO TRIAL AND THROUGH APPEAL

Table 8 sets forth the length of time required for filing to trial in district courts (Table 8, Column 1) for the period 2011 through 2015. These figures represent the average of figures shown in Table 3. Column 2 of Table 8 depicts the average total time required for filing through appeal for the five years examined (based on Table 6). Column 3 of Table 8 presents the average time required for filing to award in AAA arbitration cases for the eight states with the highest caseload in 2015. Columns 4 and 5 of Table 8 show the *additional time* required by district courts when compared with arbitration. See Figure 4 below.

Figure 4: Median Time Required and Additional Time Required, U.S. District and Appellate Court Cases Going to Trial and through Appeal v. AAA Arbitration Cases Going to Award, States with the Highest Caseload in 2015, 2011 – 2015 (Reflected in Table 8)

State	Circuit	U.S. District Courts (Filing to Trial)	U.S. District and Appellate Courts (Filing through Appeal)	AAA Arbitration (Filing to Award)	Additional Time Required: To Trial	Additional Time Required: Through Appeal
		(1)	(2)	(3)	(1) - (3) (4)	(2) - (3) (5)
				(Months)		
1. California	9th	27.0	41.5	12.6	14.4	28.9
2. New York	2nd	34.6	45.7	12.2	22.4	33.5
3. Texas	5th	22.0	31.4	12.2	9.8	19.2
4. Florida	11th	18.4	26.0	11.2	7.2	14.8
5. Pennsylvania	3rd	24.6	32.3	10.2	14.4	22.1
6. Georgia	11th	25.9	33.5	10.6	15.3	22.9
7. New Jersey	3rd	35.8	43.5	11.7	24.1	31.8
8. Illinois	7th	30.4	38.4	13.7	16.7	24.7

Comparisons for the U.S. as a whole (rather than the eight states with the highest caseload in 2015) are summarized in Table 9, which depicts the length of time required for district court cases to get to trial (Table 9, Column 1), and through appeal (Table 9, Column 2), and for AAA arbitration cases to be fully adjudicated (Table 9, Column 3). Data contained in Table 9 indicate that between 2011 and 2015, the median time required for district court cases to get to trial was approximately 12 months *longer* than the median time for cases completely resolved by

arbitration (24.2 months v. 11.6 months; Table 9, Column 4).[13] These data also indicate that median time from initial filing in lower court to final appeal is more than 21 months *longer* than the median time for cases resolved by arbitration (33.6 months v. 11.6 months; Table 9, Column 5).[14] These differences are systematic throughout the five-year period examined. They indicate that a significant difference exists in time to adjudication between cases that work their way through district courts and cases brought to arbitration. See Figure 5 below.

Figure 5: Median Time Required and Additional Time Required, U.S. District and Appellate Court Cases Going to Trial and through Appeal v. AAA Arbitration Cases Going to Award, All States, 2011 – 2015 (Reflected in Table 9)

Year	U.S. District Courts (Filing to Trial)	U.S. District and Appellate Courts (Filing through Appeal)	AAA Arbitration (Filing to Award)	Additional Time Required	
				To Trial	Through Appeal
	(1)	(2)	(3)	(1) - (3) (4)	(2) - (3) (5)
			(Months)		
1. 2011	23.6	34.6	10.8	12.8	23.8
2. 2012	23.7	33.5	11.8	11.9	21.7
3. 2013	24.1	33.1	11.5	12.6	21.6
4. 2014	25.3	33.8	12.4	12.9	21.4
5. 2015	24.5	33.0	11.6	12.9	21.4

[13] Our use of "filing to trial" is conservative given the time between "start of a trial" on the one hand and "rendering of a final judgment" on the other. See the Appendix for additional details.

[14] Our calculation of "filing through appeal" is conservative given the gap in time between "start of trial" on the one hand and "filing of notice of appeal" on the other. See the Appendix for additional details.

F. DIRECT ECONOMIC CONSEQUENCES OF DELAY IN ADJUDICATION

As noted above, delayed disposition creates uncertainty among affected entities. It is well understood that the presence of such uncertainty makes businesses less prone to invest and expand operations, and can constrain the availability of capital for investment in business activities.[15] Further, entities engaged in litigation are deprived of resources and funds that otherwise would be available. Inability to access these funds and resources can be thought of as the opportunity cost of delayed adjudication.

In order to calculate this direct opportunity cost to the parties in dispute, we have made use of an estimate of minimum amount at issue in cases brought at the district court level. District courts have subject matter jurisdiction over cases in which the parties to the lawsuit are citizens of different states, either foreign or domestic, and there is at least $75,000 at stake in the lawsuit.[16] District courts also have original subject matter jurisdiction over all cases that arise under any federal law. This would include patent infringement cases, antitrust cases, and certain types of civil rights actions.[17] Given this mix of cases that arise in district courts, $75,000 per case represents a highly conservative estimate of minimum resources at risk in federal litigation. For example, patent infringement and antitrust actions brought in district courts typically involve multi-million dollar damage claims.

Table 10 depicts an estimate of the total amounts at issue in civil litigation at the district court level. Column 1 of Table 10 sets forth figures for the number of civil cases at the district court level disposed of at trial or through some other method (i.e. summary judgment, settlement, etc.) by year, 2011-2015.[18] Using $75,000 as a conservative estimate of the minimum average amount at issue per case (Table 10, Column 2), it is possible to estimate the total minimum amount at issue in civil cases litigated at the district court level (Table 10, Column 3). Annual total minimum amounts at issue varied between $14.9 billion in 2014 (and 2012) and $18.6 billion in 2011. See Figure 6 below.

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[15] Bloom, Nicholas, "The Impact of Uncertainty Shocks," *Econometrica*, Vol. 77, No. 3 (May 2009), pp. 623-685.

[16] "Federal or State Court: Subject Matter Jurisdiction," *Thomson Reuters FindLaw* (http://litigation.findlaw.com/filing-a-lawsuit/federal-or-state-court-subject-matter-jurisdiction.html).

Also, see 28 U.S. Code § 1331 (https://www.law.cornell.edu/uscode/text/28/1331) and 28 U.S. Code § 1332 (https://www.law.cornell.edu/uscode/text/28/1332).

[17] "Federal or State Court: Subject Matter Jurisdiction," *Thomson Reuters FindLaw* (http://litigation.findlaw.com/filing-a-lawsuit/federal-or-state-court-subject-matter-jurisdiction.html).

[18] As noted in the Appendix, U.S. District Court civil cases exclude criminal cases, prisoner petitions, land condemnations, deportation reviews, recovery of overpayments, and enforcement of judgments.

Although not every case filed in district court goes to trial, all cases have the potential to go to trial or through appeal.

Figure 6: U.S. District Court Civil Cases, Number of Cases and Minimum Amount at Issue, 2011 – 2015 (Reflected in Table 10)

Year	Number of Cases Terminated	Minimum Amount At Issue Per Case ($)	Total Minimum Amount At Issue ($Billions)
1. 2011	247,419	$75,000	$18.6
2. 2012	198,023	75,000	14.9
3. 2013	199,400	75,000	15.0
4. 2014	198,998	75,000	14.9
5. 2015	217,288	75,000	16.3
6. Total	**1,061,128**		**$79.6**

In order to estimate the direct economic opportunity cost (i.e. to the parties in dispute) attributable to delay associated with the slow pace of civil cases that go to trial in district courts relative to adjudication through AAA arbitration, we apply these "at issue" estimates to the *additional time* required to trial at the district court level as shown in Column 4 of Table 9. Table 11 depicts a calculation of the direct economic opportunity cost of delay (also referred to as "lost resources due to delay") in getting to trial v. arbitration. These lost resources have been estimated by calculating the foregone return (i.e. unrealized investment income) from the minimum amount at issue per year (Table 11, Column 1) based on (a) the *additional time* required to trial (Table 11, Column 2) and (b) the average annual return on investments in the S&P 500, which was approximately 13 percent between 2011 and 2015 (Table 11, Column 3).[19] This calculation yields an estimate of lost resources attributable to delay in getting to trial (Table 11, Column 4). The figures in Column 4 represent the value of resources which are unavailable to litigants *for the additional period of time* (i.e. at trial compared with arbitration) because of uncertainty associated with the litigation outcome. Said differently, these estimates reflect the value that could have been created if these resources had been successfully invested. This direct economic opportunity cost is approximately **$10.9 billion** between 2011 and 2015 (Table 11, Column 4).

Table 12 presents a similar calculation to Table 11, i.e. opportunity cost associated with delay in getting to trial versus adjudicating via arbitration, but instead we use the time difference for the eight overlapping states with the highest caseload in 2015 as opposed to the time difference for

[19] Of course, the S&P rate of return varies over time and is only one measure of potential returns on investment. The S&P rate of return is used because it is publicly available, carefully calculated, and representative of returns on an investment in this pool of public companies during the period of time that is the subject of this analysis.

the entire United States (see Table 12, Column 2). Here, the direct economic opportunity cost exceeds **$13.6 billion** between 2011 and 2015 (Table 12, Column 4).[20]

Appealed cases take even longer to adjudicate and thus are subject to additional losses. A calculation of these losses is shown at Table 13, which is based on the same total minimum amount at issue and the same average annual return on investments in the S&P 500 presented in Tables 11 and 12, as well as the *additional time* required through appeal (Table 13, Column 2). The estimated direct loss attributable to delay through appeal between 2011 and 2015 is approximately **$20.0 billion** (Table 13, Column 4).

Table 14 presents a similar calculation to Table 13, i.e. lost resources through appeal, but instead it is based on *additional time* required through appeal for selected U.S. appellate courts for the eight states with the highest caseload in 2015 (see Table 14, Column 2). The estimated direct economic opportunity cost in this instance is roughly **$22.9 billion** (Table 14, Column 4).[21]

A summary of the four distinct "direct loss" analyses is set forth in Figure 7 below.

Figure 7: Direct Economic Opportunity Cost (Lost Resources) Associated with Delay to Trial and Delay through Appeal, 2011 – 2015 (Reflected in Tables 11-14)

	U.S. District Courts v. Arbitration (Delay to Trial)		U.S. Appellate Courts v. Arbitration (Delay through Appeal)	
Year	Based on Delay in Entire U.S. ($Billions)	Based on Delay in States with Highest Caseload in 2015 ($Billions)	Based on Delay in Entire U.S. ($Billions)	Based on Delay in States with Highest Caseload in 2015 ($Billions)
1. 2011	$2.6	$3.2	$5.1	$5.7
2. 2012	1.9	2.5	3.7	4.2
3. 2013	2.0	2.5	3.7	4.1
4. 2014	2.1	2.8	3.6	4.3
5. 2015	2.3	2.7	4.0	4.5
6. Total	**$10.9**	**$13.6**	**$20.0**	**$22.9**

[20] To be clear, this second calculation also uses the total number of U.S. district court civil cases per year (Table 10, Column 1). The only difference in calculating direct economic opportunity cost in Tables 11 and 12 is that the *additional time* required (trial v. arbitration) is based on the entire U.S. in Table 11 and the eight states with the highest caseload (in 2015) in Table 12. In other words, both estimates of the direct economic opportunity cost of delay to trial utilize the entire U.S. district court caseload.

[21] To be clear, this fourth calculation also uses the total number of U.S. district court civil cases per year (Table 10, Column 1). The only difference in calculating direct economic opportunity cost in Tables 13 and 14 is that the *additional time* required (appeal v. arbitration) is based on the entire U.S. in Table 13 and the eight states with the highest caseload (in 2015) in Table 14. In other words, both estimates of the direct economic opportunity cost of delay through appeal utilize the entire U.S. district court caseload.

These analyses reflect comparisons between federal courts and AAA arbitration. As noted above, systematic data reflecting the performance of state courts with respect to time required for adjudication are unavailable. That said, there is significant evidence that the performance of state courts in this area is even worse than that of the federal court system, i.e. it is likely that the amount of time required by state courts to adjudicate disputes is significantly greater than time required by federal courts. Anecdotal evidence in this regard includes the following:

- Michigan has cut 49 judgeships through retirements and attrition;
- Alabama's chief justice ordered the state's courts to close on Fridays to keep costs down;[22]
- In Iowa, courts now operate at 12 percent below staffing standards, causing significant delays in case processing;[23]
- New York laid off approximately 500 employees due to a $178 million cut in state court system funding;[24]
- New York also had to abandon a special program intended to reduce case backlog that made use of retired judges to handles thousands of cases.[25]

There is little doubt that were systematic data available reflecting performance of state courts, overall results would support the conclusions described herein, i.e. administration of cases through the court system requires significantly more time than AAA arbitration.

Recognizing that delays impose costs on litigants, states have enacted statues to award interest for civil case recoveries obtained in district courts or state courts. Each state has its own laws as to the appropriate level of interest and as to how interest is to be calculated. For example, under New York law, interest shall be at the rate of nine percent per year.[26] Under California law, the

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[22] Weise, Karen, "U.S. Courts Face Backlogs and Layoffs," Bloomberg Businessweek, April 28, 2011 (http://www.businessweek.com/magazine/content/11_19/b4227024878939.htm).

[23] Hall, Daniel J., "Reshaping the Face of Justice; The Economic Tsunami Continues" (http://www.ncsc.org/~/media/Files/PDF/Information%20and%20Resources/Budget%20Resource%20Center/Hall.ashx).

[24] Adeboyejo, Betsy M. and Buller, Alexandria, "Cuts to State Courts Are Focus of Symposium," American Bar Association News Service, September 23, 2011 (http://web.archive.org/web/20111001051737/http://www.abanow.org/2011/09/cuts-to-state-court-focus-of-symposium/).

As of 2011, at least six states opted to close their courts one day a week due to insufficient funding; New Hampshire suspended all civil cases for one year because of backlogs that were exacerbated by funding issues; and 40 states had decreased the funding for their courts. *See* Adeboyejo, Betsy M. and Buller, Alexandria, "Cuts to State Courts Are Focus of Symposium," American Bar Association News Service, September 23, 2011 (http://web.archive.org/web/20111001051737/http://www.abanow.org/2011/09/cuts-to-state-court-focus-of-symposium/).

[25] Glaberson, William, "Cuts Could Stall Sluggish Courts at Every Turn," New York Times, May 15, 2011 (http://www.nytimes.com/2011/05/16/nyregion/budget-cuts-for-new-york-courts-likely-to-mean-delays.html).

[26] New York Civil Practice Law and Rules § 5004, Rate of Interest (http://codes.findlaw.com/ny/civil-practice-law-and-rules/cvp-sect-5004.html).

interest rate is set by the legislature and is not to exceed 10 percent per year.[27] Under Florida law, the rate reflects a complex formula based on the discount rate of the Federal Reserve Bank of New York for the preceding year.[28] Texas makes use of a complex formula based on the prime rate published by the Federal Reserve Board of Governors.[29] Regardless of the state, interest allowed on money judgments obtained often is well under amounts associated with returns on common indices of invested capital performance such as the S&P 500. Further, we are not aware of any instance where a defendant is compensated for its inability to use capital at risk in litigation when the defendant prevails.

Where the courts have discretion in the determination of interest, they may adopt lower interest rates, sometimes based on "risk-free" federal government instrument rates. Illustrative cases show an award of interest rates as low as 2-3 percent.[30] Post-judgment interest in federal court is governed by 28 U.S.C. § 1961(a), which provides that: "Interest shall be allowed on any money judgment in a civil case recovered in a district court… Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment."[31] In recent years that rate has been less than

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[27] "California Interest Rate Laws," *Thomson Reuters FindLaw* (http://statelaws.findlaw.com/california-law/california-interest-rates-laws.html).

California Civil Code – Section 3287-3291: Article 2. Interest As Damages (http://law.justia.com/codes/california/2009/civ/3287-3291.html).

The interest rate on judgments is set by the legislature. The rate of interest will be 7 percent if the legislature does not set the rate. *See* "California Interest Rate Laws," *Thomson Reuters FindLaw* (http://statelaws.findlaw.com/california-law/california-interest-rates-laws.html).

[28] The 2016 Florida Statutes, Title VI Chapter 55 Sec. 55.03 (http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0000-0099/0055/Sections/0055.03.html).

[29] 2005 Texas Finance Code Chapter 304, Judgment Interest (http://law.justia.com/codes/texas/2005/fi/004.00.000304.00.html).

[30] See, for example:

Opinion, *N.Y.Marine & General Insurance Co. v. Tradeline (L.L.C.)*, 266 F.3d 112 (2d Cir. 2001), pp. 6 and 16 ["Interest is intended to make the injured party whole, and generally should be measured by interest on short-term, risk-free obligations… District court did not abuse its discretion by applying United States Treasury Bill rate… in awarding pre-judgment interest… [t]he district court applied the United States Treasury Bill rate as provided in 28 U.S.C. § 1961(a)"].

Decision/Order, *ACM Advance Currency Markets, S.A. v. Bauer*, 2009 WL 1656046 (Sup. Ct. N.Y. Cty, 2009), p. 4 ["Plaintiff also seeks an award of prejudgment interest… the court, in its discretion, will set the interest rate at the average treasury bill rate for fiscal year 2005, 2.25%"].

Decision and Order, *In re CNB International, Inc., et al., v. Timothy S. Kelleher, et al.*, 393 B.R. 306 (Bankr. W.D.N.Y. 2008), p. 25 ["In the present instance, an appropriate level of pre-judgment interest will accomplish an objective similar to that of 28 U.S.C. § 1961, which allows for interest on federal judgments… the court will apply the average of the weekly 1 year constant maturity Treasury yields for the 392 weeks during which this matter has been litigated. This average comes to 2.975 percent. In the court's view, this rate fairly reflects the time value of money"].

[31] 28 U.S.C. 1961 – Post Judgment Interest Rates, U.S. Courts website (http://www.uscourts.gov/services-forms/fees/post-judgement-interest-rate/28-usc-1961-post-judgment-interest-rates).

one percent.[32] Thus, the interest earned in federal court cases following judgment through appeal is significantly less than the state interest statutes suggest would be applied.

[32] 1-Year Treasury Constant Maturity Rate, Economic Data from the Federal Reserve Bank of St. Louis (https://fred.stlouisfed.org/series/DGS1).

H.15 Selected Interest Rates, as of February 16, 2017, Board of Governors of the Federal Reserve System website (https://www.federalreserve.gov/releases/h15/).

G. INDUCED OR INDIRECT ECONOMIC CONSEQUENCES OF DELAY IN ADJUDICATION

The losses shown in Figure 7 (above) represent the direct opportunity cost to the parties involved in litigation. Economists recognize that a given change in economic activity produces benefits or costs in excess of the initial outcome. In economics, these costs or benefits are referred to as "multiplier effects." With respect to resources in limbo due to litigation, multiplier effects would include reduced expenditures by entities during the period of delay. They also will include reduced expenditures by entities that otherwise would have been ultimate beneficiaries of expenditures during the period of delay by the litigating entities. Economists and financial analysts refer to these secondary impacts as "indirect" and "induced" losses respectively. In the context of our analyses, the combined direct, indirect, and induced losses can be thought of as an estimated loss to society as a whole.

In the 1970s and 1980s, policymakers, academics, and U.S. government representatives recognized a need to develop a tool that could provide information on the total economic impact on sectors of the economy associated with changes in various inputs. The tool they developed ultimately became known as IMPLAN, an acronym for "impact analysis and planning." IMPLAN was developed originally at the University of Minnesota and has been in widespread use for decades.[33]

Tables 15, 16, 17, and 18 make use of the IMPLAN model to estimate the indirect and induced economic impact based on direct economic impact (i.e. resources lost due to delay). Overall economic losses associated with delay to trial are roughly **$28.3 billion to $35.3 billion**,[34] while overall economic losses associated with delay through appeal are approximately **$51.9 billion to $59.2 billion**.[35] See Figure 8 below for a summary of our findings.

[33] See www.implan.com. Numerous articles have been written about the application of the IMPLAN model by government, academic, and private industry entities.

[34] The lower estimate is based on delay to trial (district courts v. AAA arbitration) for the entire U.S., while the higher estimate is based on delay to trial for the eight states with the highest caseload in 2015. See Tables 15 and 16.

[35] The lower estimate is based on delay through appeal (appellate courts v. AAA arbitration) for the entire U.S., while the higher estimate is based on delay through appeal for circuit courts associated with the eight states with the highest caseload in 2015. See Tables 17 and 18.

Figure 8: Overall Economic Losses (Direct, Indirect, and Induced Losses) Associated with Delay to Trial and Delay through Appeal, 2011 – 2015 (Reflected in Tables 15-18)

Economic Impact	U.S. District Courts v. Arbitration (Delay to Trial)		U.S. Appellate Courts v. Arbitration (Delay through Appeal)	
	Based on Delay in Entire U.S. ($Billions)	Based on Delay in States with Highest Caseload in 2015 ($Billions)	Based on Delay in Entire U.S. ($Billions)	Based on Delay in States with Highest Caseload in 2015 ($Billions)
1. Direct Loss	$10.9	$13.6	$20.0	$22.9
2. Indirect Loss	8.0	10.0	14.6	16.7
3. Induced Loss	9.4	11.7	17.2	19.6
4. Total Loss	**$28.3**	**$35.3**	**$51.9**	**$59.2**

H. QUALITATIVE DIFFERENCES BETWEEN ARBITRATION AND COURT PROCEEDINGS

In addition to the losses described above, arbitration may provide certain advantages compared with federal courts.

- More control over the process
  - Unlike litigation, arbitration is a creature of contract and the parties control the process. This means that parties can agree to design the arbitration so that it accommodates their respective needs both at the contractual stage and after the arbitration has commenced. The parties can determine the scope of discovery, where and how the hearing should be conducted, the length of time for the entire process and many other procedural issues. Arbitration affords a flexibility that courts, governed appropriately by more directive laws and rules, typically cannot provide.
- Selecting the decision-maker
  - A potential benefit of arbitration relates to the fact that the parties can select their arbitrators and thereby choose decision-makers with qualifications tailored to the needs of the dispute. These desired qualifications can include attributes such as subject matter expertise, temperament, and commitment and ability to conduct an efficient, cost-effective arbitration. At the same time, certain types of cases seem to wind up in particular federal court districts which have developed considerable subject matter expertise (e.g. patent infringement cases in the Eastern District of Texas, pharmaceutical cases in New Jersey).
- Exposure of confidential information
  - Litigated cases typically produce some type of public hearing(s) and/or public record; arbitration can allow parties to avoid such an open platform. Even with the use of Protective Orders that limit access to confidential information, sensitive information is more difficult to conceal with litigation. The ability to keep this kind of information private can prove beneficial.
- Harmful to the relationship between disputing parties
  - All cases are unique, but in general, litigation typically is more antagonistic and may lead to strained or severed relationships between the parties. Arbitration can be less combative.
- Accumulation of additional legal fees and attorney fees
  - Legal fees and attorney fees are significant to litigants, and vary generally with the length of time required to adjudicate disputes. Other things equal, the longer things take, the greater the fees, so that parties choosing the federal court system over arbitration are subject to additional ancillary costs just based on the fact that the process takes

longer. Moreover a court trial can often take longer than an arbitration hearing because procedures followed in court like evidentiary objections, *voir dire*, jury charges, proposed findings of fact, authentication of documents, qualification of experts and the like are often streamlined to save time and cost in arbitration where those procedures are not required.

- Loss of time, energy, and focus of company executives and employees
    - Because litigation to trial and through appeal takes approximately 12-21 months *longer* than arbitration, the choice of litigation over arbitration imposes burdens on executives, managers, and/or employees that are at the expense of revenue-generating business opportunities.
- Benefits for international disputes
    - Arbitration may provide a uniquely detached and neutral forum for dispute resolution decision makers and assure adherence to the rule of law in a familiar procedural setting. Moreover, arbitration permits the parties to choose adjudicators with the necessary expertise to decide a cross-border dispute, including knowledge of more than one legal system, ability to harmonize cultural differences, and fluency in more than one language. The New York Convention enables enforcement of international arbitration agreements and awards across borders in more than 150 countries. In contrast, judgments of national courts are more difficult and often impossible to enforce in other countries.

III. SUMMARY AND CONCLUSIONS

"Justice delayed is justice denied" is a long-standing legal maxim that aligns well with economic theory. The concept is a simple one: A party that experiences compensable economic injury is effectively denied redress if resolution takes too long. State-mandated statutory interest rates are typically lower than the average rate of return that could be earned by investing capital at risk due to litigation. This means that plaintiffs often are not made whole even when statutory interest is awarded. Reducing the amount of time required to resolve disputes represents an important way to mitigate economic losses associated with litigation. Further, while statutory interest compensates the claimant who wins, the defendant is never compensated for its inability to use capital tied up in litigation. This means that defendants no less than plaintiffs have an incentive to speed up the process.

Arbitration represents one way in which the pace of dispute resolution can be accelerated. Significant differences in time required exist between the onset of a dispute and a final determination when the choice is between the federal courts and arbitration. On average, federal courts take much longer to resolve by trial and appeal than arbitration by the AAA. These differences are systematic across almost all states and sections of the country and are especially significant in the states with the highest arbitration and federal court caseloads. In light of these differences and the economic costs associated with delay, other things equal, parties would be well-advised to consider arbitration for dispute resolution.

ABOUT THE AUTHORS

About the Authors

Roy Weinstein is an economist and Managing Director at Micronomics, an economic research and consulting firm based in Los Angeles, California. Mr. Weinstein has been involved with economic research and consulting since 1969. He has prepared a number of studies addressing issues associated with cutbacks to our judiciary and the economic impact of increases in the length of time required to adjudicate disputes. Mr. Weinstein also has been commissioned by the Tournament of Roses Committee to determine the economic impact of the Rose Bowl Parade and Game on Los Angeles County, and has been engaged to conduct similar studies for the Grammys, the Emmys, the NBA All Star Game, the X-Games, AEG, and the Special Olympics World Summer Games. Mr. Weinstein's areas of expertise include industrial organization, statistics, econometrics and the calculation of economic damages. He has published articles relating to economics in numerous professional journals and is a frequent speaker before professional associations and trade groups. Mr. Weinstein received a Bachelor of Business Administration Degree *cum laude* with honors in economics from City College New York and a Master of Arts Degree in economics from the University of Chicago. He is the first recipient of the Career Achievement Award for professional success from the Business and Economics Alumni Society of the Baruch School at City College New York.

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About Micronomics

Micronomics is an economic research and consulting firm located in Los Angeles, California. Founded in 1988, it specializes in the collection, tabulation and analysis of various types of economic, financial and statistical data. Areas of expertise include industrial organization, antitrust, economic impact studies, the valuation of intellectual property and the calculation of economic damages. Clients include publicly and privately held businesses and government agencies. Industry experience includes sports and entertainment, banking and financial services, pharmaceuticals, telecommunications, and computer hardware and software.

APPENDIX
DESCRIPTION OF DATA

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DATA FROM THE UNITED STATES COURTS GOVERNMENT WEBSITE

1. Tables C-5, "U.S. District Courts – Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Periods Ending December 31, 2011 through 2015."[36]

    - From Tables C-5, we ascertain i) the total number of U.S. District Court civil cases terminated each year and ii) the median time interval from the date a case was filed to the date trial begins (i.e. "filing to trial").[37]
    - Tables C-5 exclude cases relating to land condemnations, prisoner petitions, deportation reviews, recovery of overpayments, and enforcement of judgments.
    - Information in Tables C-5 is available at three levels – district(s) within each state or territory; circuits (i.e. appellate courts); and overall total.[38]

[36] See: http://www.uscourts.gov/sites/default/files/statistics_import_dir/C05Dec11.pdf; http://www.uscourts.gov/sites/default/files/statistics_import_dir/C05Dec12.pdf; http://www.uscourts.gov/sites/default/files/statistics_import_dir/C05Dec13.pdf; http://www.uscourts.gov/sites/default/files/c05dec14_0.pdf; and http://www.uscourts.gov/sites/default/files/data_tables/stfj_c5_1231.2015.pdf.

[37] "Explanation of Selected Terms" (http://www.uscourts.gov/sites/default/files/explanation-of-selected-terms-september-2014_0.pdf).

Our use of "filing to trial" is conservative given the time between the start of trial and the rendering of a final judgment as judges may take weeks or months to issue a judgment after a bench trial. Further, post-trial motion practice following a jury trial in civil cases also may take weeks or months before a final judgment is rendered.

[38] Some states have more than one district court (e.g. California and New York both have four district courts). When a state has two or more district courts, we calculate the average time required from filing to trial for the districts within that state. For example, in California, median time required from filing to trial in 2015 is 28.1 months (shown at Line 5 of Table 2.5), which is the average of time required from filing to trial for the Northern District of California (26.7 months), the Eastern District of California (30.6 months), the Central District of California (20.9 months), and the Southern District of California (34.1 months). *See* Table C-5, U.S. District Courts - Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending December 31, 2015.

2. Tables B-4, titled "U.S. Courts of Appeals – Median Time Intervals in Months for Merit Terminations of Appeals, by Circuit, During the 12-Month Periods Ending September 30, 2011 through 2015."[39]

    - From Tables B-4, we ascertain the median time interval from filing of notice of appeal to last opinion or final order in appellate court (i.e. filing of appeal through conclusion of appeal).[40]
    - We combine data for (a) filing to trial and (b) filing of appeal through conclusion of appeal in order to calculate the duration of time required between initial filing and the conclusion of appeal (i.e. "filing through appeal").[41]
    - Tables B-4 do not include data from the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit").[42] We do not believe that this omission impacts our results.

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[39] See: http://www.uscourts.gov/sites/default/files/statistics_import_dir/B04Sep11.pdf; http://www.uscourts.gov/sites/default/files/statistics_import_dir/B04Sep12.pdf; http://www.uscourts.gov/sites/default/files/statistics_import_dir/B04Sep13.pdf; http://www.uscourts.gov/sites/default/files/statistics_import_dir/B04Sep14.pdf; and http://www.uscourts.gov/sites/default/files/data_tables/B04Sep15.pdf.

Our understanding is that Tables C-5 pertain to civil cases only, while Tables B-4 pertain to both civil and criminal cases. Anecdotal evidence suggests that appeals of criminal cases take less time to resolve than appeals of civil matters. Also, the gap between the end of a trial and the onset of an appeal typically is greater in civil than in criminal cases. Accordingly, use of data contained in Tables B-4 in conjunction with data contained in Tables C-5 is appropriate and probably conservative. See, for example:

The Honorable Carl West Anderson, "Are the American Bar Association's Time Standards Relevant for California Courts of Appeal?" *University of San Francisco Law Review*, Winter 1993, p. 3.

Stephenson, Gail S., "Reaching the Top of the Docket: Louisiana's Preference System," *Loyola Law Review*, Spring 2010, p. 50.

Krown, Lexia B., "Clarity as the Last Resort? Why Federal Rule of Appellate Procedure 4 Should and Could Stipulate Which Judgments are 'Final'," *Ohio State Law Journal*, 2009, pp. 2 and 15.

[40] In Table B-4 for 2011, this is described as median time interval "from filing of notice of appeal to final disposition."

The docket date is used to calculate median time intervals instead of "from filing of notice of appeal" for original proceedings, miscellaneous applications, and appeals from administrative agencies. See Tables B-4 for 2012-2015.

[41] The calculation of filing through appeal is conservative given the gap in time between the start of a trial on the one hand and the filing of notice of appeal on the other. For example, in district court civil cases, parties have 30 days to file an appeal after an entry of judgment is made (or 60 days if the United States is a party). See, for example:

Rule 4, Appeal as of Right – When Taken (https://www.law.cornell.edu/rules/frap/rule_4).

U.S. Court of Appeals for the Fourth Circuit, Appellate Procedure Guide, December 2016 (http://www.ca4.uscourts.gov/AppellateProcedureGuide/General_Provisions/APG-appellatedeadlines.html).

Federal Rules of Appellate Procedure, Ninth Circuit Rules, Circuit Advisory Committee Notes (http://cdn.ca9.uscourts.gov/datastore/uploads/rules/rules.htm).

[42] The Federal Circuit is unique compared with the other twelve Circuit Courts of Appeals in that it has nationwide jurisdiction in a variety of areas, including international trade, government contracts, patents, trademarks, certain

  - While systematic Federal Circuit data are difficult to obtain, a business litigation article released by *Quinn Emanuel Trial Lawyers* notes that "the Federal Circuit's median disposition time is in line with many of the other circuits."[43]
- Information in Tables B-4 is available at two levels – circuits and overall total.

money claims against the U.S. Government, federal personnel, veterans' benefits, and public safety officers' benefits claims. More than half of the cases administered by the Federal Circuit involve administrative law, while intellectual property and monetary damages against the U.S. Government account for approximately 31 percent and 11 percent, respectively. *See* United States Court of Appeals for the Federal Circuit, Court Jurisdiction, U.S. Courts website (http://www.cafc.uscourts.gov/the-court/court-jurisdiction).

[43] "Article: March 2013 Appellate Update – The Appellate Timetable," Business Litigation Reports, *Quinn Emanuel Trial Lawyers* (http://www.quinnemanuel.com/the-firm/news-events/article-march-2013-appellate-update-the-appellate-timetable/).

DATA FROM AMERICAN ARBITRATION ASSOCIATION (AAA)

3. AAA provided Micronomics with data for its arbitration cases closed between 2011 and 2015.[44]

    - From these data, we calculate the annual median time required from filing to final resolution in cases determined in arbitration at the American Arbitration Association (i.e. "filing to award").
        - We calculate filing to award for all cases in the data with the status "awarded," i.e. the case was determined in arbitration at the AAA.[45]
            - Our calculation of median time interval from filing to award is based on the timing of the award.
        - We include only AAA and ICDR arbitration cases that had claimed amounts of *at least* $75,000.[46] This matches our treatment of district court cases with subject matter jurisdiction over disputes where at least $75,000 is involved.
    - AAA informed us that its data include cases related to business-to-business, construction, employment, and consumers, its data exclude cases related to labor, no-fault insurance in New York, and automobile accident claims in Illinois.[47]

[44] Length of time for filing to trial in federal cases and filing to award in AAA arbitration is based on calendar year data; length of time for filing of appeal through conclusion of appeal in federal cases is provided on a fiscal year basis. Since all data cover a full year, this difference does not materially affect our analysis.

[45] AAA cases with status of administrative, dismissal based on settlement, withdrawn, settled, or otherwise closed without going to award are not used to calculate median time from filing to award because they were resolved in another manner (e.g. before a final decision was made in arbitration at the AAA).

[46] We have been informed by AAA that most of its data utilized in this report pertain to the domestic United States; some cases were administered by AAA's international division, the International Centre for Dispute Resolution.

[47] Of the 7,416 AAA arbitration cases that went to award from 2011 through 2015, only 637 (or 8.6%) are consumer cases.

TABLES

TABLE 1

CASELOAD FOR TOP 10 STATES
AAA ARBITRATION CASES GOING TO AWARD AND U.S. DISTRICT COURT CIVIL CASES
2015

	Arbitration[1]			U.S. District Courts[2]		
	State or Territory	Caseload	Percent of Total	State or Territory	Caseload	Percent of Total
1.	California	191	13.9%	California	22,451	10.3%
2.	New York	167	12.1%	New York	19,233	8.9%
3.	Texas	156	11.3%	Florida	16,011	7.4%
4.	Florida	76	5.5%	Illinois	13,962	6.4%
5.	Pennsylvania	68	4.9%	West Virginia	13,813	6.4%
6.	Maryland	52	3.8%	Pennsylvania	13,770	6.3%
7.	Georgia	47	3.4%	Texas	13,406	6.2%
8.	New Jersey	47	3.4%	Ohio	8,956	4.1%
9.	Michigan	41	3.0%	New Jersey	8,089	3.7%
10.	Illinois	37	2.7%	Georgia	5,531	2.5%
11.	Delaware	34	2.5%	Minnesota	5,046	2.3%
12.	Ohio	34	2.5%	Michigan	4,907	2.3%
13.	Louisiana	28	2.0%	Louisiana	4,867	2.2%
14.	Arizona	27	2.0%	Indiana	4,104	1.9%
15.	Alabama	25	1.8%	Missouri	3,847	1.8%
16.	Connecticut	25	1.8%	Washington	3,338	1.5%
17.	Missouri	25	1.8%	Maryland	3,228	1.5%
18.	District of Columbia	24	1.7%	Tennessee	3,107	1.4%
19.	Tennessee	24	1.7%	Alabama	2,993	1.4%
20.	Colorado	21	1.5%	Virginia	2,935	1.4%
21.	North Carolina	21	1.5%	North Carolina	2,779	1.3%
22.	Virginia	19	1.4%	Kansas	2,774	1.3%
23.	Minnesota	18	1.3%	Massachusetts	2,719	1.3%
24.	Washington	18	1.3%	Colorado	2,371	1.1%
25.	Massachusetts	17	1.2%	Arizona	2,345	1.1%
26.	Mississippi	14	1.0%	South Carolina	2,341	1.1%
27.	Arkansas	8	0.6%	Oklahoma	2,338	1.1%
28.	Nevada	8	0.6%	Nevada	2,165	1.0%
29.	Oklahoma	8	0.6%	Kentucky	2,025	0.9%
30.	South Carolina	7	0.5%	Arkansas	1,887	0.9%
31.	Iowa	6	0.4%	Oregon	1,794	0.8%
32.	Kentucky	6	0.4%	District of Columbia	1,777	0.8%
33.	Kansas	5	0.4%	Mississippi	1,771	0.8%
34.	North Dakota	5	0.4%	Connecticut	1,745	0.8%
35.	Puerto Rico	5	0.4%	Wisconsin	1,737	0.8%
36.	Utah	5	0.4%	Delaware	1,630	0.8%
37.	Hawaii	4	0.3%	Iowa	1,104	0.5%
38.	Indiana	4	0.3%	Puerto Rico	1,085	0.5%
39.	New Mexico	4	0.3%	New Mexico	1,017	0.5%
40.	Nebraska	3	0.2%	Utah	1,008	0.5%
41.	Oregon	3	0.2%	Rhode Island	797	0.4%
42.	Virgin Islands	3	0.2%	South Dakota	553	0.3%
43.	Wisconsin	3	0.2%	Hawaii	551	0.3%
44.	Idaho	2	0.1%	Nebraska	496	0.2%
45.	Maine	2	0.1%	Maine	470	0.2%
46.	Montana	2	0.1%	New Hampshire	421	0.2%
47.	New Hampshire	2	0.1%	Idaho	419	0.2%
48.	West Virginia	2	0.1%	Montana	407	0.2%
49.	Rhode Island	1	0.1%	Vermont	251	0.1%
50.	Vermont	1	0.1%	Alaska	237	0.1%
51.	Alaska	-	0.0%	Virgin Islands	217	0.1%
52.	Guam	-	0.0%	Wyoming	211	0.1%
53.	South Dakota	-	0.0%	North Dakota	195	0.1%
54.	Wyoming	-	0.0%	Guam	31	0.0%
55.	N/A[3]	20	1.5%	Northern Mariana Islands	26	0.0%
56.	**Top-10 Total**	**882**	**64.1%**	**Top-10 Total**	**135,222**	**62.2%**
57.	**Overall Total**	**1,375**	**100.0%**	**Overall Total**	**217,288**	**100.0%**

TABLE 1

CASELOAD FOR TOP 10 STATES
AAA ARBITRATION CASES GOING TO AWARD AND U.S. DISTRICT COURT CIVIL CASES
2015

Arbitration[1]			U.S. District Courts[2]		
State or Territory	Caseload	Percent of Total	State or Territory	Caseload	Percent of Total

Notes: [1] Entries reflect number of cases in 2015 that went to award in arbitration at the AAA and include cases related to business-to-business, construction, employment, and consumers; data exclude cases related to labor, no-fault insurance in New York, and automobile accident claims in Illinois. Entries include cases with claimed amounts of at least $75,000.

[2] Entries reflect number of cases terminated in 2015 and exclude criminal cases, prisoner petitions, land condemnations, deportation reviews, recovery of overpayments, and enforcement of judgments. Terminated cases include cases going to trial and cases disposed of prior to trial.

[3] N/A -- not available.

Sources: American Arbitration Association Statistics for arbitrations closed 2011-2015.

Table C-5, U.S. District Courts - Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending December 31, 2015 (Data from Administrative Office of the U.S. Courts on behalf of the Federal Judiciary).

"Explanation of Selected Terms" (http://www.uscourts.gov/sites/default/files/explanation-of-selected-terms-september-2014_0.pdf).

TABLE 2.1

MEDIAN TIME REQUIRED U.S. DISTRICT COURT CASES GOING TO TRIAL V. AAA ARBITRATION CASES GOING TO AWARD 2011

State or Territory	U.S. District Courts, Filing to Trial[1]	Arbitration, Filing to Award[2]	Additional Time Required to Trial
	(Months)		
	(1)	(2)	(1) - (2) (3)
1. Alabama	17.3	11.4	5.9
2. Alaska	N/A[3]	14.1	N/A[3]
3. Arizona	24.0	10.1	13.9
4. Arkansas	18.8	12.2	6.6
5. California	25.9	11.3	14.6
6. Colorado	27.5	10.7	16.8
7. Connecticut	38.6	9.0	29.6
8. Delaware	25.5	12.0	13.5
9. District of Columbia	37.6	10.6	27.0
10. Florida	17.6	10.7	6.9
11. Georgia	27.7	11.0	16.7
12. Guam	N/A[3]	N/A[3]	N/A[3]
13. Hawaii	23.3	7.4	15.9
14. Idaho	20.8	17.1	3.7
15. Illinois	27.7	15.1	12.6
16. Indiana	30.0	11.1	18.9
17. Iowa	23.5	8.3	15.2
18. Kansas	27.1	12.3	14.8
19. Kentucky	26.0	7.9	18.1
20. Louisiana	24.3	10.3	14.0
21. Maine	N/A[3]	4.9	N/A[3]
22. Maryland	25.2	6.6	18.6
23. Massachusetts	25.2	11.3	13.9
24. Michigan	22.2	10.1	12.1
25. Minnesota	26.0	9.9	16.1
26. Mississippi	23.3	9.9	13.4
27. Missouri	19.8	8.9	10.9
28. Montana	N/A[3]	13.6	N/A[3]
29. Nebraska	21.2	11.8	9.4
30. Nevada	34.1	13.3	20.8
31. New Hampshire	22.8	6.6	16.2
32. New Jersey	35.5	10.5	25.0
33. New Mexico	17.0	15.3	1.7
34. New York	31.0	11.2	19.8
35. North Carolina	19.5	10.3	9.2
36. North Dakota	N/A[3]	8.0	N/A[3]
37. Northern Mariana Islands	N/A[3]	N/A[3]	N/A[3]
38. Ohio	23.8	9.9	13.9
39. Oklahoma	19.6	9.5	10.1

TABLE 2.1

MEDIAN TIME REQUIRED U.S. DISTRICT COURT CASES GOING TO TRIAL V. AAA ARBITRATION CASES GOING TO AWARD 2011

State or Territory	U.S. District Courts, Filing to Trial[1]	Arbitration, Filing to Award[2]	Additional Time Required to Trial
	(Months)		
	(1)	(2)	(1) - (2) (3)
40. Oregon	26.1	9.3	16.8
41. Pennsylvania	25.4	8.2	17.2
42. Puerto Rico	26.0	17.7	8.3
43. Rhode Island	N/A[3]	12.2	N/A[3]
44. South Carolina	22.4	15.0	7.4
45. South Dakota	30.7	9.3	21.4
46. Tennessee	27.2	12.2	15.0
47. Texas	21.5	10.7	10.8
48. Utah	29.1	10.7	18.4
49. Vermont	N/A[3]	5.8	N/A[3]
50. Virgin Islands	61.2	14.6	46.6
51. Virginia	13.6	9.5	4.1
52. Washington	21.2	11.9	9.3
53. West Virginia	19.9	10.0	9.9
54. Wisconsin	23.9	12.3	11.6
55. Wyoming	12.8	12.2	0.6

Notes: [1] Filing to trial reflects median time from filing to start of trial in civil cases. Data exclude criminal cases, prisoner petitions, land condemnations, deportation reviews, recovery of overpayments, and enforcement of judgments.

[2] Filing to award reflects median time from filing to award in cases determined in arbitration at the AAA. Data include cases related to business-to-business, construction, employment, and consumers; data exclude cases related to labor, no-fault insurance in New York, and automobile accident claims in Illinois. Entries include cases with claimed amounts of at least $75,000.

[3] N/A -- not available.

Sources: Table C-5, U.S. District Courts - Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending December 31, 2011 (Data from Administrative Office of the U.S. Courts on behalf of the Federal Judiciary).

"Explanation of Selected Terms" (http://www.uscourts.gov/sites/default/files/explanation-of-selected-terms-september-2014_0.pdf).

American Arbitration Association Statistics for arbitrations closed 2011-2015.

TABLE 2.2

MEDIAN TIME REQUIRED U.S. DISTRICT COURT CASES GOING TO TRIAL V. AAA ARBITRATION CASES GOING TO AWARD 2012

State or Territory	U.S. District Courts, Filing to Trial[1]	Arbitration, Filing to Award[2]	Additional Time Required to Trial
	(Months)		
	(1)	(2)	(1) - (2) (3)
1. Alabama	21.7	17.0	4.7
2. Alaska	N/A[3]	14.6	N/A[3]
3. Arizona	29.1	10.6	18.5
4. Arkansas	17.7	18.6	(0.9)
5. California	26.3	12.5	13.8
6. Colorado	23.1	11.6	11.5
7. Connecticut	32.9	13.7	19.2
8. Delaware	34.9	12.5	22.4
9. District of Columbia	50.3	10.7	39.6
10. Florida	18.6	11.2	7.4
11. Georgia	23.6	8.1	15.5
12. Guam	N/A[3]	N/A[3]	N/A[3]
13. Hawaii	13.4	6.6	6.8
14. Idaho	29.6	16.6	13.0
15. Illinois	30.1	12.7	17.4
16. Indiana	26.0	10.3	15.7
17. Iowa	N/A[3]	17.5	N/A[3]
18. Kansas	24.2	11.0	13.2
19. Kentucky	N/A[3]	17.7	N/A[3]
20. Louisiana	25.6	12.0	13.6
21. Maine	N/A[3]	8.9	N/A[3]
22. Maryland	30.1	7.5	22.6
23. Massachusetts	28.6	11.5	17.1
24. Michigan	23.5	13.0	10.5
25. Minnesota	23.4	12.5	10.9
26. Mississippi	20.4	11.3	9.1
27. Missouri	23.0	11.6	11.4
28. Montana	N/A[3]	9.5	N/A[3]
29. Nebraska	23.0	10.8	12.2
30. Nevada	36.8	13.8	23.0
31. New Hampshire	23.3	7.4	15.9
32. New Jersey	32.3	10.1	22.2
33. New Mexico	24.0	10.2	13.8
34. New York	35.0	12.4	22.6
35. North Carolina	26.9	9.8	17.1
36. North Dakota	N/A[3]	16.0	N/A[3]
37. Northern Mariana Islands	N/A[3]	N/A[3]	N/A[3]
38. Ohio	26.2	11.8	14.4
39. Oklahoma	18.4	9.8	8.6

TABLE 2.2

MEDIAN TIME REQUIRED U.S. DISTRICT COURT CASES GOING TO TRIAL V. AAA ARBITRATION CASES GOING TO AWARD 2012

State or Territory	U.S. District Courts, Filing to Trial[1]	Arbitration, Filing to Award[2]	Additional Time Required to Trial
	(Months)		
	(1)	(2)	(1) - (2) (3)
40. Oregon	22.2	14.5	7.7
41. Pennsylvania	25.1	9.7	15.4
42. Puerto Rico	29.0	44.0	(15.0)
43. Rhode Island	31.2	23.0	8.2
44. South Carolina	27.3	15.2	12.1
45. South Dakota	N/A[3]	4.2	N/A[3]
46. Tennessee	26.1	11.2	14.9
47. Texas	20.8	13.2	7.6
48. Utah	38.8	9.3	29.5
49. Vermont	N/A[3]	N/A[3]	N/A[3]
50. Virgin Islands	25.7	8.8	16.9
51. Virginia	12.4	9.2	3.2
52. Washington	22.3	11.5	10.8
53. West Virginia	19.7	32.7	(13.0)
54. Wisconsin	15.9	9.8	6.1
55. Wyoming	N/A[3]	7.3	N/A[3]

Notes: [1] Filing to trial reflects median time from filing to start of trial in civil cases. Data exclude criminal cases, prisoner petitions, land condemnations, deportation reviews, recovery of overpayments, and enforcement of judgments.

[2] Filing to award reflects median time from filing to award in cases determined in arbitration at the AAA. Data include cases related to business-to-business, construction, employment, and consumers; data exclude cases related to labor, no-fault insurance in New York, and automobile accident claims in Illinois. Entries include cases with claimed amounts of at least $75,000.

[3] N/A -- not available.

Sources: Table C-5, U.S. District Courts - Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending December 31, 2012 (Data from Administrative Office of the U.S. Courts on behalf of the Federal Judiciary).

"Explanation of Selected Terms" (http://www.uscourts.gov/sites/default/files/explanation-of-selected-terms-september-2014_0.pdf).

American Arbitration Association Statistics for arbitrations closed 2011-2015.

TABLE 2.3

MEDIAN TIME REQUIRED U.S. DISTRICT COURT CASES GOING TO TRIAL V. AAA ARBITRATION CASES GOING TO AWARD 2013

State or Territory	U.S. District Courts, Filing to Trial[1]	Arbitration, Filing to Award[2]	Additional Time Required to Trial
	(Months)		
	(1)	(2)	(1) - (2) (3)
1. Alabama	22.5	15.2	7.3
2. Alaska	N/A[3]	9.2	N/A[3]
3. Arizona	30.4	15.5	14.9
4. Arkansas	21.0	4.8	16.2
5. California	25.0	12.7	12.3
6. Colorado	24.9	8.7	16.2
7. Connecticut	33.3	10.7	22.6
8. Delaware	31.3	13.7	17.6
9. District of Columbia	34.2	10.7	23.5
10. Florida	20.4	11.1	9.3
11. Georgia	22.7	9.8	12.9
12. Guam	N/A[3]	N/A[3]	N/A[3]
13. Hawaii	15.0	N/A[3]	N/A[3]
14. Idaho	24.8	11.1	13.7
15. Illinois	29.1	14.6	14.5
16. Indiana	28.6	11.8	16.8
17. Iowa	23.3	14.3	9.0
18. Kansas	28.5	15.2	13.3
19. Kentucky	36.7	7.4	29.3
20. Louisiana	28.3	15.5	12.8
21. Maine	N/A[3]	13.2	N/A[3]
22. Maryland	22.0	8.1	13.9
23. Massachusetts	31.1	12.0	19.1
24. Michigan	27.9	10.2	17.7
25. Minnesota	22.0	10.3	11.7
26. Mississippi	22.3	9.7	12.6
27. Missouri	20.2	9.0	11.2
28. Montana	N/A[3]	6.4	N/A[3]
29. Nebraska	23.1	4.5	18.6
30. Nevada	41.9	15.8	26.1
31. New Hampshire	N/A[3]	8.8	N/A[3]
32. New Jersey	35.7	10.8	24.9
33. New Mexico	25.1	10.8	14.3
34. New York	41.2	11.8	29.4
35. North Carolina	23.6	9.7	13.9
36. North Dakota	N/A[3]	10.3	N/A[3]
37. Northern Mariana Islands	N/A[3]	N/A[3]	N/A[3]
38. Ohio	26.6	9.2	17.4
39. Oklahoma	17.3	12.4	4.9

TABLE 2.3

MEDIAN TIME REQUIRED U.S. DISTRICT COURT CASES GOING TO TRIAL V. AAA ARBITRATION CASES GOING TO AWARD 2013

State or Territory	U.S. District Courts, Filing to Trial[1]	Arbitration, Filing to Award[2]	Additional Time Required to Trial
	(Months)		
	(1)	(2)	(1) - (2) (3)
40. Oregon	21.7	10.3	11.4
41. Pennsylvania	23.0	13.2	9.8
42. Puerto Rico	18.5	17.5	1.0
43. Rhode Island	31.9	11.9	20.0
44. South Carolina	23.6	12.7	10.9
45. South Dakota	N/A[3]	14.8	N/A[3]
46. Tennessee	25.7	10.4	15.3
47. Texas	22.3	13.5	8.8
48. Utah	37.6	13.5	24.1
49. Vermont	N/A[3]	12.0	N/A[3]
50. Virgin Islands	44.1	16.1	28.0
51. Virginia	13.1	12.1	1.0
52. Washington	19.4	10.5	8.9
53. West Virginia	N/A[3]	9.7	N/A[3]
54. Wisconsin	17.3	11.2	6.1
55. Wyoming	N/A[3]	13.6	N/A[3]

Notes: [1] Filing to trial reflects median time from filing to start of trial in civil cases. Data exclude criminal cases, prisoner petitions, land condemnations, deportation reviews, recovery of overpayments, and enforcement of judgments.

[2] Filing to award reflects median time from filing to award in cases determined in arbitration at the AAA. Data include cases related to business-to-business, construction, employment, and consumers; data exclude cases related to labor, no-fault insurance in New York, and automobile accident claims in Illinois. Entries include cases with claimed amounts of at least $75,000.

[3] N/A -- not available.

Sources: Table C-5, U.S. District Courts - Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending December 31, 2013 (Data from Administrative Office of the U.S. Courts on behalf of the Federal Judiciary).

"Explanation of Selected Terms" (http://www.uscourts.gov/sites/default/files/explanation-of-selected-terms-september-2014_0.pdf).

American Arbitration Association Statistics for arbitrations closed 2011-2015.

TABLE 2.4

MEDIAN TIME REQUIRED U.S. DISTRICT COURT CASES GOING TO TRIAL V. AAA ARBITRATION CASES GOING TO AWARD 2014

State or Territory	U.S. District Courts, Filing to Trial[1]	Arbitration, Filing to Award[2]	Additional Time Required to Trial
	(Months)		
	(1)	(2)	(1) - (2) (3)
1. Alabama	22.7	22.7	-
2. Alaska	N/A[3]	9.6	N/A[3]
3. Arizona	27.5	8.1	19.4
4. Arkansas	19.7	15.6	4.1
5. California	29.5	13.2	16.3
6. Colorado	29.9	13.8	16.1
7. Connecticut	39.4	11.1	28.3
8. Delaware	34.2	4.6	29.6
9. District of Columbia	53.6	13.2	40.4
10. Florida	17.6	11.2	6.4
11. Georgia	29.3	11.2	18.1
12. Guam	N/A[3]	6.6	N/A[3]
13. Hawaii	18.0	27.4	(9.4)
14. Idaho	23.4	7.7	15.7
15. Illinois	33.7	13.3	20.4
16. Indiana	26.6	12.4	14.2
17. Iowa	N/A[3]	16.6	N/A[3]
18. Kansas	23.5	5.9	17.6
19. Kentucky	23.1	10.0	13.1
20. Louisiana	27.0	24.4	2.6
21. Maine	25.5	8.5	17.0
22. Maryland	19.1	7.3	11.8
23. Massachusetts	25.3	12.4	12.9
24. Michigan	25.9	16.6	9.3
25. Minnesota	23.7	10.5	13.2
26. Mississippi	22.4	9.0	13.4
27. Missouri	29.8	10.2	19.6
28. Montana	24.5	8.9	15.6
29. Nebraska	29.7	12.6	17.1
30. Nevada	32.2	10.6	21.6
31. New Hampshire	N/A[3]	10.6	N/A[3]
32. New Jersey	36.4	13.2	23.2
33. New Mexico	27.4	14.3	13.1
34. New York	35.1	13.3	21.8
35. North Carolina	25.1	11.9	13.2
36. North Dakota	N/A[3]	9.7	N/A[3]
37. Northern Mariana Islands	N/A[3]	N/A[3]	N/A[3]
38. Ohio	17.3	9.2	8.1
39. Oklahoma	16.0	12.1	3.9

TABLE 2.4

MEDIAN TIME REQUIRED U.S. DISTRICT COURT CASES GOING TO TRIAL V. AAA ARBITRATION CASES GOING TO AWARD 2014

State or Territory	U.S. District Courts, Filing to Trial[1]	Arbitration, Filing to Award[2]	Additional Time Required to Trial
	(Months)		
	(1)	(2)	(1) - (2) (3)
40. Oregon	20.8	11.3	9.5
41. Pennsylvania	25.0	8.4	16.6
42. Puerto Rico	29.8	25.3	4.5
43. Rhode Island	N/A[3]	9.6	N/A[3]
44. South Carolina	27.8	10.6	17.2
45. South Dakota	30.0	10.4	19.6
46. Tennessee	37.4	12.9	24.5
47. Texas	24.2	12.3	11.9
48. Utah	35.4	13.6	21.8
49. Vermont	N/A[3]	N/A[3]	N/A[3]
50. Virgin Islands	38.2	25.2	13.0
51. Virginia	14.9	13.5	1.4
52. Washington	25.6	11.6	14.0
53. West Virginia	N/A[3]	8.7	N/A[3]
54. Wisconsin	22.9	12.2	10.7
55. Wyoming	22.9	12.4	10.5

Notes: [1] Filing to trial reflects median time from filing to start of trial in civil cases. Data exclude criminal cases, prisoner petitions, land condemnations, deportation reviews, recovery of overpayments, and enforcement of judgments.

[2] Filing to award reflects median time from filing to award in cases determined in arbitration at the AAA. Data include cases related to business-to-business, construction, employment, and consumers; data exclude cases related to labor, no-fault insurance in New York, and automobile accident claims in Illinois. Entries include cases with claimed amounts of at least $75,000.

[3] N/A -- not available.

Sources: Table C-5, U.S. District Courts - Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending December 31, 2014 (Data from Administrative Office of the U.S. Courts on behalf of the Federal Judiciary).

"Explanation of Selected Terms" (http://www.uscourts.gov/sites/default/files/explanation-of-selected-terms-september-2014_0.pdf).

American Arbitration Association Statistics for arbitrations closed 2011-2015.

TABLE 2.5

MEDIAN TIME REQUIRED U.S. DISTRICT COURT CASES GOING TO TRIAL V. AAA ARBITRATION CASES GOING TO AWARD 2015

State or Territory	U.S. District Courts, Filing to Trial[1]	Arbitration, Filing to Award[2]	Additional Time Required to Trial
	(Months)		
	(1)	(2)	(1) - (2) (3)
1. Alabama	25.1	8.5	16.6
2. Alaska	N/A[3]	N/A[3]	N/A[3]
3. Arizona	30.0	13.2	16.8
4. Arkansas	19.1	9.7	9.4
5. California	28.1	13.2	14.9
6. Colorado	22.1	10.1	12.0
7. Connecticut	36.6	6.7	29.9
8. Delaware	34.4	4.9	29.5
9. District of Columbia	37.1	11.5	25.6
10. Florida	17.9	11.6	6.3
11. Georgia	26.2	12.8	13.4
12. Guam	N/A[3]	N/A[3]	N/A[3]
13. Hawaii	20.8	9.0	11.8
14. Idaho	N/A[3]	16.4	N/A[3]
15. Illinois	31.4	12.8	18.6
16. Indiana	31.5	10.6	20.9
17. Iowa	25.0	12.3	12.7
18. Kansas	24.7	13.4	11.3
19. Kentucky	N/A[3]	8.4	N/A[3]
20. Louisiana	26.7	13.9	12.8
21. Maine	23.7	12.7	11.0
22. Maryland	28.5	7.4	21.1
23. Massachusetts	33.4	11.5	21.9
24. Michigan	19.3	12.0	7.3
25. Minnesota	31.7	10.9	20.8
26. Mississippi	23.6	13.3	10.3
27. Missouri	21.0	10.9	10.1
28. Montana	N/A[3]	10.7	N/A[3]
29. Nebraska	26.8	20.4	6.4
30. Nevada	39.5	12.3	27.2
31. New Hampshire	N/A[3]	23.3	N/A[3]
32. New Jersey	39.3	13.8	25.5
33. New Mexico	28.4	10.7	17.7
34. New York	30.9	12.5	18.4
35. North Carolina	24.9	10.4	14.5
36. North Dakota	N/A[3]	13.3	N/A[3]
37. Northern Mariana Islands	N/A[3]	N/A[3]	N/A[3]
38. Ohio	28.6	10.6	18.0
39. Oklahoma	15.4	9.3	6.1

TABLE 2.5

MEDIAN TIME REQUIRED U.S. DISTRICT COURT CASES GOING TO TRIAL V. AAA ARBITRATION CASES GOING TO AWARD 2015

State or Territory	U.S. District Courts, Filing to Trial[1]	Arbitration, Filing to Award[2]	Additional Time Required to Trial
	(Months)		
	(1)	(2)	(1) - (2) (3)
40. Oregon	21.6	16.1	5.5
41. Pennsylvania	24.6	11.7	12.9
42. Puerto Rico	25.8	22.3	3.5
43. Rhode Island	N/A[3]	13.9	N/A[3]
44. South Carolina	28.8	10.3	18.5
45. South Dakota	N/A[3]	N/A[3]	N/A[3]
46. Tennessee	27.4	12.0	15.4
47. Texas	21.3	11.4	9.9
48. Utah	29.3	20.7	8.6
49. Vermont	N/A[3]	8.3	N/A[3]
50. Virgin Islands	N/A[3]	31.6	N/A[3]
51. Virginia	15.5	10.1	5.4
52. Washington	20.3	11.9	8.4
53. West Virginia	21.7	16.5	5.2
54. Wisconsin	20.4	19.9	0.5
55. Wyoming	16.3	N/A[3]	N/A[3]

Notes: [1] Filing to trial reflects median time from filing to start of trial in civil cases. Data exclude criminal cases, prisoner petitions, land condemnations, deportation reviews, recovery of overpayments, and enforcement of judgments.

[2] Filing to award reflects median time from filing to award in cases determined in arbitration at the AAA. Data include cases related to business-to-business, construction, employment, and consumers; data exclude cases related to labor, no-fault insurance in New York, and automobile accident claims in Illinois. Entries include cases with claimed amounts of at least $75,000.

[3] N/A -- not available.

Sources: Table C-5, U.S. District Courts - Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending December 31, 2015 (Data from Administrative Office of the U.S. Courts on behalf of the Federal Judiciary).

"Explanation of Selected Terms" (http://www.uscourts.gov/sites/default/files/explanation-of-selected-terms-september-2014_0.pdf).

American Arbitration Association Statistics for arbitrations closed 2011-2015.

TABLE 3

MEDIAN TIME REQUIRED
U.S. DISTRICT COURT CIVIL CASES GOING TO TRIAL
STATES WITH HIGHEST CASELOAD IN 2015
2011 - 2015

State	Time Required, Filing to Trial (by State)				
	2011	2012	2013	2014	2015
	(Months)				
	(1)	(2)	(3)	(4)	(5)
1. California	25.9	26.3	25.0	29.5	28.1
2. New York	31.0	35.0	41.2	35.1	30.9
3. Texas	21.5	20.8	22.3	24.2	21.3
4. Florida	17.6	18.6	20.4	17.6	17.9
5. Pennsylvania	25.4	25.1	23.0	25.0	24.6
6. Georgia	27.7	23.6	22.7	29.3	26.2
7. New Jersey	35.5	32.3	35.7	36.4	39.3
8. Illinois	27.7	30.1	29.1	33.7	31.4

Sources: Micronomics Table 1, "Caseload for Top 10 States, AAA Arbitration Cases Going to Award and U.S. District Court Civil Cases, 2015."

Tables C-5, U.S. District Courts - Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Periods Ending December 31, 2011 through 2015 (Data from Administrative Office of the U.S. Courts on behalf of the Federal Judiciary).

"Explanation of Selected Terms" (http://www.uscourts.gov/sites/default/files/explanation-of-selected-terms-september-2014_0.pdf).

TABLE 4

MEDIAN TIME REQUIRED
AAA ARBITRATION CASES GOING TO AWARD
STATES WITH HIGHEST CASELOAD IN 2015
2011 - 2015

State	Time Required, Filing to Award (by State)				
	2011	2012	2013	2014	2015
	(Months)				
	(1)	(2)	(3)	(4)	(5)
1. California	11.3	12.5	12.7	13.2	13.2
2. New York	11.2	12.4	11.8	13.3	12.5
3. Texas	10.7	13.2	13.5	12.3	11.4
4. Florida	10.7	11.2	11.1	11.2	11.6
5. Pennsylvania	8.2	9.7	13.2	8.4	11.7
6. Georgia	11.0	8.1	9.8	11.2	12.8
7. New Jersey	10.5	10.1	10.8	13.2	13.8
8. Illinois	15.1	12.7	14.6	13.3	12.8

Note: Entries reflect median time from filing to award in cases determined in arbitration at the AAA.

Sources: Micronomics Table 1, "Caseload for Top 10 States, AAA Arbitration Cases Going to Award and U.S. District Court Civil Cases, 2015."

American Arbitration Association Statistics for arbitrations closed 2011-2015.

TABLE 5

ADDITIONAL TIME REQUIRED
U.S. DISTRICT COURT CIVIL CASES GOING TO TRIAL V.
AAA ARBITRATION CASES GOING TO AWARD
STATES WITH HIGHEST CASELOAD IN 2015
2011 - 2015

State	Additional Time Required to Trial (by State)				
	2011	2012	2013	2014	2015
	(Months)				
	(1)	(2)	(3)	(4)	(5)
1. California	14.6	13.8	12.3	16.3	14.9
2. New York	19.8	22.6	29.4	21.8	18.4
3. Texas	10.8	7.6	8.8	11.9	9.9
4. Florida	6.9	7.4	9.3	6.4	6.3
5. Pennsylvania	17.2	15.4	9.8	16.6	12.9
6. Georgia	16.7	15.5	12.9	18.1	13.4
7. New Jersey	25.0	22.2	24.9	23.2	25.5
8. Illinois	12.6	17.4	14.5	20.4	18.6
9. Average	**15.5**	**15.2**	**15.2**	**16.8**	**15.0**

Sources: Micronomics Table 3, "Median Time Required, U.S. District Court Civil Cases Going to Trial, States with Highest Caseload in 2015, 2011 - 2015."

Micronomics Table 4, "Median Time Required, AAA Arbitration Cases Going to Award, States with Highest Caseload in 2015, 2011 - 2015."

TABLE 6

MEDIAN TIME REQUIRED
U.S. DISTRICT AND APPELLATE COURT CASES
GOING THROUGH APPEAL
STATES WITH HIGHEST CASELOAD IN 2015
2011 - 2015

State	Circuit	Time Required, Filing through Appeal (by State)				
		2011	2012	2013	2014	2015
		(Months)				
		(1)	(2)	(3)	(4)	(5)
1. California	9th	43.3	41.6	38.3	41.9	42.2
2. New York	2nd	43.1	47.2	51.6	45.7	41.1
3. Texas	5th	31.7	29.8	31.6	33.1	30.7
4. Florida	11th	26.2	25.8	28.0	24.7	25.3
5. Pennsylvania	3rd	35.1	32.8	29.3	31.4	33.0
6. Georgia	11th	36.3	30.8	30.3	36.4	33.6
7. New Jersey	3rd	45.2	40.0	42.0	42.8	47.7
8. Illinois	7th	37.3	38.4	37.1	40.8	38.6

Note: Time required from filing in lower court through appeal is calculated by adding the median times for (a) filing in lower court to trial in each state listed and (b) filing of notice of appeal through last opinion or final order in each circuit court (i.e. appellate court) associated with each state listed.

Sources: Micronomics Table 1, "Caseload for Top 10 States, AAA Arbitration Cases Going to Award and U.S. District Court Civil Cases, 2015."

Tables C-5, U.S. District Courts - Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Periods Ending December 31, 2011 through 2015 (Data from Administrative Office of the U.S. Courts on behalf of the Federal Judiciary).

Tables B-4, U.S. Courts of Appeals - Median Time Intervals in Months for Merit Terminations of Appeals, by Circuit, During the 12-Month Periods Ending September 30, 2011 through 2015 (Data from Administrative Office of the U.S. Courts on behalf of the Federal Judiciary).

"Explanation of Selected Terms" (http://www.uscourts.gov/sites/default/files/explanation-of-selected-terms-september-2014_0.pdf).

TABLE 7

ADDITIONAL TIME REQUIRED
U.S. DISTRICT AND APPELLATE COURT CASES GOING THROUGH APPEAL V.
AAA ARBITRATION CASES GOING TO AWARD
STATES WITH HIGHEST CASELOAD IN 2015
2011 - 2015

State	Circuit	Additional Time Required through Appeal (by State)				
		2011	2012	2013	2014	2015
		(Months)				
		(1)	(2)	(3)	(4)	(5)
1. California	9th	32.0	29.1	25.6	28.7	29.0
2. New York	2nd	31.9	34.8	39.8	32.4	28.6
3. Texas	5th	21.0	16.6	18.1	20.8	19.3
4. Florida	11th	15.5	14.6	16.9	13.5	13.7
5. Pennsylvania	3rd	26.9	23.1	16.1	23.0	21.3
6. Georgia	11th	25.3	22.7	20.5	25.2	20.8
7. New Jersey	3rd	34.7	29.9	31.2	29.6	33.9
8. Illinois	7th	22.2	25.7	22.5	27.5	25.8
9. Average		**26.2**	**24.6**	**23.8**	**25.1**	**24.1**

Sources: Micronomics Table 6, "Median Time Required, U.S. District and Appellate Courts Going through Appeal, States with Highest Caseload in 2015, 2011 - 2015."

Micronomics Table 4, "Median Time Required, AAA Arbitration Cases Going to Award, States with Highest Caseload in 2015, 2011 - 2015."

TABLE 8 -- SUMMARY

MEDIAN TIME REQUIRED AND ADDITIONAL TIME REQUIRED U.S. DISTRICT AND APPELLATE COURT CASES GOING TO TRIAL AND THROUGH APPEAL V. AAA ARBITRATION CASES GOING TO AWARD STATES WITH HIGHEST CASELOAD IN 2015 2011 - 2015

State	Circuit	U.S. District Courts, Filing to Trial[1]	U.S. District and Appellate Courts, Filing through Appeal[2]	Arbitration, Filing to Award[3]	Additional Time Required	
					To Trial	Through Appeal
		(Months)				
		(1)	(2)	(3)	(1) - (3) (4)	(2) - (3) (5)
1. California	9th	27.0	41.5	12.6	14.4	28.9
2. New York	2nd	34.6	45.7	12.2	22.4	33.5
3. Texas	5th	22.0	31.4	12.2	9.8	19.2
4. Florida	11th	18.4	26.0	11.2	7.2	14.8
5. Pennsylvania	3rd	24.6	32.3	10.2	14.4	22.1
6. Georgia	11th	25.9	33.5	10.6	15.3	22.9
7. New Jersey	3rd	35.8	43.5	11.7	24.1	31.8
8. Illinois	7th	30.4	38.4	13.7	16.7	24.7

Notes: Entries reflect averages of the figures shown in Tables 3, 6, and 4 for the years 2011-2015.

[1] Time required for filing to trial reflects median time from filing to start of trial in each state listed. Data exclude criminal cases, prisoner petitions, land condemnations, deportation reviews, recovery of overpayments, and enforcement of judgments.

[2] Time required for filing through appeal is calculated by adding the median times for (a) filing in lower court (i.e. district court) to start of trial in each state listed and (b) filing of notice of appeal through last opinion or final order in each circuit court (i.e. appellate court) associated with each state listed.

[3] Time required for filing to award reflects median time from filing to award in cases determined in arbitration at the AAA in each state listed. Data include cases related to business-to-business, construction, employment, and consumers; data exclude cases related to labor, no-fault insurance in New York, and automobile accident claims in Illinois. Includes cases with claimed amounts of at least $75,000.

Sources: Micronomics Table 3, "Median Time Required, U.S. District Court Civil Cases Going to Trial, States with Highest Caseload in 2015, 2011 - 2015."

Micronomics Table 6, "Median Time Required, U.S. District and Appellate Court Cases Going through Appeal, States with Highest Caseload in 2015, 2011 - 2015."

Micronomics Table 4, "Median Time Required, AAA Arbitration Cases Going to Award, States with Highest Caseload in 2015, 2011 - 2015."

TABLE 9 -- SUMMARY

MEDIAN TIME REQUIRED AND ADDITIONAL TIME REQUIRED U.S. DISTRICT AND APPELLATE COURT CASES GOING TO TRIAL AND THROUGH APPEAL V. AAA ARBITRATION CASES GOING TO AWARD ALL STATES 2011 - 2015

Year	U.S. District Courts, Filing to Trial[1]	U.S. District and Appellate Courts, Filing through Appeal[2]	Arbitration, Filing to Award[3]	Additional Time Required: To Trial	Additional Time Required: Through Appeal
	(Months)				
	(1)	(2)	(3)	(1) - (3) (4)	(2) - (3) (5)
1. 2011	23.6	34.6	10.8	12.8	23.8
2. 2012	23.7	33.5	11.8	11.9	21.7
3. 2013	24.1	33.1	11.5	12.6	21.6
4. 2014	25.3	33.8	12.4	12.9	21.4
5. 2015	24.5	33.0	11.6	12.9	21.4

Notes: [1] Time required for filing to trial reflects median time from filing to start of trial. Data exclude criminal cases, prisoner petitions, land condemnations, deportation reviews, recovery of overpayments, and enforcement of judgments.

[2] Time required from filing through appeal is calculated by adding the median times for (a) filing in lower court (i.e. district court) to start of trial and (b) filing of notice of appeal through last opinion or final order. Entries do not include data for the Federal Circuit.

[3] Time required for filing to award reflects median time from filing to award in cases determined in arbitration at the AAA. Data include cases related to business-to-business, construction, employment, and consumers; data exclude cases related to labor, no-fault insurance in New York, and automobile accident claims in Illinois. Includes cases with claimed amounts of at least $75,000.

Sources: Tables C-5, U.S. District Courts - Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Periods Ending December 31, 2011 through 2015 (Data from Administrative Office of the U.S. Courts on behalf of the Federal Judiciary).

Tables B-4, U.S. Courts of Appeals - Median Time Intervals in Months for Merit Terminations of Appeals, by Circuit, During the 12-Month Periods Ending September 30, 2011 through 2015 (Data from Administrative Office of the U.S. Courts on behalf of the Federal Judiciary).

"Explanation of Selected Terms" (http://www.uscourts.gov/sites/default/files/explanation-of-selected-terms-september-2014_0.pdf).

American Arbitration Association Statistics for arbitrations closed 2011-2015.

TABLE 10

U.S. DISTRICT COURT CIVIL CASES
NUMBER OF CASES AND
MINIMUM AMOUNT AT ISSUE
2011 - 2015

Year	Number of Cases Terminated[1]	U.S. District Courts, Minimum Amount At Issue Per Case[2]	Total Minimum Amount At Issue
		(Dollars)	($000s)
	(1)	(2)	(1) x (2) (3)
1. 2011	247,419	$75,000	$18,556,425
2. 2012	198,023	75,000	14,851,725
3. 2013	199,400	75,000	14,955,000
4. 2014	198,998	75,000	14,924,850
5. 2015	217,288	75,000	16,296,600
6. Total	**1,061,128**		**$79,584,600**

Notes: [1] Number of cases terminated includes cases disposed of by trial or some other method. Excludes criminal cases, prisoner petitions, land condemnations, deportation reviews, recovery of overpayments, and enforcement of judgments.

[2] U.S. District Courts have subject matter jurisdiction over cases that i) arise under any federal law and ii) contain parties of different states (foreign or domestic) and have at least $75,000 at issue. *See* "Federal or State Court: Subject Matter Jurisdiction," *Thomson Reuters FindLaw* (http://litigation.findlaw.com/filing-a-lawsuit/federal-or-state-court-subject-matter-jurisdiction.html).

Sources: Tables C-5, U.S. District Courts - Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Periods Ending December 31, 2011 through 2015 (Data from Administrative Office of the U.S. Courts on behalf of the Federal Judiciary).

"Explanation of Selected Terms" (http://www.uscourts.gov/sites/default/files/explanation-of-selected-terms-september-2014_0.pdf).

"Federal or State Court: Subject Matter Jurisdiction," *Thomson Reuters FindLaw* (http://litigation.findlaw.com/filing-a-lawsuit/federal-or-state-court-subject-matter-jurisdiction.html).

TABLE 11

U.S. DISTRICT COURTS V. AAA ARBITRATION OPPORTUNITY COST ASSOCIATED WITH DELAY TO TRIAL ALL STATES 2011 - 2015

Year	Minimum Amount At Issue ($000s)	Additional Time Required to Trial[1] (Months)	Average But-For Rate of Return[2] (Percent)	Lost Resources Due to Delays[3] ($000s)
	(1)	(2)	(3)	(4)
1. 2011	$18,556,425	12.8	13.0%	$2,583,883
2. 2012	14,851,725	11.9	13.0%	1,913,640
3. 2013	14,955,000	12.6	13.0%	2,047,735
4. 2014	14,924,850	12.9	13.0%	2,095,532
5. 2015	16,296,600	12.9	13.0%	2,288,133
6. Total	**$79,584,600**			**$10,928,923**

Notes: [1] Additional time required to trial represents the difference between median time from filing to trial (U.S. district court civil cases) and median time from filing to award (arbitration).

[2] Average but-for rate of return represents a simple average of the 2011-2015 annual rates of return on investments in the S&P 500.

[3] Lost resources due to delays represent unrealized investment income from funds at risk for longer duration at trial than arbitration. Column 4, lost resources due to delays, is calculated by applying the 13 percent return to the minimum amount at issue each year for the additional time required to trial. The compound interest formula is shown below:
"Column 4 = Column 1 x (1 + Column 3) ^ (Column 2 ÷ months per year) - Column 1".

Sources: Micronomics Table 10, "U.S. District Court Civil Cases, Number of Cases and Minimum Amount At Issue, 2011 - 2015."

Micronomics Table 9, "Median Time Required and Additional Time Required, U.S. District and Appellate Court Cases Going to Trial and through Appeal v. AAA Arbitration Cases Going to Award, All States, 2011 - 2015."

Annual Returns on Stock, Treasury Bonds and Treasury Bills: 1928 - Current, NYU website (http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/histretSP.html).

TABLE 12

U.S. DISTRICT COURTS V. AAA ARBITRATION OPPORTUNITY COST ASSOCIATED WITH DELAY TO TRIAL FOR EIGHT STATES WITH HIGHEST CASELOAD IN 2015 2011 - 2015

Year	Minimum Amount At Issue ($000s)	Additional Time Required to Trial[1] (Months)	Average But-For Rate of Return[2] (Percent)	Lost Resources Due to Delays[3] ($000s)
	(1)	(2)	(3)	(4)
1. 2011	$18,556,425	15.5	13.0%	$3,162,224
2. 2012	14,851,725	15.2	13.0%	2,493,321
3. 2013	14,955,000	15.2	13.0%	2,510,659
4. 2014	14,924,850	16.8	13.0%	2,791,966
5. 2015	16,296,600	15.0	13.0%	2,687,489
6. Total	**$79,584,600**			**$13,645,659**

Notes: [1] Additional time required to trial represents a simple average of the difference between median time from filing to trial (U.S. district court civil cases) and median time from filing to award (arbitration) for eight states with highest caseload in 2015.

[2] Average but-for rate of return represents a simple average of the 2011-2015 annual rates of return on investments in the S&P 500.

[3] Lost resources due to delays represent unrealized investment income from funds at risk for longer duration at trial than arbitration. Column 4, lost resources due to delays, is calculated by applying the 13 percent return to the minimum amount at issue each year for the additional time required to trial. The compound interest formula is shown below:
"Column 4 = Column 1 x (1 + Column 3) ^ (Column 2 ÷ months per year) - Column 1".

Sources: Micronomics Table 10, "U.S. District Court Civil Cases, Number of Cases and Minimum Amount At Issue, 2011 - 2015."

Micronomics Table 5, "Additional Time Required, U.S. District Court Civil Cases Going to Trial v. AAA Arbitration Cases Going to Award, States with Highest Caseload in 2015, 2011 - 2015."

Annual Returns on Stock, Treasury Bonds and Treasury Bills: 1928 - Current, NYU website (http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/histretSP.html).

TABLE 13

U.S. DISTRICT AND APPELLATE COURTS V. AAA ARBITRATION OPPORTUNITY COST ASSOCIATED WITH DELAY THROUGH APPEAL ALL STATES 2011 - 2015

Year	Minimum Amount At Issue ($000s)	Additional Time Required through Appeal[1] (Months)	Average But-For Rate of Return[2] (Percent)	Lost Resources Due to Delays[3] ($000s)
	(1)	(2)	(3)	(4)
1. 2011	$18,556,425	23.8	13.0%	$5,090,058
2. 2012	14,851,725	21.7	13.0%	3,673,369
3. 2013	14,955,000	21.6	13.0%	3,679,924
4. 2014	14,924,850	21.4	13.0%	3,634,661
5. 2015	16,296,600	21.4	13.0%	3,968,725
6. Total	**$79,584,600**			**$20,046,737**

Notes: [1] Additional time required through appeal represents the difference between median time from filing in lower court to last opinion or final order in appellate court (U.S. district and appellate courts) and median time from filing to award (arbitration).

[2] Average but-for rate of return represents a simple average of the 2011-2015 annual rates of return on investments in the S&P 500.

[3] Lost resources due to delays represent unrealized investment income from funds at risk for longer duration at appeal than arbitration. Column 4, lost resources due to delays, is calculated by applying the 13 percent return to the minimum amount at issue each year for the additional time required through appeal. The compound interest formula is shown below:
"Column 4 = Column 1 x (1 + Column 3) ^ (Column 2 ÷ months per year) - Column 1".

Sources: Micronomics Table 10, "U.S. District Court Civil Cases, Number of Cases and Minimum Amount At Issue, 2011 - 2015."

Micronomics Table 9, "Median Time Required and Additional Time Required, U.S. District and Appellate Court Cases Going to Trial and through Appeal v. AAA Arbitration Cases Going to Award, All States, 2011 - 2015."

Annual Returns on Stock, Treasury Bonds and Treasury Bills: 1928 - Current, NYU website (http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/histretSP.html).

TABLE 14

U.S. DISTRICT AND APPELLATE COURTS V. AAA ARBITRATION OPPORTUNITY COST ASSOCIATED WITH DELAY THROUGH APPEAL FOR EIGHT STATES WITH HIGHEST CASELOAD IN 2015 2011 - 2015

Year	Minimum Amount At Issue ($000s)	Additional Time Required through Appeal[1] (Months)	Average But-For Rate of Return[2] (Percent)	Lost Resources Due to Delays[3] ($000s)
	(1)	(2)	(3)	(4)
1. 2011	$18,556,425	26.2	13.0%	$5,672,099
2. 2012	14,851,725	24.6	13.0%	4,221,399
3. 2013	14,955,000	23.8	13.0%	4,109,461
4. 2014	14,924,850	25.1	13.0%	4,344,945
5. 2015	16,296,600	24.1	13.0%	4,523,128
6. Total	**$79,584,600**			**$22,871,032**

Notes: [1] Additional time required through appeal represents a simple average of the difference between median time from filing in lower court to last opinion or final order in appellate court (U.S. district and appellate courts) and median time from filing to award (arbitration) for eight states with highest caseload in 2015.

[2] Average but-for rate of return represents a simple average of the 2011-2015 annual rates of return on investments in the S&P 500.

[3] Lost resources due to delays represent unrealized investment income from funds at risk for longer duration at appeal than arbitration. Column 4, lost resources due to delays, is calculated by applying the 13 percent return to the minimum amount at issue each year for the additional time required through appeal. The compound interest formula is shown below:
"Column 4 = Column 1 x (1 + Column 3) ^ (Column 2 ÷ months per year) - Column 1".

Sources: Micronomics Table 10, "U.S. District Court Civil Cases, Number of Cases and Minimum Amount At Issue, 2011 - 2015."

Micronomics Table 7, "Additional Time Required, U.S. District and Apellate Court Cases Going through Appeal v. AAA Arbitration Cases Going to Award, States with Highest Caseload in 2015, 2011 - 2015."

Annual Returns on Stock, Treasury Bonds and Treasury Bills: 1928 - Current, NYU website (http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/histretSP.html).

TABLE 15 -- SUMMARY

DIRECT, INDIRECT, AND INDUCED LOSSES DUE TO DELAY TO TRIAL ALL STATES 2011 - 2015

	Estimated Losses Due to Delay to Trial
	($000s)
	(1)
1. Direct Loss[1]	$10,928,923
2. Indirect Loss[2]	7,978,696
3. Induced Loss[3]	9,366,971
4. Total	**$28,274,590**

Notes: [1] Direct losses are equal to Lost Resources Due to Delays calculated at Micronomics Table 11, "U.S. District Courts v. AAA Arbitration, Opportunity Cost Associated with Delay to Trial, All States, 2011 - 2015."

[2] Indirect losses (or indirect effects) are estimated decreases in spending on goods and services by firms that experience direct losses.

[3] Induced losses (or induced effects) are estimated decreases in spending by households containing employees of firms that experienced direct and indirect losses.

Sources: Micronomics Table 11, "U.S. District Courts v. AAA Arbitration, Opportunity Cost Associated with Delay to Trial, All States, 2011 - 2015."

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TABLE 16 -- SUMMARY

DIRECT, INDIRECT, AND INDUCED LOSSES DUE TO DELAY TO TRIAL FOR EIGHT STATES WITH HIGHEST CASELOAD IN 2015 2011 - 2015

	Estimated Losses Due to Delay to Trial
	($000s)
	(1)
1. Direct Loss[1]	$13,645,659
2. Indirect Loss[2]	9,962,058
3. Induced Loss[3]	11,695,431
4. Total	**$35,303,148**

Notes: [1] Direct losses are equal to Lost Resources Due to Delays calculated at Micronomics Table 12, "U.S. District Courts v. AAA Arbitration, Opportunity Cost Associated with Delay to Trial for Eight States with Highest Caseload in 2015, 2011 - 2015."

[2] Indirect losses (or indirect effects) are estimated decreases in spending on goods and services by firms that experience direct losses.

[3] Induced losses (or induced effects) are estimated decreases in spending by households containing employees of firms that experienced direct and indirect losses.

Sources: Micronomics Table 12, "U.S. District Courts v. AAA Arbitration, Opportunity Cost Associated with Delay to Trial for Eight States with Highest Caseload in 2015, 2011 - 2015."

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TABLE 17 -- SUMMARY

DIRECT, INDIRECT, AND INDUCED LOSSES DUE TO DELAY THROUGH APPEAL ALL STATES 2011 - 2015

	Estimated Losses Due to Delay through Appeal
	($000s)
	(1)
1. Direct Loss[1]	$20,046,737
2. Indirect Loss[2]	14,635,186
3. Induced Loss[3]	17,181,672
4. Total	**$51,863,595**

Notes: [1] Direct losses are equal to Lost Resources Due to Delays calculated at Micronomics Table 13, "U.S. District and Appellate Courts v. AAA Arbitration, Opportunity Cost Associated with Delay through Appeal, All States, 2011 - 2015."

[2] Indirect losses (or indirect effects) are estimated decreases in spending on goods and services by firms that experience direct losses.

[3] Induced losses (or induced effects) are estimated decreases in spending by households containing employees of firms that experienced direct and indirect losses.

Sources: Micronomics Table 13, "U.S. District and Appellate Courts v. AAA Arbitration, Opportunity Cost Associated with Delay through Appeal, All States, 2011 - 2015."

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TABLE 18 -- SUMMARY

DIRECT, INDIRECT, AND INDUCED LOSSES DUE TO DELAY THROUGH APPEAL FOR EIGHT STATES WITH HIGHEST CASELOAD IN 2015 2011 - 2015

	Estimated Losses Due to Delay through Appeal
	($000s)
	(1)
1. Direct Loss[1]	$22,871,032
2. Indirect Loss[2]	16,697,072
3. Induced Loss[3]	19,602,323
4. Total	**$59,170,427**

Notes: [1] Direct losses are equal to Lost Resources Due to Delays calculated at Micronomics Table 14, "U.S. District and Appellate Courts v. AAA Arbitration, Opportunity Cost Associated with Delay through Appeal for Eight States with Highest Caseload in 2015, 2011 - 2015."

[2] Indirect losses (or indirect effects) are estimated decreases in spending on goods and services by firms that experience direct losses.

[3] Induced losses (or induced effects) are estimated decreases in spending by households containing employees of firms that experienced direct and indirect losses.

Sources: Micronomics Table 14, "U.S. District and Appellate Courts v. AAA Arbitration, Opportunity Cost Associated with Delay through Appeal for Eight States with Highest Caseload in 2015, 2011 - 2015."

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Articles

DEATH BY DISCOVERY, DELAY, AND DISEMPOWERMENT: LEGAL AUTHORITY FOR ARBITRATORS TO PROVIDE A COST-EFFECTIVE AND EXPEDITIOUS PROCESS

Tracey B. Frisch [a1]

Whether warranted or not, despite statistics to the contrary, [1] arbitration in recent years has become a punching bag for criticism that it has begun to mirror the type of scorched earth discovery practices and delays seen in litigation. Why is this? Is it because parties are not actively participating in the arbitration process and instead have allowed their outside counsels to use the litigation-style discovery and delay tactics with which counsel feel most comfortable? Maybe. Do parties themselves want protracted discovery and a drawn out arbitration process? Some, perhaps. Has arbitration become a victim of its own success, attracting more bet-the company-claims that demand a process reflecting the magnitude of those claims? It's possible. What role, if any, do arbitrators play in ensuring that the arbitration process does not fall victim to death by discovery, delay, and arbitrator disempowerment? A pivotal role. This article outlines why arbitrators should feel empowered to take an active role in managing the arbitration process -- be it through refusing to hear unnecessary evidence, denying unwarranted discovery requests, denying excessive adjournment requests, deciding an issue or disposing of a case based on a dispositive motion, or sanctioning parties for failure to comply with a discovery order or lack of good faith in the arbitration process -- and it provides guidance as to how arbitrators can manage the arbitration process without feeling concerned that their award will be in danger of vacatur.

***156** The Federal Arbitration Act ("FAA") lists as grounds for vacatur under Section 10(a)(3) failure to hear pertinent and material evidence, refusal to postpone a hearing, and other arbitrators' misbehavior prejudicing the rights of any party. [2] Arbitrators, however, do not need to live in fear that their awards will be vacated under FAA 10(a)(3). While arbitrators do need to be aware of the limits of their authority, courts around the country generally defer to the arbitrators' discretion in this context. Arbitrators play a critical role in asserting their authority to provide parties with a cost-effective and expeditious arbitration -- no informed arbitrator should shy away from their responsibility for fear of jeopardizing the award.

I. ARBITRATORS CAN REFUSE TO HEAR EVIDENCE AND DENY DISCOVERY REQUESTS SO LONG AS PARTIES ARE PROVIDED A FUNDAMENTALLY FAIR HEARING

Judicial review of awards on the ground that arbitrators have refused to hear evidence is limited. Courts have confirmed awards so long as the arbitrators' refusal to hear evidence or deny discovery requests did not deprive the party of a fundamentally fair hearing. The court's analysis is performed on a case-by-case basis with wide discretion given to the arbitrator. The fundamentally fair hearing standard used to determine whether arbitrators have misconducted themselves by refusing to hear pertinent and material evidence under Section 10(a)(3) has been adopted by the Eleventh, Sixth, Fifth, and Second Circuits. The following cases highlight where courts draw the line between a fundamentally fair and unfair hearing. For instance, did the arbitrator exceed her authority pursuant to the parties' arbitration clause, and if so, did the erroneous determination cause prejudice to a party.

***157** In *Rosenweig v. Morgan Stanley*, the Eleventh Circuit confirmed an arbitral award against Morgan Stanley finding that the arbitrators' refusal to allow Morgan Stanley additional cross-examination of Rosenweig, its former employee, did not

amount to misconduct. [3] The arbitrators did not explain their reasons for denying the additional cross-examination. However, the court determined that the evidence from additional cross-examination, concerning a client list contained in disks produced by Rosenweig, would have been cumulative and immaterial, and for this reason, Morgan Stanley was not deprived of a fair hearing. [4]

The Sixth Circuit ruled similarly in *Nationwide Mutual Insurance Co. v. Home Insurance Co.* [5] In *Nationwide Mutual Insurance Co.*, the Court confirmed the arbitral award where the reinsurer argued that the panel was guilty of misconduct because the panel's damages decision was based on spreadsheets prepared by the insurer without allegedly allowing the reinsurer to conduct discovery as to the adequacy of the insurer's cost estimates. The Sixth Circuit stated:
'Fundamental fairness requires only notice, an opportunity to present relevant and material evidence and arguments to the arbitrators, and an absence of bias on the part of the arbitrators.' [*Louisiana D. Brown 1992 Irrevocable Trust v. Peabody Coal Co.*, No. 99-3322, 2000 WL 178554, at *6 (6th Cir. Feb. 8, 2000).] Because [the reinsurer] received copies of [the insurer's] submissions on the costs it incurred in defending against rescission, and the arbitration panel gave [the reinsurer] an opportunity to respond to these submissions, it is not clear what purpose discovery or a hearing on this issue would have served. [6]

Thus, the *Nationwide Mutual Insurance Co.* Court held that "the standard for judicial review of arbitration procedures is merely whether a party to arbitration has been denied a fundamentally fair hearing" and found that the parties had not been denied a fundamentally fair hearing. [7]

The rationale behind the fundamentally fair hearing standard has been defined by the Fifth Circuit. [8] In *Prestige Ford v. Ford* ***158** *Dealer Computer Services, Inc.*, the Court confirmed the arbitral award when the arbitrators denied motions to compel discovery. [9] In its opinion, the Court explained that "arbitrators are not bound to hear all of the evidence tendered by the parties; however, they must give each of the parties to the disputes an adequate opportunity to present its evidence and arguments." [10] The arbitrators had not denied the parties a fair hearing when they held hearings on motions to compel discovery and denied them. The Court concluded that "submission of disputes to arbitration always risks an accumulation of procedural and evidentiary shortcuts that would properly frustrate counsel in a formal trial; but because the advantages of arbitration are speed and informality, the arbitrator should be expected to act affirmatively to simplify and expedite the proceedings before him." [11]

Courts have also examined arbitral rulings alleged to exclude material and pertinent evidence, which the losing party argues had a prejudicial effect. [12] In *LJL 33rd Street Associates, LLC v. Pitcairn Property Inc.*, the Second Circuit Court of Appeals confirmed the award in part over the losing party's argument that the arbitrator excluded hearsay documents that should have been considered. [13] The Court explained that the evidence the arbitrator excluded was all hearsay, and that while arbitrators are not bound with strict evidentiary rules, they are not prohibited from excluding hearsay documents. [14] Furthermore, the Court stated that the arbitrator gave the party the opportunity to eliminate the hearsay by bringing in the makers of the documents to the arbitration hearing. There was thus no prejudice to the party. For this reason, and based upon the Court's deference to arbitrators' evidentiary decisions, ***159** the Court held that the parties were not denied a fundamentally fair hearing. [15]

District courts have also adopted the fundamentally fair hearing standard. [16] In *A.H. Robins Co., Inc. v. Dalkon Shield*, the Court confirmed the arbitral award, finding that the arbitrator's decision to exclude evidence of defect in the product at issue was not an abuse of their discretion, and even if it was, the exclusion of evidence did not deprive the claimants of a fundamentally fair hearing. [17] To determine whether Section 10(a)(3) of the FAA had been violated, the court used a two-pronged test. First, the claimant had to show "that the arbitrator's evidentiary ruling was erroneous." [18] Second, the claimant had to show "that the error deprived the movant of a fundamentally fair hearing." [19] The Court determined that the arbitrator's evidentiary rulings

were not erroneous and that even if the court found that the arbitrator's evidentiary rulings were erroneous, the movants did not show that they were denied a fundamentally fair hearing.[20] Furthermore, the *Dalkon Shield* Court expressed concern that a court's review of arbitral awards should be limited because "an overly expansive review of such decisions would undermine the efficiencies which arbitration seeks to achieve."[21]

Many district courts have applied a similarly limited review of arbitral awards challenged under Section 10(a)(3).[22] The Southern ***160** District of New York held that an arbitrator's refusal to hear or to admit evidence alone does not constitute misconduct; it only constitutes misconduct when it amounts to a denial of fundamental fairness.[23] For instance, in *Areca, Inc. v. Oppenheimer and Palli Hulton Associates*, the Court denied the motion to vacate based on petitioner's argument that the arbitrators erroneously refused to allow the petitioner to present the testimony of the brokerage firm's CFO.[24] However, the Court noted that "petitioners presented their direct case over seven full hearing days, in which they called ten witnesses, including four present and former [ ] employees and three experts, and introduced over 148 exhibits into evidence."[25] Therefore, "[t]he scope of inquiry afforded [to] petitioners was certainly sufficient to enable the arbitrators to make an informed decision and to provide petitioners a fundamentally fair hearing."[26] The Court further stated that the arbitrators' broad discretion to decide whether to hear evidence needed to be respected and that arbitrators needed not to compromise their hearing of relevant evidence with arbitration's need for speed and efficiency.[27]

Certain state courts have also confirmed awards despite parties' allegations that arbitrators refused to hear or admit evidence.[28] Similar to their federal counterparts, the courts focused not only on the arbitrators' alleged error, but also on the alleged prejudice suffered by the claimant from this alleged error. For instance, in *Hicks III v. UBS Financial Services, Inc.*, a Utah appellate ***161** court reversed the lower court and confirmed an arbitral award in which the movant sought to vacate the arbitration award based on what it contended were erroneous discovery decisions that substantially prejudiced its rights to participate fully in the arbitration.[29] Namely, the movant based its motion to vacate on the arbitrator's alleged denial of its ability to cross-examine a witness and denial of certain deposition requests.[30] While the case focused on FINRA rules, the Court held:
[A]n arbitrator's discovery decisions can provide grounds for vacatur if those decisions prevent a party from exercising statutorily-guaranteed rights to an extent that 'substantially prejudice[s]' the complaining party. . . . At a minimum, a discovery decision must be sufficiently egregious that the district court is able to identify specifically what the injustice is and how the injustice can be remedied.[31]

In this case, the movant presented no record of the arbitration proceeding itself and instead sought vacatur of the award based on an insinuation that a piece of evidence presented by the opposing party was false.[32] The Court held that credibility determinations are exclusively within the province of the arbitration panel and nothing movant presented identified any specific information he was denied or precluded from presenting.[33] Therefore, the court held that movant failed to show that the arbitration panel's discovery decisions substantially prejudiced his rights to present his case fairly.[34]

Not surprisingly, these state courts' views are similar to the federal courts' interpretations of the standard for a violation of Section 10(a)(3). Because evidentiary rulings are procedural in nature, courts rightfully defer to arbitrators' decisions on evidentiary issues so long as these decisions do not rob the parties of a fundamentally fair hearing. While courts will vacate awards at the extremes, generally arbitrators are generally granted the wide discretion that they need to provide for an expeditious and cost-effective process.

*162 II. COURTS WILL VACATE AN AWARD IF ARBITRATORS' REFUSAL TO HEAR PERTINENT AND MATERIAL EVIDENCE/DENIAL OF DISCOVERY REQUEST DEPRIVES A PARTY OF A FUNDAMENTALLY FAIR HEARING

The Fourth and Second Circuits, applying the fundamentally fair hearing standard, have vacated arbitral awards on the ground that the arbitrators denied the parties a fundamentally fair hearing. [35]

In *International Union, United Mine Workers of America v. Marrowbone Development Co.*, the Fourth Circuit vacated an award because the arbitrator had denied the parties a fair hearing. [36] The arbitrator reached a decision without holding a hearing. [37] First, the Court explained that the arbitrator's making of the award without an evidentiary hearing conflicted with the parties' agreement to arbitrate, which required the arbitrator to hold a hearing. Indeed, the parties' agreement stated that the arbitrator had to "conduct a hearing in order to hear testimony, receive evidence and consider arguments." [38] Second, the Court explained that while "an arbitrator typically retains broad discretion over procedural matters and does not have to hear every piece of evidence that the parties wish to present," the Court could not condone an arbitrator's decision to both go against the parties' agreement and to deny them a full and fair hearing. [39]

In *Tempo Shain Corp. v. Bertek, Inc.*, the Second Circuit vacated an arbitral award on the ground that the arbitrators' conduct in denying the testimony of one of the parties' officers deprived the party of a fundamentally fair arbitration. [40] The claims in arbitration were based on whether the parties were fraudulently induced to enter into a contract. The witness at issue was Bertek's former president who was intimately involved in the contract negotiations ***163** and allegedly was the only person who could testify about certain aspects of the negotiations. The witness became temporarily unavailable to testify after his wife was diagnosed with a reoccurrence of cancer. [41] Bertek asked the arbitrators to keep "the record open until [the witness] could testify." [42] The arbitrators refused Bertek's request on the ground that the testimony would be cumulative. [43] The Second Circuit did not defer to the arbitrators' decision because they had given no reasonable basis for their denial. [44] While the *Tempo Shain Corp.* Court recognized that "undue judicial intervention would inevitably judicialize the arbitration process, thus defeating the objective of providing an alternative to judicial dispute resolution," the Court found that:
[B]ecause [the witness] as sole negotiator for Bertek was the only person who could have testified in rebuttal of appellees' fraudulent inducement claim, and the documentary evidence did not adequately address such testimony, there was no reasonable basis for the arbitrators to conclude that [the witnesses] testimony would have been cumulative with respect to those issues. [45]

Similarly, district courts in the Second and Ninth Circuits have vacated awards on the grounds that the arbitrators denied the parties a fair hearing when they refused to hear material and pertinent evidence. [46] In *Harvey Aluminum (Inc.) v. United Steelworkers of America, AFL-CIO*, the Court vacated the award because the arbitrator refused to consider testimony based on rules of evidence without first notifying the parties and counsel that the rules of evidence would apply. [47] The arbitrator's opinion stated that he disregarded a witness's rebuttal testimony because it should have been presented as part of the principal case and was not timely. [48] However, no evidentiary rules were announced prior to the hearing by the arbitrator and no such rules were included in the parties' arbitration agreement. [49] Thus, the Court found that the arbitrator's decision to ignore the testimony provided by the petitioner's rebuttal ***164** witness amounted to a fundamentally unfair hearing. [50] The Court held that the rules of evidence did not apply to an arbitral proceeding and by denying evidence to be heard on that basis alone without warning the parties as to what rules the arbitrator would be applying, the arbitrator denied the petitioner a fundamentally fair hearing. [51]

State courts have also vacated awards pursuant to Section 10(a)(3) when arbitrators refused to hear evidence that the court found to be material and pertinent. [52] In *Boston Public Health Commission v. Boston Emergency Medical Services-Boston Police*

Patrolmen's Association, IUPA No. 16807, after the evidentiary hearing took place, the arbitrator set a date for the parties' post-hearing briefs to be due.[53] Prior to the due date for the post-hearing briefs, the employer filed a motion for leave to file supplementary evidence of warnings given to the employee that justified the employer issuing a five-day suspension. The arbitrator denied the employer's motion and refused to accept the supplementary evidence. The arbitrator based his denial on the fact that the evidentiary record was closed as of the conclusion of the evidentiary hearing. The arbitrator's award found that the employer was not justified in issuing the five-day suspension. The Massachusetts Court of Appeals vacated the award on the ground that the arbitrator did not have the authority under the American Arbitration Association rules adopted by the parties to declare the evidentiary record closed prior to the due date for the post-hearing briefs.[54] The Court found the following:
[A]lthough decisions concerning excluding or admitting evidence are generally within an arbitrator's discretion, the arbitrator did not have the authority under the American Arbitration Association rules to declare that the hearing was closed before the briefs were filed, or to exclude evidence on that basis. As a result, the arbitrator's justification for excluding the evidence -- that the hearing was closed -- was not within his authority to determine, ***165** particularly when he never made a determination concerning the materiality or reliability of the evidence.[55]

The Court further found that the evidence excluded was material and the exclusion prejudiced the rights of the employer.[56]

An overarching theme in all of these cases is that courts show deference to arbitrators' evidentiary decisions. However, given that arbitration is a creature of contract, it is important that an arbitrator stay within the confines of the parties' agreement. For example, if the clause provides that each party take two depositions, then the arbitrator should not deny a party two depositions. Beyond that, courts should view evidentiary matters as procedural and thus leave them to the wide discretion of the arbitrator. Courts that substitute their own reasoning and vacate awards simply because they disagree with the arbitrators' evidentiary rulings risk going beyond the confines of 10(a)(3) and being reversed. If arbitration is to live up to its promise as an efficient and cost-effective alternative to litigation, courts need to continue to provide deference to arbitrators' evidentiary rulings.

III. COURTS DEFER TO ARBITRATORS' DISCRETION IN THEIR DECISION TO GRANT OR DENY ADJOURNMENTS

Even though FAA 10(a)(3) provides that awards may be vacated based on an arbitrator's refusal to postpone the hearing upon sufficient cause shown -- as with evidentiary rulings -- granting or denying requests for adjournments are generally considered procedural matters and thus courts grant arbitrators broad discretion in such determinations. This makes sense given that the arbitrator, not a reviewing court, is closest to the matter at the time when the request for adjournment is being sought. Requests for adjournments can derail an otherwise efficient arbitration. Unlike in the context of litigation where matters in court are often adjourned without protest, the granting of an adjournment in arbitration should be the exception rather than the rule. Not surprisingly, the Second and the Sixth Circuits, as well as several district courts, have held that arbitrators' refusal to postpone hearings did not negate ***166** a fundamentally fair hearing or amount to an abuse of the arbitrator's discretion.[57]

Courts have confirmed the awards submitted to them when arbitrators have denied adjournment requests in the arbitral proceedings. For instance, in *Alexander Julian Inc. v. Mimco, Inc.*, the Second Circuit determined that granting an adjournment falls within the arbitrator's broad discretion.[58] In *Mimco*, the Court held that the arbitrators' denial of an adjournment request made by a party because his counsel had to be in federal court did not deprive the party of a fundamentally fair hearing.[59] The Court had two bases for its decision. First, the Court explained that the arbitrators had “at least a barely colorable justification” for denying the adjournment.[60] Second, the Court reiterated the *Tempo Shain* rule and held that “the granting or denying of an adjournment falls within the broad discretion of appointed arbitrators.”[61] Thus, this decision illustrates courts' deference to the arbitrators' procedural decisions.

Other courts have held that when arbitrators have a reasonable basis and justification for the adjournment refusal, courts should defer to the arbitrators' decision. [62] For example, in *Bisnoff v. King*, the Southern District of New York deferred to the arbitrators' decision in refusing to postpone a hearing. [63] There, the arbitrators denied a party's request to postpone a hearing, even though the party asked for this postponement on the grounds of sickness. [64] The arbitrators clearly and reasonably justified their denial in a letter to the party explaining that they believed that the party was capable of participating in hearings. [65] The Court deferred to this ***167** decision for two reasons. First, the Court held that the arbitrators had clearly and reasonably justified their denial. Second, the Court stated that it was "not empowered to second guess the arbitrators' assessment of credibility." [66] The *Bisnoff* Court distinguished this case from *Tempo Shain*. In *Tempo Shain*, the Second Circuit had not deferred to the arbitrators' decision to refuse to hear a witness's testimony. There, Bertek, a manufacturing company planned on calling a crucial witness for its case. Bertek asked for the arbitrators to keep "the record open until [the witness] could testify." [67] The arbitrators refused Bertek's request on the ground that the testimony would be cumulative. The Second Circuit did not defer to the arbitrators' decision because they had given no reasonable basis for their denial. In *Bisnoff*, the situation was different because the arbitrators provided reasons for their decision. Thus, the standard of review remains deferential to the arbitrators' decision. Courts will defer to arbitrators' procedural decisions so long as the arbitrators have provided a reasonable basis for their choices. [68]

The Sixth Circuit has shown even greater deference to the arbitrators' procedural decisions, such as granting or refusing an adjournment request. [69] *In re Time Construction, Inc. v. Time Construction Inc.*, the Court confirmed the arbitral award and held that the arbitration panel's refusal to postpone a hearing requested on the ground of the illness of a partner in a partnership was not an abuse of discretion. [70] In this case, the arbitration involved a construction dispute between a construction company and a partnership. The partnership moved to vacate the award entered in favor of the construction company on the ground that the panel abused its discretion in denying the adjournment request asked for because of a partner's sickness. [71] The Sixth Circuit reviewed the case under Michigan Court Rules 3.602(j)(1)(d) (similar to FAA 10(a)(3)) and it stated that "the party seeking to vacate the arbitration award carried the burden of proving by 'clear and convincing evidence' that the arbitrators abused their discretion." [72] Furthermore, the Court stated that, within the arbitration, it was the burden of party seeking the adjournment to provide the information ***168** necessary for the arbitrator to grant the adjournment. [73] The Court thus reviewed the procedural facts and observed that the arbitrators had "been generous in granting [the partnership] continuances and . . . adjournments throughout the two and a half years of the arbitration." [74] In light of these facts, the Court confirmed the award.

Courts have specified that so long as the parties had a full opportunity to present their cases, the arbitrator's denial does not amount to a violation of the fundamentally fair hearing standard. [75] Courts have also relied on the principle that so long as arbitrators provide the parties an adequate opportunity to present their evidence and argument, they are not bound by formal rules of procedure and evidence. [76]

Finally, courts have decided that arbitrators who act within the authority granted to them by the rules of the arbitration have not denied a fundamentally fair hearing to the parties. [77] For example, in *Verve Communications Pvt. Ltd v. Software International, Inc.*, the New Jersey District Court confirmed the arbitral award and held that an arbitrator had properly refused the party's request for a continuance of discovery as the arbitrator acted within the authority granted to him by the arbitration rules. [78] In this case, the arbitration agreement provided that the dispute be resolved in accordance with the Commercial Arbitration Rules of the American Arbitration Association. [79] The party against whom the award was entered moved to vacate the award on the ground that the arbitrator wrongfully denied him the right to a subpoena to depose a non-party and submit a transcript of the deposition. The Court disagreed and stated that since the AAA Rules provided that "the tribunal may conduct the arbitration in whatever manner it considers ***169** appropriate, provided that the parties are treated with equality and that each party has the right to be heard is given a fair opportunity to present its case" and that the arbitrator "shall manage the exchange of information among the parties in advance of the hearing with a view to maintaining efficiency and economy," the arbitrator had sufficient authority to decide whether or not to extend discovery. [80] Furthermore, the Court observed that the party seeking to vacate the

award had the opportunity to present evidence and chose not to during the eight months that the arbitration lasted. [81] For these reasons, the arbitrator's choice not to continue discovery did not amount to misconduct under FAA 10(a)(3). [82]

As evidenced from the cases above, courts generally provide arbitrators with wide discretion when reviewing arbitrators' decisions regarding adjournment requests. However, courts will look to the arbitrator's reasoning to determine whether there was a reasonable basis or justification for denying a request for adjournment. Therefore, best practice dictates that arbitrators provide reasoning for their denial of an adjournment.

V. COURTS WILL VACATE AN AWARD IF ARBITRATORS' REFUSAL TO GRANT ADJOURNMENT AMOUNTS TO PREJUDICIAL MISCONDUCT

Courts have held that while the decision to grant or to deny adjournment requests is generally within the arbitrator's discretion, when the decision amounts to prejudicial misconduct the award must be vacated. [83]

The appellate division of the Supreme Court of New York has held that an arbitrator's refusal to grant a party's request for adjournment of an arbitration proceeding amounts to misconduct and justifies vacatur of the award when the party requesting the adjournment was not properly notified of the arbitration. [84] In *Wedbush Morgan Securities, Inc. v. Brandman*, a New York Stock Exchange arbitration, the Court granted the vacatur of the award because the arbitrators failed to provide due notice of arbitration ***170** to one of the parties. [85] The Court held that New York Civil Practice Law and Rules 7506[b] which mirrored New York Stock Exchange Rule 617 required arbitrators in New York Stock Exchange arbitrations to "notify the parties [of an upcoming arbitration hearing] in writing personally or by registered or certified mail not less than eight days before the hearing." [86] Failure by the arbitrators to do so and denial of an adjournment upon request by the improperly notified party amounted to prejudicial misconduct. [87] In *In re Arbitration between Leblon Consultants Ltd. and Jackson China, Inc.*, the Court also vacated the arbitral award on the ground that the arbitrator denied an adjournment request. [88] The Court remanded the case to the American Arbitration Association. [89] In this case, the respondent in the arbitration sought a hearing adjournment from the arbitrator in order to have the only employee who had knowledge of the dispute fly from England to New York and attend the arbitral hearing. In light of these facts, the Court found that the arbitrator had abused his discretion by refusing the adjournment. [90] Judge Silverman, dissenting in this opinion, stated that he would have confirmed the award. Based on the history of adjournments and delays in this arbitration, Judge Silverman considered that the arbitrator acted within his discretion. [91]

In *Pacilli v. Philips Appel & Walden, Inc.*, the Eastern District of Pennsylvania partially vacated the award on the ground that the arbitrators had refused to adjourn proceedings to allow a party that was rejoined the opportunity to cross-examine a witness concerning the cross claim against the rejoined party. [92] In this case, the Pacillis initiated a New York Stock Exchange arbitration against a brokerage firm for unauthorized transfer of funds, unauthorized securities transactions, and other claims. [93] The claimants named a series of respondents, including Mr. Engelhardt, the Compliance Director of the brokerage firm. A few days into the proceeding, Engelhardt reached a settlement agreement with the Pacillis and the claims against him were dismissed. [94] However, later in the proceeding, ***171** the claimant's expert witness testified as to Engelhardt's compliance obligations. [95] At this time, the arbitral panel decided to entertain cross claims from Engelhardt and the other respondents. The panel left a telephone message with Engelhardt's counsel inviting cross claims from Engelhardt. Within ten minutes of this phone call and before Engelhardt's counsel could respond, the arbitrators proceeded with the cross claims against Engelhardt with other defendants present. [96] Within forty minutes of the phone call, the arbitrators entertained cross-examination of the claimant's expert witness by another defendant, which was incriminating for Engelhardt. [97] Finally, the arbitrators entered an award against Engelhardt and other defendants. [98] The Court in this case vacated the award against Engelhardt on the ground

that the arbitrators denied him his right to a fair hearing. [99] Therefore, the arbitrators' decision not to wait for Engelhardt to appear, respond, and cross examine the expert witness amounted to misconduct on the part of the arbitrators.

These cases show that the while there is a presumption in favor of deferring to the arbitrator's discretion, unreasonable denials of adjournments will justify vacatur. These cases, however, involved situations in which arbitrators denied the parties' basic rights, such as the right to notice, the right to present a crucial witness, and the right to appear in the arbitration and cross-examine a witness. Thus, these cases do not undermine arbitrators' discretion; they only show that this discretion is to be construed within the broad boundaries of a fundamentally fair hearing. Given that the grounds for vacatur under 10(a)(3) are based on an arbitrator's procedural determination, courts rightly grant arbitrators wide discretion in these matters, vacating awards only at the extremes.

V. COURTS HAVE CONFIRMED AWARDS WHEN ARBITRATORS DECIDED THE CASE ON DISPOSITIVE MOTIONS

Federal courts have confirmed awards and deferred to the arbitrators' decision to render either an award on the merits or a motion to dismiss without holding a full evidentiary hearing. These ***172** decisions focus on whether the process in which the arbitrator engaged to reach her determination deprived the parties of a fundamentally fair hearing. The matter at issue must be ripe for summary disposition and the parties must be given the opportunity to submit argument on the issue.

In *Intercarbon Bermuda, Ltd. v. Caltex Trading and Transport Corporation*, the Southern District of New York confirmed an award that arbitrators made without holding in-person evidentiary hearings. [100] In this case, after the parties filed submissions and without holding a hearing, the arbitrator made a preliminary award in favor of Caltraport. The arbitrator then rendered his final award in favor of Caltraport, without holding any in-person hearings. InterCarbon, which had initiated the arbitration, moved to vacate the award on the grounds that the arbitrator was guilty of misconduct under FAA 10(a)(3) because he refused to hear evidence pertinent and material to the dispute. The Southern District of New York determined that InterCarbon had received a fundamentally fair hearing even though it was a "paper hearing." [101] To reach this decision, the Court applied the F.R.C.P. 56 standard (summary judgment) to determine whether the documents-only "hearing" was proper. [102] The Court determined that "the extent to which issues of fact were in dispute" determines whether the arbitrator should hold a live hearing. [103] In this arbitration, the circumstances were such that a summary disposition was fair. [104] Therefore, the arbitrator did not deny the parties a fundamentally fair hearing by considering only document submissions.

In *Warren v. Tacher*, the United States District Court for the Western District of Kentucky similarly refused to vacate an award on the ground that an arbitrator had decided to dismiss the case against certain respondents without permitting discovery. [105] In *Warren*, one of the respondents in an arbitration involving a broker-dealer transaction filed a motion to dismiss all claims against it at the outset of the arbitration. Petitioners filed a written response to this motion and the arbitration panel subsequently granted the respondent's motion to dismiss. After an arbitral award was rendered in petitioner's favor against the remaining respondents, petitioners ***173** moved to vacate the award in their favor on the ground that the arbitrator had granted one of the respondents' motion to dismiss prior to discovery and a full evidentiary hearing. The Court confirmed the award and held that petitioners failed to show that the arbitrator's decision denied them a fundamentally fair hearing. [106] Indeed, the Court noted that the arbitration panel entertained written submissions and a hearing on the motion to dismiss prior to granting the motion.

State courts have also deferred to arbitrators' granting dispositive motions and confirmed awards so long as parties were not denied a fundamentally fair hearing. [107] For instance, in *Pegasus Construction Corp. v. Turner Construction. Co.*, the Court of Appeals of Washington confirmed an arbitral award in which the arbitrator had decided that he could not award either party any damages because they did not comply with their contract. [108] In this arbitration, a subcontractor and a contractor on a construction project had a dispute. The subcontractor filed an arbitration demand under the AAA's Construction Industry

Arbitration Rules. The contractor then moved to dismiss the claims against him on the ground that the subcontractor had not complied with the dispute resolution provisions agreed to in the prime contract. After reviewing written submissions and holding oral arguments on the motion to dismiss, the arbitrator held that neither party had complied with the contract provisions. [109] Thus, the arbitrator awarded damages to neither party. The Court confirmed the award and held that a full hearing is not required when a dispositive issue makes it unnecessary. [110]

In *Schlessinger v. Rosenfeld, Meyer & Susman*, the California Court of Appeals confirmed an award even though the arbitrator resolved the principal issues presented to him by summary adjudications motions. [111] In this case, a law firm and a former partner in the law firm resorted to arbitration to determine the amount due to ***174** the former partner. [112] The parties agreed to arbitrate pursuant to AAA rules. [113] First, the parties cross-motioned for summary adjudication on the validity of the partnership agreement's penalty for competition. [114] The parties submitted written documents and the arbitrator held a hearing via telephone conference on the motion. The arbitrator then determined that the agreement was valid but that the reasonableness of the penalty would be examined after taking further evidence. [115] After engaging in discovery on that matter, the former partner filed a motion for summary adjudication contending that the penalty ("tolls") was unreasonable. Both parties submitted written submissions as well as declarations and depositions from relevant persons in the dispute (accountant, current law firm partners, former law firm partner). The arbitrator then conducted a telephone hearing on the motion. The arbitrator then ruled that the penalty was reasonable as a matter of law. [116] The arbitral award was then issued after the parties resolved the remaining issues by stipulation. The Court held that the former partner was not deprived of a fundamentally fair hearing because the arbitrator was allowed to rule on summary adjudication motions even if the AAA rules did not explicitly grant that power to the arbitrator. [117] The Court did, however, caution that its holding "should not be taken as an endorsement of motions for summary judgment or summary adjudication in the arbitration context." [118]

These cases indicate that arbitrators' granting dispositive motions will be upheld when the contract or the parties' agreement grants arbitrators such power and when decisions do not deprive the parties of a fundamentally fair hearing. [119] The permissibility of arbitrators to grant dispositive motions is supported by administrative rules such as the AAA Commercial Arbitration Rules ***175** amended and effective October 1, 2013, R-33. "The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case." [120] An arbitrator's authority to grant summary disposition motions is crucial to promoting the time and cost savings available in the arbitration process.

VI. SANCTIONS UNDER FAA 10 (A)(4)

One way for an arbitrator's ruling on discovery issues to have teeth is for the arbitrator to issue sanctions against a non-compliant party. Courts reviewing awards sanctioning a party for lack of good faith in the conduct of the arbitration or faulty document production have confirmed such awards. [121] The arbitrator must have the authority to award sanctions, be it granted by the parties' arbitration clause, applicable statute, or the parties themselves. Once the arbitrator determines that she has authority to award sanctions, one limit to the arbitrator's power is that the party owing sanctions must be a party to the arbitration agreement.

In *Reliastar Life Insurance Company of New York v. EMC National Life Co.*, the Second Circuit confirmed an award in which the arbitrator awarded attorney fees to the prevailing party. [122] In this case, the sanctioned party argued that the arbitrators had exceeded their powers and that the award should be vacated pursuant to FAA 10(a)(4). [123] The Court determined that it must evaluate whether the arbitrator had the power to award attorney's fees in the parties' agreement to arbitrate. [124] The Court held that the parties' arbitration agreement, which stated that parties should bear their own arbitration expenses, was sufficiently broad to confer ***176** on arbitrators the power to sanction a party that participates in the arbitration in bad faith. [125]

Similarly, in *Interchem Asia 2000 Pte. Ltd. v. Oceana Petrochemicals AG*, the Second Circuit confirmed in part an award that sanctioned a party for faulty document production and held that "an arbitrator's determination that a party acted in bad faith is subject to limited review." [126] This case involved a commercial arbitration for a breach of a contract to sell and purchase a petrochemical. The purchaser initiated the arbitration against the seller for breach of contract. [127] The arbitration was to be conducted under the Commercial Arbitration Rules of the AAA. [128] In their initial submissions, both parties requested attorney's fees. During the arbitration proceeding, the arbitrator determined that the purchaser's document production was "patently dilatory and evasive," and at the request of the seller, the arbitrator imposed sanctions on the purchaser and its attorney. [129] The Second Circuit confirmed the award with regards to sanctions imposed on the purchaser on the ground that since the parties had both requested attorney's fees in the initial submissions, the arbitrator was authorized to award attorneys fees. [130] There was thus no violation of FAA 10 (a)(4). However, the Court found that the arbitrator did not have the authority to award sanctions against the attorney herself because she was not a party to the arbitration agreement. [131]

In *First Preservation Capital, Inc. v. Smith Barney, Harris Upham & Co.*, the United States District Court for the Southern District of Florida confirmed an arbitral panel's decision to dismiss with prejudice a case on the ground that the claimant had sent "egregious" letters to clients concerning the respondent. [132] In that case, the Court held that the arbitrators had not exceeded their ***177** power in dismissing this case with prejudice. [133] Indeed, the Court reasoned that, "if arbitrators are not permitted to impose the ultimate sanction of dismissal on plaintiffs who flagrantly disregard rules and procedures put in place to control discovery, arbitrators will not be able to assert the power necessary to properly adjudicate claims." [134]

These cases show that even when they are confronted with a motion to vacate an award based on sanctions allegedly imposed improperly by arbitrators, courts show deference to arbitrators' decisions.

In *MCR of America, Inc. v. Greene*, the Maryland Court of Special Appeals vacated an arbitral award in which the arbitrator had sanctioned the employee and his counsel to pay the employer's attorney's fees in an arbitration between an employee and an employer. [135] The Court held that the arbitrator had exceeded her authority under Maryland's Uniform Arbitration for two reasons. First, the arbitrator exceeded her authority because the parties' agreement did not expressly enable her to award attorney's fees. [136] The Court disregarded the AAA rules applicable to the arbitration that allowed for attorney's fees, and it looked at the Maryland Arbitration Act, which presumed that parties have not agreed to attorney's fees unless expressly stated in the agreement. Second, the Court held that arbitration was a matter of contract and for this reason, since the employee's attorney was not party to the contract, he could not be sanctioned. [137]

While this Maryland decision vacated the award pursuant to FAA 10(a)(4), it does maintain that arbitrators' authority derives from the parties' agreement, and were the parties' agreement clear on the subject of attorney's fees, the award would have been enforced. Informed arbitrators should not shy away from their authority, if it exists in the case, to issue sanctions against a party who is not complying with the arbitrator's orders or who is flagrantly participating in bad faith. Arbitration is intended to be a cost effective and efficient process, and when a party to an arbitration abuses the process, that abuse should not be tolerated by the arbitrators.

***178 VII. CONCLUSION**

Arbitrators play a critical role in asserting their authority to provide parties with a cost-effective and expeditious arbitration. No informed arbitrator should shy away from that responsibility for fear of jeopardizing the award. Be it through refusing to hear unnecessary evidence, denying unwarranted discovery requests, denying excessive adjournment requests, deciding an issue or disposing of a case based on a dispositive motion, or sanctioning parties for failure to comply with a discovery order or lack of good faith in the arbitration process, arbitrators have the tools to manage the arbitration process. These tools coupled

with courts' strong support of arbitrators' discretion in this context provide arbitrators with the means to take an active role in controlling the time and cost of arbitration.

Many arbitrators are already using these tools and successfully managing the arbitration process. [138] For those who have been hesitant, fearing that asserting control will create grounds for vacatur, fear not. Inform yourself of the judicially recognized boundaries outlined in this article and step into your rightful role as time and cost controller.

Footnotes

a1 Tracey B. Frisch, Esq. is Senior Counsel at the American Arbitration Association. Ms. Frisch is also an adjunct Professor at Benjamin N. Cardozo School of Law. Special thank you to Alyssa Feliciano and Severine Losembe, AAA Legal Department interns, whose assistance motivated me to complete this article, and to Eric Tuchmann, AAA's General Counsel for his support and guidance in drafting this article. And of course to the editors of the Journal for accepting this article for publication and for helping me to get this article into shape.

1 The median time frame for a civil case to go to trial in federal court is 23.2 months, based on U.S. Federal Court statistics for civil cases for the 12-month period ending March 31, 2011; but the median timeframe for an AAA commercial arbitration to be awarded is 7.3 months, based on AAA commercial arbitrations awarded in 2011. Statistics on file with author.

2 9 U.S.C. §10(a)(3). Section 10(a) of the Federal Arbitration Act lists four grounds for vacating an arbitration award:
(1) where the award was procured by corruption, fraud, or undue means;
(2) where there was evident partiality or corruption in the arbitrators, or either of them;
(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

3 Rosenweig v. Morgan Stanley, 494 F.3d 1328 (11th Cir. 2007).

4 *id.* at 1334.

5 Nationwide Mut. Ins. Co. v. Home Ins. Co., 278 F.3d 621 (6th Cir. 2002).

6 *id.* at 625.

7 *Id.*

8 *See* Bain Cotton Co. v. Chestnut Cotton Co., 531 F.App'x 500 (5th Cir. 2013). In this case, the Circuit Court affirmed the District Court's denial of motion to vacate award on ground arbitrators denied discovery requests. The Court held that "regardless whether the district court or this court -- or both -- might disagree with the arbitrators' handling of [[Plaintiff's] discovery requests, that handling does not rise to the level required for vacating [award] under any of the FAA's narrow and exclusive grounds." *Id.* at 501. *See also* Prestige Ford v. Ford Dealer Comput. Serv., Inc., 324 F.3d 391 (5th Cir. 2003).

9 *Prestige Ford*, 324 F.3d at 391.

10 *id.* at 395.

11 *id.* at 394.

12 *See* LJL 33rd St. Assoc., LLC v. Pitcairn Prop. Inc., 725 F.3d 184 (2d Cir. 2013); *see also* Bangor Gas Co., LLC v. H.Q. Energy Serv. (U.S.) Inc., 695 F.3d 181 (1st Cir. 2012) ("So even if we were to assume [doubtfully] that consideration of these two additional documents was 'misconduct' under the FAA, it could not have been prejudicial, a requirement for vacating an award under §10(a)(3)."); *Rosenweig v. Morgan Stanley & Co., Inc.*, 494 F.3d 1328 (2007).

13 *LJL 33rd St. Assoc.*, 725 F.3d at 184.

14 *id.* at 194.

15 *id.* at 193.

16 *See* Ardalan v. Macy's Inc., No. 5:09-CV-04894 (JW), 2012 WL 2503972, at *1 (N.D. Cal. Jun. 28, 2012) (determining that even if an arbitrator deliberately excludes evidence because of bias, the plaintiff bears the burden of showing that the exclusion resulted in a fundamentally unfair hearing); A.H. Robins Co., Inc. v. Dalkon Shield, 228 B.R. 587 (Bankr. E.D. Va. 1999); *see also* Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust, 878 F. Supp. 2d 459 (S.D.N.Y. 2012); Sebbag v. Shearson Lehman Bros., Inc., No. 89-CV-5477 (MJL), 1991 WL 12431 (S.D.N.Y. Jan. 8, 1991) (confirming the arbitral award despite the claimant's argument that they did not get access to files on the grounds that the court must look at the proceedings as whole in determining whether a fair hearing has been given and not look at each evidentiary decision and determine whether the court agrees with them).

17 *A.H. Robins Co., Inc.*, 228 B.R. 587.

18 *Id.* at 592.

19 *Id.*

20 *id.* at 592-93.

21 *Id.* at 592.

22 *See* Abu Dhabi Inv. Auth. v. Citigroup, Inc., No. 12-CV-283 (GBD), 2013 WL 789642, at *8 (S.D.N.Y. Mar. 4 2013) (confirming the award and determining that an arbitral panel's decision to deny a party's request for two documents out of sixty does not amount to "misconduct" under the FAA); Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust, 878 F. Supp. 2d 459 (S.D.N.Y. 2012) (confirming the arbitral award and held that arbitrators are afforded great deference and thus hearing only one witness when the issue was one of contractual interpretation did not make the hearing fundamentally unfair); AT&T Corp v. Tyco, 255 F. Supp. 2d 294 (S.D.N.Y. 2003) (confirming the award on the ground that the arbitration did entail a discovery process including depositions and documents exchange as well as briefing of the issues and evidentiary hearings).

23 *See* Robert Lewis v. William Webb, 473 F.3d 498 (2d Cir. 2007) (confirming the award although the arbitrators had restricted discovery because it did not deprive the claimant of a fundamentally fair arbitration process); Areca, Inc. v. Oppenheimer and Palli Hulton Assoc., 960 F. Supp. 52 (S.D.N.Y. 1997) (confirming the award despite the fact that arbitrators refused to allow investors to present testimony of the brokerage's firm CFO).

24 *Areca, Inc.*, 960 F. Supp. 52.

25 *Id.* at 55.

26 *Id.*

27 *Id.*

28 *See* American State Univ. v. Kiemm, No. B242766, 2013 WL 1793931, at *1 (Cal. Ct. App. Apr. 29, 2013) (confirming award and determining that courts "should focus on whether the exclusion was prejudicial, not whether the evidence was material"); Hicks III v. UBS Fin. Serv., Inc., 226 P.3d 762 (Utah Ct. App. 2010); Carson v. Painewebber, Inc., 62 P.3d 996 (Colo. App. 2002) (confirming the arbitral award because the NASD rules, which the arbitration followed, allowed for the arbitrator's conduct but held that "parties to an arbitration proceeding have an absolute right to be heard and present evidence before the arbitrators, and that a refusal ... is such misconduct as affords a sufficient ground for setting aside the award").

29 *Hicks III*, 226 P.3d at 762.

30 *id.* at 770.

31 *Id.* at 772.

32 *id.* at 771.

33 *Id.* at 772.

34 *Id.* at 762.

35 *See* Int'l Union, United Mine Workers of America v. Marrowbone Dev. Co., 232 F.3d 383 (4th Cir. 2000); Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16 (2d Cir. 1997); *see also* Teamsters v. E.D. Clapp Co., 551 F. Supp. 570 (N.D.N.Y. 1982); Harvey Aluminum (Inc.) v. United Steelworkers of America, AFL-CIO, 263 F. Supp. 488 (C.D. Cal 1967).

36 *Int'l Union, United Mine Workers of America*, 232 F.3d at 383.

37 *id.* at 389.

38 *Id.* at 388

39 *Id.* at 390. As seen through this case, oftentimes parties will move to vacate based on both 10(a)(3) and 10(a)(4) (FAA 10(a)(4): "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.") grounds arguing that the arbitrator's alleged misdeed under 10(a)(3) resulted in the arbitrator exceeding her powers under 10(a)(4).

40 *Tempo Shain Corp.*, 120 F.3d 16.

41 *id.* at 17.

42 *id.* at 18.

43 *Id.*

44 *id.* at 20.

45 *Tempo Shain Corp.*, 120 F.3d at 21.

46 *See* Teamsters v. E.D. Clapp Co., 551 F. Supp. 570 (N.D.N.Y. 1982); Harvey Aluminum (Inc.) v. United Steelworkers of America, AFL-CIO, 263 F. Supp. 488 (C.D. Cal 1967).

47 *Harvey Aluminum (Inc.)*, 263 F. Supp. at 488.

48 *id.* at 490.

49 *id.* at 491.

50 *id.* at 492.

51 *id.* at 490.

52 *See* Boston Pub. Health Comm'n v. Boston Emergency Med. Services-Boston Police Patrolmen's Ass'n, IUPA No. 16807, AFL-CIO, 85 Mass.App.Ct. 1126 (2014); Manchester Twp. Bd. of Educ. v. Carney, Inc., 199 N.J. Super. 266 (1985).

53 *Boston Pub. Health Comm'n*, 10 N.E.3d 670, 2014 WL 2776854.

54 Rule 31 AAA Labor Arbitration Rules as amended and effective July 1, 2005: "[i]f briefs ... are to be filed ... the hearings shall be declared closed as of the final date set by the arbitrator for filing with the AAA." *Id.* at *2.

55 *Boston Pub. Health Comm'n*, 85 Mass.App.Ct. at *2.

56 *Id.*

57 *See* Alexander Julian Inc. v. Mimco, Inc., 29 F.App'x. 700 (2d Cir. 2002); Metallgesellschaft A.G. v. M/V Captain Constante, 790 F.2d 280 (2d Cir. 1986); *In re* Time Constr., Inc., 43 F.3d 1041 (6th Cir. 1995); Sunrise Trust v. Morgan Stanley & Co., No. 2:12-

CV-944 JCM (PAL), 2012 WL 4963766 (D. Nev. Oct. 16, 2012); HBK Sorce Fin. v. Ameriprise Fin. Serv., No. 4:10-CV-02284 (BYP), 2012 WL 4505993 (N.D. Ohio Sept. 28, 2012); Dealer Comput. Serv. Inc. v. Dale Spradley Motors, Inc., No. 11-CV-11853 (JAC), 2012 WL 72284 (E.D. Mich. Jan. 10, 2012); Verve Commc'n Pvt. Ltd v. Software Int'l, Inc., No. 11-1280 (FLW), 2011 WL 5508636 (D.N.J. Nov. 9, 2011).

58 *See Alexander Julian Inc.*, 29 F.App'x. 700; Berlacher v. Painewebber, 759 F. Supp. 21 (D.D.C. 1991).

59 *Alexander Julian Inc.*, 29 F. App'x. at 703.

60 *Id.*

61 *Id.*

62 *See* Bisnoff v. King, 154 F. Supp. 2d 630 (S.D.N.Y. 2001); Gordon Capital Corp. v. Jesup, No. 91-CV-3821 (MBM) 1992 WL 41722 (S.D.N.Y. Feb. 20, 1992).

63 *Bisnoff v. King*, 154 F. Supp. 2d at 639.

64 *id.* at 634.

65 *id.* at 638.

66 *id.* at 635.

67 *Bisnoff*, 154 F. Supp. 2d 630.

68 *id.* at 637.

69 *See In re* Time Constr., Inc., 43 F.3d 1041 (6th Cir. 1995).

70 *Id.* at 1045.

71 *id.* at 1043.

72 *id.* at 1045.

73 *Id.*

74 *In re Time Constr., Inc.*, 43 F.3d at 1046.

75 *See* HBK Sorce Fin. v. Ameriprise Fin. Serv., No. 4:10-CV-02284 (BYP), 2012 WL 4505993 (N.D. Ohio, Sept. 28, 2012). *See also* Gwire v. Roulac Grp., 2008 WL 3907403 (Cal. Sup. Ct. 2008) (confirming an award despite the arbitrator having refused to grant a party's request for a "sur-reply brief").

76 *See Alexander Julian Inc.*, 29 Fed.Appx. 700 (2d Cir. 2002); *Dealer Comput. Serv. Inc.*, No. 11-CV-11853 (JAC), 2012 WL 72284 (E.D. Mich. Jan. 10, 2012); Roche v. Local 32B-32J, 755 F. Supp. 622 (S.D.N.Y. 1991).

77 *Dealer Comput. Services Inc.*, 2012 WL 72284 (confirming the award and holding that the arbitrator acted within the authority granted to him by the AAA rules when he did not grant the party's request for continuance).

78 Verve Commc'n Pvt. Ltd v. Software Int'l, Inc., No. 11-1280 (FLW), 2011 WL 5508636 (D.N.J. Nov. 9, 2011).

79 *id.* at *1.

80 *id.* at *1, *7 (citations omitted).

81 *id.* at *7.

82 *Id.*

83 *See* Wedbush Morgan Sec., Inc. v. Brandman, 192 A.D.2d 497 (1st Dep't 1993); Pacilli v. Philips Appel & Walden, Inc., 1991 WL 193507 (E.D. Pa. Sept. 24, 1991); Leblon Consultants, Ltd. v. Jackson China, Inc., 92 A.D.2d 499 (1st Dep't 1983).

84 *See Wedbush Morgan Sec., Inc.*, 192 A.D.2d 497; *Leblon Consultants, Ltd.*, 92 A.D.2d 499.

85 *Wedbush Morgan Sec., Inc.*, 192 A.D.2d 497.

86 *id.* at 497 (citations omitted).

87 *Id.*

88 *Leblon Consultants, Ltd.*, 92 A.D.2d 499.

89 *id.* at 499.

90 *Id.*

91 *Id.*

92 *Pacilli*, 1991 WL 193507.

93 *id.* at *1.

94 *Id.*

95 *id.* at *2.

96 *Id.*

97 *Id.* at *3.

98 *Pacilli*, 1991 WL 193507 at *3.

99 *id.* at *6.

100 Intercarbon Bermuda, Ltd. v. Caltex Trading and Transp. Corp., 146 F.R.D. 64 (S.D.N.Y. 1993).

101 *id.* at 72.

102 *Id.*

103 *Id.*

104 *Id.*

105 Warren v. Tacher, 114 F. Supp. 2d 600 (W.D. Ky. 2000)

106 *id.* at 602.

107 *See* Altreus Cmty. Grp. of Arizona v. Stardust Dev., Inc., 229 Ariz. 503 (Ct. App. 2012) (confirming the award and holding that arbitrators have an implicit power to award summary judgment based on Rule 45 of the AAA Rules); Pegasus Const. Corp. v. Turner Constr. Co., 84 Wash.App. 744 (Ct. App. 1997); Schlessinger v. Rosenfeld, Meyer & Susman, 40 Cal. App. 4th 1096 (App. Ct. 1995).

108 *Pegasus Const. Corp.*, 84 Wash. App. 744.

109 *id.* at 747.

110 *id.* at 750.

111 *Schlessinger*, 40 Cal. App. 4th 1096.

112 *id.* at 1100-01.

113 *Id.*

114 *id.* at 1101.

115 *id.* at 1101-02.

116 *Id.* at 1103.

117 *Schlessinger*, 40 Cal. App. 4th 1096 at 1111. New AAA rules do expressly allow for dispositive motions.

118 *Id.*

119 However, despite this deferential review of arbitrators' summary adjudications, at least one state court has vacated an arbitration award when an arbitrator granted a motion to dismiss based on a statute of limitations defense. In *Andrew v. Cuna Brokerage Services, Inc.*, the court vacated a National Association of Securities Dealers arbitration award on the ground that the arbitrator should not have dismissed a valid claim on the basis of a statute of limitations as it denied the parties a full and fair hearing. *See* Andrew v. Cuna Brokerage Serv., Inc., 976 A.2d 496 (Pa. Super. Ct. 2009).

120 *See also* JAMS Arbitration Rules, effective July 1, 2014, Rule 18. Summary Disposition of a Claim or Issue: "[t]he Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request."

121 *See* Reliastar Life Ins. Co. v. EMC National Life Co., 564 F.3d 81 (2d Cir. 2009); Interchem Asia 2000 Pte. Ltd. v. Oceana Petrochemicals AG, 373 F. Supp. 2d 340 (2d Cir. 2005).

122 *Reliastar Life Ins. Co.*, 564 F.3d 81.

123 *id.* at 85.

124 *Id.*

125 *id.* at 86.

126 *Interchem Asia 2000 Pte. Ltd.*, 373 F. Supp. 2d at 355.

127 *id.* at 343.

128 *Id.*

129 *id.* at 344.

130 *id.* at 354.

131 *Id.* at 359; *see also* Seagate Tech., LLC v. Western Dig. Corp., No. A12-1944, 2014 WL 5012807 (Minn. Sup. Ct. Oct. 8, 2014) (confirming an award and holding that the arbitrator did not exceed his authority by imposing punitive sanctions after the arbitrator determined a party fabricated evidence because sanctions were authorized by the AAA Employment rule).

132 First Preservation Capital, Inc. v. Smith Barney, Harris Upham & Co., 939 F. Supp. 1559 (S.D. Fla. 1996); *see also* Prime Associates Group, LLC. v. Nama Holdings, LLC., 2012 WL 2309055 (Cal. Ct. App. June 19, 2012) (confirming an arbitral award which sanctioned a party for discovery misconduct and holding that arbitrators did not exceed their powers in sanctioning that party).

133 *First Preservation Capital, Inc.*, 939 F. Supp. at 1566-67.

134 *id.* at 1565.

135 MCR of America, Inc. v. Greene, 148 Md. App. 91 (Md. Ct. Spec. App. 2002).

136 *id.* at 103.

137 *id.* at 111.

138 The AAA looked at 4,400 cases administered by the AA concluded in 2009 through 2011, across five important U.S. business sectors and found that some large complex cases (exceeded $500,000 in claims) were awarded in five months of less. On file with author.

17 CDZJCR 155

The College of Commercial Arbitrators

Protocols

for

Expeditious, Cost-Effective Commercial Arbitration

Key Action Steps for

Business Users, Counsel, Arbitrators

& Arbitration Provider Institutions

Thomas J. Stipanowich, Editor-in-Chief

Curtis E. von Kann and Deborah Rothman, Associate Editors

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The College of Commercial Arbitrators Protocols for Expeditious, Cost-Effective Commercial Arbitration

Key Action Steps for Business Users, Counsel, Arbitrators and Arbitration Provider Institutions

Table of Contents

Foreword

The College of Commercial Arbitrators was established in 2001. Its mission is to promote the highest standards of conduct, professionalism and ethics in commercial arbitration, to develop "best practices" guidelines and materials, and to provide peer training and professional development. Its membership currently consists of approximately two hundred leading commercial arbitrators in the United States and abroad.

In response to mounting complaints that commercial arbitration has become as slow and costly as litigation, thus substantially diminishing its appeal, the College decided in 2008 to convene the following year a National Summit on Business-to-Business Arbitration to identify the chief causes of the problem and explore concrete, practical steps that can be taken now to remedy them. ***The concept of a National Summit sprang from two key insights: (1) lengthy, costly arbitration results from the interaction of business users, in-house attorneys, the institutions that provide arbitration services, outside counsel and arbitrators; and (2) all of these "stakeholders" must collaborate in identifying and achieving desired efficiencies and economies in arbitration.*** Therefore, in addition to its own Fellows, who have considerable experience and expertise as commercial arbitrators (and, in many cases, as advocates), the College invited to the National Summit in-house counsel from numerous major companies that utilize arbitration, skilled advocates who represent such parties in arbitration in a wide variety of geographic regions and commercial specialties, and individuals who occupy key positions in leading institutional providers of arbitration services.

In anticipation of the Summit, the College appointed Task Forces composed of corporate counsel, outside counsel and arbitrators to study the issues and provide insight and perspective concerning the problems and possible solutions. Thereafter, the College's Summit Planning Committee carefully reviewed submissions from the Task Forces and developed a Draft Report for discussion at the Summit. The Report, edited by Fellows Professor Thomas Stipanowich, Curtis von Kann and Deborah Rothman, concluded with four *Protocols* containing proposed action steps for Business Users and In-House Counsel, Arbitration Provider Institutions, Outside Counsel and Arbitrators. The Draft Report, entitled *"How to Drastically Reduce Cost and Delay in Commercial Arbitration,"*[1] was circulated to all Summit invitees in the early fall of 2009.

The National Summit was convened in Washington, D.C. at the end of October, 2009. A measure of the perceived importance of the Summit was the fact that five of the principal organizations involved in commercial arbitration, namely, the American Bar Association Section of Dispute Resolution, the American Arbitration Association, JAMS, the International Institute

[1] As used in the draft report and in this publication, the term "commercial arbitration" refers to arbitration between two or more commercial entities, i.e., business-to-business arbitration. Neither the Summit nor this report has attempted to address the rather separate and distinct issues that arise in arbitration between businesses and employees or consumers. While those scenarios are certainly worthy of thoughtful study and attention, they are beyond the scope of the present initiative. Furthermore, although the recommendations offered herein may be of great benefit in the context of international arbitration, the focus of this report is on commercial arbitration in the United States.

for Conflict Prevention and Resolution ("CPR"), and the Chartered Institute of Arbitrators, joined the College as co-sponsors of the Summit, along with the Straus Institute for Dispute Resolution of Pepperdine University School of Law and seventy-two Fellows of the College.

More than 180 individuals participated in the Summit, which was designed as a structured "conversation" to elicit participants' input on the proposed *Protocols*. Following panel presentations regarding each of the four *Protocols* (conducted by corporate counsel, outside counsel, arbitrators and executives of "provider" institutions), Summit participants had the opportunity to comment on the proposals and recommend amendments or additions. The Summit concluded with a "town hall" meeting during which electronic voting devices were used to gauge the opinion of Summit participants concerning specific action steps.

In the course of producing this Final Report, the Editors thoroughly analyzed the results of the National Summit as well as numerous additional written recommendations for the improvement of the draft *Protocols* and made material revisions to those documents. The *Protocols* and accompanying commentary are designed to produce simple and straightforward guidance for all stakeholders with the intent of encouraging efforts that promote more expeditious and cost-effective arbitration.[2] The commentary provides information on numerous procedural options and tools designed by various organizations to promote the goals and fulfill the action steps set forth in the *Protocols*.

The College expresses its deep gratitude to all of the Summit sponsors as well as the many individuals and organizations that helped plan, organize and produce the National Summit and *Protocols*. While the views and opinions of all participants were extraordinarily valuable in producing this report, the report is ultimately that of the College which takes full responsibility for any deficiencies that may be found in the document.

It is the fervent hope of the College of Commercial Arbitrators that publication of these *Protocols* will sound a clarion call to action by all constituencies involved in business arbitration, encouraging prompt adoption of effective measures to dramatically reduce process costs and delay, restoring arbitration to its rightful place as a valuable and efficient alternative to litigation in the resolution of business disputes.

Bruce W. Belding
President of the College 2008-2009

Curtis E. von Kann
President of the College 2009-2010

[2] The *Protocols* target ways to reduce cost and delay because those factors are the focus of most current complaints about commercial arbitration. Economy and efficiency are usually among the key concerns of arbitrating parties, but these goals may be in tension with, and may even be outweighed by, a desire for court-like due process. In any event, the *Protocols*' value will be in direct proportion to parties' desire to promote economy and efficiency in arbitration.

About the Editors

Thomas J. Stipanowich, William H. Webster Chair in Dispute Resolution and Professor of Law at Pepperdine University School of Law and Academic Director of the Straus Institute for Dispute Resolution, has had a distinguished career as a scholar, teacher, and leader in the field as well as a commercial and construction arbitrator and mediator, federal court special master, and facilitator. From 2001 until mid-2006, he served as CEO of the International Institute for Conflict Prevention & Resolution (CPR); prior to that time he was a litigator with a national construction law firm and, for fourteen years, a chaired professor of law. He was co-author with Ian Macneil and Richard Speidel of the much-cited multi-volume treatise *Federal Arbitration Law* (Little, Brown & Co. 1994). He edited *Commercial Arbitration at Its Best* (ABA 2001), the report of the CPR Commission on the Future of Arbitration. He co-authored a groundbreaking book and materials for law schools entitled *Resolving Disputes: Theory, Practice, and Law* (Aspen Publishing, 2d ed. 2010). In 2008 he was awarded the highest honor of the ABA Dispute Resolution Section, the D'Alemberte-Raven Award, for contributions to the field of conflict resolution. He has twice (1987, 2010) received the CPR Best Professional Article award, most recently for "Arbitration: The 'New Litigation'" and "Arbitration and Choice." He is one of very few individuals accorded the title of Companion by the Chartered Institute of Arbitrators. He holds a Bachelors (with highest honors) and Masters in Architecture as well as a Juris Doctor (*magna cum laude*, Order of the Coif) from the University of Illinois. He is an arbitrator and mediator with JAMS.

Curtis E. von Kann, a graduate of Harvard College and Harvard Law School, was a civil litigator for sixteen years, principally as an associate, then partner in the Washington, DC law firm of Hogan & Hartson. In 1985 President Ronald Reagan appointed him a Judge of the District of Columbia Superior Court where he presided over hundreds of jury and non-jury trials and was a principal designer of the Court's highly successful civil case management and ADR program. Since 1997 he has served as a full-time arbitrator and mediator in the Washington office of JAMS and has written and spoken widely on a variety of ADR topics. He is currently President of the College of Commercial Arbitrators and was Editor-in-Chief of the first edition of the College's *Guide to Best Practices in Commercial Arbitration.*

Deborah Rothman, a *magna cum laude* graduate of Yale College, received her Masters in Public Affairs from the Woodrow Wilson School at Princeton University and her Juris Doctor from NYU School of Law. After practicing law with Manatt Phelps in Los Angeles, she became President and CEO of Baby Fair Enterprises. Since 1991, she has been a full-time mediator and arbitrator with the American Arbitration Association in New York and Los Angeles, specializing in business, entertainment, franchise, intellectual property and employment matters. She also provides arbitration consulting services in high-stakes arbitrations and has been on the Board of the College of Commercial Arbitrators since 2003.

I

Speed, Economy and Efficiency in Commercial Arbitration: Failed Expectations, Shared Responsibility[3]

Despite meaningful efforts to promote better practices and ensure quality among arbitrators and advocates, criticism of American commercial arbitration is at a crescendo. Much of this criticism stems from the fact that business-to-business arbitration has taken on the trappings of litigation—extensive discovery and motion practice, highly contentious advocacy, long cycle time and high cost.[4] While many business users still prefer arbitration to court trial because of other procedural advantages,[5] the great majority of complaints being voiced by arbitration users are the same: commercial arbitration now costs just as much, and takes just as long, as litigation.[6] Clients and counsel often wonder aloud what happened to the economical and efficient alternative to the courtroom.[7]

As a result, some business clients and counsel have removed arbitration clauses from their contracts. This situation has also contributed to the removal of arbitration provisions

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[3] Many elements of this Report are borrowed or adapted from documents prepared in anticipation of the National Summit on Business-to-Business Arbitration and the development of the *Protocols*. These include the reports of Task Force Committees including the Committee on Business Users and House Counsel (Jeff Paquin and James Snyder, Chairs); the Committee on Arbitration Advocates (David McLean and Steven Comen, Chairs); and the Committee on Arbitrators (Louise LaMothe and John Wilkinson, Chairs). Concepts and text were also drawn from two extensive articles prepared in anticipation of the National Summit on Business-to-Business Arbitration: Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1 (Jan. 2010) *available at* http://ssrn.com/abstract=1297526 [hereinafter Stipanowich, *New Litigation*] (analyzing current trends affecting perception and practice in commercial arbitration); Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the New Litigation*, *(Symposium Keynote Presentation)*, 7 DEPAUL BUS. & COM. L.J. 401 (2009), *available at* http://ssrn.com/abstract=1372291 [hereinafter Stipanowich, *Arbitration and Choice*].

[4] Stipanowich, *New Litigation, supra* note 3, at 6-27.

[5] FULBRIGHT & JAWORSKI, U.S. CORPORATE COUNSEL LITIGATION TRENDS SURVEY RESULTS 18 (2004); Michael T. Burr, *The Truth About ADR: Do Arbitration and Mediation Really Work?* 14 CORP. LEGAL TIMES 44, 45 (2004).

[6] *See, e.g.*, Mary Swanton, *System Slowdown: Can Arbitration Be Fixed?,* INSIDE COUNSEL, May 2007, at 51; Lou Whiteman, *Arbitration's Fall from Grace*, LAW.COM IN-HOUSE COUNSEL, July 13, 2006, http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id= 900005457792; Leslie A. Gordon, *Clause for Alarm,* A.B.A. J., Nov. 24, 2006, at 19, *available at* http://www.abajournal.com/magazine/article/clause_for_alarm/. Barry Richard, *Corporate Litigation: Arbitration Clause Risks*, NAT'L L.J., June 2004, at 3. *See also* Benjamin J.C. Wolf, *On-line But Out of Touch: Analyzing International Dispute Resolution Through the Lens of the Internet*, 14 CARDOZO J. INT'L & COMP. L. 281, 306-07 (2006) (describing the disadvantages of arbitration, including costs similar to litigation and lengthy discovery process and hearings); *See also Mediation—Knocking Heads Together—Why go to court when you can settle cheaply, quickly and fairly elsewhere?*, THE ECONOMIST, Feb. 3, 2000, at 62 (noting arbitration is no "cheaper, fairer or even quicker" than trial).

[7] Stipanowich, *New Litigation*, *supra* note 3, at 9.

from important standard industry contract forms.[8] As one West Coast in-house counsel recently reported,

> We really sell arbitration to our business clients [as a superior alternative to litigation]. Now they are accusing us of false advertising. . . . Literally all of the top general counsel from the largest corporations in the Bay Area were uniform in their frustration with arbitration and many have said . . . they're not agreeing to it anymore.

Such outcomes are unfortunate, because commercial arbitration offers businesses the prospect of a true alternative to litigation— indeed, a spectrum of alternatives. While litigation may prove desirable to parties who require public proceedings, case precedents, and the contempt power of courts, arbitration offers the inestimable range of advantages that come with *choice*—the ability to tailor the process to the dispute. For this key reason, arbitration should always be a prominent contender in the marketplace of alternatives for resolving business disputes.[9]

In recent years, to be sure, much effort has been devoted to providing guidance for arbitrators, business users and advocates. In addition, leading dispute resolution provider institutions have spent considerable time and effort developing and revising arbitration procedures. Despite all of this, the problems—perceived and real—remain.

At the October 2009 National Summit on Business-to-Business described in the Foreword to this report, the views of all participants—including corporate counsel, outside counsel, arbitrators and executives of institutions providing arbitration and other dispute

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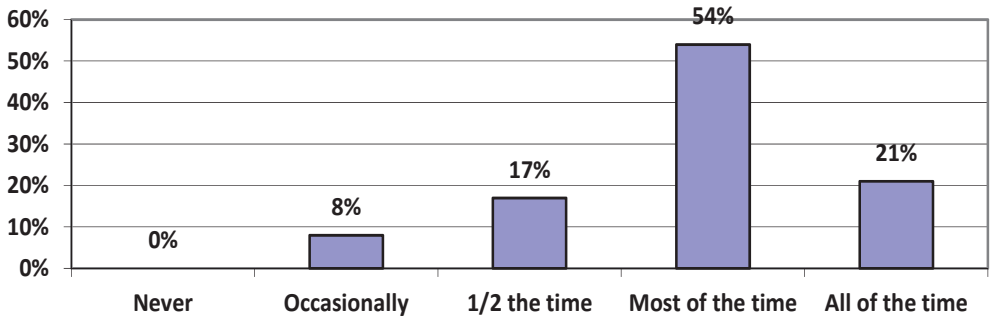
[8] The latest edition of the American Institute of Architects construction forms, the nation's most widely used template for building contracts, eliminates the default binding arbitration provision, long a *sine qua non* of construction contracts; parties must henceforth affirmatively agree to arbitration by checking a box or, by default, go to court. *See* AIA DOCUMENT A201-2007, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, art. 15 (2007); AIA DOCUMENT B101-2007, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT, art. 8 (2007). A new much-heralded rival set of standard contract documents also relegates arbitration to an option rather than a default procedure. CONSENSUSDOCS 240, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT/ENGINEER, art. 9.5 (2007).

[9] Advocates of arbitration are quick to point out that arbitration awards are likely to prove much more "final" than court judgments, tending to substantially reduce post-hearing process time and costs. Moreover, arbitration offers parties a host of opportunities to craft a process that proves vastly superior to litigation in many cases, such as the ability to choose their decision maker(s) (including subject matter experts), procedures and venue. Parties may also identify the issues that will (and will not) be arbitrated, help set the timetable for the process, and take steps to ensure the confidentiality of proceedings and of documents disclosed during the process. For any or all of these reasons arbitration may be an appealing alternative to litigation regardless of the relative cost and length of arbitration. *See, e.g.,* Curtis E. von Kann, *A Report Card on the Quality of Commercial Arbitration: Assessing and Improving Delivery of the Benefits Customers Seek,* 7 DEPAUL BUS. & COM. L.J. 499 (2009) (concluding that commercial arbitration does quite a good job of meeting user expectations concerning their ability to choose the decision-maker, the opportunity to adapt the process to the needs of individual cases, flexibility in the adjudicative process, privacy of the adjudicative process, accessibility of the decision-maker, efficient and user-friendly case administration, fair and just results, and finality of the decision). Nevertheless, the perception that arbitration processes are unacceptably slow and costly—and in this respect not a demonstrably superior alternative to litigation—has tainted arbitration in the eyes of many business clients and counsel.

resolution services—were sought by means of a "town hall" meeting and electronic voting. While not a scientific survey, the voting data reflected important levels of consensus about the depth of user concerns about arbitration, the roots of those problems, and potential solutions.

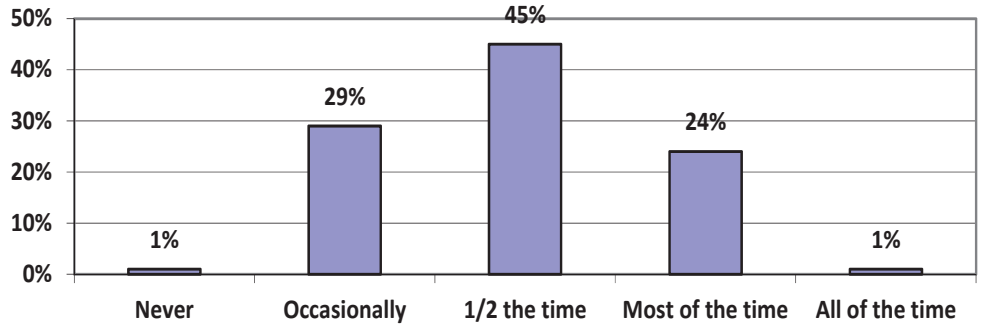
Summit participants overwhelmingly believed that relative speed, efficiency and economy tend to be important to business users of arbitration.

How often do business users desire arbitration to be speedier, more efficient and more economical than litigation?



Moreover, to one degree or another, nearly all participants were convinced that arbitration falls short of users' expectations regarding speed, efficiency and economy at least some of the time. Seven in ten were convinced that this occurred *at least half the time*:

In your experience, how often does arbitration fail to meet the desires of business users when they want speed, efficiency and economy?



Even if these collective perceptions exaggerate to some extent the gap between business users' expectations of arbitration and their actual experiences, there is considerable room for concern.

In order to address this disquieting *status quo*, the Summit focused on identifying the perceived roots of the problem and exploring potential solutions.

II
The Root of the Problem:
Arbitration Has Become Too Much Like Litigation

A. Reduced Use of Trial; Growth of Commercial Arbitration

Over the past three decades large, complex business disputes that used to be filed in court, typically federal court, have been increasingly brought to commercial arbitration. Several factors have contributed to this trend.

A recent ABA Symposium on "The Vanishing Trial" spotlighted an 84% decrease in the percentage of federal cases resolved by trial between 1962 and 2002, and significant parallel declines in state courts.[10] The dramatic fall-off in the rate of trial may be attributed in large part to concerns about the high costs and delays associated with full-blown litigation, its attendant risks and uncertainties, and its impact on business and personal relationships.[11] Businesses have become increasingly gun-shy about entrusting their financial success, even their continued existence, to unpredictable juries or autocratic judges (often with little or no pertinent legal or commercial background or experience). Their first and foremost concern, however, is the costliness and slowness of litigation: in the blunt words of a recent report by a task force of the American College of Trial Lawyers and the Institute for Advancement of the Legal System, "because of expense and delay, both civil bench trials and civil jury trials are disappearing."[12]

The concerns that contributed to the waning of civil litigation offered opportunities for the growth of private adjudication through binding arbitration.[13] Conventional wisdom—and common sense—suggests that businesses choose binding arbitration mainly because it is perceived to be superior to litigation[14] in some or all of the following ways: cost savings, shorter

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[10] Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* 1 J. EMPIRICAL LEGAL STUD. 459, 460 (2004).

[11] *See* David R. Fine et al, *The "Vanishing" Civil Jury Trial—Report of The Middle District Bench/Bar Task Force*, 80 PA. B. ASS'N Q. 24 (2009) (citing costs and delays among primary reasons for reduced trials); Nathan L. Hecht, *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163 (2006) (same); Stephen Daniels & Joanne Martin, *The Impact It Has Had Is Between People's Ears: Tort Reform, Mass Culture, and Plaintiff's Lawyers*, 50 DEPAUL L. REV. 453, 454 (2000) (noting businesses' fear of litigation). *See also* John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions,* 3 HARV. NEGOT. L. REV. 1, 26 (1998) (94% of surveyed executives believed there had been a "litigation explosion"); VALERIE P. HANS, BUSINESS ON TRIAL 56 (2000) (describing public apprehensions regarding litigation).

[12] INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 3 (Mar. 11, 2009) [hereinafter FINAL REPORT ON LITIGATION REFORM].

[13] As one experienced commercial dispute resolution lawyer explains, "Nature abhors a vacuum, and a vacuum has been created with the decreased frequency of bench and jury trials. This portends good things for alternative dispute resolution processes."

[14] William H. Knull, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?,* 11 AM. REV. INT'L ARB. 531, 532 (2000); Richard E. Speidel, *Securities Arbitration: A Decade after McMahon*,

resolution times, a more satisfactory process, expert decision makers, privacy and confidentiality, and relative finality.[15] The untiring efforts of arbitration providers in promoting commercial arbitration rules and standard model clauses have encouraged broader use of arbitration in recent decades, while the growth of a large cadre of relatively sophisticated, accomplished, and well-trained professional arbitrators has undoubtedly enhanced confidence that arbitration will produce a reasonable and fair result. A wide variety of simple as well as sophisticated contractual provisions for the resolution of disputes by arbitrators are now featured in many different kinds of commercial contracts.[16] These phenomena, coupled with plenary judicial enforcement of broadly tailored arbitration provisions, have made arbitration a wide-ranging surrogate for trial in a public courtroom.[17]

B. Importation of Trial Practices into Arbitration

Commercial arbitration is, to a large extent, a victim of its own success. The migration of commercial cases from litigation to arbitration has, predictably, brought into arbitration some of the practices associated with commercial case litigation. Many skilled and experienced attorneys, while happy to accept the foregoing advantages of arbitration, nonetheless generally want to try cases in arbitration with the same intensity and the same tactics with which they were conducted in court. Thus, expanded arbitral motion practice and discovery have developed within the framework of standard commercial arbitration rules which tend to afford arbitrators and parties considerable "wiggle room" on matters of procedure. As a consequence, practice under modern arbitration procedures is today often a close, albeit private, analogue to civil trial.

Aside from the natural human tendency to want to do things "the way we've always done them," there are other drivers of the incorporation of litigation-style proceedings into large commercial arbitration. Litigators, being inherently conservative and cautious, on the one hand, and determined to achieve the best possible result for their clients, on the other, are very reluctant to try a big case—in either a court or an arbitration proceeding—until they have sought all possible evidence, analyzed every issue, and played every legal card at their disposal. If, notwithstanding all these efforts, the client suffers an adverse result, counsel can say with confidence that this did not occur because they held back on any actions that might have produced a better outcome. It must be noted, finally, that these practices—constituting the arguable path of prudence—are also significant contributors to law firm revenues.

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62 BROOK. L. REV. 1335 (1996); COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS 12-13 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001) [hereinafter COMMERCIAL ARBITRATION AT ITS BEST].

[15] *See* DAVID B. LIPSKY & RONALD L. SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES—A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS 17 (1998) (detailing reasons why companies use mediation and arbitration). *See also* Richard W. Naimark & Stephanie E. Keer, *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People: A Forced Rank Analysis*, 30 INT'L BUS. LAW. 203 (2002) (simple forced rank analysis of factors of importance to attorneys and clients in AAA international arbitration cases).

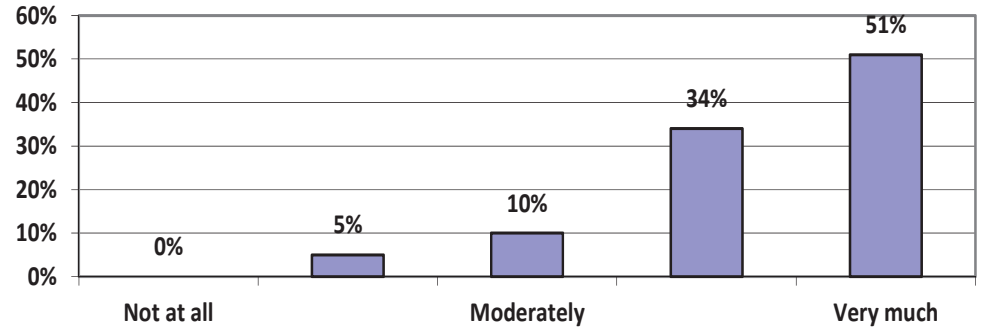
[16] Celeste M. Hammond, *A Real Estate Focus: The (Pre)(As)summed "Consent" of Commercial Binding Arbitration Contracts—An Empirical Study of Attitudes and Expectations of Transactional Lawyers*, 36 J. MARSHALL L. REV. 589, 591 (2003) (commenting on the widespread use of arbitration provisions in commercial contracts).

[17] *See* Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 839-44.

1. Discovery

Among many aspects of this phenomenon, the expansion of discovery stands out as the primary contributor to greater expense and longer cycle time, as affirmed by a poll of National Summit participants:

> *If you believe arbitration fails to meet the desires of business users regarding speed, efficiency and economy, to what extent does excessive discovery tend to contribute to that result?*



Arbitration hearings are now often preceded by extensive discovery, including requests for voluminous document production and depositions. Since discovery has traditionally accounted for the bulk of litigation-related costs,[18] the importation of discovery into arbitration (which traditionally operated with little or no discovery) is particularly noteworthy. Although many arbitrators and some arbitration rules aim to hold the line on excessive discovery,[19] it is not unusual for legal advocates to agree to litigation-like procedures for discovery, even to the extent of employing standard civil procedural rules.[20] This should not be surprising, since there

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[18] According to a 1999 study, document discovery alone accounts for 50% of litigation costs in the average case, and 90% in active discovery cases. Admin. Office of the U.S. Courts, *Judicial Conference Adopts Rule Changes, Confronts Projected Budget Shortfalls*, THE THIRD BRANCH, Oct. 1, 1999, *available at* http://www.uscourts.gov/News/NewsView/99-09-15/Judicial_Conference_Adopts_Rules_Changes_-_Confronts_Projected_Budget_Shortfalls.aspx. American lawyers devote more time to document discovery than to nearly any other activity, including client counseling, legal research and negotiations. *See* Salvatore Joseph Bauccio, *E-Discovery: Why and How E-Mail is Changing the Way Trials are Won and Lost,* 45 DUQ. L. REV. 269, 269 n.7 (2007). *See also* JAMES S. KAKALIK, ET AL., DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA 55 (1998); John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 506 (2000); Wayne D. Brazil, *Civil Discovery: How Bad Are the Problems?*, 67 A.B.A. J. 450 (1981).

[19] *See, e.g.*, INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION (CPR) NON-ADMINISTERED ARBITRATION RULES R. 11 (2007) ("The Tribunal may require and facilitate such discovery as it shall determine is appropriate…taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective.") *See also* JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES, R. 22 (2007); AAA COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R. 30 (2009).

[20] In some cases arbitrators are confronted by a prior agreement of counsel for arbitrating parties to utilize the discovery provisions of the Federal Rules of Civil Procedure in arbitration. This poses a dilemma for the arbitrator, who may or may not be able to persuade counsel to forego requests for admission and interrogatories and to strictly limit the number of depositions, and also to closely supervise the discovery process to avoid unnecessary delays.

is a tendency to use the tools with which one is most familiar, and lawyers schooled in trial may predictably rely on their knowledge and experience in the private analog of the process. Trial practice, with its heavy emphasis on intensive discovery and related motion practice, is reinforced by ethical rules enshrining the model of zealous advocacy.[21] For lawyers accustomed to full-fledged discovery, anything less may seem tantamount to malpractice.[22]

It is not hard for American lawyers to justify intensive discovery to themselves and their clients. Legitimizing a legal position often requires painstaking reconstruction of past events, a highly labor- and time-intensive activity that may require conscientious sifting of vast amounts of information, most of which is of little or no relevancy. The expectation—or hope—is that the "mining" effort will ultimately produce a picture that supports the position.[23] Alternatively, it might at least forestall an undesired resolution for months or years.[24]

Business clients—especially those with significant interests or assets at stake—are often disinclined to challenge this effort to mine information. They may agree with or rely on the advocate's preliminary counsel that the mining operation will yield productive results;[25] indeed, they may have strategic reasons for using discovery to increase their opponent's costs, and/or delay the final resolution of the dispute.[26]

Arbitrators, intent upon striking a balance between fundamental fairness and efficiency, may be reluctant to push parties to limit such practices or to keep to schedule, especially when all parties have agreed to wide-ranging discovery. These tendencies are likely to be reinforced by the reality that arbitration is founded on an agreement between the parties, leading to the common and reasonable perception that arbitrators have no business second-guessing agreements between counsel regarding the conduct of discovery and other procedures. There are also concerns about an arbitration award being subjected to a motion to vacate based on a failure to consider relevant evidence, especially among arbitrators who lack the confidence of long experience.[27] Some have even suggested that a reluctance to limit discovery may reflect an arbitrator's desire to avoid offending anyone in the hope of securing future appointments.[28]

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[21] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1983).

[22] John Hinchey, Remarks at the Annual Meeting, American College of Construction Lawyers, *Adjudication: Coming to America* (Feb. 22, 2008) (notes on file with author).

[23] *See* Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(A) – 'Much Ado about Nothing?*,' 46 HASTINGS L.J. 679, 697-714 (1995) (noting that overly broad discovery allows parties to go on "fishing expeditions"); Chris A. Carr & Michael R. Jencks, *The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision*, 88 KY. L.J. 183, 222 (2000) (discussing the advent of the "discovery lawyer").

[24] *See* BENJAMIN SELLS, THE SOUL OF THE LAW 88 (1994).

[25] Carr & Jencks, *supra* note 23, at 240.

[26] *See* Sorenson, Jr., *supra* note 23, at 699-700. Discovery has been used as a tactical weapon to impose excessive costs on the opposing party.

[27] There is little case law in this area to provide guidance and reassurance to arbitrators who might otherwise be inclined to more rigorously impose limits over counsel's objection. In Hicks v. UBS Financial Services, Inc., 649 Utah Adv. Rep. 7 No 20080950-CA , filed Feb. 4, 2010 UT, App 26, the Utah Court of Appeals held that "erroneous

For all of these reasons, discovery under standard arbitration procedures has tended to become much like its civil court counterpart. As one corporate general counsel explains:

> [I]f you simply provide for arbitration under [standard rules] without specifying in more detail . . . how discovery will be handled . . . you will end up with a proceeding similar to litigation.[29]

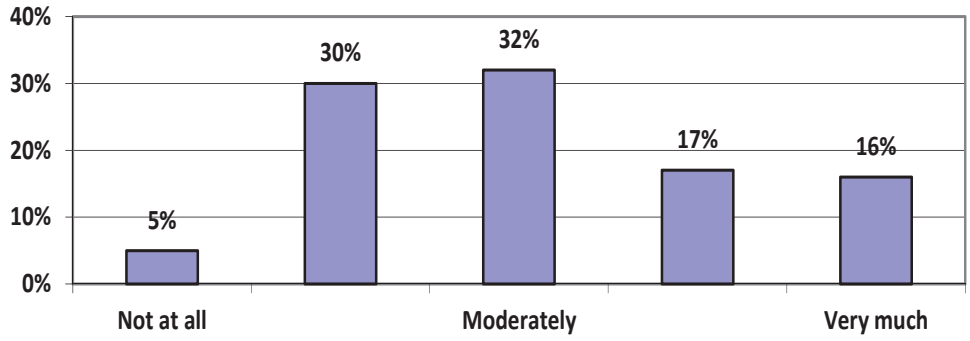
All too often, lamented another corporate lawyer at the National Summit, this expensive, "overblown" process results in little or no useful information, let alone the proverbial "smoking gun."

With the advent of electronic discovery—producing what was recently termed "a nightmare and a morass" for parties in litigation,[30] the costs and stakes of litigation-style discovery have never been higher. Never, moreover, has the need to control discovery in arbitration been more imperative.

2. Motion practice

Another key source of cost and delay in commercial arbitration is motion practice, as reflected in the poll of National Summit participants:

> *If you believe arbitration fails to meet the desires of business users regarding speed, efficiency and economy, to what extent does excessive, inappropriate or mismanaged motion practice tend to contribute to that result?*



discovery decisions" could provide a basis for vacating an arbitration award, but that the showing of "prejudice" resulting from the arbitrator's discovery decisions must be "substantial."

[28] *See* Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 717 (2004) (arguing that arbitrators may be less restrictive with discovery than judges because of their concern over obtaining future appointment as an arbitrator).

[29] James Bender, General Counsel, Williams Companies, Remarks at The Torch is Passed, Corporate Counsel Panel Discussion, Annual Meeting, CPR Institute for Dispute Resolution (Jan. 29-30, 2004), *cited in* Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. EMPIRICAL LEGAL STUD. 843, 895 n. 292 (2004) [hereinafter Stipanowich, *Vanishing Trial*].

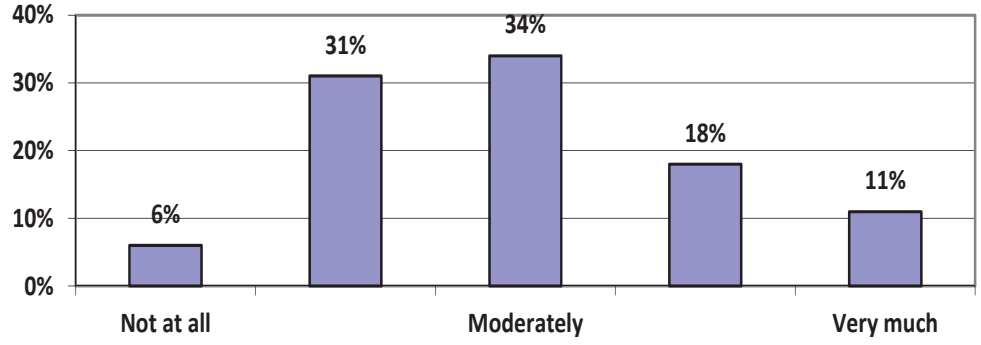
[30] FINAL REPORT ON LITIGATION REFORM, *supra* note 12, at 14.

The use of dispositive motions in arbitration—now contemplated even by some expedited rules[31]—is, practically speaking, a double-edged sword.[32] This import from the court system, prudently employed, is a potentially useful tool for narrowing arbitral issues prior to hearings and full-blown discovery, thus avoiding unnecessary preparation and hearing time. While arbitrators are properly chary of summarily disposing of matters implicating factual issues, there are certain matters that may be forthrightly addressed early on with little or no discovery, such as contractual limitations on damages, statutory remedies, or statutes of limitations and other legal limitations on causes of action.[33] The problem is that, as in court, motion practice often contributes significantly to arbitration cost and cycle time without clear benefits. The filing of motions leads to the establishment of schedules for briefing and argument entailing considerable effort by advocates, only to have the arbitrators postpone a decision until the close of hearings because of the existence of unresolved factual disputes raised by the motion papers.[34]

3. Other concerns

Another contributor to cost and delay is hearings that drag on too long, as reflected in the poll of National Summit participants:

> *If you believe arbitration fails to meet the desires of business users regarding speed, efficiency and economy, to what extent do <u>too-lengthy hearings</u> tend to contribute to that result?*



[31] *See, e.g.*, JAMS ENGINEERING/CONSTRUCTION EXPEDITED RULES, Rule 18 (2009).

[32] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 14, at 203-06; Zela G. Claiborne, *Constructing a Fair, Efficient, and Cost-Effective Arbitration*, 26 ALTERNATIVES TO THE HIGH COST OF LITIG. 186 (Nov. 2008). *See also* Albert G. Ferris & W. Lee Biddle, *The Use of Dispositive Motions in Arbitration*, 62 DISP. RESOL. J. 17 (Aug.-Oct. 2007).

[33] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 14, at 48, 53-55. The new Final Report on Litigation Reform states that "parties and the courts should give greater priority to the resolution of motions that will advance the case more quickly to trial or resolution." FINAL REPORT ON LITIGATION REFORM, *supra* note 12, at 22. It also calls for "a new summary procedure . . . by which parties can submit applications for the determination of enumerated matters (such as rights that are dependent on the interpretation of a contract) on pleadings and affidavits or other evidentiary materials." *Id.* at 6.

[34] *See* Romaine L. Gardner, *Depositions in Arbitration: Thinking the Unthinkable*, 1131 PRACTICING LAW INST. CORP. LAW & PRACTICE COURSE HANDBOOK 379, 389-97 (Jul.-Aug. 1999).

As with discovery and motion practice, the cause of drawn-out hearings is often a complex interaction of several factors. It typically starts with attorneys, intent on pursuing their brand of "zealous advocacy" for strategic or tactical reasons, interposing constant objections, introducing redundant testimony, and framing the same question over and over again. It is facilitated by arbitrators who are unable or unwilling to come down too heavily on the parties—perhaps because of lack of skill or native discomfort with proactive management, or because they may be uncomfortably aware of scheduling issues of their own that may need to be accommodated during the course of trying a complex case. The ballooning of hearing time is especially likely within the ambit of open-ended arbitration procedures with considerable "wiggle room"; however, even previously established timetables and prescribed deadlines sometimes fall by the wayside due to mindsets like those described above.

C. Looking Beyond Litigation-Style Arbitration

When effectively managed by competent arbitrators with the cooperation of counsel, a "hybrid system" which combines the basic features of arbitration (process control, confidentiality, finality and chosen expert decision-maker) with court-like discovery, motion practice, and the like is not inherently bad, and may be a perfectly sensible arrangement for some kinds of disputes. For example, a rational choice might be made in favor of such an approach, despite the prospect of expense and extended process, where the stakes are very high.

In many cases, the case management efforts of skilled arbitrators and/or the cooperation of party representatives will result in a highly satisfactory procedure that is carefully tailored to the circumstances at hand—the result, presumably, that was intended by the drafters of standard arbitration procedures that contain significant "wiggle room." In such circumstances, whether by conscious choice or dumb luck, business users enjoy an arbitration experience fully commensurate with their needs and priorities.

But, while some business clients may be perfectly comfortable with this *status quo*, in which the character, length and cost of the arbitration process are heavily dependent on the interaction of arbitrators and advocates, many others are emphatically not. They desire a higher degree of control—and modes of arbitration that deliberately place greater emphasis on economy and efficiency. Consider, for example, the complaint of two in-house attorneys for one of the world's leading companies:

> The overriding objectives [of businesses in choosing an appropriate forum for resolving disputes] . . . are fairness, efficiency (including speed and cost) and certainty in the enforcement of contractual rights and protections. These are complementary objectives, and to focus on one at the expense of the others leads to a result inconsistent with the expectations of the business world and denies basic commercial needs. Too often the practice of . . . arbitration has

> done just that, by focusing on perceived concepts of due process to the detriment of efficiency, resolution and certainty.[35]

Although this quote refers to commercial arbitration in cross-border disputes, it is perhaps even more relevant in the context of arbitration in the U.S. As one director of litigation for a multi-national company observed at the National Summit, "I'm here to tell you that . . . our current experience is that we are getting quicker and more cost-effective results in U.S. courts!"

Besides driving up costs, delay in the resolution of conflict prolongs uncertainty—potentially postponing the collection of amounts owed, affecting the setting of required financial reserves and impairing the reporting of profits, and leaving in doubt questions of contract interpretation. Thus, "[w]hile business leaders . . . expect a fair resolution, taking excessive time can often be just as damaging as a wrong decision."[36]

While concerns about speed, efficiency, economy and certainty have led many businesses to stop using arbitration, the solution is a lot less drastic. Instead of accepting without question a set of arbitration rules that fails to lay the groundwork for effective cost- and time-saving, business users' best chance to achieve harmony between process and business priorities is to take affirmative steps to move beyond the one-size-fits-all approach.

Powerful support for this conclusion comes from the recent report of the American College of Trial Lawyers task force linking the disappearance of civil trials with high cost and delay: the report recommends a wide range of critical changes in the landscape of American litigation, including an end to the "'one size fits all' approach of the current federal and most state rules."[37] If clear procedural choices are perceived as not just desirable but essential in litigation, the same should be *even more so in arbitration*—since arbitration is almost wholly a creature of contract and therefore highly amenable to choices that "fit the forum to the fuss."[38]

In the litigation system, speed and economy have sometimes been achieved by court order. For years, a handful of state and federal courts have managed to resolve their civil cases much faster, with attendant cost savings, than their peers. While such expedition sometimes results from unique factors, such as abnormally low case loads, in most instances the time and cost savings occur because the court has adopted a successful vehicle for containing the proceedings. For example, the U.S. District Court for the Eastern District of Virginia has been for many years one of the fastest federal trial courts in the country. It did this without any effort to micromanage proceedings in its cases. Instead, it instituted a case management program in which all civil cases (no matter how complex) were set for trial approximately six months after service of process on defendants, all motions were immediately heard and decided (usually from the bench at hearing), and continuances were virtually never granted.

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[35] Michael McIlwrath & Roland Schroeder, *The View from an International Arbitration Customer: In Dire Need of Early Resolution,* 74 ARBITRATION 3, 4 (2008).

[36] *Id*. at 4-5.

[37] *See* FINAL REPORT ON LITIGATION REFORM, *supra* note 12.

[38] Frank E. A. Sander & S. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).

This arrangement, which came to be known as "the rocket docket," soon became the distinguishing feature of the court's reputation and legal culture. Attorneys who had cases there quickly focused their discovery efforts on the most important evidence, eschewed any attempt to track down every marginal lead or possibility, and generally cooperated in discovery and pre-hearing activities (knowing that failure to cooperate would be quickly sanctioned).

This highly successful cost and time containment program is firmly grounded in the universal truth known as Parkinson's Law—to wit, "work expands so as to the fill the time available for its completion."[39] (This is particularly true, one might add, when those doing the work—outside counsel and arbitrators – are paid by the hour.) Some containment mechanism is an essential ingredient of any successful effort to reduce transaction costs and cycle time.

Unfortunately, while external imposition of such a containment mechanism is readily achievable in litigation (though, regrettably, seldom done), it is not in arbitration. The undoubted broad discretion granted trial judges to manage their calendars and proceedings, vests them with authority to impose reasonable restrictions on discovery, motions, and trial time even if all parties vigorously object. Arbitrators, by contrast, have only such power as is conferred by party agreement. If all arbitration parties agree that each should be able to take twenty depositions, file dispositive motions both before and after discovery, and have twenty days to present their evidence at hearing, an arbitrator who recognizes that a fair and just decision could be reached through a much more abbreviated proceeding may try to persuade the parties to drastically scale back. If unable to use persuasion, however, the arbitrator is powerless to override the parties' agreement on how the arbitration shall be conducted.[40] As noted above, moreover, arbitrators may have other reasons not to push back too strenuously when confronted with an unduly expansive proceeding.

If the intent is to have an expeditious and economical process, therefore, it is incumbent upon business clients and counsel to establish the appropriate framework at the outset, preferably when laying the contractual foundation for arbitration, and thereafter to reinforce those choices by other choices during the course of arbitration. It is axiomatic that the less pre-dispute effort is made to establish an appropriate framework for containing the arbitration, the more likely it is that the arbitration proceedings will spiral out of control, with ad hoc decisions being made at the discretion of the arbitrator in this effort.

But business users cannot be expected to act unilaterally. First and foremost, business users need assistance from reputable providers of arbitration and dispute resolution services in the form of clear, user-friendly procedural choices—including procedures that make speed and economy a true priority. Second, they need outside counsel willing and able to share and promote the values of efficiency and economy during the arbitration process. Finally, they need arbitrators with effective management skills and the audacity to use them.

In the following part we will more closely examine the roles of each of these parties.

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[39] This adage initially appeared in The Economist of November 1955 as the first sentence of a humorous essay by Cyril Northcote Parkinson and was later reprinted with other essays in the book PARKINSON'S LAW: THE PURSUIT OF PROGRESS (London, John Murray, 1958).

[40] This sort of agreement is far from fanciful, as many experienced arbitrators can attest.

III
Business Users & In-House Counsel, Providers, Outside Counsel and Arbitrators Must All Play a Role in Promoting Efficiency and Economy in Arbitration

A. The Need for a Mutual Effort

It is time to return to fundamentals in American arbitration. Those who seek economy, efficiency and a true alternative to the courthouse need more than good arbitrators. Real change must begin with the commitment of business users to thoughtful, informed consideration of *discrete process choices* that lay the groundwork for a particular kind of arbitration—whether they seek a highly streamlined, short and sharp process with tight time frames and firmly bounded discovery, a private version of federal court litigation or something in between. In the absence of specific user guidance, arbitration under modern, broadly discretionary procedures is primarily a product of the interaction of advocates and arbitrators, even the best of whom have limited ability, absent a contractual mandate or the stipulation of all parties to blend efficiency and economy with fundamental fairness. All too often, the result is a process that looks and feels like litigation—which is not what the parties expected in electing arbitration over court trial.

For business users, process choice is an illusion in the absence of appropriate alternative process prototypes from arbitration provider institutions. Even before a dispute arises, at which time heated emotions prevent agreement on something as simple as expedited arbitration rules, clients and counsel tend to have neither the time nor the expertise to craft their own process templates and usually need straightforward, dependable guidance from those who develop and administer the procedures upon which they rely. Provider institutions are awakening to the need to promote real choices in arbitration, but much remains to be done.

Users also require outside counsel able and willing to support and further the goals underpinning their agreement to arbitrate. Among those who promote themselves to business clients, there are wide variations in personal philosophy, approach, pertinent knowledge and ability.

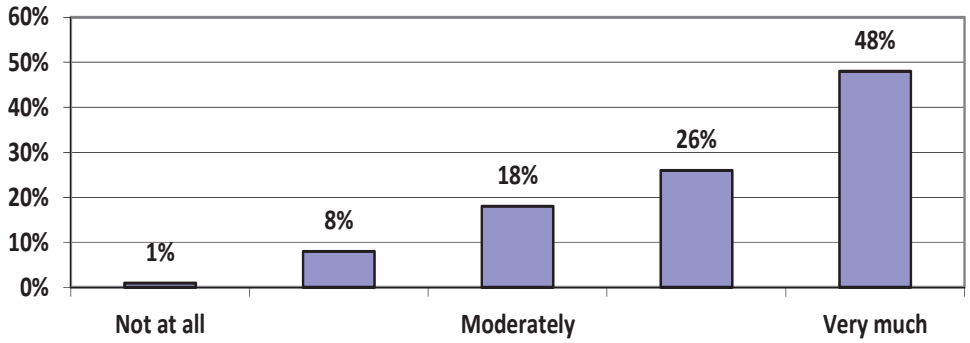
Finally, efficient and economical process depends upon the active efforts of arbitrators to employ effective process management skills, coupled with the discernment and willingness to make early rulings that will effectively truncate or streamline proceedings and the fortitude to enforce agreed timetables. To the extent that business users fail, consciously or unconsciously, to place firm limits on the arbitration timetable, the scope of discovery, and other arbitration procedures, the process management skills of arbitrators—and their interaction with counsel—become all the more critical to an efficient proceeding and speedy outcome.

In the following pages we will examine in detail the roles of each of these four groups of "stakeholders" in the arbitration process, all of which are critical to achieving efficiency and economy in arbitration.

B. The Role of Business Clients and Counsel

Participants at the National Summit thought *corporate in-house counsel* can do considerably more to ensure speed, efficiency and economy *before disputes arise.* Perhaps surprisingly, the in-house counsel participants themselves overwhelmingly agreed with this statement.

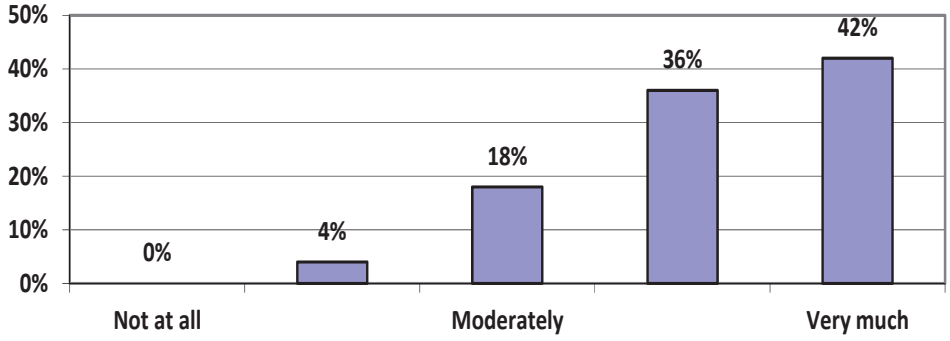
> *When arbitration fails to meet the desires of business users regarding speed, efficiency and economy, how much more can corporate in-house counsel do to help fulfill those expectations before disputes arise?*



Of the four constituencies, *corporate in-house counsel* are best-equipped to assess client goals and priorities across and within transactions. Where speed, economy and efficiency are critical to a client, they have the opportunity to tailor dispute resolution provisions (including binding arbitration) to those particular needs.

Summit participants also believed that corporate in-house counsel could do a good deal more to fulfill client expectations about speed, efficiency and economy later on, in the course of resolving particular disputes:

> *When arbitration fails to meet the desires of business users regarding speed, efficiency and economy, how much more can corporate in-house counsel do to help fulfill those expectations once the decision is made to arbitrate a dispute?*



Rather than "turn over the keys" and relinquish control to outside counsel, in-house attorneys have repeated opportunities to affect the arbitration process, from selection and supervision of counsel to the identification of arbitrators to helping to chart the course of the arbitration process.

1. The Importance of Effective Choice-Making

Business users, guided by knowledgeable and experienced counsel, are in the best position to determine how and when arbitration will be brought to bear on business disputes, and what kind of arbitration process to prescribe. If business parties really want arbitration to be a truly expeditious and efficient alternative to court, they have to assume control of the process and not delegate the responsibility to outside counsel—in other words, principals, and not agents, should act as principals.[41] This must include not only choices made after disputes arise, but also active choice-making at the time of contracting. Ideally, it begins even earlier with strategic discussions regarding the management of conflict in which arbitration is considered among a variety of tools and approaches.[42]

Indeed, at first blush, it would seem that businesses that are incurring excessive transaction costs and delays would be ideally situated to rein them in. Businesses are typically quite experienced in making cost-benefit analyses and in deciding how much they are willing to pay to reduce particular risks to a tolerable level. Experienced counsel (and arbitrators) know, for example, that the law of diminishing returns applies in discovery as it does in nearly everything else. The vast majority of cases end up being decided on the basis of a fairly small body of evidence which is usually obtained in early discovery (or may even be known when the arbitration demand is filed). Continued efforts to turn over every stone and run down every possible lead rarely produce important further evidence (the proverbial "smoking gun") but invariably drive up transaction costs and time greatly. If given the choice between spending $200,000 to achieve 90% assurance of locating most of the important evidence or spending $2,000,000 to achieve 95% assurance, most sophisticated businesses would usually opt for the first choice, while their risk-averse, hourly-billing counsel would often opt for the second.

2. Reasons Business Clients and Counsel Fail to Take Control and Make Effective Choices

Unfortunately, most businesses have not availed themselves of the opportunity to control arbitration costs and speed by adopting arbitration agreements that impose reasonable limits on the arbitration process. Instead, companies tend to reflexively insert standard "boilerplate" arbitration provisions in their transaction contracts, many of which include relatively "loose" procedures that leave considerable leeway to outside counsel and arbitrators.

There appear to be several reasons for the failure of businesses to take active control of their arbitrations from the outset. First of all, it is often difficult to anticipate precisely what disputes will arise under a contract, and what the stakes will be.[43] In-house counsel may feel that the simplest solution to such uncertainty is the adoption of arbitration provisions that leave considerable room for the arbitrators and counsel to adapt the process to whatever circumstances present themselves—the "wiggle room" to which we have alluded.

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[41] *Cf.* BENJAMIN SILLS, THE SOUL OF THE LAW 88 (1994).

[42] *See* GEORGE J. SIEDEL, USING THE LAW FOR COMPETITIVE ADVANTAGE 3 (2002).

[43] *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 14, at 6-8.

Second, in most businesses, corporate energy and attention is focused on consummating transactions; in contrast dispute resolution provisions tend to be accorded low priority in contract negotiations, at least partly because raising the specter of conflict seems inappropriate when the emphasis is on coming together.[44] Those insiders who say “but let's also make careful arrangements for what happens if things go wrong” risk being viewed as obstructionists who might derail the deal. Perhaps, too, some transactional lawyers are reluctant to make a negotiating point of arbitration, fearful that that may require trading off more "substantive" elements.

There is also the problem that transactional lawyers often lack direct experience with resolving post-negotiation conflict; for this reason they may have a tendency to fall back on inadequate boilerplate or falter in the minefield of customized drafting.[45] In the effort to define client goals and translate them into meaningful process choices, in-house counsel, the "gatekeeper to legal institutions and facilitator of . . . transactions,"[46] must play a critical role. But the pertinent knowledge and experience about dispute resolution is often reposed in litigators, not transactional counsel.

When disputes arise, moreover, there is undoubtedly a tendency on the part of in-house counsel to turn matters over to outside counsel and monitor outcomes and invoices but not actively co-manage the process. In this, perhaps, there is the perceived comfort of being able to delegate responsibility to another for the consequences of an adjudicative strategy. If the strategies are not in tune with the goals of the client, however, the consequences may be unfortunate, as reflected in the conclusion of one corporate general counsel:

> Arbitration is often unsatisfactory because litigators have been given the keys . . . and they run it exactly like a piece of litigation. It's the corporate counsel's fault [for] simply turning over the keys to a matter.[47]

3. Business Clients and Counsel Must Change These Realities

Despite the often daunting obstacles confronting client and counsel regarding arbitration and dispute resolution, there are compelling reasons why in-house advisors should devote more time and energy to overcoming current obstacles and why business clients should heed and support their efforts. As detailed in Part IV, effective process choices can provide tangible benefits for business and avoid costly and delay-producing legal consequences, thus

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[44] *See id.*

[45] John M. Townsend, *Drafting Arbitration Clauses: Avoiding the Seven Deadly Sins*, 58 DISP. RESOL. J. 28, 30 (Feb.-Apr. 2003).

[46] *See* William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 LAW & SOC'Y REV. 631, 645 (1980-1981).

[47] Stipanowich, *Vanishing Trial*, *supra* note 29, at 895 (quoting Jeffrey W. Carr, Vice President and General Counsel, FMC Technologies, Inc.). *See also* David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. LAB. & EMP. L. 133, 142 (1998); Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation,* 14 OHIO ST. J. DISP. RESOL. 1 (1998); Lande, *supra* note 11.

fulfilling legal counselors' ethical obligations to actively promote consideration of appropriate dispute resolution alternatives.

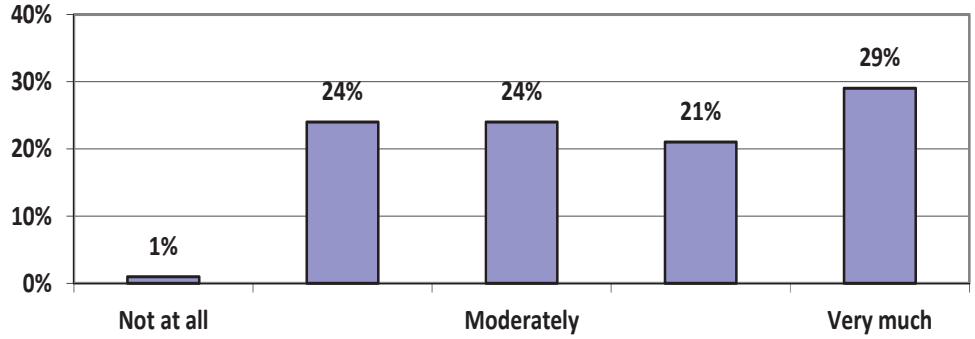
Selecting the right "template" is the first critical choice point for business users and in-house counsel. It is, however, essential to make other good choices after disputes arise. The selection of the right advocates and arbitrators can reinforce earlier process choices by ensuring adherence to the contractual arbitration "template;" the wrong outside counsel or arbitrator may undermine earlier procedural choices.

Finally, business clients and in-house counsel should recognize that, however skilled and committed their outside counsel, it is critical for the user to maintain overall control of the process of dispute resolution. This should begin with an early case assessment that sets the stage for strategic control of the conflict management process. As they do with other large expenditures, businesses should set an appropriate and realistic budget for arbitration and should forbid outside counsel from exceeding that budget without express approval. In-house counsel should attend, in person or by telephone, the initial case management conference and all important subsequent conferences and hearings during the arbitration process, should require periodic status reports from outside counsel, and should actively partner in the management of the arbitration rather than relinquishing such control to outside counsel.

C. The Role of Provider Organizations

National Summit participants also perceived that organizations providing arbitration services should play a major role in bridging the gap between user expectations and experiences regarding speed, efficiency and economy in arbitration:

> *When arbitration fails to meet the desires of business users regarding speed, efficiency and economy, how much more can institutions that provide arbitration rules, panels and administrative services do to help fulfill those expectations?*



Business users rely heavily on the organizations that publish and promote (a) arbitration and dispute resolution procedures, (b) lists of pre-screened, experienced arbitrators and other "neutrals" and (c) related administrative services. In many different respects, these "provider institutions" channel the expectations and behavior of business parties and the arbitrators that serve them and set the stage for the success or failure of arbitration. Their offerings should be closely examined and compared, but never taken for granted.

The published commercial arbitration procedures of major provider institutions offer a number of perceived advantages. For busy lawyers they offer a seemingly "tried and true" alternative to the minefield of customized drafting combined with an administrative support system and access to lists of pre-screened, trained neutrals. Many in-house counsel report that, unless a client is entering into an exceptionally significant commercial relationship or preparing a contract template that will be used multiple times,[48] it is unrealistic to expect counsel to spend considerable time planning and drafting arbitration agreements. Even in circumstances where more attention is appropriate, drafting dispute resolution agreements from whole cloth without reliance on published templates can be a dicey proposition. It therefore makes sense to examine and compare what different administrative institutions have to offer.

The incorporation of a boilerplate arbitration provision is also much less likely to raise the eyebrows of those on the other side of the negotiating table. To the extent that national or regional entities are known and respected in the marketplace, incorporating their rules is less likely to entail a drain on negotiators' time or an expenditure of a party's "bargaining chips."

But while drafters seeking guidance from the websites of institutions sponsoring arbitration have a seemingly wide variety of choices, there are few readily available, reliable guideposts that dependably link specific process alternatives to the varying goals and expectations parties may bring to arbitration.[49] Moreover, despite devoting a great deal of time and effort to developing and promoting institutional rules, most organizations offer a limited range of process templates for commercial arbitration. For example, some institutions heavily emphasize a single set of commercial arbitration rules which may be excellent for certain purposes but less advantageous for others (such as small and medium cases); by incorporating that institution's rules in an arbitration agreement, however, parties will be bound to employ those rules for whatever disputes arise. Relatively few procedures, for example, incorporate "tiered" approaches to dispute resolution in a single document.[50]

Very recently, some providers that heretofore had published a single set of "one-size-fits-all" arbitration rules are starting to give more attention to the diverse needs of business

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[48] *See* Stipanowich*, Arbitration and Choice, supra* note 3, Part III.A. (discussing options for "tailoring" arbitration provisions).

[49] Leading providers provide some basic guidance for drafters about ways of incorporating their own rules in the contract. *See, e.g.*, AAA, DRAFTING DISPUTE RESOLUTION CLAUSES: A PRACTICAL GUIDE (Amended and Effective September 1, 2007); JAMS GUIDE TO DISPUTE RESOLUTION CLAUSES FOR COMMERCIAL CONTRACTS (Rev. June 2000). One relatively comprehensive set of guideposts for business users is the product of the CPR Commission on the Future of Arbitration. See generally COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 14. Even this extensive guide, however, does not approach process questions from the standpoint of various specific user goals. A more recent CPR publication does, however, address many key drafting issues. CPR INSTITUTE FOR DISPUTE RESOLUTION, CPR DRAFTER'S DESKBOOK (Kathleen Scanlon ed., 2002).

[50] The AAA has offered a multi-tiered approach in its basic rules for a number of years. See, e.g., AAA's COMMERICAL ARBITRATION RULES (Amended and Effective September 1, 2007) and AAA's CONSTRUCTION INDUSTRY ARBITRATION RULES (Amended and Effective October 1, 2009). *See generally* Thomas J. Stipanowich, *At the Cutting Edge: Conflict Avoidance and Resolution in the Construction Industry* in ADR & THE LAW 65-86 (1997) (describing rationale for American Arbitration Association's tiered construction procedures).

users of arbitration. For example, there has been a trend among leading U.S. arbitration institutions to create discrete templates for expedited or streamlined arbitration.[51] In light of growing concerns about the scope and cost of arbitration-related discovery, moreover, various institutions have devoted attention to that subject, and choices may now be discerned among existing procedures.[52] These are important steps toward the goal of moving beyond a "one-size-fits-all" approach to arbitration, but much more can be done both from the standpoint of developing alternatives and providing business users with user-friendly roadmaps.

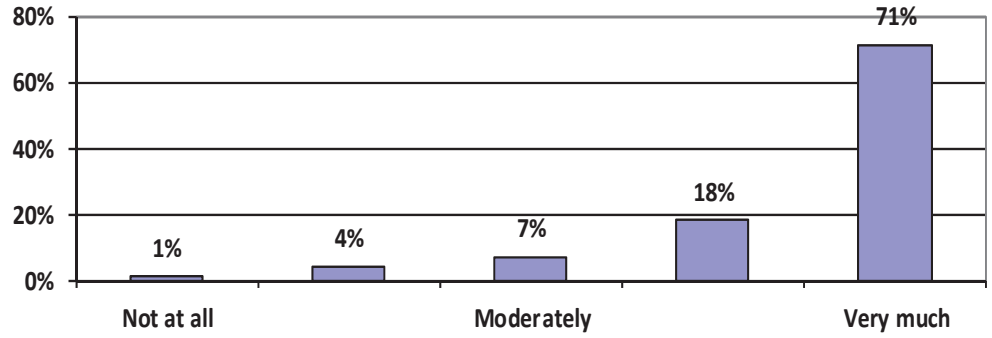
Moreover, providers are ideally positioned to collect and share information about the experience of users with streamlined procedures or other economy- and efficiency-focused devices. Such information is likely to be of critical importance to business clients and counsel as they consider the relative value and appropriateness of different process choices.

Perhaps most importantly, the community of users continues to seek more and better information about the capabilities and skills of arbitrators; this is a significant business opportunity for providers that are able to figure out how to obtain, mine and transmit reliable and relevant data.

D. The Role of Outside Counsel

Legal advocates have considerable control over the arbitration experience, including cost and cycle time. Effective advocates, with the cooperation of opposing counsel and the arbitrator, may overcome the deficiencies of arbitration provisions embodying inadequate procedures. Ineffective advocates, on the other hand, may undermine the best-crafted procedural framework. Not surprisingly, National Summit participants believed that outside counsel could do a great deal more to help meet clients' expectations of speed, efficiency and economy in arbitration:

> *When arbitration fails to meet the desires of business users regarding speed, efficiency and economy, how much more can outside counsel (advocates in arbitration) do to help fulfill those expectations?*



[51] *See* Stipanowich, *Arbitration and Choice, supra* note 3, Part III.B.

[52] *See id.,* Part III.C.

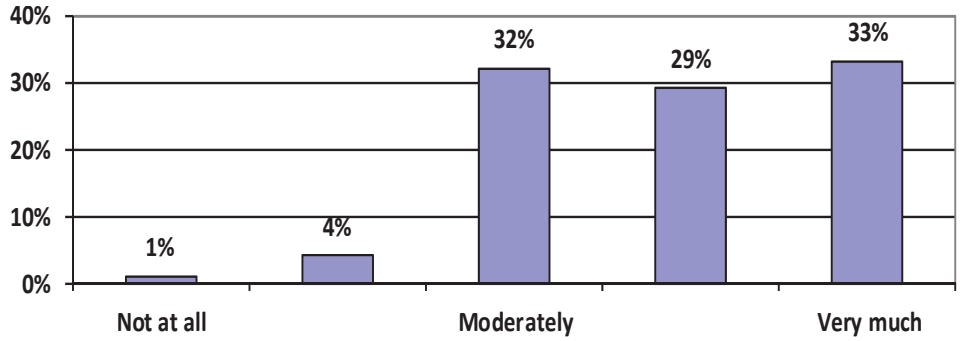
Thoughtful, experienced lawyers who understand arbitration and appreciate the significant differences between arbitration and litigation are in the best position to navigate through the arbitration process in a way that most effectively promotes client goals such as economy and efficiency. At each stage of the process—communicating with administrators, selecting arbitrators, providing arbitrators with guidance for the creation of effective procedural orders and establishing a timetable, setting and participating in hearings, and creating a roadmap for the final award—they have opportunities to further these goals. Some advocates may find it possible to collaborate with opposing counsel in order to develop integrative process solutions that promote expedition and economy along with other mutual benefits.[53]

More attention needs to be given to specific ways advocates can most effectively move the arbitration process along and reduce costs. Advocates, like arbitrators and business users, must also be alerted to the scenarios in discovery, motion practice and hearings that can drive up costs without proportionate benefits.

E. The Role of Arbitrators

Most National Summit participants agreed that arbitrators, too, must share responsibility for meeting user expectations regarding speed, efficiency and economy:

> *When arbitration fails to meet the desires of business users regarding speed, efficiency and economy, how much more can arbitrators do to help fulfill those expectations?*



The critical role of arbitrators in achieving efficiency and cost-saving—and in striking an appropriate balance between efficiency and fairness—is well understood by many experienced arbitrators.[54] That role also helped inspire recent published guidebooks[55] and prompted

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[53] *See generally* Zela G. Claiborne, *Constructing a Fair, Efficient, and Cost-Effective Arbitration*, 26 ALTERNATIVES TO THE HIGH COST OF LITIG. 186 (Nov. 2008) (describing possibilities for collaborative process design).

[54] *See generally* John Wilkinson, *The Future of Arbitration: Striking a Balance Between Quick Justice and Fair Resolution of Complex Claims*, 8 BNA EXPERT EVIDENCE REPORT 189 (Apr. 21, 2008) (discussing ways arbitrators may bring tools to bear).

[55] *See, for example,* THE COLLEGE OF COMMERCIAL ARBITRATORS GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION, 2nd Ed. (James M. Gaitis, Curtis E. von Kann and Robert W. Wachsmuth eds., Juris Net 2010).

leading arbitration provider institutions to develop more rigorous education and training programs for arbitrators. Such guidance, however, does not normally single out approaches that promote economy and speed, but addresses a variety of purposes. Arbitrators need to understand parties' priorities and act accordingly, but in the absence of clear evidence to the contrary arbitrators should assume that their role is to move proceedings forward as quickly and efficiently as possible, consistent with fundamental fairness.[56]

As noted above, more emphasis needs to be placed on specific ways of promoting fairness and on spotting and avoiding circumstances that enhance costs and delays without proportionate benefits. Special attention should be given to care in setting timetables and managing discovery, motion practice and hearings.

F. The Central Lesson

To summarize, the dramatic "success" of arbitration in evolving into a primary role in the resolution of commercial disputes has brought with it complaints that arbitration has become too much like litigation: too slow, and too costly. While much has been done to improve the understanding of business users and the performance of arbitration provider institutions, advocates and arbitrators, there is a need to focus on the specific ways all stakeholders—beginning with business clients and in-house counsel—can more effectively reduce the cost and length of arbitration. This is the purpose of the *Protocols for Expeditious, Cost-Effective Commercial Arbitration*, presented below with accompanying commentary.

[56] *See, e.g.*, McIlwrath & Schroeder, *supra* note 35, at 6 (discussing priorities of corporate counsel).

IV
Protocols for Expeditious, Cost-Effective Commercial Arbitration

General Principles

These *Protocols* are premised on the National Summit consensus that the pace and costs of commercial arbitrations are driven by dependent variables: specific steps taken, or not taken, by each of the four constituencies of the arbitration process (i.e., the parties, the advocates, the arbitrators and the arbitration providers). The *Protocols* are, accordingly, structured to provide specific steps that each constituency can take to alter the current trajectory of increasing costs and extended proceedings in arbitration. For example, if the arbitration provider whose rules control a case provides no option for limited discovery and if the parties and their counsel are battling every issue, the arbitrator's ability to contain discovery costs is seriously constricted. These *Protocols* therefore also contemplate that, in adopting specific steps, the constituencies will strive to cooperate and coordinate their actions, yielding maximum impact. Common to the *Protocols* for each constituency are these overarching principles:

Be deliberate and proactive. Promoting economy and efficiency in arbitration depends first and foremost on deliberate, aggressive action by stakeholders, starting with choices made by businesses and counsel at the time of contract planning and negotiation and continuing throughout the arbitration process. Service providers must actively support good choices in a variety of ways, including publishing and promoting clear procedural choices and putting forward effective arbitrators. Arbitrators must aggressively manage the process from day one of their appointment. All these activities may be strongly reinforced by the cooperative efforts of counsel.

Control discovery. Discovery is the chief culprit of current complaints about arbitration morphing into litigation. Arbitration providers should offer meaningful alternative discovery routes that the parties might take; the parties and their counsel should strive to reach pre-dispute agreement with their adversary on the acceptable scope of discovery, and arbitrators should exercise the full range of their power to implement a discovery plan. The *Protocols* do not assume that the parties in every case will favor truncated discovery; some disputes require deeper discovery to allow for more efficient hearings. The pivotal point is that, by having options to consider and then by electing an appropriate option for the particular dispute, the overall costs of arbitration can still be contained, if only because disputes over the scope of discovery can be averted by agreements and a scheduling order at the outset.

Control motion practice. Substantive motions can be the enemy or the friend of the effort to achieve lower costs and greater efficiencies. Some see current motion practice as adding another layer of court-like procedures, resulting in heavy costs and delay. Others see current motion practice as missing an opportunity for reducing costs and delay, where clear legal issues that might be disposed of at the outset are instead deferred by arbitrators, to allow parties to conduct discovery and then offer their proofs. Recognizing whether in a particular

case a substantive motion would advance the goal of lower cost and greater efficiency is among the most challenging tasks these *Protocols* present to the constituencies; they aim to promote cooperation and close consideration of the role a motion might play.

Control the schedule. Since work expands to fill the time allowed, it is critical to place presumptive time limits on activities in arbitration or on the overall process, coupled with "fail safe" provisions that ensure the process moves forward in the face of inaction by a party. At hearings, for example, the use of a "chess clock" approach is of proven value in expediting examinations and presentations. Some experienced in-house counsel favor establishing overall time limits in large, complex disputes as well as smaller cases.

Use the Protocols as tools, not a straitjacket. While there are certain categories of cases that are alike except for the identity of the parties and other participants, most commercial arbitrations with a substantial amount at stake are distinct in at least some way, be it the twist of circumstance that sparked a dispute or the array of legal issues presented. These *Protocols* offer actions that might apply to the broad range of cases, and yet embedded in them is recognition that parties' needs vary with circumstances and that a well-run arbitration will at some level be custom-tailored for the particular case. The parties and their counsel are encouraged to embrace those elements of the *Protocols* that are most appropriate to their circumstances as understood at contract time or after disputes have arisen.

Remember that arbitration is a consensual process. Arbitration is rooted most often in an arbitration agreement made when the parties were in a constructive, business-enhancing mode. When a dispute arises, the reaction will vary. Some parties, looking to do business again in the future or accepting of the occurrence of a dispute, will be able to cooperate productively towards a common goal of cost containment. Other parties, by the point of a dispute, are entrenched in their respective perspectives of what occurred and why the other side is to blame; parties in this mind-set face a daunting challenge to look beyond grievances in order to find cost savings that might benefit each side. These *Protocols* aim to meet the diverse settings in which cases arise, recognizing that the prescribed behavior ultimately cannot be imposed but can only be encouraged, in a context where the constituencies' efforts permit formulation of the best plan for the particular case.

A Protocol for Business Users and In-House Counsel

While not all business users seek economy and efficiency in arbitration, these are priorities for most businesses much or most of the time. The high cost and/or length of commercial arbitration appear to be the greatest sources of dissatisfaction with the process. There are, however, a number of choices available to business users—in preparing to sign a contract, after disputes arise, and throughout the arbitration process—that will promote cost- and time-saving in dispute resolution. The following Actions are recommended as options for business users and in-house counsel in making choices regarding arbitration. They may be embraced wholly or selectively in light of business priorities in particular relationships and kinds of disputes.

1. Use arbitration in a way that best serves economy, efficiency and other business priorities. Be deliberate about choosing between "one-size-fits-all" arbitration procedures with lots of "wiggle room" and more streamlined or bounded procedures.

Promoting economy and efficiency in arbitration depends first and foremost on proper contract planning. Reflexively "plugging in" a standard form arbitration provision forfeits the single best opportunity business users have for tailoring procedures to limit the scope of discovery, establish timetables and create other boundaries for arbitration. Traditional "one-size-fits-all" provisions afford considerable leeway for arbitrator discretion but also create opportunities for counsel to expand, often excessively, the dimensions and density of the arbitration. The potential benefits of this flexibility must be balanced against significant downsides—the possibility of strategic or tactical manipulation by counsel, and the tendency to convert arbitration into a replica of litigation.

In most cases an arbitration clause should be part of a comprehensive dispute resolution process that might include executive negotiation, mediation and, finally, arbitration. An effective dispute resolution provision incorporating appropriate procedures of a well-established "provider institution" is usually of mutual beneficial to the parties (see *Protocol for Arbitration Providers*).

Comments:

Those charged with choosing business dispute resolution provisions must take a much more considerate approach to the selection of arbitration procedures—preferably after discussing key goals with the affected executives. If customized provisions seem appropriate, special caution is required in the crafting.[57] Choice regarding arbitration is too important to be left until the eleventh hour of negotiation; process options should be considered and developed

[57] One famous nightmare scenario of one-off drafting which generated nine years of litigation involved a contractual provision for expanded judicial review of arbitration awards. *See* Kyocera Corp. v. Prudential-Bache Trade Services, Inc., 341 F.3d 987, 1000 (9th Cir. 2003) *overruling* LaPine Technology Corp. v. Kyocera Corp., 130 F.3d 884, 888 (9th Cir. 1997).

ahead of time.[58] By today's standards, simply ticking off basic options ("mediation," "arbitration") and throwing in convenient boilerplate clauses without reflection might be characterized as malpractice; lawyer-counselors must have or gain access to the knowledge and sophisticated tools necessary to address key process choices and issues.

A number of companies have embraced systematic approaches to handling conflict. They have articulated business goals to be achieved in their program, developed effective mechanisms for the early assessment and affirmative management of conflict,[59] and promoted various appropriate dispute resolution tools (including executive negotiation, mediation and arbitration).[60] Approached in this way, as part of a thoughtful and multi-faceted approach to resolving conflict, arbitration is more likely to prove its particular value as a response to business needs and priorities. Binding arbitration is often a favorable alternative to the litigation process, but it is ill-suited to being the sole process option for serving the day-to-day needs of businesses. Rather, the first step should normally be negotiation, followed in most instances by mediation. Keep in mind that mediation not only offers significant opportunities for effective resolution of claims and controversies but may also reap dividends for commercial relationships. Moreover, even if mediators are unable to help the parties reach a complete settlement of substantive issues, they may be in a position to facilitate the tailoring of arbitration procedures most appropriate to the resolution of those same issues.[61]

If a business client places high priority on speed, efficiency and economy in its arbitrations, consideration should be given to adopting (or carefully adapting) arbitration procedures that effectively address those concerns through one or more of the following, discussed at greater length below:

- mandatory pre-arbitration negotiation and/or mediation;
- early "fleshing out" of claims and defenses;
- early identification by arbitrators of legal or factual issues amenable to early disposition that will narrow or focus the issues in dispute, and procedures to resolve those issues;
- meaningful limits on the scope of discovery;
- expedited procedures for resolving motions and discovery disputes;
- overall time limits on arbitration;

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[58] *See* Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the New Litigation, (Symposium Keynote Presentation)*, 7 DEPAUL BUS. & COM. L.J. 401, 400-03 (2009) [hereinafter Stipanowich, Arbitration and Choice], *available at* http://ssrn.com/abstract=1372291.

[59] *Id*.

[60] By way of comparison, the Final Report on Litigation Reform calls on courts to "raise the possibility of mediation or other forms of alternative dispute resolution early in appropriate cases." INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 3 (Mar. 11, 2009) [hereinafter FINAL REPORT ON LITIGATION REFORM].

[61] *See generally* COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS Ch. 1, 2 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001) [hereinafter COMMERCIAL ARBITRATION AT ITS BEST] (discussing general strategies for conflict management and drafting considerations).

- "fast-track" procedures for appropriate cases;
- relying on one rather than multiple arbitrators when appropriate.

2. Limit discovery to what is essential; do not simply replicate court discovery.

Since the most critical factor in the cost and length of litigation or arbitration is nearly always the scope of discovery, parties seeking efficiency and economy in arbitration must make it clear that discovery in arbitration is not for the litigator who will leave no stone unturned.[62]

The first and by far the best opportunity for business users to place meaningful limits on discovery is in the arbitration agreement or incorporated arbitration procedures. There are a number of ways in which arbitration provider institutions' procedures might limit discovery (see *Protocol for Arbitration Providers,* Action 3). A pre-dispute agreement, while not always achievable, is more likely to produce favorable results since post-dispute it is much more difficult to achieve consensus.

A second opportunity occurs when a dispute arises and outside counsel is retained. At this point, in-house counsel may promote discovery limits by acknowledging that, while scaling back on discovery carries some risk that some significant evidence may not be found, the client is prepared to accept that risk in order to secure the greater benefit of a process that is substantially faster and less expensive than litigation. Inside and outside counsel should thoroughly discuss the cost versus benefit of various courses of discovery that might be pursued in the arbitration and memorialize in writing the client's decision concerning the nature and extent of discovery it wishes to initiate (see *Protocol for Outside Counsel*, Actions 2, 5).

If business users have failed or been unable to avail themselves of either of the first two opportunities, it may still be possible to convince the arbitrator(s) to limit the scope of discovery (see *Protocol for Outside Counsel*, Action 3; *Protocol for Arbitrators*, Action 6).

Comments

With regard to options for meaningfully limiting the scope and nature of discovery, see the extensive commentary under the *Protocol for Arbitration Providers*, Action 3.

3. Set specific time limits on arbitration and make sure they are enforced.

Business users should consider agreeing to binding limits on the length of the arbitration in the arbitration agreement. This could be accomplished by simply setting a deadline (e.g., one year) for completion of the arbitration or by incorporating provider rules that establish a

[62] INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, RULES FOR NON-ADMINISTERED ARBITRATION Commentary to CPR Rule 11 (2007) [hereinafter CPR RULES], *available at* http://www.cpradr.org/ClausesRules/2007CPRRulesforNonAdministeredArbitration/tabid/125/Default.aspx#Commentary.

timetable for each phase of the arbitration. A pre-dispute arbitration agreement might establish different deadlines or timetables corresponding to different total amounts in controversy (see *Protocol for Arbitration Providers*, Action 4). Arbitrators could be afforded authority to establish procedures and timelines for achieving the contractual limits as well as discretion to vary the limits in truly exceptional circumstances.

Some experienced in-house counsel favor prescribing overall time limits in large, complex disputes as well as smaller cases. If binding time limits are not desired in all cases, however, business users should at least consider their application in disputes involving amounts below a certain dollar figure.

Contractual time limits, like other stipulated boundaries, are only effective if they are recognized and enforced. Thus, it is critical for outside counsel to advocate such enforcement and for arbitrators to respond accordingly (see *Protocol for Outside Counsel,* Action 3; *Protocol for Arbitrators*, Action 3).

If businesses are unwilling or unable to establish pre-dispute timetables for arbitration but still hope to set an acceptable deadline, it will be necessary to seek a post-dispute agreement with the other party (if consensus is realistically achievable) or an appropriate arbitral order.

Comments:

C. Northcote Parkinson's famous "law" that work expands to fill the time available for its completion[63] encapsulates the fundamental truth that human beings find it nearly impossible to terminate working on an important matter when there is still time left to do more. This is especially true in commercial arbitration where the stakes are often high, those doing the work are typically conscientious "Type A" lawyers, and all actors – both counsel and arbitrators – are being paid by the hour. However, if work on the matter is firmly limited to a fixed period of time, lawyers are very good at determining how to use that time most effectively by concentrating on the most important tasks and dispensing with activities that offer less promise.

Time limits are accepted norms in many critical aspects of modern life, whether it be delivering a Supreme Court argument, or preparing a multi-billion dollar case for trial in certain state and federal courts, or taking a college entrance exam. There is no reason why time limits cannot be placed on completing a commercial arbitration, and many thoughtful observers believe that such limits are the single most effective device available for reining in arbitration cost and delay. Moreover, time limits in arbitration, particularly where arbitrators have authority to increase the limit in exceptional circumstances, are eminently achievable. One senior attorney, who manages a large portfolio of highly complex arbitrations for one of the world's largest corporations, reported at the National Summit that her company has never had a dispute that could not be fairly and efficiently arbitrated within one year.

[63] *See* PARKINSON'S LAW: THE PURSUIT OF PROGRESS (London, John Murray, 1958).

The best way to impose time limits on arbitration is to include those limits in the arbitration clause or incorporate provider rules that contain such limits. All expedited or streamlined rules are distinguished by fixed or presumptive time limits, although these vary considerably in detail. The *AAA Expedited Procedures*, aimed at small-dollar claims, contemplate the shortest cycle time, with an anticipated time horizon of around sixty days.[64] CPR's procedures embody a conceptual hundred-day time frame, including a maximum of sixty days to the hearing, thirty days for hearings, and ten days for deliberation and preparation of an award.[65] Importantly, the 100-day period does not begin until the date set by the arbitrators at an initial pre-hearing conference; it thus does not include critical early procedures including the selection of arbitrators and detailed statements submitted by both parties.[66] JAMS' models also include shortened procedural stages.[67]

An agreement to time limits, standing alone, is obviously insufficient; drafters must incorporate specific process elements that facilitate a shorter arbitration. These include faster arbitrator selection procedures, early sharing of detailed information, tightly bounded discovery, and (possibly) limitations on the length of the final award.

Importantly, one Summit participant, a senior in-house dispute resolution lawyer at a leading global corporation, urges business users to use time limits in cases of all sizes:

> [E]xpedited [arbitration] rules are often limited to very small dollar values. I am urging my lawyers to break that paradigm. . . . We are not talking about setting the bar at a couple of hundred thousand, [but rather cases involving] $50 million or less in six months, more than $50 million, 12 months.[68]

Once set, timetables should be adhered to in the absence of extraordinary circumstances. One experienced advocate and arbitrator explains:

> Binding limits on the length of proceedings can and should be [utilized]. Often, however, . . . the parties mutually agree they will take the time limits off and [the arbitration] goes on forever.[69]

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[64] The hearing is "to be scheduled to take place within 30 days of confirmation of the arbitrator's appointment." AAA COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, SECTION E: EXPEDITED PROCEDURES (2009) [hereinafter AAA EXPEDITED PROCEDURES], E-7. Awards are to be rendered within 14 days of the close of hearing. *Id.*, E-9. In the absence of a showing of good cause, the hearing itself is limited to a day. *Id.*, E-8(a). *Cf.* CONSTRUCTION INDUSTRY ARBITRATION RULES AND MEDIATION PROCEDURES F-9 (2009) [hereinafter AAA CONSTRUCTION INDUSTRY FAST TRACK RULES].

[65] INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, EXPEDITED ARBITRATION OF CONSTRUCTION DISPUTES R. 1.3 (2006) [hereinafter CPR EXPEDITED ARBITRATION].

[66] *See id.*, Rules 3, 5, 9.3.

[67] *See* JAMS STREAMLINED ARBITRATION RULES & PROCEDURES (2009) [hereinafter JAMS STREAMLINED RULES].

[68] Michelle Leetham, Esq., Bechtel Corporation, Rossdale Group ADR Teleconference (May 5, 2010).

[69] Larry Harris, Esq., Partner, Greenberg Traurig, Washington, D.C., Rossdale Group ADR Teleconference (May 5, 2010).

4. Use "fast-track arbitration" in appropriate cases.

Businesses should use, in appropriate cases, fast-track (expedited or streamlined) arbitration. Businesses wishing to employ fast-track procedures in a pre-dispute arbitration agreement must either specify those procedures and the circumstances under which they will be used or incorporate an arbitration provider's rules that detail such procedures and the circumstances of their application.

Some businesses may be willing to utilize, in cases of certain types or certain dollar amounts, a highly truncated approach in which discovery and motions are not permitted; the parties' arbitration demand and response are accompanied by detailed statements of their claims and/or defenses as well as all facts to be proven, supplemented by citation to all legal authorities relied upon, copies of exhibits, and summaries of the testimony of all lay and expert witnesses, after which the case proceeds to an immediate hearing (see *Protocol for Arbitration Providers*, Action 5).

Comments:

See comments under Action 3 above.

5. Stay actively involved throughout the dispute resolution process to pursue speed and cost-control as well as other client objectives.

Sophisticated in-house counsel know that it is absolutely essential for business principals and senior in-house counsel to stay actively involved throughout the dispute resolution process. They should conduct an early case assessment to determine how much of an effect the dispute may have on the business's important interests, the prospects for a successful outcome, how much time and money the business is prepared to devote to the resolution of the dispute, and what resolution approach is likely to be most effective. If outside counsel is not involved in early case assessment, in-house counsel should convey the internal assessment to outside counsel and request their independent analysis (see *Protocol for Outside Counsel*, Action 2). As they do with other large expenditures, businesses should set an appropriate and realistic budget for arbitration and should forbid outside counsel from exceeding that budget without express approval. In-house counsel should attend the first case management conference as well as all important subsequent conferences and hearings during the arbitration process in person or by telephone, should require periodic status reports from outside counsel, and should actively partner in the management of the arbitration rather than relinquishing such control to outside counsel.

Comments:

In-house counsel must play an important part in forward planning and continuous management of the arbitration schedule; minimization of interruptions through firm stances supported by flexible solutions such as consensus; and preparing their companies to deal

appropriately with changing circumstances.[70] Communication must be healthy not only with traditional stakeholders but with "the key business person(s) who will often have the best handle on the value to the business of the disputed matter, including its risks. They will discuss frankly the expense, delay, and lost opportunity cost of proceeding in the most litigation-like manner in arbitration, especially discovery and motion costs, scheduling the evidentiary hearing (how soon and how lengthy), and hearing procedures. In arbitration the parties can and should decide how much process they want, and want to pay for."[71]

In-house counsel are a vital part of the effort to distinguish the tone of an arbitration process from that of litigation. This is noted with particular frequency by some commentators in the area of labor disputes, who advocate approaching arbitrations in terms of bottom line savings over the long term.[72] An efficient arbitration process may have a significant impact on relationships with current and past commercial partners.

6. Select outside counsel for arbitration expertise and commitment to business goals.

In-house counsel should select outside arbitration counsel for their expertise in arbitration, not litigation, their likely effectiveness as advocates in the arbitration process, taking account of the key players (opposing party and counsel, the arbitration provider institution, and prospective or appointed arbitrators), and their ability to meet client's objectives regarding speed and economy (including the client's decision regarding the extent of resources to be devoted to the matter). In-house counsel should explore the possibility of billing arrangements other than pure hourly billing such as fixed fees, contingency fees, and other arrangements that incentivize counsel to conduct the arbitration and resolve conflict as efficiently and expeditiously as possible (see *Protocol for Outside Counsel, Action 7*).

Comments:[73]

An international organization recently sponsored a competition among major law firms with the aim of identifying a firm whose practice embodied effective methods of managing and resolving business-related disputes. The entries revealed very different conceptions of what constitutes effective dispute resolution. Some firms simply touted big court victories, while others focused on their expertise in commercial arbitration. Still others portrayed a variegated

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[70] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 226.

[71] JOAN GRAFSTEIN, IMPROVING COMMERCIAL ARBITRATION: THE VIEW OF AN ARBITRATOR AND FORMER IN-HOUSE COUNSEL (April 30, 2010), *available at* http://www.lexisnexis.com/Community/UCC-Commerciallaw/blogs/ucccommercialcontractsandbusinesslawblog/archive/2010/04/30/improving-commercial-arbitration-the-view-of-an-arbitrator-and-former-in-house-counsel.aspx.

[72] "The Dispute-Wise studies found that the most dispute-savvy businesses considered the full spectrum of legal disputes as a portfolio — where the focus was not on 'winning' each individual dispute through protracted litigation but on 'winning' back the loyalty of Stakeholders who will stay with you for the long haul if you treat them with fair-mindedness and integrity when disputes inevitably occur." THE METROPOLITAN CORPORATE COUNSEL, EXPERTS IDENTIFY ADR TRENDS AND BEST PRACTICES (January 1, 2006), *available at* http://www.metrocorpcounsel.com/current. php?artType=view&EntryNo=4160.

[73] These comments are drawn in large measure from Stipanowich, *Arbitration and Choice*, *supra* note 58.

practice employing different approaches, including early case assessment, negotiation, mediation, arbitration and litigation to address particular client needs.

Business clients typically rely heavily on outside counsel to represent their interests in the management of conflict, including arbitration. These advocates have as much to do with realization of a client's goals and expectations as procedures, administrative framework or neutrals. The wide variation in approaches to conflict makes it inevitable that some law firms—and lawyers—will be more suitable for particular clients—and particular circumstances—than others. Selection of a law firm or lawyer that lacks the willingness or capability to align itself with the client's goals may undermine the most careful contract planning.

Unless a legal dispute is inevitably destined for the courtroom, something beyond litigation experience is essential in outside counsel. Litigation experience is not in itself sufficient to qualify one as arbitration counsel—the legal and practical differences are simply too great. Moreover, as our discussion of varied client goals reveals, arbitration and court trial are very often appropriately relegated to a secondary or tertiary role, forming a backdrop or backstop for efforts at informal dispute resolution.[74] With that in mind, an effort should be made to ensure that counsel is capable of understanding and fulfilling a client's specific goals and priorities in addressing disputes. Consider the following list of questions that might be asked before retaining counsel to resolve a dispute:

- Do you have experience helping clients consider the appropriateness of options for early resolution of disputes? What options do you discuss?
- What methods do you use to analyze options?
- What is your experience with and attitude toward negotiated resolution of disputes? With mediated negotiation?
- Have you had formal training in negotiation or mediation theory and practice?
- What is your experience with commercial arbitration, including arbitration under the relevant procedures and administrative framework?[75] Are you familiar with the case managers or case administrators for this matter?
- Are you familiar with the provider institution's list of arbitrators?
- Are you familiar with applicable ethics rules?
- What experience have you had negotiating, arbitrating or litigating with opposing counsel? What is the nature of your relationship?
- How does your arbitration advocacy differ from your advocacy in litigation?
- What techniques have you found to be most effective in promoting efficiency and economy in commercial arbitration?
- What professional service models do you employ other than hourly fees? Are you willing to explore incentives for early resolution?

As noted above, even after vouchsafing the role of advocate to appropriate outside counsel, a prudent client or inside counsel will continue to be involved in the conflict resolution

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[74] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 5-6, 10-33, 39-41.

[75] Depending on the circumstances, this might include an exploration of experience with expedited rules, rules for large or complex arbitration, or appellate arbitration rules.

process. This means being present at key decision points before and during arbitration, including pre-hearing conferences at which the timetable and format for the arbitration are discussed and established.[76]

7. Select arbitrators with strong case management skills.

In-house counsel should be actively involved, alongside outside counsel, in selecting arbitrators who are able and willing to promote effective cost- and time-saving procedures. Information from provider institutions may be supplemented by intra-firm communications and discrete queries to listservs and social networking programs. Counsel might agree to pre-screen prospective arbitrators by means of a questionnaire or joint or separate interviews; counsel should be forthright in asking prospective arbitrators about their philosophy and style of case management (see *Protocol for Outside Counsel,* Action 3).

Counsel should be aware that (1) the requirement that its arbitrators continually upgrade their process management skills and (2) the quality and scope of information regarding prospective arbitrators, may offer key points of comparison among arbitration provider institutions (see *Protocol for Arbitration Providers*, Points 7, 10).

Comments:[77]

It has been said that "the arbitrator *is* the process." This is not mere hyperbole: while the appropriate institutional and procedural frameworks are often critical to crafting better solutions for business parties in arbitration, the selection of an appropriate arbitrator or arbitration tribunal is nearly always the single most important choice confronting parties in arbitration;[78] a misstep in the choice of arbitrator(s) may undermine many other good choices.

One should never choose an arbitral institution without doing due diligence regarding the institution's panel or list of neutrals and ascertaining whether or not the requisite experience, abilities and skills are represented. In order to inform and channel the eventual selection process, moreover, it may be appropriate to prepare reasonable guidelines for the choice of neutral(s) for particular kinds of disputes. In considering candidates, some or all of the following may be relevant: legal, professional, commercial or technical background; notability;[79] hearing management experience and skills; attitudes about arbitration; current schedule and availability.

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[76] *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 183-190.

[77] These comments are drawn in large measure from Stipanowich, *Arbitration and Choice*, *supra* note 58, 432-434.

[78] JAY FOLBERG ET AL., RESOLVING DISPUTES—THEORY, PRACTICE & LAW 470-73 (2008) ("the choice of arbitrators [is] critical for two reasons: They will likely provide the only review of the case's merits, and arbitrators will have primary control over the process itself.").

[79] Notability in the sense of perceived standing within a commercial community or industry, while insufficient in itself, may be especially desirable if an authoritative pronouncement or application of pertinent norms and practices is needed. Int'l Produce, Inc. v. A/S Rosshavet, 638 F.2d 548, 551-52 (2nd Cir. 1981) ("The most sought-after arbitrators are those who are prominent and experienced members of the specific business community in

Again, the relevant questions depend on goals and priorities. If those priorities include low cost, efficiencies, and the avoidance of undue delay, the following queries may be helpful:

- Should a single arbitrator be sufficient for selected classes or kinds of disputes?[80]
- Does the prospective arbitrator (or chair of the arbitration tribunal) have experience in process management, and does that experience reflect well on his or her ability to supervise an efficient, economical process?
- Is the prospective arbitrator committed to the concept of promoting economies and efficiencies throughout the process?
- Is the prospect available for expedited hearings, or for hearings over the period during which the arbitration is likely to occur? What other standing or prospective commitments does the arbitrator have?

It is reasonable for parties to expect arbitrators to give them what they bargained for.[81] While arbitrators should always seek appropriate ways of promoting efficiency and economy in the absence of contrary agreement, clear contractual language emphasizing the primacy of such expectations should give rise to special effort on their part. Business users and counsel should emphasize to the arbitrator their expectations about arbitrator techniques like the following:

- Emphasizing speed and cost-saving to the parties at the outset, particularly the firmness of the schedule and granting continuances only for good cause;[82]
- Functioning as role models (cooperating with other arbitrators, including party-arbitrators; avoiding scheduling conflicts wherever possible);[83]
- Actively managing the process, beginning with a pre-hearing conference resulting in an initial procedural order and timetable for the entire arbitration;[84]
- Simplifying arrangements for communication, including the elimination of unnecessary communications through case administrators or third parties;[85]
- Simplifying, clarifying, and prioritizing issues;[86]

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which the dispute to be arbitrated arose."); Charles J. Moxley, Jr., *Selecting the Ideal Arbitrator* 60 DISP. RESOL. J. 24, 27 (Aug. 2005) (prominence of arbitrator increases confidence in the process).

[80] H. Henn, *Where Should You Litigate Your Business Dispute? In an Arbitration? Or Through the Courts?* 59 DISP. RESOL. J. 34, 37 (Aug.-Oct. 2004); COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 14, at 46.

[81] *See* John Tackaberry, *Flexing the Knotted Oak: English Arbitration's Task and Opportunity in the First Decade of the New Century*, Society of Construction Law Papers 3 (May 2002).

[82] *See* Louis L. C. Chang, *Keeping Arbitration Easy, Efficient, Economical and User Friendly*, 61 DISP. RESOL. J. 15 (May-Jul. 2006); COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 215-220.

[83] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 6-8.

[84] THE COLLEGE OF COMMERCIAL ARBITRATORS GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION 2nd Ed. Chs 6, 9 (James M. Gaitis, Curtis E. von Kann and Robert W. Wachsmuth eds., Juris Net 2010) [hereinafter CCA GUIDE TO BEST PRACTICES].

[85] *Id.*, Ch. 6 § V(L).

[86] *Id.,* §§ V(B)-(D), (I); Ch. 7 §§ III(B)-(C), (E)-(L).

- Addressing jurisdictional issues and reasonable requests for interim relief as soon as practicable;[87]
- Facilitating and actively monitoring information exchange/discovery;[88]
- Employing electronic means of communication and document management as appropriate; [89]
- Scheduling hearings with as few interruptions as possible;[90]
- Planning and actively managing the hearings (ending each hearing day with housekeeping sessions); [91]
- Anticipating potential problems (such as the unavailability of witnesses, unanticipated circumstances) and seeking creative solutions to minimize delay.[92]

8. Establish guidelines for early "fleshing out" of issues, claims, defenses, and parameters for arbitration.

Businesses should consider agreeing that before the preliminary conference, parties will provide preliminary statements of legal and factual issues, key facts to be proven, estimated damages broken down by category, and likely witnesses and types of experts (see *Protocol for Arbitration Providers*, Action 8). They should also consider requesting that, following the first, or at the latest, the second case management conference, the arbitrators issue comprehensive case management orders that incorporate limitations on discovery and motion practice, and set time frames and hearing dates that will not be varied except for good cause shown (see *Protocol for Arbitrators*, Actions 3, 4).

Comments:[93]

One significant insight emerging from the development of streamlined rules is the critical importance of requiring parties to furnish detailed information regarding claims and defenses at the front end of the process. By way of illustration, the JAMS expedited construction model calls for claimants to file a

> Submission of Claim . . . including a detailed statement of . . . claim including all material facts to be proved, the legal authority relied upon . . . , copies of all

[87] *Id.,* Ch. 2 § III; Ch. 6 §§ III(C), V(D); Ch. 7 § III(B), (D).

[88] *Id.*, Ch. 8.

[89] *Id.,* Ch. 6 §§ II(D), IV, V(L).

[90] *Id.,* Ch. 9(VI).

[91] *Id.,* Ch. 9 *passim.*

[92] *Id.*, §§V, VI(A)-(D), VII(C)-(D), IX(A), (F).

[93] These comments are drawn in large measure from Stipanowich, *Arbitration and Choice*, *supra* note 73, 410-411.

> documents that Claimant intends to reply upon in the arbitration and names of all witnesses and experts Claimant intends to present at the Hearing.[94]

Respondents are then required to prepare a Submission of Response of similar substance and form within twenty days of service of the Submission.[95] These requirements represent a dramatic departure from the current norm in arbitration practice and demand significant adjustment in the expectations of advocates. They can be, however, a critical element of an efficient process, as recognized by the new *Final Report on Litigation Reform,* which concludes that the failure to effectively identify issues early-on "often leads to a lack of focus in discovery."[96]

Of course, the onus of these rules is likely to fall disproportionately on respondents, since claimants will have the opportunity to make preparations in advance of making an initial demand. For this reason, current procedures emphasize arbitrator discretion to give respondents reasonable time extensions.[97] Where arbitration is preceded by negotiation or mediation, moreover, both parties will be on notice of the likelihood that claims will be brought to arbitration.

Recently, some business users have expressed concerns about the cost of "front-loading" preparation costs by requiring extensive disclosure at the outset. These concerns may be at least partially addressed by a simpler approach to "putting flesh on the bones" at the beginning of the arbitration, such as having the parties submit informal memoranda or letters describing the background of the disputes and the factual and legal issues.

In expedited processes the pre-hearing conference assumes special significance as a tool for process planning and guidance.[98] Arbitrators may also find it necessary or appropriate to conduct frequent telephonic status meetings to ensure that progress is being made toward meeting deadlines.

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[94] JAMS STREAMLINED ARBITRATION RULES & PROCEDURES R. 7 (2009) [hereinafter JAMS STREAMLINED RULES]. *See also* INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION EXPEDITED ARBITRATION OF CONSTR. DISPUTES R. 3 (2006) [hereinafter CPR EXPEDITED ARBITRATION] ("Statement of Claim" is to include a detailed statement of all facts to be proved, legal authorities relied upon, copies of all documents Claimant intends to rely on, and names, CV and summary opinion testimonies of expert witnesses Claimant intends to present.").

[95] *See* CPR EXPEDITED ARBITRATION, *supra* note 94.

[96] FINAL REPORT ON LITIGATION REFORM, *supra* note 60. The Report calls for notice pleading "to be replaced by fact-based pleading . . . that "set[s] forth with particularity all the material facts that are known to the pleading party to establish the pleading party's claims or affirmative defenses." *Id.* at 5.

[97] *See, e.g.,* CPR EXPEDITED ARBITRATION, *supra* note 94, Rule 3.6 (permitting the Tribunal to extend the time for the Respondent to deliver its Statement of Defense); *Id*. at Rule 11(e)(permitting Arbitrator to extend deadlines).

[98] *See id*. at Rule 9. A pre-hearing conference held before the arbitration hearing may be necessary to deal with difficult preliminary issues, such as specifying issues to be resolved or stipulating uncontested facts. Joseph L. Daly, *Arbitration: The Basics*, 5 J. AM. ARB. 1, 40 (2006); COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 176-78.

9. Control motion practice.

Businesses should also consider agreeing to procedures for limiting "reflexive" motion practice and expediting the presentation and hearing of motions that have the potential to promote cost- and time-saving in arbitration (see *Protocol for Arbitration Providers*, Action 6).

Comments:[99]

As stated in Part II, the use of dispositive motions in arbitration is a double-edged sword.[100] This import from the court system, prudently employed, is a potentially valuable tool for narrowing arbitral issues prior to hearings and full-blown discovery, thus avoiding unnecessary preparation and hearing time.

The problem is that, as in court, motion practice often contributes significantly to arbitration cost and cycle time without clear benefits. The filing of motions often leads to the establishment of schedules for briefing and argument that entail considerable effort by advocates, only to have the arbitrators postpone a decision until the close of hearings.[101] As two GE counsel lamented:

> Any business lawyer knows that even the most complex disputes usually boil down to one or two critical issues that, once decided, will either determine the lion's share of the dispute or encourage parties to settle. And yet, the experience of many companies . . . is that tribunals in international commercial arbitrations, whether out of concern for due process or other reasons, are rarely willing to grant such relief in the early stages of a proceeding when doing so would have the greatest impact and benefit for the parties.[102]

While it is generally appropriate for arbitrators to steer clear of dispositive motions involving extensive factual issues, there are certain matters that may be forthrightly addressed early on with little or no discovery or testimony, such as contractual limitations on damages, statutory remedies, or statutes of limitations and other legal limitations on causes of action.[103]

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[99] These comments are drawn in large measure from Stipanowich, *Arbitration and Choice*, *supra* note 58, 412-413.

[100] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 203-06; Zela G. Claiborne, *Constructing a Fair, Efficient, and Cost-Effective Arbitration*, 26 ALTERNATIVES TO THE HIGH COST OF LITIG. 186 (Nov. 2008). *See also* Albert G. Ferris & W. Lee Biddle, *The Use of Dispositive Motions in Arbitration*, 62 DISP. RESOL. J. 17 (Aug.-Oct. 2007).

[101] For a discussion of deposition handling in arbitrations, see Romaine L. Gardner, *Depositions in Arbitration: Thinking the Unthinkable*, 1131 PRACTICING LAW INST. CORP. LAW & PRACTICE COURSE HANDBOOK 379, 389-97 (Jul.-Aug. 1999).

[102] Michael McIlwrath & Roland Schroeder, *The View from an International Arbitration Customer: In Dire Need of Early Resolution,* 74 ARBITRATION 3, 3 (Feb. 2008).

[103] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 48, 53-55. The new Final Report on Litigation Reform states that "parties and the courts should give greater priority to the resolution of motions that will advance the case more quickly to trial or resolution." FINAL REPORT ON LITIGATION REFORM, *supra* note 60, at 22. It also calls for "a new summary procedure . . . by which parties can submit applications for the determination of enumerated

If dispositive action is foreseen as a useful element in arbitration, there should be an appropriate provision in the arbitration procedure.[104]

At the time of appointment, moreover, parties should assess whether potential arbitrators are temperamentally and philosophically capable of rendering dispositive awards. Indeed, some leading arbitrators insist that motions should be addressed directly and energetically, since in many cases a prompt telephonic discussion may avoid the need for extensive briefing.[105]

10. Use a single arbitrator in appropriate circumstances.

Businesses should consider using a single arbitrator when appropriate. Some in-house counsel believe the costs and practical problems associated with three-member tribunals often outweigh the benefits, and are willing to submit all but the most complex cases to a single arbitrator. Others believe that collegial decision-making usually produces better decisions by decreasing the chance that important points will be overlooked or misunderstood, and that the additional cost of having three arbitrators, which is typically a fairly small part of total arbitration costs, is well worth the expenditure in important cases. Before providing for a three-member tribunal, counsel should always consider whether the complexity of the issues, the stakes involved, or other factors warrant the use of three arbitrators. A strong argument can often be made for sole arbitrators in cases with low or moderate damages exposure. (Depending on the parameters set for the use of a single arbitrator, parties may need to modify the arbitration procedures incorporated in the arbitration agreement to address this issue.)

In cases with three-member panels, businesses should consent to having the chair decide discovery disputes and other procedural matters unless all parties request the involvement of the full tribunal.

Comments:

Using a single arbitrator instead of a panel is an obvious choice for those seeking economy and efficiency; it simplifies every stage of arbitration from appointment to award-writing. Thus, some expedited procedures assume that a single arbitrator will be appointed unless the parties agree otherwise.[106]

While employing a multi-member tribunal may make some lawyers more sanguine about streamlined arbitration of larger claims, it increases costs and increases the likelihood of

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matters (such as rights that are dependent on the interpretation of a contract) on pleadings and affidavits or other evidentiary materials." *Id.* at 6.

[104] *See, e.g.,* JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES R. 18 (2007) [hereinafter JAMS COMPREHENSIVE RULES].

[105] *See* Chang, *supra* note 82, at 16.

[106] *See, e.g.,* AAA EXPEDITED PROCEDURES, *supra* note 64, E-4; JAMS STREAMLINED RULES, *supra* note 67, Rule 12(a). *But see* CPR EXPEDITED ARBITRATION, *supra* note 65, Rule 5.1 (providing for three neutral arbitrators).

delay. If drafters are truly serious about maintaining timelines, they should require each appointee to the tribunal to expressly represent to the parties that he or she has the time available to ensure that the expedited timetable will be achieved.[107]

11. Specify the form of the award. Do not provide for judicial review for errors of law or fact.

Business users should specify in the arbitration agreement the form of award desired (e.g., bare, reasoned, findings of fact and conclusions of law, etc.) and, where appropriate, a limit on the length of the award, bearing in mind that the more detailed the award, the more costs increase.

Business users should not include in their arbitration clauses an agreement that attempts to authorize courts to review arbitration awards for errors of fact or law. Besides raising issues of enforceability under arbitration law, such provisions may entail significant additional process costs and delays without commensurate benefits. If a business is not content to accept judicial review that is limited to the few grounds for vacatur set forth in the Federal Arbitration Act or comparable state statutes, a course that best achieves the finality which is among the major benefits of arbitration for most business users, it should incorporate in its arbitration clause a well-designed appellate arbitration procedure such as those sponsored by some provider institutions.

Comments:

1. Increased cost and cycle time through questionable choice-making: agreements to expand judicial review

Although increased costs and delays are in large measure a result of business users' failure to plan for arbitration by making appropriate process choices, contract planners may only exacerbate these problems if they make the wrong choices. A contractual provision providing for judicial review and vacatur of arbitration awards for errors of law or fact may well prove to be a "bad choice."

Consistent with the understanding that arbitration offered businesses the opportunity to avoid the "needless contention that [is] incidental to the atmosphere of trials in court,"[108] Congress in the Federal Arbitration Act produced a spare legal framework for the judicial enforcement of arbitration agreements and awards. A keystone of this structure is the rigorously restrained template for judicial confirmation, modification or vacatur of arbitration awards, including a narrow statutory imprimatur for vacating awards (limited in essence to situations where due process was not accorded or where arbitrators clearly acted in excess of their contractually-defined authority[109]). These strictures imbue arbitration awards with a meaningful—or, depending on one's point of view, an awful—finality. The fear of being

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[107] *See, e.g.,* CPR EXPEDITED ARBITRATION, *supra* note 65, Rule 7.2. It makes sense to obtain such a commitment from a sole arbitrator as well.

[108] Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 614 n. 44 (1928).

[109] *See* 9 U.S.C. § 10 (West Supp. 1994).

saddled with a truly bad award gives some business lawyers pause—especially when the potential business consequences are dire. This fear inspired in recent years the emergence of a species of arbitration agreements calling for more searching judicial scrutiny of awards, including review of awards for errors of law or fact.[110] Conceptually, one supposes, the result would be a hybrid in which the benefits of private arbitration would be coupled with the checks and balances of the civil appellate process. But the sword is double-edged and the pitfalls for unwary drafters multiple.

While there has been a lot of emphasis on the legalities of contractually expanded judicial review, considerably less attention has been given a more fundamental question—namely, "Do contract planners do their clients a favor by including such provisions in commercial arbitration agreements?" The one gathering of experts that directly addressed the issue, the CPR Commission on the Future of Arbitration, an aggregation of leading arbitrators and attorneys specializing in arbitration, responded with a resounding "No!"[111] They viewed such provisions as undermining key conventional benefits of arbitration, including finality, efficiency and economy, and expert decision-making.[112] Such provisions would, they believed, increase costs and delay the ultimate resolution of conflict without commensurate countervailing benefits. Moreover, such provisions pose particular challenges for drafters, both from the standpoint of creating practical, workable standards for review and addressing all of the pre- and post-award procedures required to implement enhanced review,[113] including: dollar or subject matter limits on review; the creation of an adequate record; the making of a sufficiently specific, reasoned award; notice requirements; the possibility of remand to the original arbitrator(s); and the handling of related costs.

The extreme downside of contracting for expanded review in an atmosphere of uncertainty regarding the legal propriety and enforceability of such provisions was famously exemplified by the nine-year battle punctuated by two decisions of the Ninth Circuit. In *LaPine Technology Corp. v. Kyocera*,[114] the court concluded that it was obliged to honor the parties' agreement that any arbitration award would be subject to judicial review for errors of fact or law. But after six more years of legal maneuvering before the district court and the original arbitration panel, the Ninth Circuit reconsidered its original decision *en banc* and reversed

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[110] *See* Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 HARV. NEGOT. L. REV. 171, 183-184 (2003); Dan C. Hulea, *Contracting to Expand the Scope of Review of Foreign Arbitral Awards: An American Perspective*, 29 BROOK. J. INT'L L. 313, 351 (2003); but *see* Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT'L ARB. 147, 150 (1997).

[111] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 291 (summarizing conclusions of CPR Commission).

[112] *Id.*

[113] *See, e.g.,* Ronald J. Offenkrantz, *Negotiating and Drafting the Agreement to Arbitrate in 2003: Insuring against a Failure of Professional Responsibility*, 8 HARV. NEG. L. REV. 271, 278 (Spring 2003); Kevin A. Sullivan, Comment, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards under the Federal Arbitration Act* 46 ST. LOUIS U. L.J. 509, 548-59 (Spring 2002). *See also* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 297.

[114] La Pine Tech Corp. v. Kyocera Corp., 130 F.3d 884 (9th Cir. 1997) (attorneys were able to provide for expanded judicial review in the arbitration clause that they drafted), *overruled by* Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 1000 (2003).

itself, declaring that enforcing expanded review provisions such as those before it would "rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process."[115]

Compounding the drafter's dilemma is the fact that such provisions have not been uniformly embraced by federal and state courts. The federal circuits split on the question of whether expansion of the FAA grounds for judicial review was permissible; state court decisions also reflect a divergence of authority.

Seeking to resolve the split among federal circuits, the U.S. Supreme Court held in *Hall Street Associates, L.L.C. v. Mattel, Inc*. that the Federal Arbitration Act (FAA) does not permit parties to expand the scope of judicial review of arbitration awards by agreement.[116] Justice Souter's opinion, joined by five other justices, declared that the grounds for judicial review of arbitration awards set forth in §§ 10–11 of the FAA are the exclusive sources of judicial review under that statute.[117] Moreover, the FAA's provisions for confirmation, vacatur and modification should be viewed as "substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."[118] Having strained mightily to nail down the coffin lid on contractually expanded review under the FAA, however, the Court affirmatively invited consideration of other avenues to the same ends,[119] as where parties "contemplate enforcement under state statutory or common law . . . where judicial review of different scope is arguable."[120] Although it may be some time before the full import of this invitation is clarified, it is likely that state statutes or controlling judicial decisions promoting contractually expanded review will become "safe harbors" for such activity. New Jersey is perhaps the sole example of a statutory template for parties that wish to "opt in" to the legislative framework for elevated scrutiny of awards;[121] in *Cable Connection, Inc. v. DIRECTV, Inc.*,[122] California's highest court recognized a more general "safe harbor" for contractually expanded judicial review under that state's law.

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[115] *Kyocera*, 341 F.3d at 998.

[116] Hall Street Associates LLC v. Mattel Inc., 128 S.Ct. 1396, 1404-1405 (2008).

[117] *Id.* at 1403.

[118] "Any other reading [would open] the door to full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process." *Id. (quoting Kyocera*, 341 F.3d at 998).

[119] In a highly unusual move, the Court had requested additional briefing on these issues after the initial arguments; its March decision concluded that the supplemental arguments raised new points which required a remand for the development of the issues. The Ninth Circuit subsequently issued a remand order to the district court, concluding that the High Court decision "preserved the issue of sources of authority, other than the Federal Arbitration Act, through which a court may enforce an arbitration award. . . ." Hall Street Associates LLC v. Mattel Inc., No. 05-35721, 2008 U.S. App. LEXIS 14490 (July 8, 2008).

[120] 128 S. Ct. at 1406.

[121] New Jersey law permits parties to arbitration agreements to "opt in" to a heightened standard of review established by the statute. New Jersey Alternative Dispute Resolution Act, N.J. STAT. ANN. 2A, §§ 23A-12. (1999).

[122] Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586 (Ca. 2008).

The foregoing survey of the complex legal landscape surrounding contractually expanded judicial review illustrates the risks and uncertainties confronting those who would seek to include such provisions in their arbitration agreements. In some cases contract planners may come to the conclusion that the difficulties of securing judicial oversight of arbitration awards require them to forego arbitration entirely, at least for certain classes of cases.

2. Alternatives to expanded judicial review; appellate arbitration processes

There are other, less radical choices for those concerned about protection from "off the wall" arbitration awards. These include identifying arbitrators who are likely to deliver an authoritative and rational decision, requiring the arbitrators to produce a detailed rationale for their awards, placing limits on awards of monetary damages (including upper and lower limits for the award), a baseball arbitration format requiring arbitrators to make a choice between two alternative monetary awards, and a prohibition on certain kinds of relief, such as punitive damages.[123] For those who seek a close analogue to judicial review, however, an appellate arbitration procedure may afford the most suitable alternative.

Appellate arbitration procedures afford parties the opportunity of a "second look" at an arbitration award in a controlled setting while avoiding the delays and legal uncertainties associated with expanded judicial review, since properly constituted agreements for "second-tier" arbitration are just as enforceable as any other arbitration agreements, as are resulting awards.[124] Appellate arbitration procedures have been utilized in a variety of commercial contexts, and at least two major institutions,[125] the International Institute for Conflict Prevention & Resolution (CPR) and JAMS, have published appellate arbitration rules that may be utilized in commercial cases.[126]

Crafting an appropriate arbitral appeal process involves consideration of numerous procedural issues, including the qualifications of the appellate arbitrator(s) and method of selection; scope limits on appealable disputes; filing requirements; administrative fees; time limits on filing and appellate procedures; applicable standards of review; the type of record that will be maintained of the original arbitration hearing, and transmitted to the appellate arbitrator(s); the format of the original arbitration award; the form of argument on appeal (written, oral, or both); the remedial authority of the appellate arbitrator(s); the possibility of remand of the award to the original panel or to a different panel; and the handling of costs, including the potential shifting of costs if an appeal is unsuccessful.[127] Given the transaction

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[123] *See id*. at 277-281.

[124] *See, e.g*, *Cummings v. Future Nissan*, 2005 WL 805173 (Cal. Ct. App. 3rd Dist Apr. 8, 2005) (affirming lower court order confirming award by appellate arbitrator).

[125] *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 299-300.

[126] *See* INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, CPR ARBITRATION APPEAL PROCEDURE (1999); JAMS ARBITRATION APPEAL PROCEDURE (revised June 2003), *available at* http://www.jamsadr.com/rules/optional.asp.

[127] *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 298-304. *See also* Paul Bennett Marrow, *A Practical Approach to Affording Review of Commercial Arbitration Awards: Using an Appellate Arbitrator*, 60 DISP. RESOL. J. 10 (Aug.-Oct. 2005).

costs associated with their formulation, fully customized appellate rules are probably feasible only in exceptional cases (such as long-term relationships or large-scale business transactions). In most cases, parties will probably want to rely on existing institutional models.

12. Conduct a post-process "lessons learned" review and make appropriate adjustments.

At the conclusion of the arbitration, in-house counsel should conduct a thorough analysis of lessons learned and should make appropriate adjustments in arbitration policies, agreements, rules and management to address concerns regarding efficiency and economy.

Comments:

Self-evaluation is a fundamental strategy for every successful enterprise. Arbitration should be regarded no differently from other strategic processes. Executives and in-house counsel should review the entire proceeding and consider the financial and strategic impact of each tactical decision. These *Protocols* offer a road map for some key decision points to consider, while sections like Action 5 above may assist in-house counsel specifically in a frank self-evaluation. Questions that might be asked include these: Did the particular dispute resolution clause in this contract work well for us in this situation? Why or why not? Did the arbitration rules incorporated in that clause work well? Did our initial case assessment turn out to be accurate? If not, how can we improve our assessments in the future? Are we satisfied with the budget and effort level that we set for this case? Did outside counsel stick to the budget and represent us both effectively and efficiently? Was our fee arrangement with outside counsel appropriate? Did the arbitrator(s) conduct the proceeding efficiently? If not, how could it have been better conducted? Overall, was arbitration preferable to litigation in this instance?

Business users should also seek out arbitration providers who support evaluation and feedback processes through their arbitrators and rules (see *Protocol for Arbitrations Providers*, Actions 10 and 13).

A Protocol for Arbitration Providers

Business users rely heavily on arbitration providers for arbitration procedures, arbitrator selection and administrative services. In order to effectively promote economy and efficiency, providers need to offer users clear-cut process choices and develop and share information on their relative value and effectiveness. They also need to take measures to ensure that parties can find arbitrators with the proper case management skills and philosophy. The following specific Actions should be undertaken by providers for the purpose of achieving these goals.

1. Offer business users clear options to fit their priorities.

Instead of promoting a single "one-size-fits-all" set of procedures, institutions that provide dispute resolution services for business disputes should publish and actively promote a variety of templates, including arbitration clauses and procedures to give users real choices that fit their priorities, including time and cost savings. A provider's website should be organized in a manner that facilitates clear and easy access to different process choices, and should offer straightforward guidance (including, if possible, specific user feedback) about the benefits and costs to users of each process choice.

Comments:

Conceptually, between an arbitration model that seeks maximum expedition and economy and a model that incorporates litigation-like procedures while still preserving many of the advantages of arbitration (selection and accessibility of the decision-makers, privacy, finality, etc.) lies a broad spectrum of graduated arbitration models, each allowing a little greater process with a little less economy. To enable commercial arbitration users to choose the balance that is right for them, or even different balances for different kinds of cases, arbitration providers should offer a basic complement of dispute resolution clauses and rule sets that reflect several different points along the spectrum. Each rule set should prescribe procedures and staged timelines that permit completion of the arbitration by specified deadlines.

For example, the most economical ("fast track") model could involve a highly truncated arbitration with no discovery or motions and award issuance within 90 days of commencement (see *Protocol for Arbitration Providers,* Actions 5 and 8 below). Next could be a streamlined arbitration model that would offer a modicum of discovery (perhaps five document requests and four hours of depositions) but still provide for completion of the arbitration within six months. A standard arbitration model might allow somewhat more discovery and motions practice, though still far less than in litigation, and provide for completion of the arbitration in nine months (see *Protocol for Business Users and In-House Counsel*, Actions 2, 8, 9, and 11, and *Protocol for Arbitration Providers,* Actions 3, 4, 6, and 11). Finally, providers should offer a customized model, in which arbitrators would be empowered to develop, after consulting with counsel, customized procedures, perhaps litigation-like in some respects, which would nevertheless permit completion of the arbitration within one year in all but the most exceptional circumstances. Offering the arbitral counterpart of four, progressively fuller fixed-

price menus would truly provide business users with meaningful, easily implemented choices among arbitration models.

User feedback can be valuable in convincing business users and outside counsel of the viability of alternatives to traditional standard procedures. Dependable information about the application of process choices will make business users and outside counsel significantly more likely to "jump in" and take advantage of fresh options. Providers should aggressively solicit and organize feedback about specific options and their effectiveness in meeting users' priorities and standards.

See comments under *Protocol for Business Users*, Action 1, above. See also Actions 4, 5, 10 and 13 below for discussion of other related issues.

2. Promote arbitration in the context of a range of process choices, including "stepped" dispute resolution processes.

Resolving conflict through negotiation or mediation usually affords parties a superior opportunity to avoid significant cost or delay, and offers several other potential benefits, including greater control over outcome, enhanced privacy and confidentiality, preservation or improvement of business relationships, and better communications. Even if it fails to produce settlement, moreover, mediation may also "set the table" for arbitration. Therefore, provider-developed arbitration clauses and procedures should be employed within comprehensive, stepped dispute resolution provisions that begin with executive negotiation and mediation.

Comments:

See *Protocol for Business Users*, Action 1, above.

Stepped dispute resolution clauses can project a note of flexibility when a commercial agreement is created, while still assuring a binding, arbitrated resolution of any disputes that defy settlement.

One example of arbitration as part of a basic layered dispute resolution process is the following provision for arbitration as a “third layer” process following negotiation (“layer one”) and mediation (“layer two”):

> C. LAYER THREE: THE ARBITRATION STAGE (c) Arbitration. If the mediation provided for in "b" above does not conclude with an agreement between the Parties resolving the Dispute, the Parties agree to submit the Dispute to binding arbitration under the [insert incorporated commercial arbitration procedures]. If the Parties cannot agree on an arbitrator, the person who served as mediator shall select the person to serve as arbitrator from a list compiled by the Parties or, where the Parties do not compile a list, from a list maintained by a bona fide dispute resolution service provider or private arbitrator. The arbitrator's award shall be final, binding and may be converted to a judgment by a court of competent jurisdiction upon application by either party. The arbitrator's award shall be a written, reasoned opinion (unless the reasoned opinion is waived by

> the Parties). The Parties shall have ten (10) days from the termination of the mediation to appoint the arbitrator and shall complete the arbitration hearing within six (6) months from the termination of the mediation. The arbitrator shall have the authority to control and limit discovery sought by either party. The arbitrator shall have the same authority as a court of competent jurisdiction to grant equitable relief, and to issue interim measures of protection, including granting an injunction, upon the written request with notice to the other party and after opposition and opportunity to be heard. The arbitrator shall take into consideration the Parties' intent to limit the cost of and the time it takes to complete dispute resolution processes by agreeing to arbitrate any Dispute.[128]

An option to consider is that of an "arbitration reset button." Contained in tiered dispute resolution clause, this clause provides that if the parties' dispute is not first resolved through the prerequisite executive negotiation and/or mediation, "then, within ___ days [or immediately] following the executive discussions and/or mediation, the parties shall confer and determine whether they wish to mutually renegotiate the default arbitration provision contained herein."[129]

A less formal approach to the "reset button" concept may occur in the context of mediation. Where the parties are unable to reach full agreement on substantive issues, it may be possible for an experienced mediator to facilitate a new or modified agreement respecting arbitration procedures. A mediator can play an invaluable role in escorting parties into a structured and economical arbitration process. For example, a mediator can:

- Facilitate agreement on exchange of document and other information;
- Help clarify which issues have been resolved in mediation and frame issues to be resolved in arbitration;
- Encourage parties to jointly submit the one or two most significant questions of law or fact to the arbitrator for speedy resolution, and then return to mediation.
- Assist in selection of an arbitrator;
- Help the parties define or refine any provided arbitration procedures;
- Remain available during the arbitration process itself as a resource to resolve issues informally.[130]

3. Develop and publish rules that provide effective ways of limiting discovery to essential information.

Because discovery is usually the chief determinant of arbitration cost and duration, and because arbitration procedures that leave parties and arbitrators significant "wiggle room"

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[128] Adapted from Robert N. Dobbins, *Practice Guide: The Layered Dispute Resolution Clause: From Boilerplate To Business Opportunity*, 1 HASTINGS BUS. L.J. 161, 171 (2005).

[129] Posting by James M. Gaitis to mediate-and-arbitrate@peach.ease.lsoft.com (May 13, 2010) (on file with author).

[130] *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 18.

often result in litigation-like discovery, provider institutions should develop and publish procedures that give business users the ability to effectively limit the scope of discovery in arbitration through their pre-dispute agreement. As a general matter, discovery should be restricted to information that is material and not merely relevant. Among the possible approaches to limiting discovery:

- **limiting document production to documents or categories of documents for which there is a specific, demonstrable need; requiring parties to describe requested documents with specificity, explain their materiality, assure the tribunal they do not have the documents, and make clear why they believe the other party has possession or control of the documents;**
- **prohibiting requests for admission, and instead encouraging party representatives to confer regarding stipulation of facts;**
- **prohibiting form interrogatories and limiting the number of interrogatories;**
- **setting limits on the number and length of depositions, and limiting arbitrator discretion to authorize additional depositions to situations where there is a demonstrated need for the requested information, there are no other reasonable means of obtaining the information, and the request is not unduly burdensome to other parties;**
- **directing parties to cooperate on voluntary information exchange/discovery;**
- **directing arbitrators to manage discovery disputes as expeditiously as possible (e.g., by offering to resolve issues through prompt conference calls before resorting to extensive briefing and written argument);**
- **authorizing arbitrators to consider, when awarding fees and costs, the failure of parties to cooperate in discovery and/or to comply with arbitrator orders, thereby causing delays to the proceeding or additional costs to other parties.**

Special attention should be given to detailed procedures for managing electronic records and handling electronic discovery much more efficiently than is currently done in federal and state courts. At a minimum, the description of custodians from whom electronic discovery can be collected should be narrowly tailored to include only those individuals whose electronic data may reasonably be expected to contain evidence that is material to the dispute and cannot be obtained from other sources. In addition to filtering data based on the custodian, the data should be filtered based on file type, date ranges, sender, receiver, search term or other similar parameters. Normally, disclosure should be limited to reasonably accessible active data from primary storage facilities; information from back-up tapes or back-up servers, cell phones, PDAs, voicemails and the like should only be subject to disclosure if a particularized showing of exceptional need is made.

Comments:[131]

In litigation, parties have broad rights to discover any evidence that may be reasonably calculated to lead to the discovery of admissible evidence without regard to whether such

[131] These comments are drawn in large part from Stipanowich, *Arbitration and Choice*, *supra* note 58, 414-425.

evidence is truly material to the outcome of the case.[132] This approach, coupled with lack of focus at the outset of discovery, means that "discovery costs far too much and becomes an end in itself."[133] Thus, the recent *Final Report on Litigation Reform* calls for dramatic overhauling of the court discovery process based on a "principle of proportionality."[134]

Parties who choose to arbitrate presumably do so with the expectation of reduced discovery. As observed in the Commentary to the *CPR Rules*,

> "[a]rbitration is not for the litigator who will 'leave no stone unturned.'" Unlimited discovery is incompatible with the goals of efficiency and economy. The Federal Rules of Civil Procedure are not applicable. Discovery should be limited to those items for which a party has a substantial, demonstrable need."[135]

Yet, as discussed in Part II, discovery is now very much a part of arbitration processes.[136] The rising scope and cost of discovery in arbitration have been a long time in the making, due in large part to the lack of formal guidelines. As technology, litigation intensity, and the popularity of arbitration have exacerbated the problem, the need for more comprehensive guidelines has become overwhelming. In cases of any size or complexity cogent arguments may be framed in support of document discovery and for a number of depositions. While there are those who will draw firm lines, the response will vary with the arbitrator. Arbitrators will be especially reluctant to draw lines in the face of a broad litigation-style discovery plan embraced by counsel for the parties.[137] Because arbitration is first and last a consensual process, even arbitrators who suspect that business parties would have preferred a more attenuated process will tend to bow to a mutual agreement of the parties' counsel in the absence of (1) clear contractual guidance regarding the parties' intent to circumscribe discovery or (2) clear arbitral authority to modify the agreement of counsel regarding discovery. They are left with the alternative of encouraging or cajoling parties to consider more carefully tailored discovery; for

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[132] THE FEDERAL RULES OF CIVIL PROCEDURE, for example, state:

> Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party….relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

FED. R. CIV. P. 26(b)(1).

[133] FINAL REPORT ON LITIGATION REFORM, *supra* note 60, at 2.

[134] *Id.* at 7-16.

[135] CPR RULES, *supra* note 62, Commentary to CPR Rule 11.

[136] It is worth noting that we have evolved from no mention of prehearing discovery in the Federal Arbitration Act, 9 U.S.C. §§1-14 (1925), and the UNIFORM ARBITRATION ACT (1955) to highly deferential language in the REVISED UNIFORM ARBITRATION ACT (2000).

[137] The CPR Commentary encourages parties' counsel "to agree, preferably before the initial pre-hearing conference, on a discovery plan and schedule and to submit the same to the Tribunal for its approval." *Id.*

this purpose, some arbitrators insist that business principals be present at the pre-hearing conference to participate in the discussion on discovery.[138]

Parties desiring explicit, non-litigation-like guidelines for information exchange and discovery in arbitration, including those who are concerned about the impact of discovery on the cost and duration of arbitration, now have a variety of templates to consider.

1. Emerging discovery templates

Organizations that publish leading arbitration procedures and other institutions have begun to develop specific provisions setting clear limits on discovery or establishing standards to guide arbitral discretion in addressing discovery disputes.

The International Bar Association (IBA) Rules on the Taking of Evidence in International Commercial Arbitration[139] were an early and excellent standard aimed at limiting information exchange. Though designed for international proceedings that involve parties and practitioners from civil law countries as well as sovereign states applying common law, the *IBA Rules* are sometimes applied by agreement in purely domestic (U.S.) arbitration. *The ICDR Guidelines for Arbitrators Concerning Exchanges of Information* are a more recent standard designed for international disputes.[140]

On the domestic scene, discovery limitations are most often built into streamlined or expedited arbitration rules like the *JAMS Streamlined Arbitration Rules & Procedures*.[141] The *CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration* is another effort to offer counselors and drafters clear choices regarding information exchange and discovery.[142] It offers parties the opportunity to select among several alternative standards regarding pre-hearing exchange of documents and witness information—some of which are useful templates.

Emerging standards may enhance the ability of arbitrators to effectively address information exchange issues by encouraging deliberate weighing of burdens and benefits. They

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[138] Alternatively, some arbitrators require principals of the clients to sign-off on any discovery plan submitted by outside counsel.

[139] INTERNATIONAL BAR ASSOCIATION, IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION (May, 29 2010) [hereinafter IBA RULES], *available at* http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx

[140] INT'L CENTER FOR DISPUTE RESOLUTION, ICDR GUIDELINES FOR ARBITRATORS CONCERNING EXCHANGES OF INFORMATION (May 2008) [hereinafter ICDR GUIDELINES], *available at* http://www.adr.org/si.asp?id=5288.

[141] JAMS STREAMLINED RULES, *supra* note 94, R. 13.

[142] INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, CPR PROTOCOL ON DISCLOSURE OF DOCUMENTS AND PRESENTATION OF WITNESSES IN COMMERCIAL ARBITRATION (2008) [hereinafter CPR PROTOCOL ON DISCLOSURE] (designed in part "to afford to parties to an arbitration agreement the opportunity to adopt certain modes of dealing with pre-hearing disclosures of documents and with the presentation of witnesses, pursuant to Schedules.") *available at* http://www.cpradr.org/ClausesRules/CPRProtocolonDisclosure/tabid/393/Default.aspx.

may also offer arbitrators other tools, including explicit authority to condition production on the payment by the requesting party of associated reasonable costs.[143]

2. Document exchange and discovery

Standard procedures often provide for some exchange of documents, at least to the extent they are non-privileged and relevant to the dispute.[144] In some cases, such production is to occur within a fairly short time frame.[145] Some parties, however, may want to narrow (or expand) this framework or establish more specific standards for document exchange.

A straightforward template for more limited information exchange/discovery may be found in the leading international standard on the subject, the *IBA Rules on the Taking of Evidence in International Commercial Arbitration*.[146] This standard, a compromise in which U.S.-style discovery is tempered by the influence of prevailing practices in civil law countries, initially requires each party only to submit "all documents available to it on which it relies."[147] It also establishes a procedure for arbitral resolution of disputes over further document production that requires parties to describe requested documents with specificity, explain their relevance and materiality, assure the tribunal that they do not have the documents and make clear why they believe the other party has possession or control of the documents.[148]

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[143] *See, e.g., Id.* at § 1(e)(2). *See also* ICDR GUIDELINES, *supra* note 140, 8.a., which provides:

> In resolving any dispute about pre-hearing exchanges of information, the tribunal shall require a requesting party to justify the time and expense that its request may involve, and may condition granting such a request on the payment of part or all of the cost by the party seeking the information. The tribunal may also allocate the costs of providing information among the parties, either in an interim order or in an award.

[144] *See, e.g.*, JAMS COMPREHENSIVE RULES, *supra* note 104, (providing for the parties to "cooperate in . . . the voluntary and informal exchange of all relevant, non-privileged documents, including, but without limitation, copies of all documents in their possession or control on which they rely in support of their positions.").

[145] The JAMS COMPREHENSIVE RULES call for document exchange "within twenty-one (21) calendar days after all pleadings or notice of claims have been received." JAMS COMPREHENSIVE RULES, *supra* note 104, Rule 17(a). Under the JAMS STREAMLINED ARBITRATION RULES & PROCEDURES, this period is reduced to 14 days. *See* JAMS STREAMLINED RULES, *supra* note 67, R. 13(a).

[146] IBA Rules, *supra* note 139.

[147] *Id.*, Article 3, Section 1.

[148] The IBA Rules call for Requests to Produce to contain

> (a)(i) a description of a requested document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist;
>
> (b) a description of how the documents requested are relevant and material to the outcome of the case; and
>
> (c) a statement that the documents requested are not in the possession, custody or control of the requesting Party, and of the reason why that Party assumes the documents requested to be in the possession, custody or control of the other Party.

Id. at 5.

In a similar vein, the *JAMS Streamlined Arbitration Rules & Procedures* call for "voluntary and informal" exchange of all relevant, non-privileged documents and other information, but admonish parties to limit their requests to "material issues in dispute" and to make them "as narrow as reasonably possible." Depositions are not permissible "except upon a showing of exceptional need" and with arbitrator approval. Electronic data may be furnished in the form most convenient for the producing party, and broad requests for email discovery are not permitted.[149] (The more expedited *AAA Construction Industry Fast-Track Rules*, aimed at smaller dollar claims, contemplate no discovery beyond exhibits to be used at the arbitration hearing "except . . . as ordered by the arbitrator in exceptional cases."[150])

The *CPR Protocol on Disclosure*[151] offers parties a choice of four discrete "modes" for document disclosure. These include: Mode A (No disclosure save for documents to be presented at the hearing); Mode B (Disclosure as provided for in Mode A together with "[p]re-hearing production only of documents essential to a matter of import in the proceeding for which a party has demonstrated a substantial need"); Mode C (Disclosure provided for in Mode B together with disclosure, prior to the hearing, "of documents relating to issues in the case that are in the possession of persons who are noticed as witnesses by the party requested to provide disclosure"); and Mode D (Pre-hearing disclosure of documents regarding non-privileged matters that are relevant to any party's claim or defense, subject to limitations of reasonableness, duplication and undue burden).[152] Some arbitrators limit each party to a certain number of document requests, including subparts.[153]

3. Limits on depositions

In the interest of economy or certainty, some parties may want to provide that no depositions, or a specific, limited number of depositions, will be conducted in their

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The IBA RULES appear to have influenced the recent ICDR GUIDELINES FOR ARBITRATORS CONCERNING EXCHANGES OF INFORMATION, which empower the arbitrators,

> upon application, [to] require one party to make available to another party documents in the party's possession, not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case. Request for documents shall contain a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case.

ICDR GUIDELINES, *supra* note 140, Guideline 3(a).

[149] *Compare* JAMS STREAMLINED RULES, *supra* note 94, *with* CPR EXPEDITED ARBITRATION, *supra* note 65.

[150] *See* AAA CONSTRUCTION INDUSTRY FAST TRACK RULE, *supra* note 64, F-9.

[151] CPR PROTOCOL ON DISCLOSURE, *supra* note 142, § 1. *Cf.* Lawrence W. Newman & David Zaslowsky, *Predictability in International Arbitration*, 100 N.Y. L. J. 3. (May 25, 2004).

[152] *Id.*, Schedule 1.

[153] *See, e.g.,* Wendy Ho, *Discovery in Commercial Arbitration Proceedings*, Comment, 34 HOUS. L. REV. 199, 224-227 (Spring 1997).

arbitration.[154] A variant of this approach, used by some arbitrators, is to provide each party with a maximum number of hours for deposing persons within the other party's employ or control. Such limitations may be tempered by giving arbitrators discretion to allow additional depositions in exceptional circumstances where justice requires.[155] A useful example of a clear limit coupled with narrowly cabined arbitrator discretion is contained in Rule 17 of the *JAMS Comprehensive Arbitration Rules*, which permits each party to take a single deposition; [t]he necessity of additional depositions is to be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing parties and the witness.[156]

Another proposed response to the burgeoning discovery problem is the adoption of the international arbitration practice of substituting detailed sworn witness statements for direct examination.[157] Such statements, provided to all participants in advance of the hearing, might provide a rough surrogate for depositions and save hearing time. Adjustments to the international practice, such as abbreviated direct examination, might be necessary to provide comfort to American lawyers and arbitrators. The new draft *CPR Protocol on Disclosure* offers parties the choice of embracing such an approach in their arbitration agreement, possibly in lieu of depositions.[158]

4. Guiding and empowering arbitrators.

Another approach to controlling discovery hinges on and provides a useful framework for the "good judgment of the arbitrator." A set of guidelines for arbitrator-supervised discovery developed by the New York State Bar Association (and subsequently adopted in summary form by JAMS) offers tools for arbitrators to manage discovery and other procedural aspects of arbitration.[159] Such guidelines operate on the presumption that parties have not yet established strict guidelines for discovery, and therefore depend upon the arbitrator(s) to control discovery by giving early and active attention to the process, using persuasion and other methods to achieve results appropriate to the specific circumstances and the parties' indicated preferences (see *Protocol for Arbitrators*, Action 6).

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[154] The ICDR GUIDELINES note that "[d]epositions, . . . as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration." ICDR GUIDELINES, *supra* note 140, 6.b.

[155] *See supra* note 94 (discussing discretionary authority of arbitrator under JAMS STREAMLINED RULES).

[156] JAMS COMPREHENSIVE RULES, *supra* note 104, Rule 17(b).

[157] The witness statement concept is embodied in the IBA Rules. IBA RULES, *supra* note 139. Article 4, Sections 4-9.

[158] CPR PROTOCOL ON DISCLOSURE, *supra* note 142, at 2-3, 5, 8-9.

[159] *See* NEW YORK STATE BAR ASSOCIATION DISPUTE RESOLUTION SECTION ARBITRATION COMMITTEE, REPORT ON ARBITRATION DISCOVERY IN DOMESTIC COMMERCIAL CASES (June 2009), *available at* http://www.nysba.org/Content/NavigationMenu42/April42009HouseofDelegatesMeetingAgendaItems/DiscoveryPreceptsReport.pdf (describing factors to consider when artfully drafting arbitration clauses); *see also*, JAMS, RECOMMENDED ARBITRATION DISCOVERY PROTOCOLS FOR DOMESTIC, COMMERCIAL CASES (Jan. 6 2010), *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Arbitration_Discovery_Protocols.pdf.

Should arbitrators or counsel have the last word on the scope of discovery? In this respect, expert opinion and current standards vary, although under most standards arbitrators must respect and adhere to party agreements regarding discovery. The *AAA Rules for Large, Complex Cases* authorize the arbitrator(s) to override party agreements and "place such limitations on the conduct of such [agreed] discovery as the arbitrator(s) shall deem appropriate."[160] Although both the JAMS and CPR Rules give arbitrators considerable authority regarding exchange of information, neither set of procedures is explicit regarding the authority of arbitrators to "trump" or modify agreements regarding discovery;[161] however, the *JAMS Arbitration Discovery Protocol* recognizes that, while party agreements regarding the scope of discovery should be respected by arbitrators,"[w]here one side wants broad arbitration discovery and the other wants narrow discovery, the arbitrator will set meaningful limitations."[162]

Since parties can always amend their arbitration agreements (even, in most jurisdictions, by amending the provision of the agreement that says it may only be amended by a writing signed by the CEOs of both companies), any provision giving the arbitrator the last word on discovery (or anything else) could theoretically be rescinded by a subsequent agreement of the parties. If that happens, the arbitrators should convene a meeting with

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[160] AAA COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (2009) [hereinafter AAA COMMERCIAL RULES], L-4(c). An even stronger statement of the "final authority" of arbitrators regarding discovery is set forth in the ICDR GUIDELINES:

> 1. a. The tribunal shall manage the exchange of information among the parties in advance of the hearings with a view to maintaining efficiency and economy. The tribunal and the parties should endeavor to avoid unnecessary delay and expense while at the same time balancing the goals of avoiding surprise, promoting equality of treatment, and safeguarding each party's opportunity to present its claims and defenses fairly.
>
> b. The parties may provide the tribunal with their views on the appropriate level of information exchange for each case, *but the tribunal retains final authority to apply the above standard.* To the extent the Parties wish to depart from this standard, they may do so only on the basis of an express agreement in writing and in consultation with the tribunal. (Emphasis added.)

ICDR GUIDELINES, *supra* note 140, 1.a-b.

[161] The JAMS COMPREHENSIVE RULES grant each party one deposition as of right, and call for "the necessity of additional depositions . . . [to] be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness." JAMS COMPREHENSIVE RULES, *supra* note 104, Rule 17(b). The JAMS COMPREHENSIVE RULES do not give any indication about what happens when the parties have agreed to multiple depositions.

While empowering the Tribunal to "require and facilitate such discovery as it shall determine is appropriate" taking into account parties' needs, expeditiousness and cost-effectiveness, the CPR RULES also do not address the impact of mutual agreement on discovery issues by the parties. CPR RULES, *supra* note 62, Rule 11. However, the CPR Protocol on Disclosure appears to anticipate that "[w]here the parties have agreed on discovery depositions, the Tribunal should exercise its authority to scrutinize and regulate the process . . . [and possibly impose] strict limits on the length and number of depositions consistent with the demonstrated needs of the parties." CPR PROTOCOL ON DISCLOSURE, *supra* note 142, at 5.

[162] See JAMS, RECOMMENDED ARBITRATION DISCOVERY PROTOCOLS FOR DOMESTIC, COMMERCIAL CASES (Jan. 6 2010), *available at http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Arbitration_Discovery_Protocols.pdf.*

principals present and make sure that they (not just their counsel) want to override the "last word" provision so that outside counsel may engage in much more extensive (and costly) discovery than the arbitrator considers warranted.

5. E-discovery

Particularly troublesome has been the area of electronic discovery. As one leading participant in the development of guidelines for the management and discovery of electronic information explains,

> If the law of e-discovery were allowed to develop on an ad hoc basis, one decision at a time, companies with their complex information technology systems would be eaten alive by process costs. It is essential to develop best practices that work in a real world.[163]

The challenge for arbitrators and arbitration providers is to address these same concerns effectively, but in the context of a highly discretionary system without uniform rules or precedents that is conventionally aimed at efficiency and expedition in conflict resolution.[164] Issues include the essential scope of and limits on e-discovery, and the weighing of burdens and benefits;[165] the handling of the costs of retrieval and review for privilege;[166] the duty to preserve electronic information, spoliation issues and related sanctions.[167]

Will it be possible for arbitrators to effectively meet the challenges of e-discovery in an efficient and relatively economical manner? The answer will depend in part on the effectiveness of choices made by counselors and drafters. But they cannot make good choices when good choices are not drafted and promoted by arbitration providers.

Arbitral institutions are in a unique position to assume more responsibility for providing this critical guidance. Concerns regarding the relative burdens associated with e-discovery may lead parties to consider adopting language similar to that contained in the *ICDR Guidelines*

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[163] THE SEDONA GUIDELINES: BEST PRACTICE GUIDELINES & COMMENTARY FOR MANAGING INFORMATION & RECORDS IN THE ELECTRONIC AGE 11-20, 31-43 (Charles Ragan et al., The Sedona Conference Sept. 2005).

[164] Irene C. Warshauer, Electronic Discovery in Arbitration: Privilege Issues and Spoliation of Evidence, 61 DISP. RESOL. J. 9, 10 (Nov. 2006-Jan. 2007); Jennifer E. Lacroix, *Practical Guidelines for Managing E-Discovery Without Breaking the Bank*, in PLI PATENTS, COPYRIGHTS, TRADEMARKS AND LITERARY PROPERTY COURSE HANDBOOK SERIES 645-665 (Jan. 2008); Theodore C. Hirt, *The Two-Tier Discovery Provision of Rule 26(B)(2)(B) – A Reasonable Measure for Controlling Electronic Discovery?* 12 RICH. J. L. & TECH. 12 (2007); Thomas Y. Allman, *The "Two-Tiered" Approach to E-Discovery: Has Rule 26(B)(2)(B) Fulfilled its Promise?* 14 RICH. J. L. & TECH. 7 (2008).

[165] *See generally* THE SEDONA GUIDELINES, *supra* note 163.

[166] For a discussion of these and other issues, see John B. Tieder, *Electronic Discovery and its Implications for International Arbitration*; (unpublished article, on file with Watt, Tieder, Hoffar & Fitzgerald, LLP); Jessica L. Repa, *Adjudicating Beyond the Scope of Ordinary Business: Why the Inaccessibility Test in Zubulake Unduly Stifles Cost-Shifting During Electronic Discovery*, Comment, 54 AM. U. L. REV. 257 (Oct. 2004); Warshauer, *supra* note 164, at 11 (discussing the development of "claw-back" agreements, which permit a party to produce all of its relevant documents for review without waiving privilege).

[167] Warshauer, *supra* note 164, at 12-15.

which permit a party to make documents maintained in electronic form "available in the form . . . most convenient and economical for it, unless the Tribunal determines, on application . . . that there is a compelling need for access to the documents in a different form."[168] Moreover, requests for such documents "should be narrowly focused and structured to make searching for them as economical as possible." The *Guidelines* conclude by permitting arbitrators to engage in "direct testing or other means of focusing and limiting any search."[169] The use of "test batch production"—such as pilot tests using key search words on a limited scale—is emerging as a critical way of identifying areas that require special attention in advance of major production.

Parties may be able to avoid many of the costs—if not all the risks—of the revelation of privileged material in electronic data by agreeing to have the arbitrators issue a pre-arbitral order relieving the parties of the obligation to conduct a pre-production privilege review of all electronic documents and ordering that the attorney-client and work product privileges are not waived by production of documents that have not been reviewed.[170] Parties may also wish to consider identifying likely informational needs and agreeing on what information needs to be preserved, in what format, and for how long.[171]

A prototypical, multi-faceted template addressing various aspects of pre-hearing disclosure of electronic information is contained in the *CPR Protocol on Disclosure*.[172] That Protocol presents parties with four discrete alternatives regarding pre-hearing disclosure of electronic documents. The alternatives range from no-pre-hearing disclosure, except with respect to copies of printouts of electronic documents to be presented in the hearing, to full disclosures "as required/permitted under the *Federal Rules of Civil Procedure*." The intermediate options permit parties to limit production to documents maintained by a specific number of designated custodians, to limit the time period for which documents will be produced, to identify the sources (primary storage, back-up servers, back-up tapes, cell phones, voicemails, etc.) from which production will be made, and to determine whether or not information may be obtained by forensic means.[173]

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[168] ICDR GUIDELINES, *supra* note 140, Section 4.

[169] *Id.*

[170] Warshauer, *supra* note 164, at 11.

[171] THE SEDONA GUIDELINES, *supra* note 163; William B. Dodero & Thomas J. Smith, *Creating a Strong Foundation for Your Company's Records Management Practices*, 25 ACC DOCKET 52 (Nov. 2007).

[172] *See* Newman & Zaslowsky, *supra* note 81.

[173] *See* CPR PROTOCOL ON DISCLOSURE, *supra* note 142, Schedule B, Modes B, C. The Protocol also offers a set of General Principles which may be adopted by themselves or in tandem with a particular "mode" for pre-hearing disclosure of electronic documents. It provides:

> In making rulings on pre-hearing disclosure, the tribunal should bear in mind the high cost and burden associated with requests for the production of electronic information. It should be recognized that e-mail and other electronically created documents found in the active or archived files of key witnesses or in shared drives used in connection with the matter at issue are more readily accessible and less burdensome to produce when sought pursuant to reasonably specific requests. Production of electronic materials from a wide range of users or custodians tends to be costly and burdensome and should not be permitted without a showing of

6. Other considerations

Depending on the circumstances, parties may consider it appropriate to include other provisions, such as a term giving arbitrators explicit authority to weigh the burdens and benefits of a discovery request, or the ability to condition disclosure on the requesting party paying reasonable costs of production.[174] It may serve efficiency to provide that the chair of the tribunal serve as discovery master; in cases in which confidentiality of sensitive information is of prime concern, there might be a provision for the use of a special master to supervise certain aspects of discovery.[175]

4. Offer rules that set presumptive deadlines for each phase of the arbitration; train arbitrators in the importance of enforcing stipulated deadlines.

In the interest of economy and efficiency, providers should ensure that parties have the opportunity to adopt arbitration procedures that include a presumptive deadline for completion of arbitration. The procedures should facilitate compliance with the final deadline through the inclusion of presumptive time limits for each phase of the arbitration, and by giving arbitrators explicit authority to employ procedures and set deadlines appropriate to the goal of meeting the overall deadline. Providers should also ensure that their training programs offer arbitrators instruction in the importance of adhering to stipulated timetables or deadlines for arbitration except in circumstances clearly beyond the contemplation of the parties when the time limits were established (see *Protocol for Arbitrators*, Action 3).

Comments:

See comments under *Protocol for Business Users*, Action 3.

5. Publish and promote "fast-track" arbitration rules.

Providers should offer a variety of procedural choices with varying degrees of emphasis on expedition and economy, including at least one set of procedures that place heavy emphasis on those goals (see *Protocol for Business Users and In-House Counsel,* Action 4). A "fast-track" approach may feature some or all of the following:

- **relatively short presumptive deadlines;**
- **limits on the number of arbitrators;**

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extraordinary need. Requests for back-up tapes, deleted files and metadata should only be granted if the requesting party can demonstrate a reasonable likelihood that files were deliberately destroyed or altered by a party in anticipation of litigation or arbitration and outside of that party's usual and customary document-retention policies.

Id., Section 4(a).

[174] *See supra* note 89.

[175] *See* JAMS COMPREHENSIVE RULES, *supra* note 104, Rule 17(b).

- **expedited arbitrator appointment procedure;**
- **early disclosure of information;**
- **heavily curtailed discovery and motion practice;**
- **limits on the length and form of the award.**

If fast-track procedures are published separately from a provider's standard procedures, the provider should take measures to ensure that users are equally aware of the fast-track option and are provided with user-friendly guidance on how and when to employ the fast track procedures.

Comments:

See comments under *Protocol for Business Users*, Action 3.

6. Develop procedures that promote restrained, effective motion practice.

Properly employed, motions to narrow or dispose of claims or defenses can promote efficiency and economy in arbitration. Presently, however, there are two major concerns about motion practice in arbitration: (a) the reflexive use of motion practice in arbitration by some litigation attorneys, and (b) the reflexive denial of motions by arbitrators pending a full-blown hearing on the merits of the entire case. Providers should attempt to address these concerns by publishing guidelines for effective and efficient resolution of motions, particularly dispositive motions. This might involve a simple method for screening motions at the outset, including factors to be considered by arbitrators in deciding whether to entertain a motion. In the interest of time- and cost-saving, would-be movants might be required to set up a conference call with the arbitrator(s) and opposing counsel to discuss the issue before filing any motion (see *Protocol for Business Users*, Action 9; *Protocol for Arbitrators*, Action 7).

Comments:

See comments under *Protocol for Business Users*, Action 9.

7. Require arbitrators to have training in process management skills and commitment to cost- and time-saving.

Provider institutions should conduct training in managing hearings fairly but expeditiously, with particular emphasis on ways of reducing cost and promoting efficiency, and should require arbitrators to complete such training before being included on the provider's roster, and to update their knowledge and skills annually. Providers should also consider requiring arbitrators to make a pledge to actively seek ways to promote cost- and time-saving in a manner consistent with the agreement of the parties and fundamental fairness (see *Protocol for Arbitrators*, Action 1).

Comments:

Arbitrators need to anticipate that their predominant challenges are more likely to be encountered during the period prior to hearings. Of increasing importance is the critical role of the pre-hearing conference in establishing discovery and motion practice guidelines for the rest of the arbitration process. Arbitrators must be equipped with process management skills not only for the hearing itself, but for the pre-hearing period.

Among the many steps that skilled arbitrators may take during pre-hearing case management are the following: promoting dialogue between parties; addressing jurisdictional issues; developing a timetable and management plan; addressing requests for interim relief; facilitating information exchange and discovery; addressing dispositive motions; planning the hearings; planning the form of the final award; administrative details like rules, locations, fees, confidentiality, and communication methods.[176]

An arbitrator with a proper skill set will approach the pre-hearing proceedings as aggressively and deliberately as the hearings themselves, increasing the likelihood not only of achieving resolution of the matter before the hearing begins, but of ensuring a hearing that has set and met parties' expectations for efficiency.

8. Offer users a rule option that requires fact pleadings and early disclosure of documents and witnesses.

Providers' should afford users the option of adopting rules that require fact pleading rather than notice pleading in both demands and answers, and require that claimants and respondents serve with their initial pleadings a detailed statement of all facts to be proven, all legal authorities relied upon, copies of all documents supporting each claim or defense, as well as a list of witnesses they expect to call. Such rules should require that parties supplement their documents and witness lists periodically prior to the hearing.

Comments:

See *Protocol for Business Users*, Action 8, and the related entry in Appendix A.

9. Provide for electronic service of submissions and orders.

Arbitration procedures should require that all pleadings, motions, orders and other documents filed in the arbitration be served electronically on each arbitrator and each parties' counsel except where that method of service is impractical (as with documents of too great a length to be conveyed electronically) or where other special considerations require another method.

Comments:

A number of providers and services have begun providing for electronic service of arbitration-related documents. See Appendix A for examples.

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[176] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, Ch. 4.

10. Obtain and make available information on arbitrator effectiveness.

Providers should conduct a post-arbitration telephone interview with arbitrating parties and counsel to obtain information on arbitrator effectiveness in managing arbitration fairly and expeditiously. Such information should periodically be furnished to arbitrators in a way that precludes their identifying the sources of the comments. Such information should also be made available in summary form (and without attribution) to parties and counsel selecting arbitrators. Providers should remove from their rosters those arbitrators who prove incapable of efficiently managing business arbitrations (see *Protocol for Business Users*, Action 7).

Comments:

Perhaps more commonly associated with other dispute resolutions processes, evaluation of neutrals should be a core service offered by arbitration providers. As standards evolve, arbitrators must continue to be held accountable for their knowledge and skill levels. Care should be taken to focus evaluations on objective measures of arbitrators' management skills and knowledge levels and to make effective use of timing and language to prevent evaluations from being colored by arbitration outcomes.[177]

11. Provide for expedited appointment of arbitrators.

Provider rules should expedite the selection of the tribunal by providing that, if all arbitrators have not been appointed within a specific time (say, thirty days from the filing of the arbitration demand), the provider will appoint the arbitrators. The rules should also impose stringent time limits for all communications by parties and by prospective arbitrators that are required as a part of the appointment process.

Comments:

Arbitrations can be greatly delayed when the appointment of arbitrators drags on for many weeks or even months. While arbitrator selection is certainly an important step in the arbitration process, it is one that can be accomplished expeditiously by diligent counsel, particularly when the rules furnish the strong incentive of divesting foot-dragging parties of the right to select their arbitrators.

See below for examples of expedited procedures for appointment of arbitrators.

- AMERICAN ARBITRATION ASSOCIATION, AAA COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, SECTION E: EXPEDITED PROCEDURES R. 4 (June 1, 2009), *available at* http://www.adr.org /sp.asp?id=22440. ("If the parties are unable to agree… each party may strike two names from the list [of arbitrators] and return it to the AAA within seven days

[177] *Cf.* Donald P. Crane & John B. Miner, *Labor Arbitrators' Performance: Views from Union and Management Perspectives*, 9 J. LAB. RES. 1 (Mar. 1988) (discussing a study of performance evaluations of labor arbitrators by union representatives and management representatives that found the arbitrators' awards to so color the evaluation results that the results were either unrelated or negatively related).

from the date of the AAA's mailing... If the appointment… cannot be made from the list, the AAA may make the appointment...")

- AMERICAN ARBITRATION ASSOCIATION, SECURITIES ARBITRATION SUPPLEMENTARY PROCEDURES R. 3(a) (June 1, 2009), *available at* http://www.adr.org/sp.asp?id=22009 ("The list [of proposed arbitrators] must be returned to the AAA within 10 days from the date of the AAA's transmittal to the parties. If for any reason the appointment of an arbitrator cannot be made from the list, the AAA may make the appointment . . .").
- ADR CHAMBERS, EXPEDITED ARBITRATION RULES R. 5 (2010), *available at* http://adrchambers.com/ca/expedited-arbitration/expedited-arbitration-rules/ ("If ADR Chambers is not notified of the selection of an arbitrator… within 5 business days after the Response has been delivered . . . ADR Chambers will select the arbitrator . . .").
- AMERICAN DISPUTE RESOLUTION CENTER, INC., RULES OF EXPEDITED CONSTRUCTION ARBITRATION R. E-4 (Sept. 11, 2009), *available at* http://www.adrcenter.net/pdf/Construction/ExpRules.pdf ("The parties must return their selections to ADR Center within ten calendar days. If ADR Center is unable to appoint the arbitrator from the parties' selections, the Case Manager will appoint the arbitrator.").

12. Require arbitrators to confirm availability.

Providers should require arbitrators being considered for appointment in expedited proceedings to expressly confirm their availability to both manage and hear the case within a specific number of days prior to being confirmed.

Comments:

Per the 2009 International Arbitration Report, the ICC Court now requires arbitrators agreeing to serve in ICC arbitrations to disclose details regarding their availability.[178]

Similarly, the *CPR Expedited Arbitration Rules* provide:

> Any arbitrator appointed by the parties or by the CPR Institute shall accept appointment by expressly representing to the CPR Institute within 2 days of appointment that he or she has the time available to devote to the expeditious process and time periods for Pre-hearing Conference, discovery, hearing and award contemplated by these Rules and to facilitate the expedition contemplated in these Rules.[179]

Obviously, most arbitrators understand the concept of scheduling, but requiring explicit affirmation of availability is intended to serve as reminder to all arbitrators of the importance of avoiding unnecessary delay throughout the entire process. In fact, with the advent of

[178] ICC COMMISSION ON ARBITRATION, ICC PUBLICATION 843 -TECHNIQUES FOR CONTROLLING TIME AND COSTS IN ARBITRATION §12 (2007) *available at* http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf.

[179] CPR EXPEDITED ARBITRATION RULES, *supra* note 65, Rule 7.2.

electronic calendars, the day is not far off when parties will be able to view prospective arbitrators' calendars to determine for themselves if candidates have sufficient time available in the relevant time frame.

13. Afford business users an effective mechanism for raising and addressing concerns about arbitrator case management.

Providers that offer administrative services, including arbitrator appointment services, should offer users a meaningful mechanism (such as a designated ombud) for addressing party concerns and complaints regarding the arbitrators or the arbitration process. Among other things, the individual/office would be authorized to explore opportunities for addressing concerns about process speed and cost.

Comments:

Identifying and resolving issues with arbitrator case management while still mid-process has a number of advantages, including preserving efficiency; identifying long-term issues with procedures or arbitrators while the matter is still fresh; and increasing party satisfaction with outcomes.

Conflict resolution studies have shown that outcome satisfaction is generally improved by the opportunity to provide feedback during the proceedings. "Increasing shared information is a basic strategy in ameliorating all conflicts. Consultation and feedback mechanisms between parties provide a consistent and reliable method of sharing information."[180]

14. Offer process orientation for inexperienced users.

Providers should make available to business parties and to counsel online or in-person orientation programs that summarize and illustrate (a) the principal differences between arbitration and litigation and (b) how to use arbitration to accomplish the parties' goals of fair, economical and efficient resolution of disputes.

Comments:

Properly educated parties are far more likely to accept efficient process options, establish a constructive tone, set aside courtroom-style tactics in favor of flexibility, and reach an outcome without being frustrated by preconceptions regarding arbitration.

Note that—as discussed under Action 1—user feedback can be an effective way to "sell" a process to parties unfamiliar with the distinctions between arbitration and litigation.[181]

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[180] ERIC BRAHM & JULIAN OUELLET, DESIGNING NEW DISPUTE RESOLUTION SYSTEMS (Sept. 2003), *available at* http://www.beyond intractability.org/essay/designing_dispute_systems/.

[181] Jeffrey R Cruz, *Arbitration vs. Litigation: An Unintentional Experiment*, 60 DISP. RESOL. J. 10 (Jan. 2006) (addressing "combative" construction dispute advocates with candid, anecdotal observations about the advantages of a well-managed arbitration).

A Protocol for Outside Counsel

Business users depend on outside counsel to promote their business interests, which often include economy and efficiency, in arbitration. Outside counsel should be careful to clarify their client's goals and expectations for resolving disputes, and should approach arbitration in a manner that reflects these expectations and exploits the differences between arbitration and litigation. The following Actions are offered as specific guidance to Outside Counsel for this purpose.

1. Be sure you can pursue the client's goals expeditiously.

Outside counsel should only accept an advocacy role in arbitration when they have determined what the client's goals are in the particular case and are sure they have the knowledge, experience, and availability to pursue those goals effectively, efficiently and expeditiously. They should be familiar with the arbitration rules and provider involved in the particular case and should have in-depth knowledge of ways to save time and money in arbitration without compromising either the fairness of the process or the soundness of the result. They should also be certain that they or a partner have the negotiation and mediation skills that may be required at various stages of the arbitration.

Comments:

Rules of professional responsibility in nearly all jurisdictions make it unethical for attorneys to accept an engagement which they are not competent to perform.[182] While that provision has generally been thought to require knowledge and experience in the type of substantive work the attorney is being asked to carry out, the recent client focus on reducing excessive cost and delay in commercial arbitration suggests that the ethical obligation may well extent to knowledge of how to conduct an arbitration efficiently and expeditiously. Arbitration is quite different from litigation in many respects, and techniques that work well in one process may be ineffective, even harmful in the other. Counsel who agree to represent parties in commercial arbitrations need to have a solid understanding of the arbitration rules that will apply, the practices of the provider that is administering the arbitration, and the growing body of state and federal arbitration law. They should know how to navigate the arbitration process in an economical yet effective way. Since arbitrations frequently require or precipitate negotiations and/or mediation between the parties, whoever will serve as lead counsel at the arbitration hearing should be certain that he or she or a partner has the skill needed to effectively conduct such adjunct activities.

[182] ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.1 Competence (2010), *available at* http://www.abanet.org /cpr/mrpc/ rule_1_1.html; CA RULES OF PROFESSIONAL CONDUCT Rule 3-110 (Sept. 2009) *available at* http://rules.calbar .ca.gov/Rules/RulesofProfessionalConduct/CurrentRules.aspx; NY STATE UNIFIED COURT SYSTEM, PART1200 – RULES OF PROFESSIONAL CONDUCT Rule 1.1: Competence (2009) , *available at* http://www.nysba.org/Content/Navigation Menu/ForAttorneys/ProfessionalStandardsforAttorneys/NYRulesofProfessionalConduct4109.pdf; ARTICLE VII: ILLINOIS RULES OF PROFESSIONAL CONDUCT, Rule 1.1. Competence (2010), *available at* http://www.state.il.us/court/ supremecourt/rules/ art_viii/artviii.htm.

2. Memorialize early assessment and client understandings.

Outside counsel should provide the client at the outset with a careful early assessment of the case, including a realistic estimate of the time and cost involved in arbitrating the matter at various levels of depth and detail. Counsel should reach an understanding with the client concerning the approach to be followed, the extent and nature of any discovery to be initiated, the possibility and desirability of a negotiated settlement, the desired overall timetable for arbitration, and the resources the client is prepared to devote to the matter. Counsel should memorialize those understandings in writing and should adhere to the client's expectations and budget. Counsel should periodically review these understandings with the client and should memorialize any significant changes in the client's instructions (see *Protocol for Business Users and In-House Counsel*, Actions 5, 6).

Comments:

Studies show that many disputes arise between clients and counsel because of a failure to reach, at the outset of the engagement, a clear understanding of what counsel is expected to do (and not do) and what that work will likely cost the client.[183] The potential for such problems are clearly present in engagements, like arbitration and litigation, where the lawyer's work may be quite intensive and extend over a period of many weeks. It is essential that outside counsel should make an early and realistic assessment of the case, including the cost and time which various alternative approaches to the arbitration may involve. Ultimately it is up to the client to determine, as a matter of business priorities, what amount of time and money it is willing to devote to the case. Once that decision is made, outside counsel should memorialize it in writing, along with other important client instructions, and should revisit the matter periodically and note any changes that may have occurred in the client's expectations.

3. Select arbitrators with proven management ability. Be forthright with the arbitrators regarding your expectations of a speedy and efficient proceeding.

Outside counsel should help their client select arbitrators with the experience, knowledge and capabilities that are likely to further the client's business goals, including expectations as to cost and time. Counsel should do a thorough "due diligence" of all potential arbitrators under consideration and should, consistent with the Code of Ethics for Arbitrators in Commercial Disputes, interview them concerning their experience, case management practices, availability and amenability to compensation arrangements that would incentivize them to conduct the arbitration efficiently and expeditiously.

Parties desiring speed and economy in the arbitration process should be forthright in conveying their expectations to the arbitrators regarding the duration of the proceedings, beginning at the time candidates for appointment as arbitrator are identified. These expectations can be set down in writing at the beginning of the arbitration process and, even

[183] 2007 LAWYER-CLIENT FEE ARBITRATION REPORT CARD: HALT REPORT CARD FINDS LAWYER-CLIENT FEE DISPUTE PROGRAMS NOT MAKING THE GRADE (Sep. 17, 2007), *available at* http://www.halt.org/reform_projects/lawyer_accountability/lawyer-client_fee_arbitration/report_card.php.

if unilateral and non-binding, may have an impact on scheduling and management decisions made by the arbitrators during the proceedings (see *Protocol for Arbitrators*, Action 3).

Comments:

One of the most important functions of outside arbitration counsel is selecting, in consultation with in-house counsel, the arbitrator(s) for the case. In addition to the traditional considerations such as intelligence, integrity, familiarity with the subject matter, and availability, outside counsel these days also need to determine whether the arbitrator candidates have the knowledge, skill and temperament to manage the arbitration efficiently. Much can be learned on this score by talking with lawyers who have participated in other cases the candidates have arbitrated and by interviewing the candidates concerning the procedures and practices they follow in conducting arbitrations.[184] Counsel should advise the candidates of their client's expectations concerning the cost and length of the arbitration proceedings and should determine whether the candidates are able and willing to meet those expectations. It is not inappropriate to ask prospective arbitrators, through the case manager, about their availability to conduct the hearing during a specific time frame.[185] Counsel may also wish to explore with the candidates alternative billing arrangements that may encourage them to manage the arbitration efficiently.

4. Cooperate with opposing counsel on procedural matters.

If saving time and money is an important client goal in the arbitration, counsel should make clear to the client that the fullest benefits of time- and cost-saving (i.e., those concerning procedures for preparing for and conducting the hearing) can ordinarily only be achieved when opposing counsel cooperate fully and freely with each other and with the arbitrator to achieve those benefits. Counsel should obtain the client's consent to such cooperation and should pursue that approach regarding all procedural and process issues in the arbitration. Counsel should meet and confer early with opposing counsel in order to foster a cordial and professional working relationship and to reach as many agreements as possible concerning matters that will be taken up at the Preliminary Conference and should continue to meet and confer regularly thereafter (see *Protocol for Arbitrators*, Actions 2, 3, 4).

Comments:

Psychologists tell us that, when people have a dispute, there is a natural tendency ("reactive devaluation") to view with suspicion anything proposed by the other side.[186] This phenomenon, coupled with the hostility often accompanying commercial conflict and the ego satisfaction of trouncing one's opponent, frequently impels counsel in arbitration and litigation

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[184] Canon III of the ABA/AAA CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (2004) provides that a prospective arbitrator may respond to party inquiries designed to determine his or her suitability and availability for the appointment but may not engage in *ex parte* communications concerning the merits of the case.

[185] This procedure is already offered, for example, by CPR Institute's Director of Dispute Resolution Services.

[186] Ross, L. and C. Stillinger, *Barriers to Conflict Resolution*, 8 NEG. J. 389-404 (1991).

to fight with their opposite number on every substantive and procedural aspect of the case. The most sophisticated outside counsel realize, however, that zealous advocacy on the merits does not preclude cooperation on procedure, which is typically in the best interest of both parties, especially if they wish to reduce cost and delay. Arbitration being entirely a creature of party agreement, arbitrators normally solicit agreement on procedural matters more aggressively than judges and will not take kindly to counsel who refuse to agree to sensible process arrangements. In most cases, if counsel pursue a professional and cooperative relationship with each other concerning the scope of discovery and motions, the length and location of the hearing, stipulations on facts not genuinely in dispute, and similar matters, it is possible to achieve substantial savings of time and money without compromising the client's substantive position. If in-house counsel is inexperienced in arbitration, it may be necessary for outside counsel to explain why such cooperation is beneficial for the client and secure the client's consent to such an approach.

5. Seek to limit discovery in a manner consistent with client goals.

Make clients aware that ordinarily discovery in arbitration will be much more limited than in litigation, even in the absence of clear rules and guidelines, and cooperate with opposing counsel and the arbitrator in looking for appropriate ways to limit or streamline discovery in a manner consistent with the stated goals of the client (see *Protocol for Arbitrators*, Action 6).

Comments:

Discovery is far and away the greatest driver of cost and delay in litigation and in arbitration. In the *Protocol for Arbitration Providers*, Action 3 and the accompanying commentary discuss thoroughly the opportunities and resources available to in-house and outside counsel to greatly reduce discovery in arbitration, thus capitalizing on one of its principal advantages over litigation. Outside counsel have an obligation to make sure the client understands the limitations inherent in arbitration discovery, to assess how much (if any) discovery is truly needed in the case, and to ascertain how much time and money the client is willing to expend in turning over stones. Once that assessment is made, outside counsel should cooperate with opposing counsel and the arbitrator in establishing discovery limitations that match the client's goals.

6. Periodically discuss settlement opportunities with your client.

During the arbitration, counsel should periodically discuss with their client the possible advantages of settlement and opportunities that may arise for pursuing settlement. Unless the case has been thoroughly mediated already, counsel should ask the client to consider the possibility of mediating with an experienced mediator (who is not one of the arbitrators) at an appropriate stage in the arbitration, before substantial sums are spent on preparing for and conducting the hearing.

Comments:

In arbitration as in litigation, a reasonable settlement that avoids risk and heavy transaction costs is often in a client's best interest. Some clients seem to think that settlement may be pursued before arbitration but not once the arbitration has begun. In fact, propitious opportunities for settlement often appear at multiple points during arbitration, including during discussions with opposing counsel in preparation for the preliminary conference, after briefing or rulings on significant threshold matters, on completion of all or particular discovery, after submission of dispositive motions, during the hearing, and after submissions of post-hearing briefs. At all of these stages, outside counsel should re-evaluate their initial case assessment and discuss with the client the pros and cons of pursuing settlement. If a professionally conducted mediation did not precede the arbitration (and sometimes even if it did), counsel should raise with the client the possibility of a thorough mediation with a neutral not involved in the arbitration. In major cases, some experienced outside counsel like to establish two parallel tracks toward resolution, namely, the arbitration conducted by arbitration counsel and a separate, ongoing mediation dialogue conducted by separate counsel who are particularly skilled in the quite different mediation process.

7. Offer clients alternative billing models.

Counsel should offer clients professional service models other than an hourly fee basis, including models that provide incentives for reducing cycle time or the net costs of dispute resolution (see *Protocol for Business Users*, Action 6).

Comments:

In-house counsel are increasingly demanding that outside counsel offer alternatives to hourly billing. Arrangements such as a fixed fee for the entire arbitration or a reduced hourly rate coupled with a "success bonus" of some sort may reduce the client's transaction costs and incentivize economy and efficiency by outside counsel.[187]

8. Recognize and exploit the differences between arbitration and litigation.

Counsel should recognize the many differences between litigation and arbitration, including the absence of a jury on whom rhetorical displays and showboating may have some effect. Arbitrators are generally experienced and sophisticated professionals with whom posturing and grandstanding are almost always inappropriate, counter-productive, and wasteful of the client's time, money and credibility with the arbitrators. Counsel should keep in mind that dispositive motions are rarely granted in arbitration, and should employ such motions only where there will be a clear net benefit in terms of time and cost savings. Counsel should be aware that arbitrators tend to employ more relaxed evidentiary standards, and should therefore avoid littering the record with repeated objections to form and hearsay. An

[187] Ian Meredith & Sarah Aspinall, *Do Alternative Fee Arrangements Have a Place in International Arbitration?*, 72 ARBITRATION 22, 22-26 (2006).

advocate who objects at every turn is likely to try the patience of a tribunal and undermine his or her own credibility (see *Protocol for Arbitrators*, Actions 6, 7, 9).

Comments:

Veteran actors know that the gestures and speech patterns that work well on the stage are often ineffective, even annoying in the much different milieu of cinema or television. Arbitration is a much different milieu from litigation and requires similar adjustments in technique. Outside counsel who are serious about reducing cost and delay in arbitration must be thoroughly familiar with those differences, some obvious, some subtle, and adapt their strategy and style in ways that capitalize on arbitration's flexible, streamlined, more intimate character.

9. Keep the arbitrators informed and enlist their help promptly; rely on the chair as much as possible.

Counsel should work with opposing counsel to keep the arbitrators informed of developments in the interval between the preliminary conference and the hearing so that the arbitrators may assist in resolving potential problems and avoid inefficiencies and unnecessary expenditures of time at the hearing. If it becomes apparent during the pre-hearing phase that one or more significant pre-hearing issues cannot be resolved by agreement of the parties, counsel should not delay in putting the arbitrators to work. Failure to do so could result in the need to postpone the hearing, thus generating avoidable delay and unnecessary costs. Agreeing to have the chair of a three-arbitrator tribunal resolve discovery, scheduling, and other procedural orders will generally produce significant savings of time and money without impairing any party's substantive rights (see *Protocol for Business Users*, Action 10; *Protocol for Arbitrators*, Action 8).

Comments:

Counsel who are primarily litigators and accustomed to dealing with overloaded, somewhat inaccessible judges often fail to take advantage of one of the key benefits of arbitration, namely, readily available decision-makers. Arbitrators who are good case managers know that festering, unresolved issues can seriously derail the best of schedules and thus welcome the opportunity to promptly break any logjams that counsel cannot quickly clear. Outside counsel should not be shy in seeking arbitrator assistance whenever good faith cooperation fails to resolve any process impediments. Many such obstacles can be removed in a short conference call with a sole arbitrator or tribunal chair, without necessity of any written submissions that drive up costs. The flexibility, informality and economy potential of arbitration can only be fully realized if counsel share responsibility with the arbitrators for moving the case along at a brisk pace.

10. Help your client make appropriate changes based on lessons learned.

Once arbitration is completed, counsel should conduct an evaluation of the entire process with the client and attorneys involved in the representation. Counsel should memorialize

lessons learned and make appropriate changes to dispute resolution provisions, firm arbitration training, and firm procedures and policies (see *Protocol for Business Users*, Action 12).

Comments:

Action 12 of the *Protocol for Business Users and In-House Counsel* describes the sort of post-arbitration evaluation that should be conducted by in-house counsel in every case. Outside counsel should be part of that evaluation. In addition, however, outside counsel should conduct their own internal assessment of how they performed in the subject engagement. Did they make an accurate initial assessment of the case? Did they establish with the client a clear understanding of the client's goals and the way in which counsel would pursue them, including the cost and length of the arbitration? Did they take advantage of all opportunities presented for reducing transaction time and costs? What could they have done better? Only by answering questions of this kind will outside counsel be equipped to make necessary changes in their retainer agreements and billing models, training programs, and arbitration procedures and strategy.

11. Work with providers to improve arbitration processes.

Outside counsel should work with arbitration providers to create more effective choices for business arbitration through the development of new alternative process techniques, rules and clauses.

Comments:

Insights gained by outside counsel during arbitration and through post-arbitration evaluations can be very helpful to providers in improving their clauses, rules and administrative procedures. Outside counsel should freely share such insights with providers to the extent that is consistent with the client's business goals and any confidentiality provisions in the subject arbitration.

12. Encourage better arbitration education and training.

Outside counsel should help improve laws governing dispute resolution, including arbitration, and should encourage more effective legal, business and judicial education regarding arbitration and other forms of dispute resolution.

Comments:

Through their affiliations with law schools, bar associations, other professional organizations, and various local and national civic groups, outside counsel are often in a position to affect education and legislation concerning arbitration. Improving arbitration awareness and understanding among business executives, lawyers, judges and the general public increases the opportunities for effective use of this valuable dispute resolution process and may have the collateral benefit of increasing the demand for counsel's arbitration services.

A Protocol for Arbitrators

Whether or not business users have tailored arbitration procedures to most effectively promote economy and efficiency, they commonly rely on arbitrators to conduct arbitration proceedings economically and efficiently. Arbitrator training, experience and philosophy may all play a part in their ability to accomplish these goals through thoughtful case management; adherence to contractual limits on discovery, timetables, etc.; and effectively distinguishing, and appropriately acting upon, dispositive motions that might conclude or streamline a dispute. The following Actions are offered as detailed guidance for arbitrators in addressing these concerns.

1. Get training in managing commercial arbitrations.

It is axiomatic that all arbitrators should have the knowledge, temperament, experience and availability required by the appointment, as well as a working knowledge of arbitration law, practice and procedures of administrative organizations, and the various opportunities for realizing economies and efficiencies throughout the arbitration process. Those who wish to arbitrate large and complex commercial cases should secure special training in how to manage such arbitrations with expedition and efficiency without sacrificing essential fairness, should identify that training in their biographical materials, and should pledge to conduct the arbitration so as to adhere to any time limits in the arbitration agreement or governing rules (see *Protocol for Arbitration Providers*, Action 7).

Comments:

Just as "one size fits all" is not a cost-saving approach to arbitration rules, it is also true that being an effective arbitrator in one field does not assure effectiveness in another. Commercial arbitration, for example, is quite different from labor arbitration or consumer arbitration. One serving as an arbitrator in any of these fields should be well grounded in the arbitration law, practice, and management techniques particular to that field. Fortunately, many institutions, including the American Bar Association, the American Arbitration Association, JAMS and CPR, offer specialized instruction in managing the sort of large, complex cases that typify commercial arbitration. In addition, there are a number of excellent published practice guides, including *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration* (James M. Gaitis, Curtis E. von Kann & Robert W. Wachsmuth, eds. 2nd ed. Juris Net 2010) and *Commercial Arbitration at Its Best: Successful Strategies for Business Users* (Thomas J. Stipanowich & Peter H. Kaskell, eds. 2001). In short, the resources are there for those who seek to learn how to arbitrate commercial cases fairly but efficiently.

2. Insist on cooperation and professionalism.

Arbitrators should communicate clearly and unequivocally from the outset their expectation that counsel can and will cooperate fully and willingly with each other and with the arbitrator in all procedural aspects of the arbitration. Arbitrators should establish a professionally cordial atmosphere, one that reinforces expectations of cooperation and reasonableness and

affords counsel the fullest opportunity to contribute to shaping the arbitration process. Arbitrators should lead by example by being prepared and punctual for all arbitration proceedings and by fixing and meeting deadlines for their own actions, such as ruling on motions, issuing orders and the like (see *Protocol for Outside Counsel*, Actions 4, 5, 8).

Comments:

Arbitrators set the tone of any arbitration, and establishing a tone of professionalism and mutual respect among participants greatly increases the prospects for developing cooperative approaches to expedite the proceedings. Arbitrators must make clear that they expect reasonable and constructive conduct by counsel and must model such conduct in their own interactions with counsel and parties. Arbitrators can hardly insist on counsel's compliance with deadlines if they themselves are late in issuing rulings, appearing at hearings, and the like. Arbitrators who make their expectations of cooperation clear and lead by example will have built a solid foundation on which to rest reasonable and efficient management actions.

3. Actively manage and shape the arbitration process; enforce contractual deadlines and timetables.

Arbitrators should recognize that commercial parties are generally looking for "muscular" arbitrators who will take control of the arbitration and actively manage it from start to finish, encourage and guide efforts to streamline the process, make a serious effort to avoid unnecessary discovery or motions, and generally conduct the arbitration fairly and thoughtfully but also expeditiously. Commercial arbitrators should utilize their considerable discretion and the natural reluctance of counsel and parties to displease the ultimate decision-maker so as to fashion, with the input and cooperation of the parties and their counsel, an arbitration process that is appropriate for the case at hand and as expeditious as possible while still affording all parties a full and fair hearing.

Arbitrators should routinely enforce contractual deadlines or timetables for arbitration except in circumstances that were clearly beyond the contemplation of the parties when the time limits were established (see *Protocol for Business Users*, Action 3). They should also encourage parties to "tee up" particular issues for early resolution when the resolution of such issues is likely to promote fruitful settlement discussions or expedite the arbitration (see *Protocol for Arbitration Providers*, Action 6; *Protocol for Outside Counsel*, Action 8).

Comments:

A recurrent plea from National Summit participants was that arbitrators take active control of commercial arbitrations. Even when counsel are cooperating with one another, there are inevitably many points during an arbitration when someone needs to make a decision or take other action to keep the proceeding "on time and under budget." All arbitration rules give arbitrators considerable discretion in managing the arbitration process. Business users, in-house counsel, and outside counsel want arbitrators who will accept that responsibility and act. Especially if they have set a collegial tone at the outset and thoughtfully consider the views of

counsel on process issues that arise, arbitrators will find that parties welcome pro-active management by the neutral person(s) to whom they have entrusted the resolution of their dispute. With input from counsel, arbitrators must announce clear procedures and deadlines and must enforce them absent exceptional circumstances. In the commercial arbitration world of today, it is no longer up to arbitrators to decide whether to be pro-active or laissez faire. Thoughtful, well-informed and active management of the arbitration is now a critical part of the service parties are paying arbitrators to deliver. Just as Harry Truman reminded us that those who can't stand the heat should get out of the kitchen, those who are unwilling to devote serious attention to managing their cases should not serve as commercial arbitrators.

4. Conduct a thorough preliminary conference and issue comprehensive case management orders.

As early in the case as possible, arbitrators should conduct a thorough Preliminary Conference in the manner prescribed in Chapter 6 of *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration.* Arbitrators should emphasize the importance of participation by senior client representatives of each party, in person or by phone, in this critical opportunity to develop a sensible and economical plan for the arbitration. Whenever feasible, the first conference should be conducted in-person, since that setting is more conducive than conference calls to fostering cordial and cooperative relations among parties and counsel. After the conference, arbitrators should issue a comprehensive "case management order" setting forth the procedures and schedule that will govern the arbitration. Arbitrators should only permit departures from those procedures and schedule for good cause shown (see *Protocol for Outside Counsel*, Actions 3, 4, 5).

Comments:

The single greatest tool for achieving a fair and efficient commercial arbitration is a well-conducted preliminary conference. It is the best opportunity for all participants to focus their attention and creativity on how to make the arbitration run smoothly and economically. It is also the ideal time for client representatives to appreciate how costly and protracted a "scorched earth" campaign will be and how much time and money can be saved by scaling back on discovery, motions and hearing time. That is why arbitrators should insist that senior client representatives (business executives or in-house counsel) attend the conference.

Because the preliminary conference is such a critical phase of the arbitration, it must not be given short shrift. Arbitrators should assure that lead counsel appear at the conference and that all parties have reserved ample time for careful consideration of all issues. If possible, the conference should be conducted in-person, which is more conducive to cooperation and mutual brainstorming than a conference call. Unless the amount at stake is quite modest, the increased productivity of an in-person conference is almost always worth the added expense.

A productive preliminary conference requires thorough preparation by all participants. Arbitrators should provide counsel with an agenda of matters to be taken up at the conference and should invite counsel to add to the list. Arbitrators should require counsel to discuss the agenda items in an effort to reach agreement on as many items as possible and provide to the

arbitrators, prior to the conference, a joint email setting forth the agreements they have reached and their respective positions on points of disagreement. How best to conduct a preliminary conference could be a course in itself. *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration* devotes thirty single-spaced pages to the topic. While that discussion should be consulted in full, here is a summary checklist of the matters that ought to be determined at the preliminary conference:

- Identity of ALL parties to the arbitration (no *et al* descriptions).
- The specific claims, defenses and counterclaims (if any) to be decided. Are all stated with sufficient specificity?
- Under what arbitration agreement is the arbitration being conducted?
- What law governs the arbitration procedure?
- What law governs the merits of the claims and defenses?
- What rules will apply in the arbitration?
- Is there any dispute concerning the arbitrability of any claim or defense?
- Do the arbitrators need any additional information (e.g., names of testifying witnesses and key actors who may not testify) in order to make additional disclosures?
- Does any party seek to join additional parties? On what authority and basis?
- Does any party seek consolidation with another arbitration? On what authority and basis? Who is authorized to make the decision if a party is opposed to consolidation?
- What discovery (if any) will be permitted? What procedures will apply? (See *Protocol for Arbitration Providers*, Action 3.)
- What motions (if any) will be permitted? What procedures and time frames will apply? (See *Protocol for Business Users and In-House Counsel*, Action 9.)
- Does the arbitration involve specialized scientific or technical matters for which the arbitrators should have a "tutorial"? If so, can the parties agree on a treatise or other publication for the arbitrators to read, or neutral expert to teach the Panel?
- Would appointment of one or more neutral experts be appropriate?
- How will the parties submit documents and information to the arbitrators and to each other- email, fax, electronic filing, hand delivery?
- At what location(s) will the hearing be held?
- On what dates will the hearing be held?
- Do the parties need subpoenas for non-party witnesses? What authority to issue?
- Procedures and standards for seeking a continuance of the hearing.
- Procedures for the conduct of the hearing (see Action 9 below).
- Nature of the award (see Action 10 below).
- Due date of the award.

Following the preliminary conference, arbitrators should promptly issue a case management order that memorializes the determinations made on all the foregoing matters and any others addressed at the conference. If subsequent developments require some adjustments in that order, an amended case management order should be promptly be prepared and issued.

5. Schedule consecutive hearing days.

In order to avoid the delay and excess costs caused by having multiple hearing sessions, arbitrators should schedule the hearing on consecutive days whenever possible. Arbitrators should encourage the parties to make a realistic estimate of the number of hearing days they will need and should reserve a sufficient number of days for completing the hearing in the time allotted, even if unexpected developments, or unduly optimistic estimates, lead to a somewhat longer hearing than originally projected.

Comments:

Arbitration hearings that do not run on consecutive days involve much greater expense than those that do.[188] Apart from the possibility of repetitive travel expenses, there is duplicative deployment, preparation and refreshing tasks for all participants and added work that people think to do in the time between sessions. Spreading the hearing out over a period of weeks or months obviously protracts the arbitration. Arbitrators should attempt to schedule consecutive hearing days whenever possible.[189] Arbitrators should also be sure that a realistic number of days are reserved for the hearing. Counsel frequently underestimate, sometimes drastically, the amount of time they will take for examinations and arguments at the hearing. It is better to schedule an ample number of days and cancel those not needed than to schedule too few days and then have to find, on the calendars of busy lawyers and arbitrators, additional, mutually available time for completing the hearing.

6. Streamline discovery; supervise pre-hearing activities.

Arbitrators should make clear at the preliminary conference that discovery is ordinarily much more limited in arbitration than in litigation and should work with counsel in finding ways to limit or streamline discovery in a manner appropriate to the circumstances. Arbitrators should actively supervise the pre-hearing process. They should keep a close eye on the progress of discovery and other preparations for the hearing and should promptly resolve any problems that might disrupt the case schedule (usually through a conference call preceded by a jointly-prepared email outlining the nature of the parties' disagreements and each side's position with regard to the dispute, rather than formal written submissions) (see *Protocol for Outside Counsel*, Action 5).

Comments:

The necessity of containing discovery and multiple ways of doing so are thoroughly discussed in the *Protocol for Arbitration Providers*, Action 3. Such procedures are typically set at the preliminary conference and memorialized in the case management order. However, it is

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[188] The AAA COMMERCIAL RULES provide that, "Generally hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs." AAA COMMERCIAL RULES, *supra* note 160, at R. L-4(h).

[189] When a hearing may require multiple weeks, it may be appropriate to have one week day off per week so that counsel and arbitrators can keep up with their other cases.

equally essential for arbitrators to monitor the parties' progress with discovery and other pre-hearing activities and to quickly step in if unexpected developments threaten to disrupt the schedule. Some arbitrators like to schedule periodic conference calls to check the status of pre-hearing activities. Others fear this may encourage counsel to pile up problems for the periodic calls rather than work them out themselves and thus instruct counsel to request a conference call promptly after serious, good faith efforts at resolution have failed. Whichever approach is taken, arbitrators need to "stay on top of the case" from preliminary conference to hearing to make sure that the parties' expectations about the length of the arbitration are met.[190]

An excellent template for arbitrator control of discovery is provided by the *New York State Bar Association Report on Arbitration Discovery* and *JAMS Recommended Arbitration Discovery Protocols* based on the Report.[191]

7. Discourage the filing of unproductive motions; limit motions for summary disposition to those that hold reasonable promise for streamlining or focusing the arbitration process, but act aggressively on those.

Arbitrators should establish procedures to avoid the filing of unproductive and inappropriate motions. They should generally require that, before filing any motion, the moving party demonstrates, either in a short letter or a telephone conference, that the motion is likely to be granted and is likely to produce a net savings in arbitration time and/or costs.

Arbitrators should explain to parties that dispositive motions involving issues of fact are granted less frequently in arbitration than in litigation because there is no appellate court to reinstate the case if they erred in dismissing it. However, there are matters for which a dispositive motion, especially a motion for partial summary disposition, might provide an opportunity for shortening, streamlining or focusing the arbitration process—as, for example, where arbitrators are able to rule on a statute of limitations defense, determine whether a contract permits claims for certain kinds of damages, or construe a key contract provision. Thus, arbitrators should encourage parties to be judicious in filing motions but should be willing to entertain and rule on them in situations where the motion presents a realistic possibility of shortening, streamlining or focusing the arbitration process.

Comments:

After discovery, motions are probably the leading cause of excessive cost and delay in commercial arbitrations. Veteran litigators, acting largely out of habit, frequently file motions

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[190] The ICDR has established a voluntary set of guidelines designed to promote fair and expeditious arbitration proceedings by encouraging voluntary exchanges of the most material documents. *See* ICDR GUIDELINES, *supra* note 140.

[191] NEW YORK STATE BAR ASSOCIATION, REPORT ON ARBITRATION DISCOVERY IN DOMESTIC COMMERCIAL CASES (2009) *available at* http://www.nysba.org/Content/NavigationMenu42/April42009HouseofDelegatesMeetingAgendaItems/DiscoveryPreceptsReport.pdf; JAMS RECOMMENDED ARBITRATION DISCOVERY PROTOCOLS FOR DOMESTIC, COMMERCIAL CASES (2010) *available at* http://www.jamsadr.com/arbitration-discovery-protocols/.

for summary disposition and other relief, which impose substantial burdens of briefing and argument on all counsel and intensive factual and legal review by arbitrators. While arbitrators certainly have the authority to grant such motions, the absence of appellate review typically and properly makes them quite cautious about doing so, especially when the other side has had little or no discovery. On the other hand, there are purely legal issues, such as statute of limitations, interpretation of a contract, or identifying the required elements of a cause of action, which arbitrators can and should undertake to decide early in a case, particularly when a decision in favor of the movants could substantially reduce transaction time and cost for both sides. Arbitrators need to educate counsel on which sorts of motions are likely to be productive in arbitration and which are not and then establish procedures for processing the former quickly and efficiently.[192]

8. Be readily available to counsel.

Arbitrators should recognize that their acceptance of an arbitral appointment carries with it an obligation to be reasonably available to the parties to resolve procedural, process or scheduling disputes that could delay the timely resolution of the case. Thus, they should be willing on fairly short notice (generally not more than two or three business days) to hold a conference call with the parties in order to resolve such matters.

In litigation, parties sometimes wait months to present an issue to a judge or to receive the judge's decision; often the case is at a near standstill until the issue is resolved. Arbitration parties can escape these long delays, but only if arbitrators are prepared to hear their arguments promptly and issue prompt decisions. Arbitrators who are committed to speed and economy in commercial arbitration must encourage counsel to consult them quickly when obstacles to schedule compliance arise, must be willing to convene a conference call within a few days of such a contact, and must be able to rule either at the end of the call or very shortly thereafter.

9. Conduct fair but expeditious hearings.

Arbitrators should conduct hearings in a manner that is both fair and expeditious as described in detail in Chapter 9 of *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration.*

[192] For example, arbitrators may provide in their case management order that (1) prior to filing any dispositive motion, the moving party must provide the arbitrator with a letter of not more than five pages explaining why the motion is ripe, likely to be granted, and likely to save time and money in the arbitration; (2) the opposing party may have five days to respond with a five page letter; and (3) the arbitrator will promptly decide whether to entertain the motion. If he or she does so, the arbitrator may set an expedited briefing schedule and page limits on the briefs. After receiving the briefs, the arbitrator may deny the motion without argument or schedule a prompt oral argument (perhaps by phone) and then rule. *See generally* CCA GUIDE TO BEST PRACTICES, *supra* note 84.

Comments:

Every day of a hearing, in which one or more lawyers, paralegals, client representatives and witnesses are in attendance, having prepared hours for that day's events, typically costs a client many thousands of dollars. While it is certainly important that the proceedings be fair and contribute to a sound result, it is also important that the proceedings be efficient and respectful of the parties' time and money. Conducting a fair but efficient hearing is almost entirely in the hands of the arbitrators and is the best hallmark of a truly accomplished commercial arbitrator. Chapter 9 of *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration* provides 45 pages of guidance on how to accomplish that goal and should be reviewed in detail. Major steps toward an efficient arbitration hearing include the following:

- Make clear to counsel that, unless formal rules of evidence apply (which is rare in arbitration), virtually all non-privileged evidence offered by any party will be received and traditional objections (hearsay, foundation, etc.) will not be entertained. Urge counsel to focus on the probativeness of evidence, not its admissibility.
- Determine what order of proof is most appropriate for the particular case, including sequencing the hearing in progressive phases, taking both sides' witnesses issue by issue, or ruling on threshold issues before receiving evidence on other issues.
- Encourage the parties to submit a joint collection of core exhibits in chronological order with key portions highlighted.
- Establish an expedited procedure for receipt of other exhibits. For example, require all parties to submit their tabbed, index exhibits in advance of the hearing and advise counsel that all such exhibits will be received en masse at the start of the hearing save for any that are privileged or genuinely challenged as to authenticity.
- Require that parties show demonstrative exhibits, including power point slides, to each other a reasonable time before they are used in the hearing so that time is not wasted in assessing and possibly challenging their accuracy.
- Discuss with counsel the possible use of written direct testimony for some or all witnesses.
- Establish procedures to narrow and highlight the matters on which opposing experts disagree. For example, require experts to confer before hearing and provide the arbitrators with a list of the points on which they agree, the points on which they disagree, and a summary statement of their respective opinions on the latter.
- Limit the presentation of duplicative or cumulative testimony.
- Make appropriate arrangements for receiving by conference call or otherwise testimony from witnesses in remote locations.
- Consider receiving affidavits or pre-recorded testimony regarding less critical matters.
- Sequester witnesses until they testify unless all parties request otherwise.
- Establish and maintain a realistic daily schedule for the hearing. Start hearings on time and don't allow excessive recesses and lunch breaks.

- Encourage the parties to employ a “chess clock” that limits the total number of ours available to counsel for examination and argumentation.
- At the close of each hearing day (NOT the beginning), discuss with counsel any administrative matters that need attention and monitor their progress against the projected hearing schedule. If needed to meet the scheduled completion date, consider starting hearings earlier, ending them later, or having one or more weekend sessions.
- Don't hesitate to tell counsel when a point has been understood and they may move on, or when a point was not understood and requires clarification.
- Make sure, well prior to the hearing, that counsel have worked out all logistical arrangements concerning transcripts, shared use of power point or other equipment, etc.
- Freely take witnesses out of turn when necessary to accommodate scheduling conflicts.
- Prohibit parties from running out of witnesses on any given day. "Call your next witness" is a powerful tool for keeping a hearing moving.[193]

Through these and similar techniques practiced by experienced arbitrators, commercial arbitration hearings can be conducted both fairly and efficiently.

10. Issue timely and careful awards.

Arbitrators should issue carefully crafted awards that meet the parties' needs in terms of format, level of detail, and timing, and that are unlikely to lead to additional cost and delay due to vacatur and further proceedings. See Chapter 11 of *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration.*

Comments:

Arbitration award are of multiple types (e.g., interim awards, partial final awards, and final awards) and multiple forms (e.g., bare awards, reasoned awards, awards with findings of fact and conclusions of law). There are pros and cons to each form and type. *See generally* Chapter 11 of *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration*.[194] Arbitrators should explain these considerations to the parties and ascertain what sort of award they want. Arbitrators should then exercise maximum care and judgment in crafting such an award and issuing it within any applicable time limit. Vacatur proceedings can add substantially to the cost and length of an arbitration; arbitrators thus have a duty to the parties to render awards that are as "vacatur-proof" as possible.

[193] *Id.* at Ch. 9.

[194] *Id.* at Ch. 11.

Appendices

Appendix A: Bibliography/Helpful Sources

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Some Tips for Conducting Muscular Arbitration Hearings

by Charles J. Moxley, Jr.[1]

The Overriding Imperative – That We Become "Muscular Arbitrators"And Choose "Muscular Arbitrators" For Our Cases

Following are some tips that have occurred to me in presiding over many arbitrations, as to how arbitrators might begin to become the vaunted "Muscular Arbitrator" and as to how litigators in arbitration may improve the prospects of their receiving a "Muscular Arbitration."

The Muscular Arbitrator

- The Muscular Arbitrator will proactively manage the hearing from the beginning.
- The Message: Both sides will get a full and fair opportunity to present their case/defense, but we will move it along.
- Limit opening statements where appropriate and enforce the limits.
- Give guidance to counsel, at the first provocation, to not engage in repetitive or cumulative testimony or argumentative behavior and advise that redirect and recross will be limited.

Opening Statements: Tip to Counsel

- A colorful and engaging PowerPoint can add wonders to an opening statement—and, with a good one, the arbitrators may refer to it throughout the hearing.

All the Exhibits Are In

- Arbitrators should be very clear (unless there is a reason to do it differently in a particular case) that all pre-marked exhibits, except ones that have been objected to, are fully in evidence as of the beginning of the hearing.
- And further – that objections to objected-to documents will be heard when the documents are offered.
- This should be in the context of making the parties understand that, generally speaking, all exhibits come in, subject to issues as to authenticity, privilege, extreme irrelevance/prejudice or prior failure to pre-designate the documents.

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Study the Witness Statements and Experts' Reports in a Timely Way

- The Muscular Arbitrator will study the Witness Statements/Experts' Reports and related exhibits in advance – and will review them closely the night before, so as to be as familiar with them as she would have been had the substance thereof been presented by live testimony.
- The Muscular Arbitrator will tell the parties at the opening of the hearing that she will be doing this and that they can count on it.
- The same applies to reviewing the Key Exhibits in advance.
- Tips to Counsel:
  - Remember that arbitrators do not have a staff of junior attorneys and paralegals working with them on the arbitration.
  - Faciliate the arbitrators' access to Witness Statements, Experts' Reports for upcoming witnesses, and the like and keep them advised of changes in the order of witnesses.
  - It is generally a good idea for counsel to provide the arbitrators with *dramatis personae*, summaries, copies of earlier papers -- whatever counsel would like the arbitrators to be looking at or thinking about at any given point in time.

Having the Necessary Papers

- The Muscular Arbitrator will have copies of the pleadings and other important papers at ready access.

Paper Exhibits

- It is a very nice touch when the exhibits are in binders that are small enough that one can open and close them and not break one's back lifting them.
- Two-sided copies save a lot of trees and are easy on arbitrators' backs.
- It also can be a wonderful if the documents are organized in some sensible way, whether by chronology or by topic or the like.
- Another very handy device is for counsel to Bates stamp the individual pages of all the exhibits consecutively before having the copies made, so that one can reference any page of any exhibit by its unique page number.
- Further Tip to Counsel: Some arbitrators aren't in firms and have no real support staff. Helping the arbitrators with the set-up of the Exhibits and the shipping and/or storage of them between hearing days, when there are gaps, can be a nice touch.

The Electronic Hearing

- The Muscular Arbitrator will increasingly be ready for the fully electronic hearing.
- Tips for Counsel
  - Providing a thumb drive or the like containing all of the pleadings, Witness Statements, Experts' Reports, briefs, transcripts (if any), exhibits, copies of cases, *etc.* can be very helpful to arbitrators when evaluating the case and writing the award.
  - Particularly helpful are briefs that are hyperlinked to the exhibits and authorities cited.

- It can also be helpful, with the permission of the arbitrators, to mark up the important parts of exhibits and cases, etc.

Some Nice Touches with Respect to Individual Witnesses

- In a long case, it can be a nice touch for counsel to provide photos of individual witnesses.
- It is often a good idea to provide a CV of each witness, where applicable, in advance of her testimony, and to hand a copy of the CV to the arbitrators as the witness starts to testify, thereby making it possible to save time on foundations.
- Tip to Counsel: It's not unreasonable for counsel in such circumstances to make a nice summary statement of what the CV shows.

Organizational Charts as to the Positions and Responsibility of Witnesses and other Such Guides Can Be Helpful

- Tips to Counsel
  - Basic chronologies can be helpful.
  - A *dramatis personae* can be helpful where there are many witnesses.
  - Again, counsel are well-advised to recall that the arbitrators do not have a team of junior lawyers and paralegals to assist them in organizing materials for the arbitration.
  - In addition, arbitrators don't necessarily live with the case during the breaks, so it can be helpful to provide copies of materials like the forgoing to the arbitrators when the hearings resume to bring the arbitrators back into the picture (though the Muscular Arbitrator will obviously have done this on her own).
  - Accordingly, it is always a good idea for counsel to make available to the arbitrators whatever they would like the arbitrators to be looking at or thinking about at the time.

Argumentative Counsel

- It not infrequently happens that counsel are inclined to engage in heavy and sometimes vituperative colloquy among themselves.
- While parties have a right to make any objections they want and to be heard with respect to objections, there is no room for vituperation (not to mention that it is counter-productive), nor is extended colloquy helpful.
- These practices must be squelched when they first appear.
- Approaches:
  - Direct counsel, when they are too disputatious with one another, to direct everything to the arbitrators; and
  - Don't be afraid to limit argument once the point has been made.

Reviewing Upcoming Witnesses and Areas of Testimony at the End of the Day

- The Muscular Arbitrator will review upcoming witnesses and their anticipated areas of testimony with counsel at the end of each day.
- Particularly after the matter has gone on for a while and the arbitrator has heard enough testimony to have a sense of the matter, she will advise counsel as the case proceeds as to

what witnesses and what areas of testimony seem potentially helpful, and what ones do not.

- The Muscular Arbitrator will provide for extended days when necessary to get the job done on time --- and will remember that the court reporter (if there is one) has to be on board for extended days to be an option.

Limiting Direct Testimony When the Witness' Direct Testimony Has Been Presented by Witness Statement, Experts' Report or the Like

- A lot of time can be saved by avoiding extensive repetition of direct testimony when that testimony has already been provided by Witness Statement, Expert Report or the like.

Offers of Proof and Unnecessary Testimony

- The situation will arise where a party is going to put a witness on to testify to something that the party needs to establish but that the other side is not really going to be in a position to dispute anyhow, although they would not necessarily stipulate to it.
- In this situation, a quick compromise can be to have an offer of proof put on the record by offering counsel – and have that offer be stipulated to as testimony, *i.e.*, not that the matter is true, but that this is what the witness would have testified to.

Hearing Expert Witnesses on a Particular Topic at the Same Time

- It can save time to have expert witnesses on a particular topic testify at the same time, with all such witnesses being present when each testifies.

Arbitrator's Stream of Consciousness Notes at the End of Each Day

- A practice that some arbitrators follow – and that can be quite helpful in terms of helping the arbitrator understand a case and organize her thoughts on it, and also to get back into it promptly again after a break – is to dictate a stream of consciousness memorandum at the end of each day's hearing, setting forth in some detail the arbitrator's impressions and tentative conclusions based on the day's testimony and her overall analysis of the issues in the case, as they appear in the hearing to date, along with any questions the arbitrator has going forward.
- These dictated notes can be much more helpful than the notes arbitrators take on yellow pads or laptops during the hearing, since they typically provide more of an overview and analysis.
- Arbitrators who follow this practice find that it increases their understanding of the case and their sense of what will be most helpful in the case going forward.

Form of Award

- Reasoned awards are expensive and time-consuming.
- The Muscular Arbitrator will challenge the parties, as with discovery and motion practice, as to why they want a reasoned award, and will point out that, given the limited scope of review, in many instances, a standard award may be sufficient.
- Where the parties want a reasoned award, the question becomes what level of reasoning they want.
- Different arbitrators and counsel have markedly different views of what is meant by a "reasoned award."

- This should be a matter of explicit discussion: The Muscular Arbitrator will discuss with counsel what level of reasoning they want, conducting this discussion with reference to the potential costs of different levels of reasoned awards.
- The Muscular Arbitrator will also remember that at times, when counsel advise that they want a standard, non-reasoned award, this means not only that they do not want to incur the expense of a reasoned award, but also that they *affirmatively want to avoid having a reasoned award.* When this is the case, obviously the arbitrator will want to respect this.

Avoiding Post-Hearing Briefs When It Makes Sense/The Closing Statement Alternative

- Post-hearing briefing adds a considerable level of expense to arbitrations and results not only in substantial delay, but also in the arbitrators' not addressing the matter and writing their awards until weeks, or typically, months after the close of the hearing.
- Often — although counsel may have a hard time letting go — the arbitrators will know the case as well as counsel by the end of the hearing, so that post-hearing argument and briefing will not really be all that helpful to the arbitrators. This is worth discussing with counsel. Nonetheless, if, as often happens, counsel nonetheless want to brief the matter and/or have closing statements a week or two subsequent to the closing statements, that should generally be permitted.
- Closing statements can be an efficient alternative to post-hearing memoranda when counsel are satisfied with them.
- Where the parties and counsel are local, it is often convenient for them to come back a week or two after the hearing to provide their closing statements (in some instances after the transcripts (if any) are received.
- While this takes some time, it is generally more efficient and quicker than post-hearing briefs and, in many cases, may be more helpful to arbitrators because of the dialogue the closing statements make possible.
- Tips to Counsel:
    - A good closing PowerPoint presentation, annotated to the record can be helpful in an appropriate case (if counsel don't then just read it).
    - Also quite helpful and handy is a small binder of the key documents from the hearing, marked up to highlight the points counsel like (it can be particularly handy if the documents are somewhat reduced in size and 2-sided).

Attorneys' Fees and Costs

- In cases in which the arbitrators will be awarding attorneys' fees and costs, it becomes very important how this process is administered.
- Many arbitrators believe that the best practice is to ask both sides to submit their statement of their fees with their final briefs and to agree that the arbitrators may decide attorneys' fees based on those submissions.
- Assuming one gets buy-in for this approach, substantial potential delay in the future can be avoided. However, in the unusual case where either side objects and says they reserve the right to have a hearing as to fees, allowance will have to be made at a later time for such a hearing, since factual questions will presumably be presented.
- While this approach results in the winning party's having had to submit its fees as well, this should not be a significant burden because lawyers in most cases will have recorded

their time on a regular basis anyhow. Plus the fact, having the two submissions to review can be helpful as to reasonableness.

- The alternative – the submission of fees applications after the award – can take up much more time, as the losing party may, by that time, be quite uncooperative.

Dealing with Those Last Minute Troublesome Issues That Come Up

- It often happens that issues come up late – sometimes quite late in arbitration – which are really a nuisance.
- The Muscular Arbitrator, to protect the record of the case and avoid the risk of issuing an award that is unclear or in some way subject to challenge, will give fair consideration to such matters and, as appropriate, create a record as to that consideration, rather than simply brushing such matters aside.

Important Words to Add at the Very End

- Nothing can more derail the efficiency and economy of arbitration than to have the award be subject to challenge in court.
- Running a good hearing is obviously a way to decrease the likelihood that any such court challenge will have merit.
- One important stopgap is to very carefully and comprehensively ask counsel at the end of the hearing questions along the following lines: Have you had an opportunity to offer whatever proof you feel you're entitled to offer and to say whatever you feel you need to say? Do you feel you've had a full and fair hearing? Is there anything further you need in order to feel that you have a full and fair hearing?
- While this may seem like looking for trouble, it can save a lot of time in the long-run.

Non-Party Subpoenas

by Charles J. Moxley, Jr.

Significance of the Issue

- Importance of Non-Party Subpoenas: In many cases, non-parties are key witnesses and hold key documents.
- Concerns: Arbitration is a creature of contract. Non-parties should not be required to be involved absent a real need.

Overriding Practicalities as to Subpoenas

- Likely compliance by non-party witnesses: Anecdotally, it appears that non-party witnesses accept subpoenas in many instances, rather than disputing them, and then often negotiate convenient times for compliance.
- Reasons for acceptance of subpoenas: This may be because such witnesses want to come forward because they are aligned with a party, because they respect the process and feel a responsibility as a witness to cooperate, because they want to schedule their appearance to suit their own convenience, or because they want to avoid the time and expense of opposing the subpoena.

Considerations Applicable to What Subpoenas Arbitrators Should Sign

- Case specific considerations—Threshold Questions: Is this witness or are these documents reasonably necessary for the case? Is the other party objecting?
- Legal considerations: What law, federal or state, applies? What does that law provide?

Evolutionary Nature of Applicable Law

- Arbitration subpoenas as limited to "hearings": The Second and Third Circuits have held that FAA Section 7 only permits subpoenas to be returnable at hearings, albeit with "hearings" including pre-merits hearings – *see generally* The New York City Bar report at http://www.nycbar.org/pdf/report/uploads/20071980-ObtainingEvidencefromNon-PartiesinInternationalArbitrationintheUS.pdf
- Possibility of deposition subpoenas under other law: Some federal courts and the arbitration law of numerous states (including, it appears, New York), however, permit pre-hearing non-party depositions and/or pre-hearing discovery of documents from non-parties under some circumstances, as does Section 17 of the Revised Uniform Arbitration Act (RUAA), as promulgated by the National Conference of Commissioners of Uniform State Laws.
- Scope of subpoenas: There are also various approaches by different jurisdictions, federal and state, throughout the United States, as to the range of subpoenas, potentially raising issues as to whether a particular subpoena will enforceable, depending on where it was issued or where a party may try to enforce it. Some jurisdictions permit the process whereby commissions may be issued by a court at the site of the arbitration requesting that a subpoena be issued by a court in the jurisdiction where the witness or documents in question are located.
- The roving arbitrator alternative: There is the possibility under the law of some jurisdictions that an arbitrator (including possibly one member of a panel of arbitrators)

might "rove" from the seat of the arbitration to the location of the witness or documents at issue, sitting there, so as to conduct a hearing session or the like there, in some instances potentially making it possible for the parties to obtain testimony or documents they might not otherwise have been able to obtain.

- Choice of law questions: Accordingly, in any case where subpoenas are presented to arbitrators for signature, there may be a myriad of choice of law issues as to what jurisdiction's law is applicable, and whether the federal or state law of that jurisdiction is applicable.

Ethical and Practical Significance of the Uncertainty of the Law in this Area

- Unenforceable subpoenas: Many would argue that it is inappropriate for an arbitrator to sign a subpoena which she knows is unenforceable.
- Colorable subpoena: But what about a subpoena whose enforceability is at least colorable? May an arbitrator sign such a subpoena?

Some Standards for Consideration (If Only by Analogy)

- Canon I.F of the Code of Ethics for Arbitrators in Commercial Disputes: "An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision.
- Canon IV: "AN ARBITRATOR SHOULD CONDUCT THE PROCEEDINGS FAIRLY AND DILIGENTLY."
- Canon IV.B: "The arbitrator should allow each party a fair opportunity to present its evidence and arguments."
- Rule 4.1 of the New York Rules of Professional Conduct for Attorneys: "In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person."
- Rule 3.1(a): "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."
- Rule 3.1(b): A claim or defense is frivolous "that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;"
- Rule 4.4(a): "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person or use methods of obtaining evidence that violate the legal rights of such a person."
- Rule 8.4(c): A lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Some Tentative Conclusions

- Arbitrator's right and duty to help the parties obtain non-party testimony and documents where not inappropriate: Desiring to accord the parties a fair and efficient resolution of their issues and a fair opportunity to present their evidence and arguments, the Muscular Arbitrator will generally want to help the parties obtain necessary non-party testimony and documents where not inappropriate.
- Overriding responsibility for subpoenas: It is the right and obligation of the parties, when they disagree as to the matter, to argue the law and facts as to subpoenas issues in an arbitration. As a general proposition, arbitrators are not required independently to

research such matters, but rather to decide issues presented based on the law and facts argued to them by counsel. However, this will often be an area where the arbitrators possess specialized knowledge not familiar to the parties or even their counsel.

- No signing of subpoenas known to be unenforceable: It would appear to be inappropriate for an arbitrator to sign a subpoena that she *knows* to be unenforceable under any circumstances, since that subpoena could be misleading to the non-party recipient.
- Appropriateness of signing subpoenas that are colorably enforceable: Although there are differing views on this, many arbitrators believe it is reasonable for arbitrators to sign subpoenas that are colorably enforceable, subject to resolving issues as to enforceability in the ordinary course when presented by the parties or by non-party recipients of subpoenas who bring the matter to the arbitrators.

Back-up Alternative Approach

- Inappropriateness of subpoenas in some instances: There will be instances where the arbitrators will decide to decline to sign subpoenas.
- The information request alternatives: In such instances, a non-binding information request may still be helpful in assisting the parties in obtaining the desired testimony or documents.

Summary

- Scheduling order: Provide for the consideration of subpoenas in the scheduling order, leaving sufficient time for possible court challenges or enforcement proceedings.
- Appropriateness for the case: Get comments from all parties. The arbitrator should always make the threshold determination as to whether the requested witnesses or documents sought by a subpoena are reasonably necessary for the case.
- Legal considerations: Assuming they are, the Muscular Arbitrator will generally want to cooperate with counsel in signing subpoenas when requested, unless it would be inappropriate to do so.
- Hearing argument from the parties: Arbitrators should hear argument from the parties if there is a dispute about signing the subpoenas and from the non-party recipients of subpoenas if they are willing to address their objections with the arbitrators.
- Requiring colorability: Arbitrators should not sign subpoenas unless they are at least colorably enforceable.
- The non-subpoena alternative: The Muscular Arbitrator, when she is unwilling to sign a non-party subpoena, may suggest to the Parties a non-binding "subpoena"—an information or document request that requests that the witness testify or the documents be produced, rather than directing that that happen.

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Arbitrability of Motions to Disqualify

by Charles J. Moxley, Jr.

Motions to Disqualify a Party's Attorney in Arbitration

- Trap for the unwary: Such motions can be a trap for the unwary, given applicable law.
- Applicable law: Numerous jurisdictions hold that, as a matter of public policy, the disqualification of counsel in arbitration is a matter for the courts, not arbitrators, since it involves attorney conduct. *See, e.g., Northwestern Nat'l Ins. Co. v. Insco, Ltd.*, 2011 U.S. Dist. LEXIS 113626 (S.D.N.Y. October 3, 2011); *but see, Canaan Venture Partners L.P. v. Salzman*, 1996 Conn. Super. LEXIS 245 (Conn. Super. Ct. Jan. 22, 1996); *SOC-SMG, Inc. v. Day & Zimmermann, Inc.*, 2010 Del. Ch. LEXIS 195 (Del. Ch. Sept. 15, 2010).

Parties' Right to Pick Their Counsel

- Rule 24 of the AAA's Commercial Arbitration Rules: "Any party may be represented by counsel or other authorized representative...."
- Canon IV.C of the Code of Ethics for Arbitrators in Commercial Disputes: "The arbitrator should not deny any party the opportunity to be represented by counsel or by any other person chosen by the party."
- Impact of Rule: On a motion to disqualify counsel, the attorney conflict of interest rules would likely override Rule 24 and Canon VI.C.

How Should Arbitrators Handle Such Motions

- Advising counsel of the issue: Because of the possible risk of vacatur in some jurisdictions if an arbitrator decides this issue, the Muscular Arbitrator, depending on the jurisdiction, may want to alert the parties to the existence of this issue and accord them time to consider the issue and take a position on it.
- Whether arbitrators may decide this issue with the informed consent of the parties: Many arbitrators believe that, even in jurisdictions with the restrictive rule, they may hear the motion, if the parties give informed consent.
- Muscularity: The Muscular Arbitrator should hear the motion if the parties give informed consent, rather than subject the case to the delays and expense of ancillary litigation.

Respective Roles of the Chair and Other Arbitrators

by Charles J. Moxley, Jr.

Issues

- Arbitrator authority: What types of matters may be decided unilaterally by the chair? What types of matters need to be decided by all the arbitrators? What communications are appropriate among the arbitrators?

Three Different Situations in which These Questions Arise

- No party-appointed arbitrators: Where there are three neutral non-party-appointed arbitrators;
- Two party-appointed neutral arbitrators: Where there is a neutral chair and two party-appointed neutral arbitrators; and
- Two party-appointed non-neutral arbitrators: Where there is a neutral chair and two party-appointed non-neutral (Canon X) arbitrators.

Rules and Canons

- Rule 40 of the AAA's Commercial Arbitration Rules: "When the panel consists of more than one arbitrator, unless required by law or by the arbitration agreement, a majority of the arbitrators must make all decisions."
- Canon IV.G of The Code of Ethics for Arbitrators in Commercial Disputes: "Co-arbitrators should afford each other full opportunity to participate in all aspects of the proceedings."
- Official Comment to Canon IV.G: "Paragraph G of Canon IV is not intended to preclude one arbitrator from acting in limited circumstances (e.g., ruling on discovery issues) where authorized by the agreement of the parties, applicable rules or law, nor does it preclude a majority of the arbitrators from proceeding with any aspect of the arbitration if an arbitrator is unable or unwilling to participate and such action is authorized by the agreement of the parties or applicable rules or law. It also does not preclude ex parte requests for interim relief."
- Canon X.C(5): "Unless otherwise agreed by the arbitrators and the parties, a Canon X arbitrator may not communicate orally with the neutral arbitrator concerning any matter or issue arising or expected to arise in the arbitration in the absence of the other Canon X arbitrator. If a Canon X arbitrator communicates in writing with the neutral arbitrator, he or she shall simultaneously provide a copy of the written communication to the other Canon X arbitrator".

Situation Where there Are Three Neutral Non-Party-Appointed Arbitrators

- Decision-making: In this situation, the three arbitrators together make all substantive decisions. The chair runs the preliminary hearing and other conferences and the hearing, deciding routine evidentiary and procedural matters, but consults generally with the wing arbitrators in advance and along the way, and the three arbitrators consult on any matters as to which any of them would like consultation.
- Process: The communications between the three arbitrators are generally collegial and consultative. No arbitrator should be excluded, although there is no impropriety and

indeed nothing unusual in any two of the arbitrators discussing the matter between themselves without the presence of the third, although, even with three neutral arbitrators, this should generally be kept to a minimum—and certainly nothing may be decided without including all three arbitrators in the discussions. The parties and arbitrators may agree to a "discovery master" to hear and decide discovery and routine procedural matters, subject to convening the entire panel at the request of any party or arbitrator.

Situation Where There Are Two Party-Appointed Neutral Arbitrators and the Chair

- General rule: This situation is generally handled the same way as where there are three non-party-appointed neutral arbitrators.
- Exception: A possible exception is the situation where one or both of the party-appointed neutral arbitrators seem to be partisan, in which case, on a judgmental basis, the chair may choose to treat the situation more like the one where there are two party-appointed non-neutral arbitrators.

Situation Where There Are Two Party-Appointed Non-Neutral Arbitrators

- General rule: The rule, as set forth above, is that the chair will treat the non-neutral arbitrators essentially as she treats counsel, refraining from discussing the case with such non-neutral arbitrators unless both are present.
- Decision-Making: All substantive decisions will be made jointly. As in the other two situations, the chair runs the preliminary hearing and other conferences and the hearing, deciding routine evidentiary and procedural matters, but consults generally with the party-appointed arbitrators in advance and along the way, and the three arbitrators consult on any matters as to which any of them would like consultation.

The Muscular Arbitrator and Vacatur

by Charles J. Moxley, Jr.

What the Muscular Arbitrator Does

- Controlling discovery: The Muscular Arbitrator controls discovery to assure that each side gets the discovery it reasonably needs to prosecute or defend its case, without imposing the costs and delays of unnecessary discovery.
- Limiting motion practice: The Muscular Arbitrator does not permit parties to make substantive motions unless the motions appear likely to foster the economical, expeditious, and fair administration of the case, but is not afraid to grant meritorious substantive motions when that appears likely to foster those objectives.
- Conducting an expeditious hearing: The Muscular Arbitrator conducts a hearing that avoids duplicative, cumulative, and irrelevant testimony, while according each party a reasonable opportunity to prosecute or defend the case.

Applicable Canons, Rules, and Law

- Canon 1.F of the Code of Ethics for Arbitrators in Commercial Disputes: "An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process."
- Canon IV: Arbitrators are required to "conduct the proceedings fairly and diligently" (Canon IV), "conduct the proceedings in an even-handed manner" (Canon IV.A), "afford all parties the right to be heard" (Canon IV.B), and "allow each party a fair opportunity to present its evidence and arguments" (Canon IV.B).
- Rule L-4(a) of the AAA's Commercial Arbitration Rules: "Arbitrator(s) shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of Large, Complex Commercial Cases."
- Rule L-4(b): "Parties shall cooperate in the exchange of documents, exhibits and information within such party's control if the arbitrator(s) consider such production to be *consistent with the goal of achieving a just, speedy and cost-effective resolution of a Large, Complex Commercial Case*." (emphasis added).
- Federal Arbitration Act §10(a)(3): Grounds for vacatur under the FAA include, the situations "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy…"
- Requirement of a fundamentally fair process: By case law, parties in arbitrations are entitled to a fundamentally fair proceeding.

No Jeopardy to the Muscular Arbitrator

- Role of muscularity: The Muscular Arbitrator, in reasonably controlling discovery, limiting motion practice, and conducting an expeditious hearing does not run a significant risk of vacatur either under the FAA or the requirement of a fundamentally fair proceeding. Arbitrators have substantial discretion. Courts understand that arbitration is supposed to be faster and more economical than litigation.

- The greater risk: The alternative – extended, expensive, litigation-like arbitrations – pose a far greater risk to the effectiveness of arbitration.

What if the Parties Don't Want Arbitral Muscle?

by Charles J. Moxley, Jr.

Appropriate Process when the Parties want Expansive Discovery and Motion Practice

- Presumption of an expeditious process: The AAA Rules, including Commercial Arbitration Rule L-4(a), anticipate that arbitrators will accord the parties a just, speedy and cost effective process. Rule L-4(a):

  > Arbitrator(s) shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of Large, Complex Commercial Cases.

- Party Control of the Process: Nonetheless, parties may, by agreement, override the applicable arbitration rules and the governing presumptions as to arbitration. *E.g.*, Rule 1:

  > The parties, by written agreement, may vary the procedures set forth in these rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator.

- Cases where parties want greater process: With increasingly large and complex commercial cases and other cases of great concern to parties being brought to arbitration, there will be instances where parties choose an expanded process.
- Making sure it is an informed choice: When counsel communicate their parties' agreement to an expanded process, the Muscular Arbitrator will schedule a meeting **with party representatives**, as well as counsel, to make sure that the parties' choice of that approach is an informed one.
- The arbitrator's power to jawbone: Even where the parties agree on an informed basis to an expanded process, the Muscular Arbitrator will jawbone the situation, trying to bring the process within reasonable bounds, for example, by limiting the number and length of depositions and possibly sequencing the depositions, if the parties are willing to agree to such limitations
- The risk of the "blame the arbitrator" outcome: Even after electing a fuller process, the parties, after the fact, may well "blame the arbitrator" for the expanded and expensive nature of the case, making it important that the Muscular Arbitrator do everything she can, at every step of the process, to make the proceeding as expeditious and economical as possible.

Talking Points on Best Practices of Arbitrators in Conducting Effective Arbitrations

Charles J. Moxley, Jr.

- **The arbitration difference**: Subject to the needs of the particular case, it is good practice generally for arbitrators to communicate to counsel early on their expectations as to how arbitration differs from litigation, particularly as to discovery, motion practice, and the conduct of the hearing.
- **Requirements of arbitration clauses**: Arbitrators should generally be alert to any issues as to compliance by the parties and the arbitrators with the requirements of the arbitration clause in a case and address the situation as necessary so as to protect the award.
- **Relations with other arbitrators**: It is important early on panel members to establish a good working relationship among themselves.
- **Listening and Hearing**: It is obviously important for arbitrators to listen to and understand the parties' arguments before ruling. It is generally best to "mediate" a ruling on intermediate disputes between the parties, such as discovery disputes, to the extent possible, rather than simply ruling on them off the top. This is particularly important in the early phases of the case when the lawyers know the case much better than the arbitrators.
- **Detailed pleadings, with the main supporting documents attached**: Where the parties present bare-bones pleadings, it will often make sense for the arbitrators to require that the parties interpose detailed pleadings, perhaps with supporting documents attached. This can sometimes lessen the scope of discovery/disclosure needed in the case. Doing this also advances the goal of giving each side reasonable notice of the other side's factual and legal assertions. This also applies to the need in some cases for the early particularization of a party's claimed damages, subject to any experts' reports on the subject that may be submitted later in the case.
- **Applications for interim relief**: Where parties press applications for interim relief, arbitrators should hear them on an expedited basis, conducting fact hearings as necessary. However, one should be very careful to limit one's rulings on such applications to matters that need to be decided at the time, and to make it clear, as a general matter, that the interim rulings are only that and do not necessarily reflect how the subject matters will be decided on the merits.
- **Focusing on the overall design of the case**: Arbitrators should see as their central role at the outset of a case figuring out the appropriate process for the case, the type of proceeding most suited to the needs of the case. This involves familiarizing oneself with the file and giving counsel a reasonable opportunity at the preliminary hearing to describe their views as to the case – most essentially, their sense of the appropriate scope of

process for the case, including with respect to discovery, particularly e-discovery and depositions (if any), motion practice, schedule and the like. Salient issues in this regard include the following:

- **The preliminary hearing/organizational meeting/scheduling conference/management conference**: This first meeting, usually telephonic, between counsel and the arbitrators can be a pivotal moment in the case for formulating the design – the very architecture – of the case. It generally makes sense for arbitrators to conduct a robust preliminary hearing, essentially covering, at least broadly, everything that can be anticipated that may come up in the case
- **Whether to ask counsel in advance of the preliminary hearing to try to work out a schedule and protocol for the case**: It is a judgment call in each case whether to ask parties to do this. Requiring this pre-hearing coordination among counsel can be efficient, and counsel tend to like it, but it can lead to counsels' agreeing to a litigation-style process, making it harder at the preliminary hearing to get buy-in from counsel on a scope of discovery that is appropriate for arbitration. However, it generally makes sense for arbitrators to at least figure out their mutual days of availability for the hearing and be prepared to present them to counsel on a unified basis. Where the arbitrators know from the papers or the case manager the general timeframe in which the parties would like to conduct the hearing (and when that timeframe makes sense to the arbitrators), it can be helpful for the arbitrators to advise counsel of their mutually available dates in advance of the preliminary hearing, so counsel can figure out which of those dates are most convenient for the parties. It will sometimes make sense for the arbitrators to send a detailed agenda to counsel several weeks in advance of the preliminary hearing. However, this has the disadvantage that it may be too cookie-cutter, in that the arbitrators may not yet know enough to really adapt the agenda to the particular needs of the case. As a result, sometimes it's best to just go into the preliminary hearing without a pre-fixed agenda and move forward as the needs of the case unfold.
- **The possibility of having the preliminary hearing in person with clients present:** Everyone seems to agree that this is a good idea when the scope of the case and the location of the parties, counsel, and arbitrators make it convenient. Nonetheless, preliminary hearings are still largely conducted telephonically. Perhaps, as arbitrators, we should be pushing harder for in-person preliminary hearings when the scope of the case and complexity of the issues justify it.
- **The scope of the preliminary hearing**: My sense is that it is now recognized as a Best Practice that arbitrators should conduct a robust preliminary hearing extending over several hours or more, when necessary, essentially covering, at least broadly, all the things that one can anticipate may come up in the arbitration. Nonetheless, there still appear to be some experienced arbitrators who prefer conducting the preliminary hearing essentially as a scheduling conference, generally taking an hour or less, without getting into any real discussion of the case. Perhaps this is a topic we might want to talk about in some detail. It is important to remember, if one intends to conduct a robust preliminary hearing, to give the parties advance notice, so they can allow sufficient time.

- **Standards as to discovery**: It still happens fairly often that counsel approach arbitration with a litigation mindset as to the scope of discovery and the like. This makes it important for arbitrators early on to discuss with counsel the arbitrators' expectations, subject to the needs of the particular case, as to the scope of discovery/disclosure in the case, perhaps even going so far, when it seems warranted, as to advise counsel of the robust body of "soft law" that exists in reports and studies by bar associations and other professional groups and the like and of the standards that can be found in the arbitration rules applicable to the case at hand.
- **Reliance documents**: The production by parties of their reliance documents is a normal expectation in international cases. However, this approach can also be helpful in domestic cases, sometimes serving as a substitute for the more expansive document production approach more typically used in arbitration in the United States, or at least for limiting the scope of the document production phase of the case. On the other hand, if, in a domestic case, the parties are going to want, in any event, to conduct more traditional discovery as to documents, with document requests, objections, and the like, requiring the production of reliance documents can be redundant, depending of the facts of the particular case. It is important to discuss this matter with counsel in the preliminary hearing and to review the advantages and disadvantages of the various approaches.
- **E-discovery**: It is broadly recognized that many arbitrations will succeed or fail in terms of efficiency and economy based on whether e-discovery is conducted in an efficient and proportionate way. Not so long ago, most of us tended not to address the subject until a dispute concerning e-discovery was presented for decision. However, I think it is now a clear Best Practice to raise the issue of the appropriate scope of e-discovery in the preliminary hearing (or in a follow-up conference on the scope of discovery), and to suggest that the parties meet and confer on the subject within a reasonable timeframe, addressing such potential issues as the following: search terms and the possible testing thereof, time periods, custodians, hit counts, format in which documents will be produced, predictive coding as a possible option, metadata and other points relating to electronic discovery that may arise. It is probably worth telling the parties in the first procedural order that something along the lines of the following will apply to e-discovery in the case:
    - There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, electronic documents are not required to be produced from back-up servers, tapes or other media.
    - Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format which is usable by the party receiving the e-documents and convenient and economical for the producing party. Absent a showing of compelling need, the parties need not produce metadata, with the exception of header fields for email correspondence.
    - Where the costs and burdens of e-discovery are disproportionate to the nature and/or gravity of the dispute or to the relevance of the materials requested, the Arbitrators will consider either denying such request or

ordering disclosure on the condition that the requesting party advance the reasonable costs of production to the other side, subject to further allocation of costs in the final award.

- **Depositions**: Arbitrators should generally make an effort to limit depositions in domestic cases (U.S.) and avoid them in international cases, subject to special need or other good cause shown. One will need to make the "deposition speech" in most preliminary hearings and to try to walk counsel back from the out-size deposition programs that they will often be proposing. Even in cases where the parties are in agreement on extensive depositions, arbitrators still have the option of trying to "jawbone" them down to something more reasonable and to requiring that in-house party representatives be present for a discussion of the time and expense factors attendant to depositions (although this is very rarely done). In many cases, it will be possible to get counsel to agree to a limited number of depositions per side and a limited total number of hours for all depositions taken by each side. However, the depositions issue is no longer as important a threshold issue as it used to me, given the emergence of e-discovery as the worst offender in imposing extraordinary costs and delay on the arbitration process. Paradoxically, there may now be cases where it will be efficient to permit a limited number of depositions as a way to limit e-discovery.
- **Using a discovery master**: This practice is efficient and to be recommended.
- **Parties' cooperation in making non-party witnesses available**: In contemporary arbitration there will often be non-party witnesses whose documents or testimony will be needed in the case. Quite often, such non-party witnesses are associated with one of the parties, often as a consultant, accountant, valuation expert, banker or the like. In probably most such instances, the party will not control such non-parties in a formal or legal sense, but will have influence over them and the *de facto* ability to get them to cooperate in providing the needed documents or testimony, subject, perhaps, to a pro forma subpoena. It is appropriate – and, I would argue, a Best Practice – for arbitrators to advise the parties early in the case that the arbitrators expect parties to exert best efforts to secure the cooperation of such non-parties, subject to the risk of an adverse inference if they fail to do so and it turns out at the hearing that they could have done it. This is a matter worth discussing.
- **Non-Party Subpoenas**: Issues as to non-party subpoenas in arbitration in the United States can be quite complicated. This is such an area of specialized knowledge and there are so many pitfalls in obtaining enforcement of subpoenas in the US courts that I think this area deserves special attention. Specifically, I think it appropriate for arbitrators to advise counsel as to the range of issues that may come up as to non-party subpoenas and give them some guidance as to the form of such subpoenas that may be most effective or at least point them in the direction of bar reports or the like providing wisdom on the subject. I think arbitrators should also exercise some kind of gateway function in terms of making sure that the scope of subpoenas that they sign is reasonably limited to what is necessary in the case and appropriate in the context of arbitration.
- **Substantive motions**: This is a tricky area. The bottom line as to arbitrators' Best Practices in this area comes down essentially to the following: that

arbitrators should permit substantive motions that appear likely to foster the efficient administration of the case and not permit substantive motions that fail to meet that test.

- **Witness statements**: This is an area that deserves attention by arbitrators early on in a case and that should be discussed with counsel at the preliminary hearing. The use of sworn witness statements is a normal practice in international arbitration and increasingly used in domestic arbitration. If witness statements are presented early in a case, they can potentially obviate a fair amount of discovery. On other hand, where there are important issue of credibility, it may be more helpful to the arbitrators to hear the direct testimony live. Overall, it is by no means clear that witness statements save much time or money, although opinions differ on the matter. Arbitrators should encourage sworn witness statements where this approach seems effective and efficient in a particular case and discourage it when it does not.

- **Confidentiality**: This area is a trap for the unwary in that counsel often assume that arbitration proceedings are necessarily more confidential than they typically are. I would suggest that it is now a Best Practice to alert counsel to the limits of the confidentiality that may exist in a case and invite them to stipulate to a broader scope of confidentiality if they so desire.
- **Sanctions**: It used to be extraordinarily rare that there was any need to consider sanctions in arbitration. However, the issue does occasionally arise in contemporary arbitration practice. The important thing is for arbitrators to be alert to recognize it when it does happen and stop it promptly and definitively, failing which, a detailed record should be kept of the matter so it can be dealt with at an appropriate time.
- **Timing and length of the hearing**: It is important to assure that the hearing is scheduled at a realistic time and that enough time is reserved for the hearing. Extreme delays can result, given the schedules of busy counsel and arbitrators, when established hearing dates need to be rescheduled or when more time is needed than had been reserved for the case. The last thing we want to do is schedule too many days and create a self-fulfilling prophecy. On the other hand, given the disadvantages of having to schedule additional days, it will often make sense, after a candid and substantive discussion with counsel as to the likely requirements of the hearing, to build in a little cushion, perhaps an extra day or two, or the like, in the schedule.
- **Evidentiary nature of designated hearing exhibits**: There are various approaches here that make sense. The important thing is to establish a clear rule for each particular case. Perhaps the most usual approach in contemporary arbitration is to establish the procedure whereby all previously identified exhibits that have not been specifically objected to by the opening of the hearing are deemed in evidence as of the opening of the hearing. There is also the alternate approach whereby all exhibits actually used in the hearing are deemed in evidence as of the time of their use or as of the close of the hearing. It also makes sense to be clear early on, after consulting with counsel, as to whether documents relating solely to credibility need to be identified and marked in advance.
- **Having as much of the case briefed on a pre-hearing basis as possible**: While there are obviously cases where extensive post-hearing briefing is necessary and helpful, it can often be efficient to have the parties brief as much of their case on a pre-haring basis as possible, making it possible after the hearing to have only limited and relatively quick

briefing or oral argument, getting the case to the panel quicker when it is fresh in their minds.

- **Summaries, Chronologies and *Dramatis Personae***: It can be quite helpful to have such materials in complex cases and well-worth asking counsel for them.
- **Stipulated facts**: These can be great if the parties want to embark on the effort, but it is often more efficient to have each side submit its own proposed factual findings or the like.
- **Opening statements using PowerPoint**: These can be quite helpful, but it is important to remember to require parties to exchange them in advance of the hearing, lest disputes about them take up valuable hearing time.
- **Disruptive counsel performance at the hearing**: As noted above, it is important for arbitrators to recognize trial abuses promptly when they are occurring and deal with them promptly.
- **Rules of evidence**: It is sometimes worth reminding counsel that, while the rules of evidence are not generally binding in arbitration, there are reasons for such rules – and that often evidence, such as extreme hearsay or extremely leading questions on key issues, that is problematical under the rules of evidence will also be lacking in credibility.
- **Heuristics**: Arbitrators are now generally familiar with recent psychological studies and popular books about heuristics, mental shortcuts that our minds take in assimilating information and making judgments that can produce distorted thinking. Contemporary arbitrators should be alert to red flags for problematic heuristics and take compensatory steps to correct for them.
- **Mediation window**: If arbitration is to be at least competitive with litigation, if not better, it must offer similar opportunities for settlement as litigation. I think it can be said that it is a contemporary Best Practice for arbitrators to build a time into the schedule for the parties to consider whether they want to engage in mediation. Any such effort by the parties should generally take place independently of the arbitrators, but their fostering this possibility for the parties is a service to the process of arbitration.
- **Motions to disqualify adversary counsel**: In some jurisdictions, including New York, such motions are reserved for decision by courts. This is such an esoteric area of arbitration practice that it is, in my view, appropriate for arbitrators to advise counsel of it when the issue comes up. I think it is appropriate, as a matter of arbitration practice, for arbitrators to entertain such motions, if the parties give their informed consent for the arbitrators to do so.
- **Choosing counsel who will create a conflict with an arbitrator**: This is a current hot issue. If it comes up, the ordinary practice of arbitrators would be to have the parties brief it, whereupon the arbitrators can decide it under the applicable rules and law**.**
- **Posing questions during the hearing**: When testimony is unclear, it is certainly fine for arbitrators to ask questions for clarification, and it will often make sense to do this as the testimony unfolds. However, subject to the needs of the particular case, I think it is generally preferable for arbitrators to refrain from asking extensive questions until counsel have completed their examinations. It is particularly important, it seems to me, for arbitrators, absent special circumstances, generally to refrain from asking questions that are outside the scope of the case as the parties have framed it.
- **Form of award**: It is generally good practice for arbitrators to have an open discussion with counsel as to the advantages and disadvantages of the different kinds of awards and

then, subject to the needs of the particular case, to do the form of award that the parties want when they are in agreement.

- **Presenting one's case as to costs and attorneys' fees sooner rather than later**: There are real efficiencies in having the parties tee this issue up for resolution in their final post-hearing papers, so it can be dealt with by the arbitrators in the final award when they decide the substantive issues in the case. The alternate approach of having the arbitrators only issue an interim award on the merits and thereafter address the attorneys' fees issue runs the risk of having that part of the case take on a life of its own, causing unnecessary delay and expense.

Discussion Points on Best Practices of Counsel in Representing Clients in Arbitration

Charles J. Moxley, Jr.

- **The arbitration difference**: It is important to appreciate the extent to which arbitration is different from litigation. It can be quite instructive reading through the "soft law," the numerous available "Best Practices" reports and protocols of bar and other professional groups, arbitration providers, and the like, when embarking on representing clients in arbitration.
- **Arbitration clauses**: Obviously, it can greatly streamline the administration of a case when the parties' arbitration clause is specific as to the various usual bones of contention in a case, such as discovery, motion practice, schedule and the like.
- **Selection of effective arbitrators**: It is important to select arbitrators who not only have subject matter expertise, management ability, and computer know-how (if e-discovery will be a significant issue), but who also have the ability to work effectively with the other panel members. Care should be given to the make-up of the panel qua panel.
- **Credibility with the arbitrators**: The most fundamental requirement for effective representation in an arbitration is credibility with the arbitrators. Cases that go to hearing are often characterized by hotly contested factual, contractual, and legal issues. Sometimes arbitrators have to really struggle to figure out who is right. Arbitrators expect counsel to represent their clients vigorously, but are also more likely to be persuaded by counsel whose representations as to the facts and law seem to be reliable. Acknowledging and addressing the issues in the case tend to work better and are certainly more helpful to the arbitrators than the two ships passing in the night scenario. Nor is extreme argumentativeness, essentially treating the arbitrators as if they were a jury, helpful.
- **Compliance or waiver of express requirements of arbitration clauses**: The requirements of arbitration clauses as to step clauses, timing and the like have binding effect, making it important that both sides comply with or expressly waive them.
- **Detailed pleadings, with the main supporting documents attached**: Detailed pleadings setting forth the factual and legal bases of a party's claims or defenses, along with supporting documents, can be quite helpful in educating arbitrators early on as to a party's view of the world, although there will be situations where one would prefer, or need to take, a more bare-bones approach, at least initially.
- **Pleadings that tell a clear and consistent story**: Pleadings that present a clear and consistent story are often more effective with arbitrators than pleadings that set forth multiple positions in the alternative or the like, although, of course, there will be cases when the latter is necessary or will otherwise make sense. The same applies to counsels' arguments generally in an arbitration.

- **Applications for interim relief**: Counsel generally have the option of making such applications before an arbitrator or a judge. The standards may be more open-ended and discretionary before an arbitrator, but an arbitrator does not have enforcement power, so it will generally make sense to proceed in court when time is of the essence, one really needs the relief, and it is uncertain that the other side would comply with an order by the arbitrator. Interim applications, particularly when made to the arbitrator(s), can serve as a way to get a case jump-started – and sometimes to lay a basis for settlement discussions, if that is what one wants in the particular case.
- **Focusing on the overall design of one's arbitration**: There are many considerations that go into the design of any particular arbitration. Different parties, counsel, and arbitrators will inevitably have different views of such matters in any particular case, including with respect to discovery, particularly e-discovery and depositions, if any, motion practice, schedule and the like. It well behooves arbitration counsel to focus on this aspect of the case early on and be prepared to advocate for the type of design of the case that they believe appropriate in the circumstances. Salient issues in this regard include the following:
  - **The preliminary hearing/organizational meeting/scheduling conference/management conference**: This first meeting, usually telephonic, between counsel and the arbitrators, can be a pivotal moment in the case for formulating the design – the very architecture – of the case. Counsel are well advised to put a lot of time into preparing for this conference as comprehensively as possible, given the uncertainties as to what matters may come up in it.
  - **Conferring with one's adversary in advance of the preliminary hearing to work out a schedule and protocol for the case**: It is a real judgment call whether to confer with one's adversary in advance. Relevant considerations include whether one thinks one will do better with one's adversary or with the arbitrators in terms of getting the design of the arbitration that one wants. This deserves a lot of thought and planning.
  - **The possibility of having the preliminary hearing in person with clients present:** While preliminary hearings are typically conducted telephonically, there can be real advantages, in cases that justify the expense, to holding them in person. An in-person session can provide a real opportunity for the parties, counsel, and the arbitrators to size one another up and begin to develop a working relationship. Having clients present can help with keeping the scope of discovery and the like under control, but can also lead to unhelpful showboating.
  - **The scope of the preliminary hearing**: Parties, counsel and arbitrators have different views as to the appropriate scope of a preliminary hearing, both in general and with respect to individual cases. On the one hand, many now believe that a very robust preliminary hearing extending over several hours or more and essentially covering, at least broadly, all the things that one can imagine may come up in the arbitration, makes sense. Others prefer the older practice of having the preliminary hearing serve essentially as a scheduling conference, generally taking an hour or less, leaving more detailed subjects for later discussion as they come up. It well behooves counsel to think in advance about what kind of preliminary hearing they would like in the particular case and to be able to advocate for that level of process.

- **Standards as to discovery**: Whether counsel in a particular case want expansive or narrow discovery, it can be quite helpful to frame one's arguments in either direction based on the wide array of "soft law" that is out there, in terms of reports and studies by bar associations and other professional organizations and the like. It is also important to be able to frame one's arguments based upon the standards expressed or implicit in the applicable provider rules, although they tend to be of a general nature.
- **Reliance documents**: The production by the parties of reliance documents early on can often serve, at least to some extent, as a substitute for a more expansive document production approach, particularly in international cases, but also in domestic ones. Building in an approach for the early exchange of reliance documents can be efficient in some cases.
- **E-discovery**: It is broadly recognized that many arbitrations will succeed or fail in terms of efficiency and economy based on whether e-discovery is conducted in an efficient and proportionate way. Everyone has stories as to cases where e-discovery has gotten out of hand. It accordingly becomes important for counsel to be conversant with their clients' electronic systems and the underlying technical issues involved in e-discovery or to have a technical expert ready and available for discussions with the arbitrators concerning such matters and the overall administration of e-discovery. Whether one wants expansive or narrow e-discovery, the issue must be addressed, and the earlier the better. There are also emerging technologies that offer efficiencies in this regard, with which one should be aware, whether personally or through a technical expert.
- **Depositions**: Obviously attitudes towards depositions in arbitration differ and depositions are particularly disfavored in international arbitration. Whether counsel in any particular case want several or many depositions or to avoid them entirely, it is essential to be aware of the applicable standards emanating from the soft law as well as from the applicable rules to be able to advocate effectively for whatever scope of depositions, if any, one thinks appropriate in the particular case.
- **Using a discovery master**: This practice can be efficient, but sometimes, where important conceptual issues will be developed in connection with the discussion of discovery matters, it may make sense to have all three panel members be part of this issue. It well behooves counsel to think about this in advance. It is also worth remembering that, even when the chair is designated to serve as discovery master, any party may request the involvement of the entire panel on any particular issue. There may be issues of such broad potential impact that it will make sense to do this at times.
- **Cooperation or not as to non-party witnesses**: In many cases there will be non-party witnesses whose documents and testimony are potentially important in the case. A big threshold question will be whether parties are expected to cooperate in making non-party witnesses over whom they have influence available to produce documents and testify, whether on a pre-hearing or hearing basis, and whether the failure of a party to cooperate in this regard may serve as a basis for an adverse inference. There are arguments on both sides of this issue. It well

behooves counsel to think about it in advance of the preliminary hearing, since the issue may well (and should) come up there.

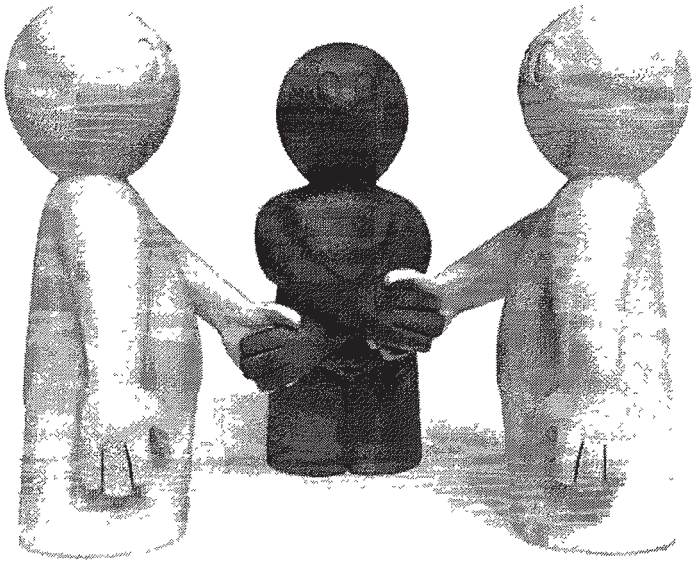
- **Subpoenas**: Issues as to non-party subpoenas in arbitration in the United States and in other jurisdictions can be quite complicated. It well behooves counsel to be think about this issue in advance and be prepared on it.
- **Substantive motions**: Whether substantive motions will be permitted is an important issue in some cases. There will be cases where such motions will be potentially successful and also cases where making such a motion will be productive in terms of providing useful discovery and also potentially leading to a posture of the case where productive settlement discussions can take place. It well behooves counsel to focus on this issue in advance.
- **Witness statements**: The use of sworn witness statements is a normal practice in international arbitration and increasingly used in domestic arbitration, as well as in many bench trials in court. If witness statements are presented early in a case, they can potentially obviate a fair amount of discovery. On other hand, where there are important issue of credibility, it may be more helpful to the arbitrators to hear the direct testimony live. Overall, it is by no means whether witness statements save much time or money, although opinions differ on the matter. It well behooves counsel to think this out in advance and to have support for whichever approach they think appropriate for the particular case.

- **Confidentiality**: Parties sometimes assume that arbitration proceedings are necessarily more confidential than they actually are. This area deserves real attention and planning by counsel so that they will be in a position to seek to obtain a broad confidentiality order when they think it appropriate for the particular case and to avoid such an order when they don't think it appropriate.
- **Sanctions**: If one's adversary is acting in a sanctionable way, it is important to maintain a detailed log of contemporaneous examples of such conduct, as such details tend to get lost with the passage of time. There is no reason for counsel to be shy about raising the issue of sanctions when there is a significant basis for such relief.
- **Timing and length of the hearing**: It is important to assure that the hearing is scheduled at a realistic time and that enough time is reserved for the hearing. Extreme delays can result, given the schedules of sometimes numerous busy counsel and arbitrators, when established hearing dates need to be rescheduled or when more time is needed than had been reserved for the case.
- **Evidentiary nature of designated hearing exhibits**: There are various approaches that arbitrators typically take as to the admission of documents, including the approach that all previously identified exhibits that had not been specifically objected to are deemed in evidence as of the opening of the hearing or the alternate approach that all previously marked exhibits that were actually used in the hearing are deemed in evidence as of the time of their use or as of the end of the close of the hearing. The issue also arises as to whether documents relating solely to credibility need to be identified and marked in advance. It well behooves counsel to think these through and be prepared to advocate for whatever approach they think appropriate in a particular case.
- **Briefing as much of one's case on a pre-hearing basis as possible**: While there are obviously cases where extensive post-hearing briefing is needed, it can often be efficient to have the parties brief as much of their case on a pre-haring basis as possible, making it

possible to thereafter have a limited number of fairly expedited post-hearing memoranda, if any, submitted, and/or possibly closing statements a week or two after the close of the hearing. The advantage of having as much as possible of the parties' briefing done on a pre-hearing basis is that this can make it possible to get the case to the arbitrators for decision faster, sometimes several months faster, when the case is fresher in their memory.

- **Summaries, Chronologies and *Dramatis Personae*:** Up to the time of the hearing, counsel are generally living with the case far more than the arbitrators. At times the arbitrators, particularly the wing arbitrators if the chair is handling discovery, will only pick up the file occasionally. In such circumstances, it can be quite helpful for counsel to have provided the arbitrators with summaries, chronologies, *dramatis personae* and the like.
- **Stipulated facts**: While stipulated facts can be helpful, they often take more time than they are worth, except as to the most basic matters. It is often more efficient to have each side present its own chronology or the like.
- **Opening statements using PowerPoint**: These can be very effective, particularly if they are keyed to the documents. The arbitrators may use the PowerPoint printouts as a handy reference throughout the hearing.
- **Counsel performance at the hearing**: Excessive showmanship, harshness, and disruptive objections can harm counsel's credibility with counsel, depending on the facts of the case. Vigorous representation of one's client, which arbitrators expect and respect, does not generally require harsh litigation practices. Arbitrators tend to want to get to the merits and may typically be less than impressed by excessive litigiousness.
- **Rules of evidence**: The rules of evidence are not generally applicable in arbitration. However, this freedom from such rules should not lead counsel to become completely untethered from them. There are reasons for the rules of evidence, such as the hearsay rule. Arbitrators are more likely, for example, to give weight to the testimony of witnesses with personal knowledge.
- **Heuristics**: Recent psychological studies and popular books have identified heuristics, mental shortcuts that our minds take in assimilating information and making judgments. Be familiar with such heuristics and how one can protect one's client from unsound thinking in this regard. Some might add that one may consider how one might advantage one's own client by the exploitation of such heuristics, although ethical issues may be raised by such actions.
- **Mediation window**: While the possibility of building a mediation window into the schedule of a case may generally be something better raised by the arbitrators than by counsel, counsel should be alert to the potential to mediate the case concurrently with the conducting of the arbitration, given the substantial savings of time and money that can result from a successful mediation.
- **Motions to disqualify adversary counsel**: In some jurisdictions, including New York, such motions are reserved for decision by courts. However, agreement by both sides, under conditions of informed consent, may provide an appropriate basis for arbitrators to hear such motions.
- **Choosing counsel who will create a conflict with an arbitrator**: Whether this is permissible is a hot contemporary issue that bears study before one embarks on such a course of conduct.

- **Providing ammunition to an arbitrator who appears to favor one's view of the world**: If one senses that one has made headway with one of the arbitrators, that is no time to let up on nailing the point down, as that arbitrator may need ammunition to use with the other arbitrators in discussing the point.
- **Respond to, value, and catalogue questions from panel**: It's important to not only answer such questions on the spot or asap, but to also be sure to follow up on them in any way that seems potentially helpful.
- **Don't embarrasses the arbitrators by excessive chitchat**: A certain amount of collegiality with the arbitrators is human nature, but be careful not to overdo it to the extent of unnecessarily creating an issue or making the arbitrators feel uncomfortable.
- **If an arbitrator misses a matter that should have been disclosed, disclose it yourself**: It's far better to have a clean record than to have something come out later that could compromise the award.
- **Form of award**: Counsel should put real thought into this. There will be times when clients will prefer *not* to have a reasoned award, so as to avoid precedents on a particular point and, of course, times when just the opposite will be desired. Parties often like reasoned awards because they show the thinking of the arbitrators. On the other hand, the scope of appeal in arbitration is so narrow that at times it may make sense, at least in domestic cases in the United States, to go with a standard award, particularly when one has confidence that one's arbitrators will go through the full necessary analysis of the case even if they are not required to produce a reasoned award. In international cases, reasoned awards are not only the norm, but are required in many jurisdictions for the enforceability of an award.
- **Presenting one's case as to costs and attorneys' fees sooner rather than later**: In cases where parties are seeking the award of costs and attorneys' fees, it can be helpful to tee this issue up for resolution at the latest in the final post-hearing papers, so that it can be dealt with by the panel in the final award when they decide the substantive issues in the case. Taking the other approach of having the arbitrators only issue an interim award on the merits and thereafter address the attorneys' fees issue runs the risk of having the attorneys' fee part of the case take on an importance of its own, causing unnecessary delay and expense.
- **Clarification or Modification of Awards**: The scope of the doctrine of *functus officio* is somewhat fuzzy around the edges. Counsel should not be overly reluctant to go back to arbitrators for clarification of awards when there is a real need for it. This step is potentially available before moving in court for remand to the arbitrators or for vacatur.



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Why Arbitrate? The Benefits and Savings

By Edna Sussman

Choice – the opportunity to tailor procedures to business goals and priorities – is the fundamental advantage of arbitration over litigation.[1]

Much has been written in recent years about whether arbitration has become so much like litigation that arbitration's most commonly cited benefits – saving time and money – no longer pertain. One author, writing in a recent issue of the New York State Bar Association *Journal*, suggested that the cost of the arbitrators' fees makes litigation the less expensive alternative for resolving commercial disputes.[2] Response to this and other criticisms requires a review of the many benefits of arbitration, a look at the empirical data on the speed and cost of arbitration, and a summary of the mechanisms available to the parties and their counsel to control costs and increase efficiency.[3]

Why Arbitrate?

Benefits

The many benefits of arbitration have led to the extensive use of arbitration as the process of choice for dispute resolution in commercial disputes. These include:

Faster and Cheaper – As is discussed at greater length below, arbitration is the *parties'* process. The parties can craft and implement a streamlined procedure that can significantly reduce costs and provide for a much speedier resolution than can be found in court.

Flexible Process – As arbitration is a creature of contract, the parties can design the process to accommodate their respective needs. Hearings may be set at the parties' convenience and the less formal and less adversarial setting minimizes the stress on what are often continuing business relationships.

Subject Matter Expertise – Arbitration permits the parties to choose adjudicators with the expertise necessary to decide complex issues that often require such industry-specific expertise.

Finality – Judicial review of awards is restricted to very limited issues. The finality of awards is particularly important in business transactions. In many instances, with the cost of capital and the paralysis that indecision can bring to businesses, the most important consideration in a commercial dispute is that it be quickly and definitively decided.

Confidentiality – Arbitral hearings, as opposed to court trials, are generally private, and confidentiality can be agreed to by the parties. Most arbitral institutions have specific rules regarding the confidentiality of proceedings and awards. This is an important feature for many cor-

porations, particularly when dealing with disputes over intellectual property and trade secrets.

International Arena

Certain additional features of arbitration in the international context are of particular importance:

Cross-Border Expertise – Arbitration permits the parties to choose adjudicators with the necessary expertise to decide the dispute. Such special expertise can include an understanding of more than one legal tradition – such as common law, civil law or sharia law – an understanding and ability to harmonize cross-border cultural differences and fluency in more than one language.

Neutrality – In the international context, arbitration provides a neutral forum for dispute resolution and enables the parties to select decision makers of neutral nationalities who are detached from the parties or their respective home state governments and courts, in a setting in which bias is avoided and the rule of law is observed.

Enforceability – In the international context, a critical feature is the existence and effective operation of the New York Convention to which over 140 nations are parties. The Convention enables the enforceability of international arbitration agreements and awards across borders. It significantly limits the grounds for refusal to enforce an arbitration agreement or award, making it possible to enforce an award even in a jurisdiction that might otherwise find ways to favor its domestic party. In contrast, judgments of national courts are much more difficult and often impossible to enforce abroad.

Thus, even apart from the lower cost and greater speed, many parties choose arbitration for dispute resolution for one or more of these other benefits.

Is Arbitration Really Faster?

The availability of a process that is quicker than a court proceeding has long been a principal reason for the selection of arbitration for dispute resolution in business transactions. The statistics support the long-held belief that arbitration is a mechanism for achieving speedier dispute resolution. The American Arbitration Association (AAA) reports that for its business-to-business cases in which awards were rendered in 2008, the median length of time from the filing of the demand to the award was 238 days or 7.9 months.[4] The AAA's international arm, the International Centre for Dispute Resolution (ICDR), reports that for its cases in which awards were rendered in 2008, the median length of time from the filing of the demand to the award was exactly 365 days or 12 months.[5] The International Institute for Conflict Prevention and Resolution (CPR) reports that for its domestic and international cases combined in which an award was rendered in 2008, the median length of time from the filing of the demand to the award was 347 days or 11.5 months.[6]

By contrast, as reported for 2008, the median length of time for civil cases resolved through trial in the U.S. District Court for the Southern District of New York was 30.7 months for jury cases and 27.0 months for non-jury cases, a number in line with most other federal district courts.[7] The median length of time from filing in lower court to disposition in the Second Circuit for cases that were appealed was 43.1 months.[8] The Bureau of Justice Statistics reports that for state court contract cases in the 75 largest U.S. counties, the average length of time from case filing to trial in jury cases was 25.3 months and for bench trials 18.4 months.[9]

Thus as compared with both U.S. federal and state court systems, arbitration affords a significant time saving for the vast majority of cases. Indeed the average case appears to reach resolution three to five times faster in arbitration. And it must be noted that many international court systems are considerably slower than those in the United States.

Counsel expenses and fees are the most significant cost of litigation. Inevitably, a longer process requires the expenditure of additional lawyer time as it creates opportunities for additional discovery and motion practice. The abbreviated schedule in most arbitrations usually results in significant cost savings.

Is Arbitration Really Cheaper?

The reduced cost available in arbitration has historically been viewed as a principal reason to favor arbitration over litigation. It is true that access to the courts is essentially free while arbitration has some costs associated with it – *i.e.*, the cost of the administering institution if one is selected and the cost of the arbitrator(s) – but these must be viewed in light of the total cost of the proceeding, including counsel fees and the other costs of preparing a case. While there appear to be no definitive statistical studies comparing the costs of arbitration with litigation in commercial cases, through informal comparisons and anecdotal evidence arbitration appears to be generally cheaper.[10] Certainly it is a process that can be streamlined by the parties.

Only a small part of the total cost of arbitration goes for the fees and expenses of the arbitrators and the tribunal, the "additional" cost of arbitration. The International Chamber of Commerce reported that 82% of the costs incurred were what the parties spent to present their case, including lawyer fees and expenses, expenses related to witnesses and expert evidence, and other case preparation costs.[11] Thus, arbitrator and institutional charges were only 18% of the cost of the arbitration. And it should be noted that the costs for case preparation and presentation are much more easily controlled in arbitration than in litigation.

In litigation one is subject to the Federal Rules of Civil Procedure or parallel state court rules that allow for

broad discovery, including both document discovery and depositions. Typically, discovery is a very costly part of trial preparation, and it can be burdensome to the parties as well. Document discovery is generally more limited in arbitration; depositions are either dispensed with altogether or are severely limited in number. Extensive motion practice is commonplace in court but is much less common and, in fact, usually discouraged in arbitration.

Court cases require more counsel time for preparation and trial than is the case with arbitration. For example, trial-related matters not pertinent to arbitration include evidentiary issues, voir dire and jury charges instructions, and proposed findings of fact and law. Appeals from trial court decisions are commonly filed, a process generally unavailable and, in any case, very unusual in arbitration.[12] All of these additional costs must be factored into any consideration of the costs of arbitration. This suggests that arbitration can be, and generally is, much less expensive even with a paid adjudicator.

What Can Parties Do to Make Arbitration Faster and Cheaper?

While a good arbitrator will manage the arbitration to expedite the proceeding and minimize costs, the parties and their counsel can have a determinative role and in all cases they play a significant part in establishing the timing and costs for the matter. Arbitrators can "jaw-bone," set schedules, emphasize efficiency and cost saving, and work with the parties to streamline the process, but they are required to follow the terms of the arbitration agreement. If, for example, the arbitration agreement establishes extensive litigation-like protocols, the arbitrator must follow them. If the parties jointly seek to extend or complicate the arbitration, they may obstruct the arbitrator's ability to achieve efficiency goals.

There are many steps counsel and parties can take to assure time and cost savings; much is in their hands. Efficiency and cost are not always the parties' principal goals in arbitration, however. But if speed and cost saving are objectives sought by the parties, attention should be devoted to carefully addressing the many choices available, including the following:

Contract Provisions – Counsel are increasingly coming to recognize the importance of tailoring the dispute resolution clause to the specific needs of the situation and are no longer simply inserting the "standard clause" at midnight. In order to assure a speedy and less costly arbitration process, counsel can consider contractually limiting document discovery, barring or limiting depositions, providing for fast-track procedures (such as limiting the length of time from appointment of the arbitrators to hearing and from the hearing to award), providing for "baseball arbitration," limiting the matter to one arbitrator at least for smaller disputes, excluding judicial review where that is permissible, and taking care to draft an arbitration clause that will not provide grounds for a court challenge as to its application. The selection of appropriate governing rules can make all the difference and can set up the time limits and other procedures desired. In selecting the arbitral institutional rules that will govern, they should be reviewed to make an informed choice. Unless the parties want a lengthy proceeding, counsel should not provide for the application of the Federal Rules of Civil Procedure or the Federal Rules of Evidence. Of course it takes two to tango, and this contractual approach to limiting dispute resolution timing and costs only works if agreed to by all parties.[13]

If the parties jointly seek to extend or complicate the arbitration, they may obstruct the arbitrator's ability to achieve efficiency goals.

Choice of Institution – Examine the rules of the provider institution selected, if the matter will not be *ad hoc*, in deciding which is most suitable. The rules of the institutions vary. Some have rules that promote more expeditious and less costly resolution.

Choice of Counsel – Retain counsel who understand the interest in efficiency and cost savings and who are experienced in arbitration. Selecting counsel who are accustomed to litigation and see all cases as best tried with a "leave no stone unturned" attitude can lead to the conversion of the arbitration into a litigation-like process, especially if all parties subscribe to that view.

Choice of Arbitrator(s) – Select an arbitrator who (1) is experienced in case management and has the ability to conduct the pre-hearing procedures efficiently; (2) is available to deal promptly with pre-hearing issues, hear the case in the near term, and deliver awards without undue delay after the hearing; and (3) has the ability to move hearings along.

Choices on Discovery – Do not seek extensive document discovery; eliminate depositions altogether or limit them to one or two per party. If one party opposes broad discovery, it is much easier for the arbitrator to set tight limitations, as he or she is not faced with "the parties' process" and right to choose. Provide that a single arbitrator be authorized to rule on discovery issues.

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Choices on Pre-Hearing Issues – Don't make motions other than those as to such threshold issues as the jurisdiction of the tribunal or the statute of limitations. Work cooperatively with opposing counsel to minimize the matters that must be brought to the arbitrator for resolution.

Choices on Scheduling – Pick as early a date for the hearing as is realistic and consistent with the level of preparation the case merits based on client goals – and stick to it. Rescheduling a hearing can often cause a lengthy delay as it can be difficult to find dates on which all participants are available.

Choices for the Hearing – The conduct of the hearing can be expedited by (1) presenting direct testimony by affidavit; (2) limiting the time available for the hearing and, if appropriate, using the "chess clock method" to assure equal time; (3) using telephone and video conferencing technology; (4) choosing a hearing location that minimizes expenses to the parties; (5) conferencing or "hot tubbing" the experts; (6) using a single expert to advise the arbitrators rather than having the parties offer competing experts; and (7) limiting post-hearing submissions.

What Else Is Being Done to Make Arbitration Faster and Cheaper?

Current criticisms of arbitration – that it is neither speedy nor cost-effective – largely stem from two issues: the submission to arbitration of sophisticated business cases of significant monetary value and the advent of globalization with the resulting increase in complex cross-border disputes. Counsel and parties have in recent years chosen to handle some of these matters in a manner that has led to their falling within time frames and cost structures more akin to litigation than arbitration. These cases have led some to question the efficacy of arbitration.

The arbitral institutions have been responsive to the criticism and are devoting significant attention to fostering speedier and cheaper arbitration proceedings by promulgating rules, guidelines and protocols[14] intended to help parties select a more efficient process, and to provide a concrete, rule-based protocol for the arbitrator to resist burdensome party requests. Educational programs for arbitrators now often emphasize the ways in which the arbitrator can facilitate an efficient hearing. To meet the criticism head on, the College of Commercial Arbitrators is holding a national summit in October 2009 for all constituencies to come together to discuss and vote on a series of concrete, practical protocols.

In short, the institutions and the arbitrators are stepping up to the challenge of preserving the time- and cost-saving advantages of arbitration. However, it takes parallel motivation and action by parties and counsel to achieve the goal.

Conclusion

Any system of dispute resolution, whether arbitration or litigation, will have its outliers, the cases that run amok, and it is easy to point to those to support a negative view. However, any realistic analysis must look to the functioning of the overall system and the unique ability the parties have to craft a process that meets their needs. If cost and time savings are important to the parties, arbitration provides a mechanism for achieving those goals. Litigation may have many other virtues but it simply does not offer the parties the opportunity to tailor the process to meet those objectives. ■

1. Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation,"* 7 De Paul Bus. & Comm. L.J. 3 (forthcoming 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1372291.

2. Ronald J. Offenkrantz, *Arbitrating Commercial Issues: Do You Really Know the Out-of Pocket Costs?* N.Y. St. B J. (Jul./Aug. 2009), p 30.

3 This article focuses on commercial disputes. Consumer and employment arbitration which has been controversial in recent years and has been the subject of numerous studies and articles is beyond its scope.

4. E-mail from American Arbitration Association on file with author.

5. E-mail from the International Centre for Dispute Resolution on file with author.

6. E-mail from the International Institute for Conflict Prevention and Resolution on file with author.

7. *Judicial Business of the United States Courts 2008* Table C-10, *available at* http://www.uscourts.gov/judbus2008/contents.cfm.

8. *Id* at Table B-4A.

9 *Civil Justice Survey of State Courts, Bureau of Justice Statistics 2005, available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cbjtsc05.pdf.

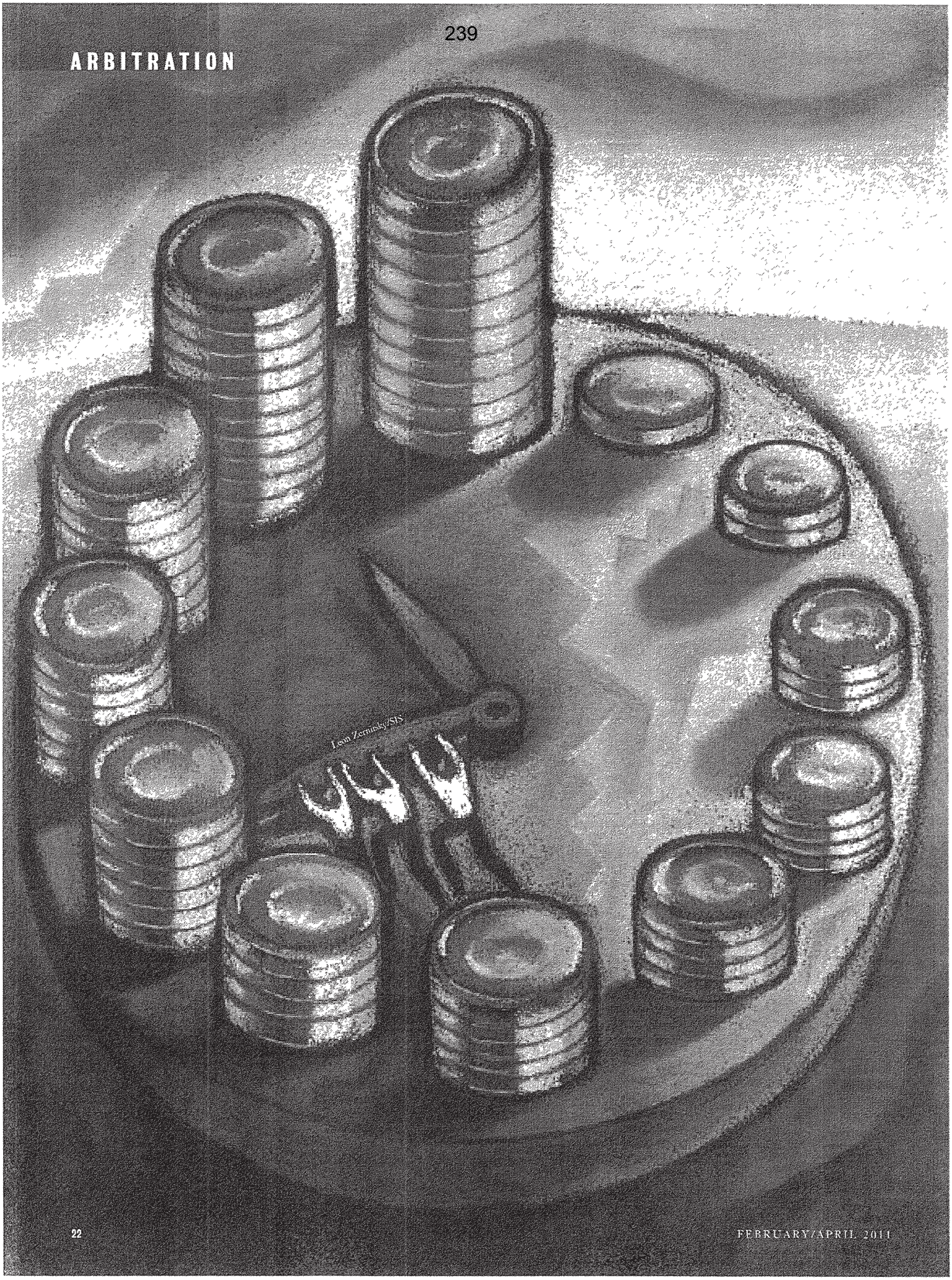
10 Susan Zuckerman, *Comparing Cost in Arbitration and Litigation*, 62 Disp. Res. J 42 (2007). An anecdotal study in which three construction litigators and arbitrators concluded that litigation was 27% more expensive than arbitration even assuming that several depositions were taken in the arbitration and excluding the costs of appeals in a court proceeding

11. International Chamber of Commerce Commission on Arbitration, *Techniques for Controlling Time and Costs for Arbitration, available at* http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf

12. *See, e.g., Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008). Some institutions provide for an appellate process with a panel of arbitrators but parties have not commonly availed themselves of this option. For example, CPR established rules for an appellate process with a panel of three arbitrators in 1999, but the process has never been used by any party.

13. For a discussion of the many issues a careful drafter should consider in drafting the dispute resolution clause, see Stipanowich, *supra* note 1; John Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, 58 Disp. Resol. J. 28 (2003).

14. *See, e.g.*, AAA *Commercial Arbitration Rules. Expedited Procedures*; ICDR *Guidelines for Information Exchanges in International Arbitration*; JAMS *Streamlined Arbitration Rules and Procedures*; CPR *Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration*, ICC *Commission on Arbitration, supra* note 11; IBA *Rules on the Taking of Evidence in International Commercial Arbitration.*


Leon Zernitsky/SIS

The ideas from the protocols condensed in a convenient, easy-to-use format that you can carry around with you.

Time & Cost SOLUTIONS

for Commercial Arbitration: Highlights from the College of Commercial Arbitrators' Four Protocols for Parties, Counsel, Arbitrators and Arbitral Institutions

BY EDNA SUSSMAN AND CHRISTI UNDERWOOD

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"Cost is a fundamental concern of businesses. As cost concerns are often not addressed with vigor in arbitration, it is not surprising that many business users have chosen to use courts instead," said Michael McIlwrath, senior counsel for litigation with GE Oil & Gas. Cost and delay are key issues facing arbitration providers and arbitrators in the 21st Century.

Users of commercial arbitration are frustrated because their expectations for an efficient, low cost process are often not being realized. The issue has been tackled to some degree by some international arbitration providers, including the International Centre for Dispute Resolution (ICDR), the American Arbitration's (AAA) international division,1 and by the International Chamber of Commerce (ICC). More recently, William K. Slate, president and CEO of the AAA gave a talk on this problem at the 2010 AAA Neutrals Conference in Florida, emphasizing that the alternative dispute resolution (ADR) industry must solve the problem through action. Fortunately, the College of Commercial Arbitrators (CCA), a group of some of the most experienced and respected commercial arbitrators in this country, has already identified solutions. The CCA has developed real practical steps that every stakeholder in the arbitration process can take to reduce the cost of the process and accelerate the proceeding. These steps are incorporated into four protocols, one for users and their in-house counsel, one for outside counsel, one for arbitrators and one for arbitration institutions.

Each protocol has value, not only for the stakeholder to whom it is addressed, but also to the other stakeholders. For example, the Protocol for Arbitrators may help the parties decide what they should seek in an arbitrator or help them prepare for an interview with prospective arbitrators.

This article highlights the CCA's recommendations in each of the four protocols.

The Basis for the Protocols

The protocols are based on information and data obtained during a CCA conference in the fall of 2009, co-sponsored by the AAA, JAMS, the International Institute for Conflict Prevention and Resolution (CPR), the Chartered Institute of Arbitrators, and Pepperdine University's Straus Institute for Dispute Resolution, on the subject of business-to-business (B2B) arbitration. At the conference, which was attended by about 200 individuals (including corporate counsel, outside counsel, arbitrators and representatives of arbitration organizations and service providers), the CCA discussed the issues and challenges facing B2B arbitration, including the issues of cost and delay. Using an electronic polling process, the CCA gathered data on possible solutions to these problems and in August 2010, released a 95-page report entitled "Protocols for Expeditious, Cost-Effective Commercial Arbitration," authored by three CCA Fellows, Academic Director of Pepperdine's Straus Institute for Dispute Resolution, Thomas Stipanowich, and co-editors Curtis von Kann, a JAMS arbitrator, and Deborah Rothman, an AAA arbitrator.

The CCA's protocols represent the conclusions drawn by business users, in-house attorneys, provider institutions, outside counsel and arbitrators in response to concerns about arbitration becoming too much like litigation over the past few years.

Having an economic and efficient arbitration is a choice. Business users can make better choices to "promote cost-and time-saving" solutions and the protocols tell them how. As noted in the introduction to the protocol for users and in-house counsel, users have more than one opportunity to make these choices. The first is at the contract planning and negotiation stage, the second is after a dispute arises and the third is during all phases of the arbitration.

"Living Documents"

The CCA protocols can have a positive impact on the efficiency of B2B arbitration only if widely disseminated and widely used by all stakeholders. Thus, the next step is publicity and education. Our intention is to serve both purposes. In service of this idea, we have summarized the highlights of each protocol on pages 22-26. To make these summaries portable and convenient to use and distribute, we formatted three of them on a

single page and one on a two sides of a page.

Can we expect these protocols to remedy the cost and delay concerns about B2B arbitration? The answer is, it depends. First, CCA must educate the four different categories of stakeholders, about the protocols. The sponsoring provider organizations are already aware of the protocols. But business users, outside counsel and commercial arbitrators who are not affiliated with the CCA may not be. The CCA is making presentations, publishing articles, giving speeches and distributing the protocols to numerous business industry groups in order to communicate its message to stakeholders.

How, when, and to what extent the concepts set forth in the protocols are adopted will determine their ultimate influence upon improving B2B arbitration. What is clear is that, once in receipt of the protocols, stakeholders will have to make great behavioral changes in order to return commercial arbitration to its roots. Passive arbitrators will have to become pro-active managers. Litigators will have to restrain themselves from "littering the record with objections" and using litigation discovery practices in arbitration. Steve Smith, vice president and general counsel at Lockheed Martin Space Systems, reflected on the premise of change when he said, "The arbitral institutions, arbitrators themselves, outside counsel, and the user community, chiefly through inside counsel, all have key roles to play. In my mind, when my colleagues in-house participate as full team members with their outside arbitration counsel, and temper the desire of some such counsel to conduct arbitration like court litigation, significant improvements will result."

However, for far reaching solutions, change must take place even earlier, in the drafting of better arbitration clauses. Additional arbitration process provisions that fit the needs of the parties' particular transaction should be incorporated into the contract. This means that the protocol must get into the hands of business lawyers, not just the litigators.

McIlwrath predicted that if the protocols are implemented, "arbitration will become more attractive to the stakeholder who ultimately matters most: the parties who decide whether to have their commercial disputes submitted to arbitration."

The protocol summaries that articulate solutions today may need to be further refined tomorrow. This concept is best presented by Stanley Sklar, president of the CCA, who said "[t]he Protocols should be considered a 'living' document which will change as new ideas and procedures are developed to create a realistic alternative to the court system for business disputes."

The actual effect of the protocols on the cost and time of arbitration will have to be measured at some future time. The CCA anticipates holding another business summit in the future at which time feedback will be solicited and lessons learned will be shared with the commercial arbitration industry. Until then those involved in B2B arbitration should avail themselves of the myriad of tools offered in the protocols, stay mindful of the choices available, and try to conduct themselves in a manner that accomplishes two of the arbitration's central goals—efficiency and low cost. ■

Endnotes

[1] In May 13, 2008, the ICDR issued Guidelines for Information Exchanges in International Arbitration, A .PDF file can be accessed from www adr.org.

[2] In 2007, the ICC issued a report called Techniques for Controlling Time and Cost in Arbitration, ICC Publication 843. A .PDF file can be accessed from www.iccwbo.org/uploadedFiles/TimeCost_E.pdf.

[3] See the President's column on page 1 of the Nov. 2010-Jan. 2011 *Dispute Resolution Journal*, which is based on AAA president and CEO William K. Slate II's presentation at the Neutrals Conference.

[4] CCA called this conference a "national summit."

[5] Available on the CCA Web site at www.thecca.net/CCA_Protocols.pdf.

TURN THE PAGE TO SEE THE HIGHLIGHTS FROM THE FOUR PROTOCOLS

Highlights from the Protocol for Users and In-House Counsel

The recommendations in this protocol address dissatisfaction with the high cost and time of commercial arbitration. They can be adoopted in whole or in part depending on the circumstances.

1 Don't mindlessly choose "one-size fits-all" arbitration provisions. Consider whether it is desirable to tailor the procedures to limit discovery and establish other boundaries. Do incorporate a requirement for an institutional provider, such as the American Arbitration Association. It is possible to choose a more streamlined process.

2 Don't replicate litigation-style discovery in the arbitration process. Instead limit discovery to what is essential. There are opportunities to limit discovery in a pre-dispute arbitration agreement or during the pre-hearing phase of arbitration by agreement of counsel or the arbitrator's order.

3 Do set a limit on the phases of arbitration and the overall length of the proceeding. The arbitration agreement might provide a deadline of one year for large controversies and less for smaller ones.

4 Do choose fast track or an other form of expedited arbitration when suitable for the controversy. Either define the circumstances when it will be employed or incorporate a service provider's rules that detail such procedures.

5 Do stay involved throughout the dispute resolution process to ensure that the client's objectives are being met. Attend the preliminary conference. Conduct a case assessment, set a realistic budget, and require counsel to abide by it unless express approval to deviate is granted.

6 Don't select outside counsel based on litigation experience. Instead, base the selection decision on counsel's arbitration experience and willingness to honor the business goals. In-house counsel should also be willing to consider alternative fee arrangements, such as incentives for achieving an efficient and expeditious process. The comments to this protocol contain a list of questions to ask prospective outside counsel.

7 Select arbitrators who are strong managers and have demonstrated an ability to supervise an efficient and economical process. A pre-screening questionnaire or interview of prospective arbitrators may be appropriate, as more fully discussed in the comments to this protocol.

8 Be willing to enter into stipulations with opposing counsel and come to the preliminary conference with submissions that identify key issues, claims, defenses, damages, and indicate whether experts are needed.

9 Agree to controls on motion practice. While dispositive motions can be a valuable, cost efficient tool, they should be employed only pursuant to a procedure. Dispositive motions may be beneficial in certain circumstances, such as when damages are limited by contract, or a statutory remedy or statute of limitations is involved.

10 Consider using a single arbitrator in lieu of a panel when appropriate. Obviously, three arbitrators cost more than one. When three arbitrators are used, agree to delegate certain pre-hearing decisions to the chair to make the process more efficient.

11 Specify the form of the award and do not include a provision for judicial review of the award. Determine whether the award shall be bare, reasoned, or contain findings of fact and conclusions of law. Also, consider putting a limit on the length of the award. Do not attempt to give courts the authority to determine an appeal of the arbitration award. The comments summarize the risks and legal uncertainties in the area of expanded judicial review. Those who desire appellate rights should consider a private appellate process.

12 Conduct a post-mortem after the arbitration to identify "lessons learned." with regard to achieving efficiency and economy. Then revise internal company procedures accordingly ■

Highlights from the Protocol for Outside Counsel

This protocol offers "guidance" for lawyers retained by the parties to B2B arbitration to help them approach the arbitration process with the "goals and expectations" of the client in mind.

1 Outside counsel should only agree to represent a business client in B2B arbitration when they are familiar with the applicable arbitration rules and the service provider, and they have the experience and knowledge to efficiently meet the client's goals and expectations.

2 Outside counsel should provide the client with an early case assessment and then reach "an understanding" with the client (and memorialize the understanding) on the approach to arbitration, discovery, possible settlement discussions, length of resolution process, arbitration, and the client's budget. These understandings should be revisited periodically to determine whether the client has new instructions.

3 Outside counsel should undertake due diligence into the background and qualifications of the arbitrator candidates in order to select an arbitrator with the right philosophy, case management ability, and a willingness to meet the client's expectations as to the cost and length of arbitration.

4 Having a cordial professional relationship with opposing counsel saves more time and money than fighting. Thus, outside counsel should obtain the client's consent to cooperate with opposing counsel in order to agree on pre-hearing procedural and process issues.

5 Consistent with the client's goals, outside counsel should advise clients that limited discovery is the norm in arbitration, and seek ways to streamline discovery by cooperating with the arbitrator and opposing counsel.

6 Outside counsel should periodically discuss with clients the advantages of negotiating a settlement, pointing out when opportunities to settle arise, and the benefits of mediating before large expenditures are incurred.

7 Outside counsel should offer client alternatives to hourly billing, such as incentives for reducing the estimated time or costs of arbitration.

8 Outside counsel should "exploit" the differences between arbitration and litigation by behaving appropriately in the hearing, curbing the inclination to grandstand. They should avoid making repetitive objections to form and hearsay. Attorneys who object at every turn waste everyone's time.

9 Outside counsel should keep the arbitrator informed of developments in the case and seek the arbitrator's assistance (or the assistance of the chair of the panel) if a pre-hearing issue arises that the parties cannot resolve themselves. Arbitrators do not want to postpone hearing dates and savvy outside counsel will take the initiative to notify the arbitrator when a potential delay causing event arises.

10 Outside counsel should engage in a post-arbitration evaluation with the client to determine the lessons learned for the client and the lawyers involved in the arbitration. A lesson learned could warrant a change in the client's standard dispute resolution clause, arbitration training, or some other matter.

11 Outside counsel should share their insights about the process with arbitration providers so that improvements can be made in the dispute resolution clauses, arbitration rules and choices offered to arbitration users.

12 Outside counsel are often in a position to effect positive change in ADR processes by their affiliation with law schools, professional organizations and civil groups. Thus, they should help identify ways to improve arbitration education, training and ADR laws. ■

Highlights from the Protocol for Arbitrators

Ultimate responsibility for the efficient management of arbitration proceedings falls to the arbitrator. The recommendations in this protocol are corollaries of recommendations in the preceding protocols for users, outside counsel and providers.

Because the protocol for arbitrators may be of considerable help to users and their in-house and outside counsel, to avoid confusion we have chosen to avoid the first person "you" and refer to arbitrators in the third person.

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1 Commercial arbitrators should have ongoing training in commercial arbitration, including training in how to manage a case efficiently without sacrificing fairness to the parties. Being an effective consumer or labor arbitrator does not ensure effectiveness as a commercial arbitrator.

2 Arbitrators should mandate that everyone behave in a professional manner, cooperate in all phases of the arbitration to shape the procedures, and comply with deadlines. Arbitrators can "lead by example," for instance, by establishing a professionally cordial atmosphere, being on time and meeting their own deadlines.

3 Arbitrators should actively manage the proceeding and enforce timetables and deadlines, except when there are compelling, unforeseen circumstances. They should use their reasonable discretion to fashion an appropriate, fair and expeditious proceeding. This goal should be facilitated by the natural reluctance of parties and counsel to displease the decision maker in their case.

4 Arbitrators should conduct a thorough preliminary conference following CCA best practices as described in the CCA Guide to Best Practices in Commercial Arbitration, and then memorialize all schedules, procedures and deadlines in a comprehensive case management order. The preliminary conference is the single best tool to focus on creating a cost efficient and fair process. This protocol provides details.

5 Arbitrators should insist that the hearing be conducted on consecutive days whenever possible, because they are less expensive. To prepare a realistic schedule, it may be necessary to add a few days at the outset because of the tendency of counsel to underestimate how many days they will need to put on their cases.

6 Arbitrators should take an active role in limiting and streamlining discovery, consistent with the applicable arbitration rules and the circumstances. Arbitrators should monitor compliance with the pre-hearing schedule and resolve promptly any issue that could disrupt the hearing dates.

7 Arbitrators should identify a procedure for parties to file motions in order to discourage inappropriate and "unproductive" motions. Dispositive motions should be permitted if the subject matter can streamline or shorten the proceeding (for example, a motion to dismiss based on the statute of limitations).

8 Arbitrators should be reasonably available to counsel to resolve disputes that could delay the timely end of the case. To achieve "speed and efficiency," arbitrators "must encourage counsel to consult them quickly when obstacles to schedule compliance arise" Thus, arbitrators should be willing to convene a telephone conference on short notice and "be able to rule at the end of the call or very shortly thereafter."

9 Arbitrators should conduct a fair hearing in an efficient manner. The need for efficiency during the hearing is especially great because each hearing day involves a great deal of expense. Arbitrators are directed to Chapter 9 of the CCA Guide to Best Practices in Commercial Arbitration for 45 pages of guidance on efficient hearing management.

10 Because arbitrators must set an example and adhere to deadlines for the process, they must issue the award within the time required. The award should be in the appropriate form and be drafted with careful attention to detail in order to avoid grounds to vacate the award. ■

Highlights from the Protocol for Arbitration Providers

Neutral arbitration providers offer a valuable service to businesses that want to resolve B2B disputes in an efficient and timely manner. For example, the American Arbitration Association has a variety of arbitration rules that commercial parties can use, such as commercial, construction, international, and patent arbitration rules and it maintains a panel of experienced independent arbitrators in a wide variety of fields. The AAA helps many parties with arbitrator selection by providing them with a list of qualified arbitrators from the panel. In addition, a case manager is assigned to help the parties' counsel and the arbitrator schedule and organize the proceeding.

Arbitration providers can help parties make better process choices to achieve economy and efficiency, and identify arbitrators with "the proper case management skills and philosophy."

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1 Providers should offer business users a clear variety of options because business dispute resolution needs vary. For example, a small sales transaction contract is different from a multimillion dollar construction or commercial contract. Thus, business users need to be able to have a choice of procedures (i.e., fast track, expedited, streamlined, large complex case clauses, etc.) as well as a choice of dispute resolution clauses. In addition, providers should publish "guidance on their Web sites about the benefits and costs of each process." Furthermore, provider Web sites should be organized in such a way that the different procedural options and clauses can be easily located and user feedback can be obtained.

2 Providers should promote stepped dispute resolution clauses, which usually begin with negotiation, followed by mediation, followed by binding arbitration if the dispute is not completely resolved in one of the earlier steps. If successful, non-binding dispute resolution processes can save the parties time and money, give them more control over the outcome, and preserve their business relationship. Mediation has the additional advantage of providing confidentiality protections for private communications between a party and the mediator.

3 Too much "wiggle room" in provider arbitration rules tends to invite parties to use litigation-like discovery practices. Thus, provider rules should be drafted so that discovery is limited to only essential information. Providers should establish guidelines that limit electronic discovery, interrogatories and depositions; that require arbitrators to rule quickly on discovery disputes; and, that authorize arbitrators to shift costs for discovery abuses. In addition, providers should incorporate these limits on discovery into an arbitration clause that offer detailed discovery procedures that users can adopt in their pre-dispute agreement.

4 Providers should offer rules and train arbitrators in adherence to "presumptive" deadlines for each phase of the process. Providers and arbitrators should enforce stipulated deadlines absent clear unforeseen circumstances.

5 Providers should offer well defined, fast track arbitration programs, guidance on when to elect to use them, and promote the rules to users. As referenced in point 1, fast track rules provide the most economical and quickest final resolution.

6 Providers should develop and promote procedures for the appropriate use of dispositive or other motions in arbitration. These procedures could save time and money by requiring parties to obtain advance approval from the arbitrator instead of parties' counsel unilaterally filing such motions.

7 Providers should train arbitrators in process management and improving skills to reduce cost and time, particularly during the preliminary conference and up to the final hearing.

8 Related to Point 1 providers should offer users a rule that requires early detailed fact pleading, early disclosure of documents supporting each claim and defense, legal authority relied on, and anticipated witnesses.

9 Provider rules should require all pleadings, motions, orders and other documents to be exchanged by electronic service upon the parties, counsel and the arbitrator, unless special circumstances justify another procedure.

10 Providers should offer as a "core service" the opportunity to evaluate arbitrators based on their effectiveness as efficient case managers. This information should be acquired in a "post-arbitration telephone interview" and periodically communicated to the arbitrators. Inefficient arbitrators should be removed from the provider's panel.

11 Providers should expedite the appointment of arbitrators with rules that impose strict deadlines on appointments and take the appointment decision away from parties who fail to meet the appointment deadline.

12 Before offering an appointment to an arbitrator, providers should confirm the arbitrator's availability to hear and decide the case within the relevant time frame.

13 Providers should develop an ADR mechanism (for example, an ombudsperson) for the express purpose of hearing users' complaints about inefficient arbitrators or the arbitration process itself. The hearer of these complaints should have authority to generate solutions.

14 Providers should offer an orientation program for business users who are new to the commercial arbitration process. The format should identify the differences between arbitration and litigation and how to use the arbitration process to further the business user's goals. This type of program could be online or in person. ■

Religious Requirement for Arbitrators *(Continued from page 19)*

proceedings fairly in accordance with the rules of natural justice." But what was not needed, it said, was "any particular ethos." Therefore, it ruled that membership of the Ismaili community was "clearly not necessary for the discharge of the arbitrators' functions." Because the religious requirement was "an integral part of the agreement to arbitrate," the court held that the entire arbitration clause was unenforceable.

Implications

The Court of Appeal recognized that its decision "has a far wider significance that the present case" due to the fact that the term "employment" is defined identically, or nearly identically, in all English legislation forbidding discrimination, including Section 9(1)(b) of the Equality Act 2010, which prohibits discrimination based on "nationality and national origins."

Many arbitration clauses in international commercial agreements contain nationality requirements and those that do not routinely incorporate institutional arbitration rules with nationality considerations or requirements. For example, Article 6(4) of the International Arbitration Rules of the International Centre for Dispute Resolution (ICDR, the international division of the American Arbitration Association) permits the ICDR, in selecting "suitable arbitrators," to "appoint nationals of a country other than that of any of the parties." At least this rule is permissive. By contrast, Article 9(1) of the ICC Rules of Arbitration is mandatory: "In confirming or appointing arbitrators, the Court shall consider the prospective arbitrator's nationality...." Article 6 of the LCIA Arbitration Rules, is prescriptive: "Where the parties are of different nationalities, a sole arbitrator or chairman of the Arbitral Tribunal shall not have the same nationality as any party unless the parties who are not of the same nationality as the proposed appointee all agree in writing otherwise."

Does the decision by the English Court of Appeals, if upheld, put at risk all arbitration clauses that specify nationality or that incorporate rules that specify nationality? There has been considerable disagreement in the English and European arbitration literature as to whether the implications would be wide or narrow, but there seems to be agreement that the implications of the UK Supreme Court decision are uncertain.

The ICC and the LCIA have both intervened as *amici curiae*, to express the arbitration community's concerns. Some major English law firms are advising clients that incorporate institutional arbitration rules in their arbitration agreements to exclude the application of any provisions relating to the nationality of an arbitrator.[2] Others are advising clients to "consider amending their arbitration agreements to delete any expressly discriminatory provisions and to disapply any relevant [institutional] rules."[3]

The UK Supreme Court's decision could be announced by the end of 2011. Until then, the concern and uncertainty about nationality requirements continue. ■

Endnotes

[1] [2010] EWCA Civ 712.

[2] See, e.g., "UK—Jivraj v Hashwani: Amendments needed to arbitration clauses," Linklaters' Technology, Media & Technology News, 13 October 2010.

[3] See A.Welsh and A. Pullen (Allen & Overy), "Jivraj v. Hashwani: is the sky falling in?" in Practical Law Company, October 2010.

Developing an Effective Med-Arb/Arb-Med Process

By Edna Sussman

"[Med-arb] proceedings, when properly executed, are innovative and creative way to further the purpose of alternative dispute resolution."

Bowden v. Weickert

The buzz is all about whether arbitration has become too much like litigation. Regardless of whether this query is based in reality for the vast majority of arbitrations and regardless of whether it is the arbitrators or the lawyers/clients who are the cause of some arbitrations having taken on a litigation-like process, there is no question that mediation is on the rise. As parties search for a more expeditious and less costly means for resolving their disputes, attention is increasingly being paid to hybrid processes—to combinations and permutations of arbitration and mediation that can serve the parties' needs and best fit the forum to the fuss. These combined processes are not new. Arbitrators attempting to settle cases (arb-med) and mediators serving as arbitrators if settlement is not achieved (med-arb) have been the subject of learned articles for many years[1] and have been part of the local culture in many parts of the globe for generations.[2]

The two-fold concerns raised most frequently as to the use of a hybrid process are applicable only if the same neutral serves as both arbitrator and mediator, a practice which serves the parties' purpose of maximizing efficiency and minimizing expense. First, it is generally accepted that the confidentiality of mediation is an essential element to successfully conducting a mediation as parties reveal their true interests and perspectives on the dispute. It is argued that if the parties know that the mediator will be the arbitrator if the mediation fails, they will not confide in the mediator and will instead try to "spin" the would-be arbitrator to achieve a better result in the arbitration. Second, there is concern, on the other hand, that the mediator will be privy to confidential information derived from private caucus sessions with the parties and the opposing party will not know what was said and will not have the opportunity to rebut the information in the arbitration phase, a breach of concepts of natural justice and due process. Some argue that these concerns are insurmountable and that a hybrid of mediation and arbitration jeopardizes both processes. Others argue that these issues can be dealt with in various ways and that, in any case, the parties should be able to design their own process and contract for the one that suits them best.

The Combinations and Permutations

The mediation and arbitration processes have been combined in a variety of ways. These include: (a) Med-arb: If an unbreachable impasse is reached, the same person serves as the arbitrator; (b) Arb-med or arb-med-arb: The appointed arbitrator attempts to mediate (or conciliate) the case but failing resolution returns to his or her role as arbitrator; (c) Co-med-arb: The mediator and the arbitrator hear the parties' presentations together but the mediator then proceeds to attempt to settle the dispute without the arbitrator, who is only called back in to enter a consent award or to serve as an arbitrator if the mediation fails; (d) MEDALOA (Mediation and Last Offer Arbitration): If the mediation fails, the mediator-now-arbitrator is presented with a proposed ruling by both parties and must decide between the two, as in a baseball arbitration.

Techniques to implement a combined arbitration-mediation process have been developed to avoid the problems identified with same neutral med-arb and arb-med. For example, the mediation can be conducted without caucus sessions, thus assuring that all parties are aware of the information being presented to the neutral with full opportunity to respond.[3] Or the arbitrator can complete his or her award following the hearing, but seals it and keeps it confidential pending an attempt to mediate the dispute between the parties. Or the parties can be allowed to opt out of the same neutral serving as the arbitrator after the mediation fails. Or two party appointed arbitrators can co-mediate the dispute without the chair, who is held in reserve for the hearing untainted by having been privy to confidential communications in case no settlement is reached. These and other process refinements can serve to ameliorate the difficulties presented in combining arbitration and mediation, but party consent may be viewed as overcoming all objections.

Can Consent Overcome Later Challenges?

While the case law in this area is still emerging, the courts in the United States that have had occasion to address med-arb have uniformly endorsed the ability of the parties to design a med-arb process to suit them. However, the courts caution that informed consent is essential. Absent informed consent, the arbitration award rendered in the med-arb or arb-med-arb context will not be confirmed. The devil here may be in the details. What must the consent include to effectively bar challenges to any arbitral award that may ultimately be rendered?

The court in *Bowden v. Weickert*[4] dealt with an arbitrator who attempted to mediate the dispute. Upon failure of the mediation process, the arbitrator returned to his role as arbitrator and rendered his award. The court reviewed the med-arb process and delineated the nature of the agreement necessary for such a hybrid:

> The mediation-followed-by-arbitration proceeding engaged in by the parties in this case is sometimes referred to as a combined, or hybrid, "med-arb" proceeding. Such proceedings, when properly executed, are innovative and creative ways to further the purpose of alternative dispute resolution. However, given the confidential nature of mediation, the high degree of deference enjoyed by an arbitrator, and the high probability that both proceedings are likely to be employed before their disputes are resolved, it is essential that the parties agree to certain ground rules at the outset. At a minimum, the record must include clear evidence that the parties have agreed to engage in a med-arb process, by allowing a court-appointed arbitrator to function as the mediator of their dispute. The record must also contain: (1) evidence that the parties are aware that the mediator will function as an arbitrator if the mediation attempt fails; (2) a written stipulation as to the agreed method of submitting their disputed factual issues to an arbitrator if the mediation fails; and (3) evidence of whether the parties agree to waive the confidentiality requirements imposed on the mediation process ... in the event that their disputes are later arbitrated.[5]

Finding that the arbitrator had relied on information obtained in his role as mediator in violation of statutory protections of mediation confidentiality and that there had been no explicit agreement by the parties regarding the use of confidential information, the court found that use of the same neutral as arbitrator and mediator rendered the arbitrator's decision "arbitrary and capricious" on its face.[6]

In *Gaskin v. Gaskin*,[7] the court noted that the mediation process encourages candid disclosures, including disclosures of confidential information, to a mediator, creating the potential for a problem when the mediator, over the objection of one of the parties, becomes the arbitrator of the same or a related dispute. The court concluded that it would be improper for the mediator to act as the arbitrator in the same or a related dispute "without the express consent of the parties."[8]

Where the parties have consented, the use of confidential information by the arbitrator in the arbitration decision should not serve to provide a basis for vacating the award. In *U.S. Steel Mining Company v. Wilson Downhole Services*,[9] the parties had agreed to have the mediator serve as the arbitrator if the mediation failed to lead to a resolution and empowered the mediator, now arbitrator, to select between the parties competing proposals in a baseball arbitration. The parties expressly authorized the mediator-arbitrator to rely on confidential mediation disclosures in reaching his decision. The parties' agreement provided:

> The Parties anticipate that *ex parte* communications with the Arbitrator will occur during the course of the mediation. The Parties agree that the Arbitrator, in evaluating each Party's best and final offer, may rely on information he deems relevant, whether obtained in an *ex parte* communication or otherwise, in making the final Award.[10]

In attacking the award, the challenging party claimed fraud in the presentation of information in the mediation. The court held that such evidence of fraud had to be clear and convincing and no such finding could be made on the facts presented in the face of the consent given.

In an analogous case, in *Conkle and Olesten v. Goodrich Goodyear and Hinds*,[11] the court reviewed a challenge to an arbitration award where the party had waived disclosure by the arbitrator and did not know that the arbitrator had previously mediated a closely related case. The court refused to set aside the award finding that the "waiver was direct and unequivocal."[12] The court said that to adopt an "absolutely-cannnot-waive-disclosure rule would give one party the unilateral right to repudiate any arbitration it didn't like."[13]

Nor will the court necessarily vacate the award even absent express consent on use of confidential information in limited circumstances. In *Logan v Logan*,[14] the loser in the arbitration sought to set aside the award on the grounds that the mediator–arbitrator referred to confidential information from the mediation in his arbitral award. The court noted that:

> if there was an improper reference to the mediation in the arbitration proceedings, this would constitute grounds for vacating or modifying the arbitration order and subsequent judgment, if the reference materially affected appellants' substantial rights.[15]

However, on the facts before it, the court refused to set aside the award, stating that no showing had been made that the reference in the arbitration order to matters that

occurred at the mediation "materially affected substantial rights."[16]

Care must be taken in designing the process, crafting the consent document and in the terminology used if an enforceable award is to be achieved. In *Lindsay v. Lewandowski*,[17] the parties agreed to "binding mediation" by the mediator upon the conclusion of a failed mediation. The court refused to enter judgment on the stipulated settlement agreement, which included provisions determined in "binding mediation" on unresolved terms following a mediation by the same neutral. The court noted the confusion that would result from allowing the development of myriad alternative dispute resolution processes such as "binding mediation" for which no legal guiding principles existed:

> If binding mediation is to be recognized, what rules apply? The arbitration rules, the court-ordered mediation rules, the mediation confidentiality rules, or some mix? If only some rules, how is one to chose? Should the trial court take evidence on the parties' intent or understanding in each case? A case-by-case determination that authorizes a "create your own alternate dispute resolution" regime would impose a significant burden on appellate courts to create a body of law on what can and cannot be done, injecting *more* complexity and litigation into a process aimed at less.[18]

Clarity as to the nature of the roles to be played and the use of constructs and terminology with which the law is familiar and as to which legal principles already exist are important in drafting the contract language establishing the process to be used.

Thus the court in *Lindsay v. Lewandowski* expressly recognized that such a combined process could be developed by the parties. The court stated that it did not preclude the parties from agreeing, if the mediation fails, to proceed to arbitration with the same neutral. But the court warned that whether or not this arbitrator (*née* mediator) may consider facts presented to him or her during the mediation would also have to be specified in any such agreement. As confirmed in the concurring opinion, "only a clearly written agreement signed by the parties can set forth a process whereby an unsuccessful settlement conference (or mediation) morphs into a *de facto* arbitration. The key to approval of such agreement is clarity of language and informed consent."[19]

As the courts have held, the success of the hybrid mediation/arbitration process depends on the efficacy of the consent to the process entered into by the parties. A sample of a consent form for consideration by the reader was developed by Gerald Phillips, a well-known California mediator and arbitrator and a strong supporter of med-arb, which addresses many of the concerns.[20]

Do You Have the Right Neutral?

The differences between the demands of the job and the skill sets required for an arbitrator versus a mediator were summed up in an anecdote by a world-class neutral who reported that his wife always knew whether he had arbitrated or mediated that day. If he arbitrated he came home in time for dinner with energy for companionship and conversation. If he mediated he came home very late, emotionally drained, and went immediately to bed.

Arbitration and mediation are two entirely different processes. In arbitration the arbitrator is charged with managing the proceeding efficiently, providing a fair opportunity to each side to present its case and analyzing the facts and the law based on the evidence to arrive at the ultimate award. The mediator is charged with working with the parties to craft a process most likely to lead to a resolution, uncover the parties' interests, understand their relationship and their motivations, explore the strengths and weaknesses of the respective positions, assist in developing workable solutions and help parties overcome psychological barriers to settlement. Bottom line: The mediator's role requires use of many of the skills of a psychologist, while the arbitrator's role requires use of many of the skills of a judge.

The trainings offered for each discipline bear little resemblance to one another. For example, a good deal of attention is devoted in arbitration training to how to manage the pre-hearing process efficiently, while in mediation training significant attention is devoted to how to overcome impasse. The good mediator and good arbitrator employs a completely different approach and set of tools in each role. Not every arbitrator is qualified to be a good mediator and vice versa.

In selecting the neutral, it is not only important to consider the qualifications of the neutral for each role but to select someone with a strong reputation for integrity who the parties can trust and respect to handle appropriately the special challenges associated with combining the roles of arbitrator and mediator.

Conclusion

Combining mediation and arbitration in a hybrid process with the same neutral can be an effective mechanism for reducing costs, increasing efficiency and maximizing the possibility of achieving the win-win result that optimizes the position of all parties and arrives at the best resolution of a dispute. If the parties are fully informed and consent knowingly to same neutral mediation and arbitration, party autonomy should be respected and the resolution derived from the process should be honored.

Endnotes

1. *See, e.g.*, Barry C. Bartel, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis and Potential*, 27 Willamette L. Rev 661 (1991); John T Blankenship, *Developing Your ADR Attitude*, 42-NOV Tenn B. J 28 (2006); Harold I. Abramson, *Protocols for International Arbitrators Who Dare to Settle Cases*, 10 Am. Rev. Int'l. Arb. 1 (1999); James T. Peter, *Med-Arb in International Arbitration*, 8 Am. Rev. Int'l. Arb. 83 (1997).
2. For a review of institutional rules on combined neutral functions around the world, see Francesco Anchini, *"Concintration:" The Ultimate Example of ADR*, 13 World Arb & Mediation Rep. 162 (2002).
3. Indeed, a no-caucus model is the basic premise of the understanding-based model of mediation. See Gary Friedman and Jack Himmelstein, Challenging Conflict: Mediation Through Understanding, American Bar Association and Harvard Program on Negotiation (2008). The book is reviewed in this issue of *New York Dispute Resolution Lawyer*.
4. *Bowden v. Weickert*, No. S-02-017, 2003 WL 21419175 (Ohio App. 6 Dist. June 20, 2003). The case went back for a second arbitration; see *Bowden v Weickert*, No. S-05-009, 2006 WL 259642 (Ohio App. 6 Dist. Feb. 3, 2006).
5. *Id* at *6.
6 *Id.* at *7.
7. *Gaskin v. Gaskin*, No. 2-06-039-CV, 2006 WL 2507319 (Tex. App.- Fort Worth, Sept. 21, 2006).
8. *Id.* *2 (citations omitted) *See also Wright v. Brockett*, 150 Misc. 2d 1031, 571 N.Y.S. 2d 660 (Sup. Ct., Bronx Cty. 1991); in reflecting on a proposal to expand the use of med-arb, the court cautioned that careful study was required before full implementation "to insure that there is a legally sufficient written 'plain language' consent by the parties both to the arbitration of the dispute and the specific procedures to be employed." *Id.* at 150 Misc. 2d at 1039.
9. *U.S Steel Mining Company v. Wilson Downhole Services*, No 02:00CV1758, 2006 WL 2869535 (W.D Pa. Oct 5, 2006).
10. *Id* at *5.
11. *Conkle and Olesten v Goodrich Goodyear and Hinds*, Nos G033972, G034063, 2006 WL 3095964 (Cal. App 4 Dist. Nov. 1, 2006)
12. *Id.* at *12
13. *Id* at *12. *See also, Estate of McDonald*, No. B189178, 2007 WL 259872 (Cal. App. 2 Dist. Jan. 31, 2007) where the parties entered into a settlement agreement following a mediation and agreed to a binding decision by a retired judge on disputed items; the court refused to set aside the decision, holding that the challenger was estopped from challenging the procedural settlement mechanism she had accepted.
14. *Logan v Logan*, No. F051606, 2007 WL 2994640 (Cal App. 5 Dist. Oct. 16, 2007).
15 *Id.* at *1.
16. *Id* at *3. See also, *Society of Lloyd's v. Moore*, No. 1:06-CV-286, 2006 WL 3167736 (S.D. Ohio Nov. 1, 2006) where the party attempted to set aside an award rendered by an arbitrator who heard the case, wrote the award and sealed it while he unsuccessfully attempted to mediate the case based on a communication by the arbitrator/ mediator in the course of the mediation The court held that the communication was protected by mediation confidentiality and was not admissible.
17. *Lindsay v. Lewandowski*, 139 Cal. App. 4th 1618, 43 Cal. Reptr 3d 846 (Ct. Appeals, 4th Dist. Div. 3, 2006).
18. *Id.* at 43 Cal Reptr. 3d at 850.
19. *Id.* at 43 Cal Reptr. 3d at 853. *See also, Weddington Productions Inc. v. Flick*, 60 Cal. App. 4th 793, 71 Cal Reprtr. 2d 265 (Ct. Appeals, 2d District, Div. 2, 1998).
20. Gerald F. Phillips, *Same Neutral Med-Arb: What Does the Future Hold?* 60- Jul Disp. Resol. J. 24 (May-July, 2005). This article is reprinted in this issue of *New York Dispute Resolution Lawyer*.

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CONTRACT

Drafting the Arbitration Clause: A Primer on the Opportunities and the Pitfalls

By Edna Sussman and Victoria A. Kummer

A review of some of the crucial issues that should be considered in order to draft an effective arbitration clause.

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The arbitration clause is often thrown into the contract at the last minute as the parties toast the conclusion of their negotiations. Usually little more than an afterthought, it deserves considerably more attention from the careful lawyer. Because the arbitration clause can become highly significant down the road if the parties' relationship deteriorates, arbitration practitioners have recognized that the clause should be shaped in a thoughtful and careful way to the transaction and the parties' needs for an economical and efficient dispute resolution process. The opportunity to do this is before the heat of battle. It is during the drafting of the contract.

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The ability to choose the terms of the arbitration clause is one of the signal advantages of arbitration, and it is this ability that differentiates arbitration from court litigation, where parties are bound by local court rules and the civil procedure laws of the jurisdiction in which the court sits. Drafters have the opportunity to streamline the resolution of any subsequent dispute, to ensure that it is heard by appropriate decision makers, and to maximize the chances of enforcing the ultimate decision. Conversely, carelessness in drafting can lead to "pathological clauses" that are not enforceable, procedural requirements that are impossible to satisfy, and provisions that endanger the enforceability of the final award.[1]

While length constraints and the vagaries of the many kinds of contracts containing arbitration clauses preclude an exhaustive review of all of the considerations that should go into drafting an arbitration clause, we review some of the most crucial issues that should be considered. The "boilerplate" arbitration clause and the arbitration provision used in the last deal are not sufficiently tailored to be inserted automatically in all contracts.

Litigation over the arbitration clause is the last thing parties want, but that is precisely what will occur when arbitration is demanded against an unwilling respondent under a poorly drafted arbitration clause.

Do No Harm

Litigation over the arbitration clause is the last thing parties want when a dispute arises and a party demands arbitration, but that is precisely what will occur when arbitration is demanded against an unwilling respondent under a poorly drafted arbitration agreement. Such agreements can prompt litigation of fundamental issues, such as whether there is an agreement to arbitrate and, if there is, what its scope is. To avoid making drafting mistakes, practitioners who are unfamiliar with the nuances of arbitration clauses should use established arbitration clause phraseology. There are excellent resources to assist in the drafting of the dispute resolution clause, for example, the American Arbitration Association's (AAA) *Drafting Dispute Resolution Clauses*[2] and the International Bar Association's (IBA) *Guidelines for Drafting International Arbitration Clauses*,[3] both of which provide detailed guidance on the subject.

The AAA Commercial Arbitration Rules (AAA commercial rules) contain the following straightforward, broad arbitration clause, which has been tested in court:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.[4]

First Steps in the Analysis

The first step the drafter should take is to raise a number of questions with the client, such as: What kinds of disputes are likely to arise? Is the client likely to be a claimant or respondent? Will there be a need for prompt resolution from a business perspective? Will there be a need to assert extra-contractual claims (i.e., claims that are beyond the subject of the contract containing the arbitration clause)? Is confidentiality important? Does the transaction have international ramifications? Answers to these and other questions will help the drafter craft an appropriate arbitration clause for the transaction. They will also alert the drafter to the need to consult, during the drafting process, with counsel in other jurisdictions, including those abroad, where the arbitration may be seated or enforcement may be sought.

Scope of the Arbitration Agreement

Based on the client's answer to the question about the nature of possible future disputes, the drafter can determine the appropriate scope of the arbitration clause. If the parties agree to limit arbitration to certain types of disputes (for example, only contract disputes, or only payment disputes, or disputes under a certain dollar value), the drafter can tailor the clause to cover just those disputes. But care should be taken in adopting this approach as it may lead to challenges to the arbitrator's jurisdiction with the consequent increased costs and risk of inconsistent results.

If the parties want a broad arbitration clause for the resolution of all disputes between them, it is important to use language that has been accepted by the courts of the applicable jurisdiction.

If they also desire to resolve claims in the arbitration that are not related to the subject of the contract, such as an unrelated offset, the contract must include a provision to that effect.

Selection of the Arbitral Forum and Rules

A properly drafted arbitration clause will serve to bind the parties to arbitrate the disputes specified, and will be enforceable, but the careful drafter should not stop there. Additional details specifying how, when, and where to conduct the arbitration should be addressed. Failing to specify these items could lead to procedural disputes that may require court intervention. Such skirmishing can be nipped in the bud by addressing these issues in the arbitration clause.

The first issue is whether to have *ad hoc* arbitration, or arbitration administered by a neutral arbitral institution. Some litigants think that *ad hoc* arbitration is cheaper because no payments need to be made to an administering institution. But that view may be shortsighted, since there are a great many advantages to administered arbitration, including the help of a case administrator assigned by the institution to help the arbitrator and the parties' attorneys move the proceedings along, and the use of the institution's arbitration rules and roster of neutrals. In addition, the institution serves as a neutral intermediary to deal with challenges to arbitrators and manage payments of the arbitrator's compensation. The presence of the arbitral institution may lessen the chances that court intervention will be needed to resolve procedural issues. In addition, it may improve the chances of enforcement and may even be required in some jurisdictions.

If administered arbitration is desired, thought should be given to the rules of the institution. The rules of the major arbitral institutions are similar in many ways, but they are by no means identical; they may differ significantly on such issues as the availability of punitive damages, confidentiality, and hybrid ADR processes, such as "med-arb." The AAA commercial rules and the international arbitration rules of the International Centre for Dispute Resolution (ICDR rules), the AAA's international division, provide that the selection of the AAA or ICDR to administer the arbitration is deemed a selection of the AAA and ICDR rules—and the selection of the AAA or ICDR rules constitutes a selection of the AAA or ICDR as the arbitration administrator.[5]

In addition, attention should be paid to the version of the rules the parties wish to govern their disputes. Many institutional arbitration rules are revised from time to time and provide that the rules in effect at the time of the filing of the arbitration govern, absent a contrary modification in the arbitration agreement.[6] Modifications of other provisions in the selected institution's rules should be approached with caution to avoid the possibility that the institution may conclude it cannot administer the dispute under the rules as amended by the parties.

If selecting an *ad hoc* proceeding, the selection of *ad hoc* arbitration rules is advisable to provide a framework for the conduct of the arbitration.

Selection of Arbitrators

Qualifications. The opportunity to select the arbitrators is one of the chief advantages of arbitration. The parties can choose the decision maker they believe is best suited to the dispute (rather than just being stuck with a judge randomly assigned to the case). Parties can make the most of this unique opportunity by having the drafter of the arbitration clause include arbitrator qualifications or other selection criteria.

The drafter can specify in the agreement the kind of experience, expertise, or other qualifications that the parties want the arbitrator to have. For example, the arbitration agreement could require the arbitrator to possess a specified amount of experience as an attorney or arbitrator, familiarity with the law of a specific jurisdiction, expertise in a particular legal field, or work experience in a particular industry. Care should be taken, however, to avoid making the arbitrator qualifications so constricting that it will be difficult or even impossible to find arbitrators who satisfy them.

Selection Method. The two most common methods for selecting arbitrators are the list method and the party-appointment method. Both methods allow the parties to select their decision maker. Under the list method, frequently used at the AAA and the ICDR, the case administrator, after input from the parties as to their preferences, usually provides a list of 10 to 15 names from the panel of arbitrators. The parties "strike" the names they don't want and "rank" the remaining names in order of preference (known as the "strike and rank" method).

Under the party-appointment system, one arbitrator is selected by each side and the chair is jointly selected by those two arbitrators, often in consultation with the parties. Under the AAA commercial rules, if the party-appointed mechanism is not specified in the arbitration clause, the list "strike and rank" method will be employed. This method is also utilized at the ICDR.

There has been considerable debate in recent years about the desirability and fairness of the party-appointed arbitrator system, but it remains popular, especially in international cases. The

AAA and ICDR will administer a party-appointed process if called for in the arbitration agreement.

Default methods of arbitrator selection are provided in the AAA rules in the event the parties' chosen process fails for some reason to result in the constitution of the panel. In an *ad hoc* proceeding, it is wise to provide in the arbitration agreement for a default appointing authority, to ensure the appointment of the arbitrator.

Number of arbitrators. The arbitration agreement may specify the number of arbitrators, but if it does not, the rules the parties have selected may make the choice for them. If the parties want to control the costs of their arbitration, specifying only one arbitrator in the arbitration agreement should be considered.

If the parties anticipate disputes that will not be especially significant (e.g., in terms of dollar amount, disruption, or impact on their respective businesses), a single arbitrator may do the trick. If larger disputes are possible, three arbitrators may be preferable, although the parties must recognize that three arbitrators will increase both the costs of resolving disputes, and the length of proceedings, due to difficulties in coordinating the arbitrators' schedules. Alternatively, the agreement can provide for one arbitrator for certain types of disputes (e.g., those under a certain dollar amount), and three for others.

When including arbitrator qualifications in the arbitration clause, avoid making them so constricting that it will be difficult or impossible to find arbitrators who satisfy them.

Selection of the Seat

The selection of the seat of the arbitration, which need not be the place where the arbitration is physically held, is a critical choice. The seat selected should be one that is friendly to arbitration. It is generally the procedural law of the seat that is applicable to the arbitration and sets the baseline requirements. It is the jurisdiction that will deal with issues relating to the appointment of arbitrators, challenges to arbitrators, and jurisdiction over a party or a claim. Another important fact is that, although other courts may, in very limited circumstances, refuse to recognize and enforce an arbitral award, the seat of the arbitration is the only forum that can vacate the award.

A seat should be selected that will recognize and enforce the agreement to arbitrate, not interfere in the arbitral process; assist the arbitration proceedings when necessary; and act expeditiously. In making this selection, the parties should also consider whether the law of the seat allows non-nationals to appear as counsel in an arbitration proceeding, specifies criteria for arbitrators to be qualified, determines the language of the arbitration, or requires any special procedures in the arbitration itself. The selection of an arbitration-friendly seat, versus one not-so-friendly, can make a huge difference in the efficiency of the arbitral proceedings and the enforceability of the award.

Another factor to be considered when selecting a seat is whether cross-border enforcement of the award is likely. The laws and procedures of the jurisdictions where enforcement might be sought (as well as requirements as to the conduct of the arbitration) should be researched to avoid problems later if an award from the seat will be the subject of enforcement proceedings. There are traps for the unwary here. An award might not be enforceable in some countries, depending on the seat from which it emanates. For example, although India is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, it will only recognize awards from the 44 countries that have been "notified" by India. Some important jurisdictions are not on that short list.

Arbitrability—Who Decides the Scope of Arbitral Jurisdiction?

The drafter should consider whether to include a provision stating that the arbitrators have the authority to determine their own jurisdiction. The precise application of this principle of "competence-competence" varies from country to country. In the United States the delegation to the arbitrator must be "clear and unmistakable."[7] The rules of most arbitral institutions specify that the arbitrators are empowered to determine their own jurisdiction, and several appellate courts in the United States have held that the adoption of these institutional rules in the arbitration agreement constitutes the requisite "clear and unmistakable" delegation of this power to the arbitrators. However, to provide clarity on this issue and avoid a potentially long and costly detour into the courts at the commencement of an arbitration, the drafter may consider incorporating

into the arbitration agreement language that expressly delegates this power to the arbitrators.

Streamlining the Arbitration

Another opportunity afforded by arbitration is the ability to tailor the process to the transaction and the parties' needs. As arbitration has increasingly been used in large-stakes disputes, it has become commonplace for some attorneys to treat arbitration proceedings like full-blown court litigation—dragging out the process by using expansive, time-consuming and expensive discovery. Arbitration is not litigation and using litigation procedures in arbitration runs counter to the purpose for which arbitration was originally conceived—as a swift and efficient alternative dispute resolution process.

To avoid falling victim to this trend, the parties should agree during the negotiation and drafting of their contract to an authentic arbitration process, one that will preclude litigation maneuvering and return arbitration to its roots as an expeditious and less costly mechanism for resolving disputes. Before such measures are added to the arbitration agreement, care must be taken to think through the nature, size, and complexity of the likely disputes and determine the procedures necessary to obtain a fair result.

One option could be for the drafter to incorporate into the arbitration clause the ICDR Guidelines for Arbitrators Concerning Exchanges of Information in international arbitration.[8] This can be done to streamline discovery in domestic arbitrations as well. Another helpful source of ideas for limiting pre-hearing procedures can be found in the Protocols developed by the College of Commercial Arbitrators.[9]

In order to circumscribe discovery, the parties' counsel should decide what forms of discovery they will need or want, and what methods of discovery they might want to avoid. For example, depositions can be expressly precluded, and a standard of need for document production can be set at a high bar. It also may be possible to agree on e-discovery limitations in the arbitration clause. It might even make sense to dispense with e-discovery altogether.

When limitations on discovery are practicable and can be agreed upon, putting them in the arbitration agreement will help defray (and even avoid) tremendous costs and business disruptions. When a dispute arises, if the parties find their agreement with regard to discovery to be too onerous, they can always agree to change it by mutual consent. The agreement can also provide for adjustments of the discovery limitations at the discretion of the arbitrator upon a requisite showing of need.

The parties can also provide for time limitations, whether because business considerations mandate an expeditious outcome, or because it will foster cost-savings in the arbitration. Typically, such provisions require that the arbitration conclude within a certain number of days from the filing of the demand, or from the appointment of the arbitrators, or require that the award be issued a certain number of days from the closing of the hearing. The drafter should be careful to make time limitations subject to adjustment at the discretion of the arbitrators, to avoid putting the award at risk if the time limits cannot be met.

Form of Award

Party autonomy extends to providing for the type of award to be rendered. The parties can provide for a "bare" award that merely states what relief is granted and to whom, a reasoned award, or a more detailed award with findings of fact and conclusions of law (which is rarely used). The parties may wish to have a reasoned award so they have the satisfaction of knowing the basis for the decision and/or to obtain guidance for future conduct. On the other hand, there may be circumstances in which the parties do not want a reasoned award because it might contain specific findings that could be harmful to them in some way in the future. In arbitration, unlike court, parties can prevent such findings by limiting the nature of the award to be issued in the arbitration agreement.

Under the AAA commercial rules, unless a request for a reasoned award is made in writing by the parties prior to the appointment of the arbitrators, the arbitrators need not render a reasoned award.[10] Parties rarely consider this point at the commencement of the arbitration, so if a reasoned award is desired, it is best to provide for it in the arbitration agreement.

In the past, many arbitrators felt that a reasoned award would provide grounds for a court to refuse to enforce it (despite the fact that a merits review is generally prohibited under the Federal Arbitration Act and most state laws). More recently, there has been a shift by many arbitrators towards providing at least some reasoning in their awards as a reaction to several court decisions that, while enforcing the awards, nevertheless criticized them for their lack of reasoning.

In the international context, it must be noted that some jurisdictions outside the United States require arbitral awards to be reasoned in order to be enforceable. The ICDR rules, like the rules of many institutions, require a reasoned award unless the parties have agreed that no reasons be given.[11]

Confidentiality

Another opportunity offered by arbitration is the ability to provide for confidentiality and avoid the public exposure attendant to court proceedings. Many practitioners wrongly assume that arbitration is "confidential." It is generally accepted that arbitrators and administering institutions have an obligation to keep arbitral proceedings confidential. But in many legal regimes and under many institutional rules, the parties have no such obligation, absent an express confidentiality agreement. Thus, although arbitration is "private," the confidentiality obligations of the parties depend on their express agreement, local law (which varies by jurisdiction), and the rules chosen to govern the arbitration.

If the confidentiality of future disputes is important, it is best to include in the arbitration agreement itself language binding the parties to confidentiality. The ability of the parties to agree on anything diminishes precipitously after a dispute arises and litigation tactics take over. Therefore, confidentiality, like virtually all of the procedural issues that arise in the course of an arbitration, is best addressed during the drafting of the arbitration clause while the parties are working harmoniously. Further, any contractual confidentiality agreement must contain exceptions, such as allowing disclosures required by law. It must also allow submissions to a court necessary for enforcement of the award. If court proceedings ensue, it may not be possible to maintain confidentiality.

Interim Measures

Interim measures, such as attachments or preliminary injunctions, can be as important in arbitration as in litigation. Jurisdictions vary as to whether the arbitrators or the courts have the authority to issue interim measures of protection. Most institutional arbitration rules authorize arbitrators to issue interim measures,[12] and parallel jurisdiction is available in many cases. The AAA commercial rules expressly provide: "A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate." Given the variability of local law on this point and certainly in *ad hoc* arbitration, the parties may wish to consider providing express authority for the courts to issue interim measures, or for the arbitrators to do so, and review the enforceability of such a provision in the relevant jurisdictions.

When the parties need interim relief prior to the appointment of the arbitrator, there could be a delay in obtaining relief because, unlike the courts, where such an application can be made at any time, there is no panel of arbitrators waiting to rule on such a request when the arbitration is first commenced. In addition, empanelling arbitrators takes time.

Rules providing for an emergency arbitrator to be appointed to hear a request for interim measures prior to the constitution of the tribunal are optional under the AAA commercial rules and therefore must be affirmatively elected in the arbitration clause.

The AAA was a leader in developing an emergency arbitrator procedure under which an arbitrator could be appointed to hear a request for interim measures of protection so that relief would be available before the panel is constituted. The emergency arbitrator rules are part of the ICDR international rules.[13] However, they are optional under the AAA commercial rules and therefore must be affirmatively elected in the arbitration clause. The drafter should consider electing the optional emergency arbitrator rules in the arbitration clause if the contracting parties have selected the AAA commercial rules to apply.[14]

Attorney Fees and Costs

Arbitration agreements often contain provisions addressing how attorney fees will be paid. Some provide that each party will bear his or her own attorney fees (known as the American rule), while others provide that the "prevailing party" shall recover its attorney fees and costs from the losing party (the loser pays rule). Arbitration agreements may provide that if an enforcement proceeding is necessary to obtain payment, the losing party will pay the attorney fees and costs of the enforcement proceeding. The purpose of this provision is to encourage voluntary compliance with the arbitral award. Likewise, an arbitration clause may provide that the party demanding arbitration must pay all filing and tribunal fees, subject to adjustment, if at all, in the final award. Alternatively, it may provide that a respondent

who fails to pay his or her share of the costs of the arbitration shall suffer specified consequences. Fee- and cost-shifting provisions are intended to deter frivolous arbitration demands and court challenges. In addition, they can help streamline the proceeding. However, their use should be carefully considered.

Arbitrators generally apply the American rule in U.S. arbitration proceedings conducted under the AAA commercial rules, absent a reason to do otherwise. Under these rules, the arbitrator is authorized to award attorney fees "if all parties have requested such an award or it is authorized by law or their arbitration agreement."[15] However, the ICDR rules, consistent with international practice, provide that the arbitrators "shall fix the costs of the arbitration in its award,"[16] leaving the arbitrators' discretion, if there is no provision in the arbitration agreement dictating the application of the American rule. It should be noted that some jurisdictions outside the United States do not enforce agreements to have each party bear its own attorney fees and costs unless that agreement is reached after the dispute has arisen.

Other Essential Terms

Under virtually all regimes, arbitration agreements must be in writing. In arbitration agreements involving a U.S. party, or where enforcement in the United States may be sought, it is important for the drafter to include an "entry of judgment" provision in order to avoid further litigation on issues of enforcement. The entry of judgment language in the AAA standard arbitration clause states: "Judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof."

To avoid later disputes as to where the arbitration hearing will take place, the drafter should identify with specificity the locale of the hearing. Absent such a provision, the choice may be made under the applicable rules.

If the transaction is international, the drafter should specify in the arbitration agreement the language in which the arbitration will be conducted and in which the submissions should be made. It may also be appropriate to specify the currency in which any damages awarded should be paid and, if a party is a government that would be entitled to sovereign immunity, include a waiver of such immunity and an agreement to submit to the jurisdiction of the court and to entry of judgment.

The law chosen by the parties to govern their contract will dictate the law governing claims that are asserted thereunder. But what about claims that do not arise under the contract but which the parties nevertheless agree may be arbitrated? Where the parties agree on arbitration of extra-contractual claims, the drafter should include the substantive law to govern those claims.

The applicability of the FAA can also be a puzzle unless the arbitration clause expressly says that the FAA applies. The FAA applies to transactions "involving commerce." The term "commerce" is broadly defined under the FAA. The breadth of the FAA has led many courts to hold that the FAA preempts many aspects of state law. Yet, because the applicability of the FAA is not always clear (and courts can be inconsistent in their understanding of its reach), the drafter should expressly provide in the arbitration clause for the FAA to govern, if this is what parties want, and most do. If the FAA governs, state law provisions will then be applicable only to the extent not in conflict with the FAA.

Contracts of adhesion (such as take-it-or-leave-it contracts between parties of unequal bargaining power, e.g., consumers) are always drafted by the stronger party. Since mandatory arbitration provisions in adhesion contracts could be challenged in court on unconscionability grounds, the drafter must be very familiar with state unconscionability law and adhesion contracts. This is necessary to avoid putting into the clause any provisions that may cause the courts to find the arbitration clause to be unconscionable and unenforceable.

There are a host of other issues that could be important in drafting an arbitration clause.[17] Addressing all of them is beyond the scope of this article, but that does not relieve careful practitioners from considering them and deciding whether it would be appropriate to include them in the arbitration clause.

Step Clauses

In recent years, "step clauses," which call for the parties to take certain preliminary steps before they can commence arbitration, are being used with greater frequency. Their popularity may be due to the fact that they give the parties an opportunity to resolve disputes in a less adversarial forum. The contract usually requires a "business persons only" negotiation first, followed by mediation to help the parties amicably resolve the matter before incurring the costs and expenses of arbitration. Requiring mediation first can make it easier for all parties to come to the table. There is no need for either side to "suggest" mediation, which often makes counsel worry that the suggestion alone shows weakness.

Some courts have held that a step clause cre-

ates a condition precedent that must be satisfied before the commencement of arbitration. Accordingly, it is important for the drafter of a step clause to include time limits for completing each step so that it is clear when the next step can be taken.

We do not recommend providing for "good faith" participation in a dispute resolution provision. The good faith requirement may sound nice, but it is a fuzzy, easily circumvented term that can lead to court fights over what constitutes "good faith" participation and whether it has been satisfied.

Additional considerations in drafting a step clause include whether the statute of limitations will be tolled during any of the preliminary processes, and whether to allow applications for interim relief during the mediation. If time is money, the step clause can be varied to have the mediation run concurrently with the arbitration.

Where mediation is used alone, or is part of a step clause, designating an administering institution in the mediation clause can help make the mediation proceed smoothly. The institution's rules provide the procedures for notice and selection of the mediator, and the case manager assigned to the case can help facilitate the initiation and management of the mediation. If the mediation is not administered, these procedures must be included in the mediation portion of the step clause.

Conclusion

The arbitration clause provides an opportunity to tailor the dispute resolution process in the manner desired by the contracting parties. This opportunity should not be squandered. The drafter must be careful to include in the arbitration agreement all provisions that will be needed to ensure its enforceability, as well as the enforceability of any awards that are issued, while still satisfying the parties' needs. The arbitration clause is an essential element in providing users with the kind of arbitration they say they want: one that resolves disputes with a minimum of time and business disruption and at lowest cost. ■

ENDNOTES

[1] Although pathological clauses may sometimes be saved by the courts, they may, in other instances, preclude enforcement of the arbitration agreement. Examples include. arbitration clauses that are unclear as to whether binding arbitration is intended; naming an institution that does not exist or is misnamed; providing too little time for the arbitration to take place with no safety valve for extensions, or providing too much specificity for the arbitrator's qualifications.

[2] This publication can be downloaded from the American Arbitration Association's Web site at www.adr.org (click on Education & Resources).

[3] International Bar Association, IBA Guidelines for Drafting International Arbitration Clauses, (2010), available on the IBA Web site at www.ibanet.org

[4] The AAA's standard arbitration clause is in the introduction to the AAA Commercial Arbitration Rules (AAA commercial rules).

[5] AAA commercial rules, R-1 & R-2; ICDR international rules, art. 1. Other institutions have similar rules.

[6] This is true of the AAA and ICDR rules. See AAA commercial rule R-1(a) and ICDR rules, art 1.

[7] See, *First Options of Chicago Inc v. Kaplan*, 514 U.S. 938 (1995). See also *Rent-A-Center, West Inc v Jackson*, 130 S. Ct. 2772 (2010). Such a provision ensures that in the United States, as in the United Kingdom, the courts will only review jurisdiction after determination in the arbitration. See *Dallah Real Estate and Tourism Holding Co. v The Ministry of Religious Aff Gov't of Pakistan*, [2010] UKSC 46.

[8] Available for downloading at www.adr.org (click on Education & Resources).

[9] The College of Commercial Arbitrators, Protocols for Expeditious, Cost-Effective Commercial Arbitration, 2010, available at www.thecca.net/CCA _Protocols.pdf.

[10] Rule R-42(b).

[11] ICDR rules, art. 27(2).

[12] AAA rules, R-34(a).

[13] ICDR rules, art. 37.

[14] AAA commercial rules, optional rule O-1-8.

[15] AAA commercial rules, R-43(d)(ii).

[16] See, e.g., ICDR rules, art. 31.

[17] Additional provisions that might be considered include whether to: (1) limit the types of damages that the arbitrator can award (e.g , by excluding punitive and consequential damages); (2) specify the interest rate to be applied; (3) limit specific issues for expert determinations; (4) permit summary disposition on written submissions; (5) waive the right to appeal (or, alternatively, allow appeals as permitted by law); (6) allow joinder and consolidation in certain circumstances; (7) include class action provisions; (8) empower the arbitrator to decide the case based on the equities (*ex aequo et bono*); (9) provide for a special type of arbitration (such as high-low or baseball arbitration); or (10) provide for online dispute resolution mechanisms.

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ARBITRATOR DECISION-MAKING: UNCONSCIOUS PSYCHOLOGICAL INFLUENCES AND WHAT YOU CAN DO ABOUT THEM

*Edna Sussman**

> *"Most studies of arbitration are devoted to discussions about the applicable law or the various procedural rules It seems far more important to try to analyze how and why arbitrators make up their minds"*
> Robert Coulson, President
> American Arbitration Association, 1990[1]

I. INTRODUCTION

Mr. Coulson's discussion of what was known at the time about psychological influences on arbitrator decision-making presaged the vigorous discussion of that subject which developed recently, some 20 years later. With the explosion of best-selling books on decision-making and the popularization of the psychological learning on the subject,[2] attention has turned to its applicability to arbitrators. Presentations at meetings of the International Bar Association,[3] the Swiss Arbitration Association and Brunel University[4] in 2013 and the upcoming International Council for Commercial Arbitration ('ICCA") Congress in 2014 have all focused on arbitral decision-making and the role of psychology.[5]

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[1] Robert Coulson, *The Decisionmaking Process in Arbitration*, 45(3) ARB. J. 37, 37 (1990).

[2] Recent best-selling books on the subject include: DANIEL KAHNEMAN, THINKING FAST AND SLOW (2011); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2009); DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2010); MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING (2005).

[3] For a report on this session, see Allison Ross, *What Goes on in Arbitrator Deliberations?*, 8(2) GLOBAL ARB. REV. (April 30, 2013).

[4] Summaries of the presentations delivered at the Brunel conference are available at http://www.brunel.ac.uk/law/research/events/bcsiacbi-brunel-centre-for-the-study-of-international-arbitration-and-cross-border-investment/ne_283957.

[5] In an earlier burst of interest, a series of papers on the subject were delivered at the ICCA Congress in 2002. *See* papers collected as *The Psychological Aspects of Dispute*

The field of psychology is immense and the number of biases, i.e. unconscious psychological influences, identified by those that study the subject is far beyond what can be discussed in a single article. This article focuses on a few of the more significant, and offers suggestions for both arbitrators and counsel to overcome them or at least lessen their influence.[6]

The literature which studies the psychological phenomena that are the subject of this article refers to them as "biases." Because the word "bias" has such profound negative connotations in the field of arbitration and forms the basis for the extensive learning on arbitrator disclosures and challenges which are not the subject of this article, this article borrows the nomenclature used by Professor Guthrie, and refers to biases as "blinders."[7] The biases/blinders discussed here are those that are simply human nature. While constraints imposed by the law to increase certainty and predictability, such as specifying elements for causes of action and establishing burdens of proof, are effective to some degree, ultimately decisions are made by judges and arbitrators who are human beings. Their minds function anatomically just as do the minds of others. Legal training cannot and does not alter that fundamental reality.

The human brain has both an intuitive and a deliberative component, a fact long known and now scientifically proven by the study of neuroscience.[8] Plato, in discussing what drives people's actions, used the image of two horses, a good horse governed by reason and a bad horse who hurries along violently and without control.[9] Descartes wrote about "intuition and deduction" as the way to arrive at

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Resolution, INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS, ICCA Congress Series, No. 11, London 2002 (Albert Jan van den Berg ed., 2003). But only in the last few years has concerted attention been devoted to the interface of psychology and arbitration.

[6] For other discussions of arbitrators and psychology, see Christopher Drahozal, *A Behavioral Analysis of Private Judging*, 67 LAW & CONTEMPORARY PROBLEMS 105 (2004) (reviewing the research as of 2004 on decision-making by arbitrators); Doak Bishop, *The Quality of Arbitral Decision Making and Justification*, 6(4) WORLD ARB. & MED. REV. 801 (2012) (discussing the anchoring effect, the framing effect, the availability heuristic, the halo effect, and the narrative fallacy); Lucy Reed, *Arbitral Decision-Making. Art, Science or Sport?* The Kaplan Lecture 2012, *available at* http://www.arbitration-icca.org/media/1/13581569903770/reed_tribunal_decision-making.pdf (discussing the anchoring effect, hindsight bias, egocentric bias, cultural effects and extremeness aversion).

[7] "Blinders" is the terminology used by Professor Guthrie in Chris Guthrie, *Misjudging*, 7 NEV. L. J. 420, 420 (2007) [hereinafter Misjudging].

[8] For a historical perspective on the concept of the dual mind, see Keith Frankish & Jonathan St. B. T. Evans, *The Duality of Mind: An Historical Perspective*, *in* TWO MINDS: DUAL PROCESSES AND BEYOND (Jonathan St. B. T. Evans & Keith Frankish eds., 2009).

[9] PLATO, PHAEDRUS 34-36 (Christopher Rowe trans., 2005). In *The Republic*, Plato couched it differently and referred to three parts rather than two: reason, spirit and appetite, with reason seeking to control the other two. Thus, one could combine spirit and appetite to arrive at the dual model. PLATO, REPUBLIC (Robin Waterfield trans., Oxford University Press 1993).

knowledge.[10] Recently Nobel Prize winner Kahneman popularized what he refers to as System 1 – our fast, automatic, high capacity, low effort, and intuitive mode, and System 2 – our slow, deliberate, limited capacity and high-effort mode.[11] His modern, research-based analysis essentially posits that we cannot function without both and that human decision-making operates with System 1 making intuitive judgments, which are sometimes modified by System 2's deliberative process. This dichotomy mirrors the two traditional models with which judging has traditionally been viewed: the "formalist" model pursuant to which it is believed that judges apply the law to the facts in a logical and deliberative way, and the "realist" model pursuant to which it is believed that judges follow their intuition to reach their judgment and later rationalize their judgment with reasoning.[12]

Scholars have explored systems 1 and 2 as they impact legal decision-making. Research has shown that, as with all human beings, the intuitive reactions of System 1 play a significant role in judges' decision-making.[13] While there is a lack of agreement as to whether there has been sufficient study of the subject to draw conclusions as to the extent to which a judge's deliberative faculties are invoked to override the intuitive reaction,[14] there is no question that System 1 is operative and impacts a judge's decision-making as it does for everyone. Given the similarity of the tasks, one must conclude that arbitrators' decision-making is similarly impacted.[15]

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[10] RENE DESCARTES, RULES FOR THE DIRECTION OF THE NATURAL INTELLIGENCE, Rule III, at 79 (George Heffernan ed. & trans., Rodopi 1998). *See also Rules for the Direction of the Native Intelligence, in* DESCARTES, SELECTED PHILOSOPHICAL WRITINGS (John Cottingham trans., Cambridge University Press 1988) (written 1626, published 1684).

[11] KAHNEMAN, *supra* note 2, at 19-105.

[12] Chris Guthrie, Jeffrey Rachlinski & Andrew Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. R. 101, 102-03 (2007) (The authors are two law professors and a U.S. magistrate). *See also* Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L. J. 1 (1998) (the author offers a comprehensive review of the prior thinking about judicial decision making).

[13] *Blinking on the Bench, supra* note 12; Anna Ronkainen, *Dual-Process Cognition and Legal Reasoning, in* ARGUMENTATION 2011: INTERNATIONAL CONFERENCE ON ALTERNATIVE METHODS OF ARGUMENTATION IN LAW I-32, (Michał Araszkiewicz et al. eds., 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2004336; Eyal Peer & Eyal Gamliel, *Heuristics and Biases in Judicial Decisions*, 49 COURT REVIEW 114 (2013), *available at* http://www.andrew.cmu.edu/user/epeer/Eyal_Peer/Publications_files/Heuristics%20and%20biases%20in%20judicial%20decisions.pdf.

[14] See Frederick Schauer, *Is There a Psychology of Judging?, in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 103-20 (David Klein & Gregory Mitchell eds., 2010) (urging that more research be done to examine whether judges diverge in deep and cognitively significant ways from other human beings in judicial decision-making lacking their training and experience). *See also* Christopher Drahozal, *Behavior Analysis of Arbitral Decision Making, in* TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION 319-37 (Christopher Drahozal & Richard Naimark eds., 2005).

[15] Drahozal, *supra* note 6; *see also* Donald Wittman, *Arbitration in the Shadow of a Jury Trial Comparing Arbitrator and Jury Verdicts,* DISPUTE RESOLUTION JOURNAL 59

Jurists have long recognized the power of the unconscious. As Justice Cardozo wrote almost 100 years ago, "Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge."[16]

The English judges have also recognized the unconscious influence. As Lord Goff said, "[T]here is also the simple fact that bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias."[17]

Similarly Judge Frank, an early proponent of the realist model of judicial decision-making, wrote, "Judges are not a distinct race . . . And their judging must be substantially like that of other men."[18] He cautioned jurists to take note and attempt to remedy the impact of the unconscious: "The conscientious judge will, as far as possible, make himself aware of his biases . . . and by that very self-knowledge nullify their effect."[19]

U.S. Supreme Court Justice Scalia, in his book on persuasive advocacy, advises counsel to address this aspect of the decision-making process if they wish to prevail: "While computers function solely on logic, human beings do not. All sorts of extraneous factors – emotions, biases, preferences – can intervene, most of which you can do absolutely nothing about (except play upon them, if you happen to know what they are)."[20]

A growing body of scholarship has developed suggesting that one needs to look at both the intuitive and the deductive models, suggesting that "judges rely on their intuitions, but sometimes override their intuitions with deliberative decisions." They propose an "'intuitive override' model of judicial decision making that can best be characterized as realistic formalism... [which] recognizes the power of the judicial hunch and... recognizes the importance of rule-based deliberation as a means of constraining the inevitable, but oft-times undesirable influence of intuition."[21]

It is the unconscious intuitive processes, the blinders, which are addressed in this article with suggestions to foster a more robust deliberative overlay and improve the quality of decisions by arbitrators. In order to provide a context that reflects actual arbitrator decision making, I conducted a survey of arbitrators in October of 2012 (the "2012 Arbitrators Survey"). The survey, which was distributed both in the U.S. and to colleagues around the world, drew 401

(2003-2004) (finding that monetary outcomes did not differ significantly between arbitrators and juries in automobile accident cases).

[16] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 107 (Quid Pro Books 2010), *original publication* (Yale University Press 1921).

[17] R v. Gough, [1993] AC 646, 659, (HL).

[18] JEROME FRANK, LAW AND THE MODERN MIND 105-106 (1930).

[19] In re J.P. Linahan, 138 F. 2d 650, 652 (2d Cir. 1943).

[20] Antonin Scalia, *Introduction, in* ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES (2008).

[21] Chris Guthrie, Andrew J. Wistrich & Jeffrey J. Rachlinski, *Judicial Intuition 3*, *available at* http://law.vanderbilt.edu/files/archive/Judicial_Intuition.pdf.

responses.[22] The relevant survey results are reported where they illustrate and amplify the psychological influence discussed.[23]

II. UNCONSCIOUS BLINDERS

Guthrie, Wistrich and Rachlinski, in their leading works on the subject of judicial decision-making, addressed the question of why it can be difficult to get a decision in a case right. They constructed a series of scenarios and presented them to 265 trial court judges as part of their study.[24] They identified three sets of blinders that are the psychological influences that can lead to erroneous decisions: informational blinders, cognitive blinders and attitudinal blinders.[25] These categorizations are useful and are adopted here.

A. *Informational Blinders – Inadmissible Evidence*

1. *The 2012 Arbitrators Survey*

Question: Do you exclude evidence that is not admissible under the evidentiary standards you believe would be appropriate outside the arbitration forum rather than take the evidence and give it such weight as you deem appropriate?

Always	1%
Usually (i.e., around 75% of the time)	5.1%
Often (i.e., around 50% of the time)	4.8%
Sometimes (i.e., around 25% of the time)	55.2%
Never	33.9%[26]

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[22] The survey was disseminated by e-mail to several arbitration list serves. Of the 401 respondents, 79% were from the United States, 12% were from Europe, 5% were from North America outside the United States, and the remainder were from Asia, Latin America and Africa. Over 55% of the respondents had served as an arbitrator in over 50 cases while 20% had served as an arbitrator in between 21 and 50 cases. Seventy-eight percent of the respondents were male and 22% were female. Forty-two percent were born between 1941 and 1950, 20% were born in 1940 or before and the remainder were born after 1951. While this sample may not be completely representative of the overall population of arbitrators, this survey provides a useful benchmark.

[23] For results of another survey conducted with arbitrators focusing on psychological aspects, see Sophie Nappert & Dieter Flader, *Psychological Factors in the Arbitral Process*, *in* THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION 121 (Doak Bishop & Edward G. Kehoe eds., 2010).

[24] Andrew Wistrich, Chris Guthrie & Jeffrey Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding,* 153 U. PA. L. Rev. 1251, 1279-81 (2005); *See also* Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAVIORAL SCIENCES AND THE LAW 113 (1994).

[25] Misjudging, *supra* note 7, at 420.

[26] For all questions, in order to give context to the numbers, the survey defined "Usually" as around 75% of the time; "Often" as around 50% of the time and

2. *The Empirical Studies*

Study 1: To illustrate the impact of informational blinders several experiments were conducted with groups of judges in the United States to ascertain whether information that was inadmissible as evidence in court impacted decision-making. In the first experiment, half of the judges saw a document claimed to be protected by attorney-client privilege which was devastating to plaintiff's case. Seventy-five percent of those judges ruled that the communication was privileged and excluded it. Half of the judges, who constituted the control group, did not see the document. Of the judges who did not see the document, 55% found in favor of plaintiff, while of the judges who saw the document and ruled that it was privileged, 29% found for the plaintiff. [27]

Study 2: In the second experiment, subsequent remedial measures which are not admissible under the federal rules of evidence in the United States were in issue. The case study concerned a gasoline can which flared up and caused a bad burn. The corporate defendant responded by saying that such flare ups almost never happened. Half of the judges saw a warning and recall sent by the company two years later recalling the product and warning of the possibility of flashbacks in the gasoline storage containers. The company moved to exclude the evidence as a subsequent remedial measure and the evidence was excluded. Of the judges who were exposed to the excluded evidence, 75% ruled in favor of the defendant, while 100% of the judges in the control group who did not see the recall notice found no liability.[28]

Study 3: The third experiment concerned a prior criminal conviction. The plaintiff was injured by a piece of machinery in a products liability case. The defendant claimed that the plaintiff was exaggerating his injury and introduced evidence of the plaintiff's conviction for swindling old ladies in a scheme 12 years earlier. Eighty percent of the judges who saw this evidence suppressed it on the grounds that its prejudicial effect substantially outweighed its probative value. The judges who had seen the evidence of the prior criminal conviction awarded a median damages amount of $400,000, while those who had not seen it awarded a median damages amount of $500,000.[29]

3. *Implications for Arbitration*

It is not surprising that judges, and undoubtedly arbitrators, are not able to unring the bell, as these experiments demonstrate. The formal rules of evidence are generally not applied in arbitration. For example, the IBA Rules on the Taking

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"Sometimes" as around 25% of the time. The order of the possible responses was randomized where appropriate to avoid possible effects of presentation order.

[27] Inadmissible Information, *supra* note 24 at 1294-98.

[28] Misjudging, *supra* note 7 at 422-24.

[29] Inadmissible Information, *supra* note 24, at 1304-1308.

of Evidence[30] (the "IBA Rules") provide some guidance, but in leaving it to the arbitrator to determine the "admissibility, relevance, materiality and weight of the evidence,"[31] they are a far cry from imposing standards of admissibility similar to formal rules of evidence.

Concerned principally about making sure that the parties have a full and fair opportunity to present their case and mindful of the time and cost that would be incurred if formal rules of evidence were to be applied, arbitrators tend to allow inadmissible evidence. The survey results revealed that 33% of the arbitrator respondents never excluded evidence and 55% excluded evidence only about 25% of the time. Thus 88% of arbitrators admit evidence even though it is inadmissible under evidentiary standards at least 75 % of the time. Only 1% of the arbitrators always exclude such evidence.

In light of these findings, should arbitrators be more willing to exclude evidence that does not meet evidentiary standards? Should arbitrators be more careful to ensure that they are not giving undue weight to unreliable evidence that enters the record? What does it mean when arbitrators say they will give evidence as to which an objection is lodged the "weight it deserves"? What can arbitrators do to try to overcome this blinder?

Concern about protecting the award and forestalling the creation of grounds for challenge, which even if without merit prolong resolution of the dispute and cause parties to incur significant expense, understandably cause arbitrators to act as the survey indicated. Moreover, studies have shown that parties are more likely to accept and honor a decision if they perceive the process to have been fair; the admission of evidence they offer and acceptance of their "voice" in the tribunal's proceedings, enhances their perception of procedural justice, even if ultimately that evidence is not influential.[32] Given the increasing proclivity of parties to challenge awards, arbitrators' practice of generally admitting evidence serves important objectives.

But arbitrators should take care to try to counter this blinder. First and foremost, arbitrators should really do what they say they will do and consciously weigh the reliability of evidence they have promised to assess as to weight. Reviewing preliminary conclusions of the case to see if the outcome would differ if unreliable evidence admitted on that basis had not been introduced may serve as a check by showing the arbitrators the extent to which such pieces of evidence have influenced their thinking.

A special situation presents itself when the tribunal is asked to review documents to determine a privilege objection. If the determination cannot be made without a review of the documents and a demand is made for such a review,

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[30] International Bar Association, RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (2010).

[31] *Id* at Art. 9(1).

[32] Shari Seidman Diamond, *Psychological Aspects of Dispute Resolution: Issue for International Arbitration, in* INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS, *supra* note 5, at 631-33.

should the tribunal perform that task itself knowing that it may be influenced by what it sees?[33] Article 3(8) of the IBA Rules, provides that in exceptional circumstances the tribunal may, after consultation with the parties, appoint an independent and impartial expert to conduct the review. While the appointment of such an independent expert may cost time and money, in light of the danger of prejudice, if a party asks for such an independent review, careful consideration should be given to all of the relevant factors before deciding on the tribunal's response.

A similar issue arises with respect to expert testimony. Arbitrators frequently accept experts who might not qualify to testify as to the subject of their testimony if they were presented in court and arbitrators often permit experts to stray from their area of expertise to offer additional opinions. Should arbitrators be so lax in admitting expert testimony? At the very least arbitrators should be aware of the psychological influence such testimony may have on their thinking and carefully assess the credentials of the experts in determining the weight to be given.

For their part, should counsel point out the inadmissibility and unreliability of evidence, if appropriate, more than is now common in order to highlight the matter for the tribunal? Or, as studies have shown with juries who remember the evidence that was excluded even more vividly than the evidence that was admitted,[34] do counsel risk exacerbating the problem by focusing the arbitrators on the problematic document or testimony? Should counsel do more to focus the tribunal's attention on the lack of expertise of a proffered expert?

Counsel should carefully weigh the pros and cons in considering their alternatives. While no one would argue for turning an arbitration into a courtroom-style debate about the admissibility of every piece of evidence, a brief, one-word objection on critical pieces of evidence as to which a valid evidentiary objection can be lodged may be advisable in some circumstances. If there are many such pieces of evidence that are important, it may be advisable to offer evidentiary objections to the tribunal in a succinct filing. Such assistance by counsel may cause the tribunal to more carefully assess the reliability of such evidence.

B. *Cognitive Blinders – Heuristics*

Cognitive blinders are patterns of deviation in judgment which can lead to perceptual distortion, inaccurate judgment, or illogical interpretation. They include heuristics, mental short cuts that permit people to solve problems, make

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[33] Courts recognize the prejudice that may result from an *in camera* review of documents as to which privilege is asserted because it "may be difficult to 'unring the bell.'" *See, e g.,* National Labor Relations Board v Jackson Hospital Corp., 257 F.R.D. 302, 307 (D. Col. 2009).

[34] Shari Siedman Diamond and Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 Va. L. Rev. 1857, 1865 (2001); Joel D. Lieberman and Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence,* 6 PSYCHOL. PUB. POL'Y & L. 677, 703 (2000).

judgments and react to situations quickly and efficiently. These rule-of-thumb strategies shorten decision-making time and allow people to function without constantly stopping to think about the next course of action.

1. *Hindsight Blinder*

a. *The empirical study*

Study 1: The study required assessing the reasonableness of conduct in foresight and in hindsight. The case presented involved the question of whether a failure to take precautions against flooding was negligent. Liability was to be found if at the time of the alleged unlawful conduct it were found that there was more than a 10% likelihood of a flood. All of the judges received the same set of facts but half of the judges were told that no precaution was taken and that later a flood costing $1 million occurred. The other half of the judges, the control group, were told that no precaution was taken, but were not told about the flood. Of the control group who were not informed about the flood, 24% found negligence and that the company should have taken precautions. Of the judges who were told about the flood, 57% found negligence and that precautions should have been taken, demonstrating the tendency to overestimate the predictability of past events based on later events.[35]

b. *Implications for arbitration*

The very nature of arbitration calls for an evaluation of events after the fact, thus making the process particularly vulnerable to the hindsight blinder. Hindsight has been described as the "most troublesome problem for judges."[36] Arbitrators understand this difficulty and often speak of the need to avoid being influenced by hindsight, but do they adequately appreciate the difficulty of putting aside what ultimately occurred in deciding what happened or should have happened in the past? Judicial decisions such as those relating to stock values and predictions of the market have been laid by some scholars at the feet of hindsight.[37]

The burden of proof may in some instances be of assistance in countering hindsight.[38] If one isolates and lists the facts that were proven as of the relevant time frame from later biasing events and apply the burden of proof just to the earlier facts, it might assist in minimizing the impact of hindsight. Counsel may wish to emphasize precisely which facts in the record are properly presented on an

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[35] Misjudging, *supra* note 7, at 432-33, *citing* Kim A. Kamin & Jeffrey Rachlinski, *Ex Post Ex Ante. Determining Liability in Hindsight*, 19 LAW AND HUMAN BEHAVIOR 89 (1995).

[36] Chris Guthrie, Jeffrey Rachlinski, & Andrew J. Wistrich, *Inside the Judicial Mind,* 86 CORNELL L. REV. 777, 825 (2001); Mitu Gulati, Jeffrey Rachlinski & Donald Langevoort, *Fraud by Hindsight,* 98 NW. U. L. REV. 773, 776 (2004) ([t]he influence of hindsight on judgment is notoriously difficult to avoid").

[37] *Id*

[38] Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 615-16 (1998).

issue and stress that it is based on those facts alone that the tribunal must rule with reference to the burden of proof.

2. *Anchoring Blinder*

a. *The 2012 arbitrator survey*

Which do you find more difficult to decide: liability or quantum of damages?

Liability	18.7%
Damages	43.7%
Both the same	37.6%

b. *The empirical studies*

Study 1: The first case involved an auto accident which resulted in an amputated arm. The same facts were presented to all of the judges but some judges heard a demand of $10 million in a settlement conference while the control group heard a demand for "a lot of money." The judges who heard the $10,000,000 demand awarded a mean of $2,210,000 while the judges who only heard a large number awarded a mean of $808,000.[39]

Study 2: The second dispute presented to the judges involved a pedestrian hit by a truck who was badly injured. He must now use a wheel chair and was seeking lost wages and damages for pain and suffering. The braking system on the truck was faulty. The defendant moved to dismiss for failure to meet the court's $75,000 jurisdictional minimum. All but two judges who heard that motion denied it. The judges in the control group did not hear the motion. The judges who did not hear the motion awarded a mean of $1,200,000. The judges who heard the motion awarded a mean of $880,000.[40]

Study 3: The subjects were asked to guess the average temperature of San Francisco. The anchor group was first asked whether the temperature was higher or lower than 558°F or 292°C. After answering this question, the anchor group was asked to give a number estimating San Francisco's average temperature. The anchor group provided higher estimates of average temperature than the control group. They had latched on to the initial high, although obviously irrelevant, figures they had heard before the final question was posed to them.[41]

c. *Implications for arbitration*

Arbitrators may question whether the anchoring studies cited are of any significance to their practice since most of their cases involve commercial or financial disputes in which there is no element of damages as discretionary as a determination of the value of an amputated arm or of pain and suffering and considerable evidence of damages is offered. But there is often considerable room

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[39] Inadmissible Information, *supra* note 24, at 1288-91.

[40] Misjudging, *supra* note 7, at 43.

[41] Inside the Judicial Mind, *supra* note 36, at 788-89.

for differences of opinion in determining which damages calculation to believe, which expert is credible, and what aspects of the damages analysis should be adopted. Numbers are suggestive, and high or low numbers, even those that are presented at the start of the arbitration, can impact an arbitrator's thinking despite the careful damages analysis conducted based on the concrete evidence presented by the parties. Study after study has proven that people will be anchored in their response by numbers that bear no relationship to the question they are asked to answer and will adjust from it.

Where it appears that one arbitrator is leaning heavily in one direction and has in mind a damages figure that does not seem to comport with the evidence, the chair might want to consider being the first one to suggest a damages figure. Such an introduction of a number that the chair believes is appropriate may deflect the anchoring bias as the deliberations proceed.

As the survey results demonstrate, many arbitrators find that quantifying damages is often more difficult than determining liability. There is often no clear right answer, perhaps opening the door for the influence of the anchoring blinder. Being mindful of the anchoring blinder should assist arbitrators to avoid falling prey to it. Counsel should carefully weigh in each case, based on its particular circumstances, whether they are better served offering a number that is very high or very low in the hope that it will influence the arbitrator to unconsciously react with the anchoring bias, or whether in doing so they will lose all credibility and would be better served by presenting a number that is credible, and supporting it in such a convincing fashion that they will overcome any anchoring blinder.

3. *Framing Blinder*

a. *The empirical studies*

Study 1: In this experiment the same two sets of adjectives in a different order were used to describe two people.

> Alan- intelligent-industrious-impulsive-critical-stubborn-envious
> Ben- envious-stubborn-critical-impulsive-industrious-intelligent

The study found that the initial adjective colored the subjects' assessment of the later adjectives, leading the experiment subjects to view Alan as an able person with some shortcomings and Ben as a problem person whose abilities are hampered by serious difficulties.[42]

Study 2: The subjects were all shown the same film. Then they were asked how fast the cars were going using different words to describe the moment of contact. The responses varied depending on the word used.

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[42] Inadmissible Information, *supra* note 24, at 1266.

Smashed	40 MPH
Collided	39 MPH
Bumped	38 MPH
Hit	34 MPH
Contacted	31 MPH[43]

b. *Implications for arbitration*

Every arbitration counsel knows that how the story is presented is crucial to persuading the tribunal to accept their version of the case. The words that are chosen to express the story, the elements of the story that are emphasized, the order and manner in which parts of the story are presented are essential elements in persuasive advocacy. Arbitrators are conscious of the fact that differences in the quality of the lawyering can affect their decision. Without overstepping and assisting counsel in inappropriate ways, arbitrators do try to look beyond the manner and style of presentations to ascertain the true story. Again, recognition of the psychological influence that a well-crafted presentation can have should serve to heighten arbitrator's ability to improve his or her decision-making. Counsel, of course, should use their skills to the best of their ability and present their story in the most favorable light and in a manner most likely to have the psychological impact they desire.

4. *Coherence and Ego-Centricity Blinders*

a. *The 2012 arbitrator survey*

On a scale of 1 to 10 with 10 being the most certain, how certain are you that you have reached the correct result by the time you sign the award?

1	0.3%
2	0%
3	0.3%
4	0%
5	0.3%
6	0.3%
7	3.3%
8	16.4%
9	52.4%
10	27%

b. *Empirical studies*

Study 1: Judges were asked to estimate their reversal rate on appeal by stating what quartile they would fall into as compared to other judges, with the top

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[43] Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction An Example of the Interaction between Language and Memory*, 13 J. OF VERBAL LEARNING AND VERBAL BEHAVIOR 13, 385-86 (1974).

quartile being the one with the highest reversal rate. Fifty-six percent put themselves in the lowest quartile and 31% in the second lowest quartile. Thus, 87% of the judges thought at least half their peers had higher reversal records on appeal,[44] confirming that "the psychology of judging includes the belief that one is almost always (some judges think always) right."[45]

c. *Implications for arbitration*

The coherence blinder is the psychological model which examines the shift from conflict to closure. During the course of deciding a case the judge's or arbitrator's view of the dispute gradually moves towards a state of coherence so that the arguments that support one result are endorsed and the opposing arguments are rejected. By the end of this process one view of the case emerges as the winning position.[46]

Justice Cardozo explained the process most eloquently:

> Then suddenly the fog has lifted. I have reached a stage of mental peace. I know in a vague way that there is doubt whether my conclusion is right. I must needs admit the doubt in view of the travail that I suffered before landing at the haven. I cannot quarrel with anyone who refuses to go along with me; and yet, for me, however it may be for others, the judgment reached with so much pain has become the only possible conclusion, the antecedent doubts merged, and finally extinguished, in the calmness of conviction.[47]

Once the state of coherence is reached, certainty, a state the mind strives for, takes hold. Jurists have long commented on the human inclination to reach a state of certainty which leads to conviction as to the accuracy of conclusions reached. As Judge Posner remarked, "People hate being in a state of doubt and will do whatever is necessary to move from doubt to belief."[48] Justice Holmes similarly stated, "The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and repose which is in every human mind."[49] Robert Burton in his book on the subject discussed this phenomenon of reaching certainty in physical terms with reference to the brain's mesolimbic dopamine system which provides feelings of pleasure.[50]

Judges have used the concept of the hunch to explain their arrival at a decision. Judge Hutcheson, who was undergoing Freudian psychoanalysis, originated the concept in an early work: "after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play,

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[44] Misjudging, *supra* note 7, at 436-37.

[45] RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 192 (1990).

[46] Simon, *supra* note 12, at 20.

[47] Benjamin N. Cardozo, *The Paradoxes of the Legal Science*, *in* THE SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 80-81 (Margaret E. Hall ed., 1947).

[48] Richard Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988).

[49] Oliver Wendall Holmes, Jr., *The Path of the Law*, 10 HARV. L. R. 457, 465 (1897).

[50] Robert Burton, ON BEING CERTAIN: BELIEVING YOU ARE RIGHT EVEN IF YOU ARE NOT 86-101 (2008).

and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision, and . . . sheds its light along the way."[51] Judge Friendly spoke of the decisional conclusion as "flashes before the shaving mirror in the morning" which he attributes to trained intuition.[52]

But the question must be asked, does feeling certain upon reaching a state of coherence provide assurance that the result reached is correct or is this really just overconfidence leading to the "illusion of validity."[53] Overconfidence may lead to premature conclusions and insufficient consideration of alternative possibilities, thus decreasing judgment accuracy.[54] Is the certainty with which a conclusion is reached also the natural result of yet another blinder, the confirmation blinder?

5. *Confirmation Blinder*

a. *2012 arbitrator survey*

Do you form a preliminary view of the merits of the case after receiving the prehearing submissions?

Always	3.5%
Usually	14.1%
Often	19.4%
Sometimes	50.5%
Never	12.4%

In what percentage of your cases have you changed your mind and rendered an award that is at variance with your prehearing preliminary view if formed?

0 -10%	9.9%
11 -20%	20.3%
21 -30%	31.3%
31 - 40%	16.6%
41 -50%	18.9%
Over 50%	8%

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[51] Judge Joseph C. Hutcheson, Jr., *The Judgment Intuitive. The Function of the "Hunch" in Judicial Decisions,* 14 CORNELL L. Q. 274, 288 (April 1929); *quoted in* Simon, *supra* note 12, at 119; *see also* Charles M.Yablon, *Justifying the Judge's Hunch· An Essay on Discretion*, 41 HASTINGS L. J. 231 (1990).

[52] Judge Henry J. Friendly, *Reactions of a Lawyer-Newly Become Judge*, 71 YALE L. J. 218, 230 (1961). *See also* R. George Wright, *The Role of Intuition in Judicial Decisionmaking,* 42 HOUSTON L.R. 1381 (2006).

[53] Raymond S. Nickerson, *Confirmation Bias· A Ubiquitous Phenomenon in Many Guises*, 2(2) REV. OF GENERAL PSYCHOLOGY 175, 188 (1998).

[54] Hal R. Arkes, et al., *Eliminating the Hindsight Bias*, 73(2) J. OF APPLIED PSYCHOLOGY 305, 307 (1988).

In Approximately what percentage of your cases have you changed your view of the case outcome while writing the award?

0 - 10%	55.4%
11 - 20%	28.4%
21 - 35%	10.1%
36 - 50%	5.8%
Over 50%	0.3%

Which of the following practices do believe is better?

Share views early in the process and discuss reactions to the merits throughout the proceeding.

63.4%.

Wait until all the evidence is in before discussions among the arbitrators about the merits of the case.

26.8%

No opinion

9.8%

b. *Empirical studies*

Study 1: When a mind reader gives an analysis of one's character in essentially universally appropriate descriptive terms, people who want to believe that their minds are being read easily find substantiating evidence in what the mind reader says as they focus on what fits and discount what does not. They do not consider the possibility that equally accurate descriptions can be given if their minds were not being read.[55]

Study 2: A series of studies demonstrated that when a person draws a conclusion on the basis of information acquired and integrated over time, the information acquired early in the process is likely to carry more weight than that acquired later, the so-called primacy effect. People often form an opinion early in the process and then evaluate subsequently acquired information in a way that is partial to that opinion.[56]

c. *Implications for arbitration*

In the context of arbitral decision-making the confirmation blinder is a particularly pernicious blinder. All arbitrators say that they keep "an open mind" until the close of the hearing and surely arbitrators honestly believe that to be true. However, the psychological learning suggests this to be a blinder in and of itself.

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[55] Nickerson, *supra* note 53, at 180.

[56] *See* studies discussed in Nickerson, *supra* note 53, at 187; *see also* Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization The Effects of Prior Theories on Subsequently Considered Evidence*, 37(11) J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 2098 (1979).

Francis Bacon stated hundreds of years ago, "The first conclusion colors and brings into conformity with itself all that comes after."[57] A similar conclusion was reached by Waites and Lawrence, both lawyers and social psychologists known for their courtroom decision-making work, who concluded in their foremost article on the subject of psychology and arbitrators:

> A typical arbitrator concludes the initial phase with a single dominant story in mind . . . [A] sizeable percentage of arbitrators have established a clear leaning by the end of the opening statement (prior to any exposure to witnesses or evidence). This would mean that for most arbitrators, the actual arbitration presentation is a process of filtering through the evidence to test their individual hypothesis about the case—to either confirm or to alter their original notion of what the case story really is . . . Arbitrators . . . will make every effort to fit their perceptions of the facts and circumstances of the case into the story they have formed . . . Once a narrative has become firmly visualized, arbitrators will rarely change their opinions about what happened although they will occasionally change their minds about how the events in the case should be legally classified.[58]

The 2012 Arbitrator Survey results are instructive. Eighty-eight percent of the arbitrators formed a preliminary view of the merits of the case at least 25% of the time after only receiving the prehearing submissions, while 37% formed such views at least 50% of the time. Sixty percent of the arbitrators changed their preliminary determination 30% or less of the time. And still, 28.4% changed their minds while writing the award 11 to 20% of the time while 10.1% did so 21 to 35% of the time.

These results suggest that arbitrators do review the case as it progresses and are not necessarily as locked into their preliminary view as the confirmation blinder would suggest. The deliberative functions do appear to be operating and the confirmation blinder may not be as strong an influence on arbitrators as some of the other blinders. But is enough being done by arbitrators to counter the confirmation blinder? Is it the case in too many arbitrations that a conclusion reached early tends to be substantiated by later evidence as conflicting evidence is filtered out by the unconscious?

The law has recognized the impact of confirmation bias in the context of jury trials in the United States. Jurors are admonished to keep an open mind during the presentation of evidence and to form no conclusions until all the evidence has been presented and they have been instructed by the judge. The jurors are instructed not to talk about the case with one another until the judge sends them to commence the deliberation process. Studies conducted with mock jurors suggest

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[57] Francis Bacon, *Novum organum*, XLVI, *available at* http://intersci.ss.uci.edu/wiki/ebooks/BOOKS/Bacon/Novum%20Orgum%20Bacon.pdf (1620).

[58] Richard C. Waites & James E Lawrence, *Psychological Dynamics in International Arbitration Advocacy, in* THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION 69, 109-110, 114 (Doak Bishop & Edward G. Kehoe eds., 2010).

that such admonitions alone are insufficient to accomplish their purpose, and that jurors often come to favor a particular verdict early in the trial process and deliver final verdicts consistent with their tentative conclusions.[59]

It is likely that the 27% of arbitrators whom the survey showed follow a similar protocol and wait until the conclusion of the evidence before talking to their fellow arbitrators about their reactions likely do so for the same reasons as the instructions to the juries: to avoid reaching decisions too early. But it is also likely that, like the findings of juries, this practice does not achieve its goal of forestalling a premature conclusion. Thus the 63% of arbitrators who believe that it is a best practice to share views early in the process and discuss reactions to the testimony and the developing merits throughout the proceeding are likely not, in fact, prejudicing a fair result. And many arbitrators would feel that many of the benefits of having three decision-makers would be lost if views and reactions could not be exchanged and debated during the course of the proceeding.

However, how those conversations are conducted can have a significant impact on whether or not the confirmation bias that is human nature is ameliorated. There are practices that can be followed by the arbitrators in the course of their discussions in a conscious effort to truly keep an open mind and forestall the impact of the confirmation blinder and ensure that all aspects of the case are being fully considered throughout.

Making sure that both "stories" are played for discussion throughout the proceeding would help. Many believe the role of the party-appointed arbitrator is to make sure the position asserted by his or her appointing party is understood. This can be viewed as a virtue as it may serve to forestall the confirmation blinder in that all arbitrators hear all sides throughout the process. But, it does pose the risk of the party-appointed arbitrator becoming increasingly convinced of his appointing party's position as the confirmation blinder strengthens.

To defuse this blinder and perhaps even counter to some extent any unconscious predisposition towards the position of the appointing party, consider whether it would be useful, in particular cases where an arbitrator seems unduly wedded to one view, to have the party-appointed arbitrators sum up the evidence each day over lunch, but have them switch which side's evidence they are marshaling from time to time. Any party-appointed arbitrator who does not perform this function in good faith and marshal the evidence competently will lose credibility in the tribunal.

If there are no party-appointed arbitrators, consider having the co-arbitrators develop the story from each party's perspective and marshal the evidence that supports each party's case continuously throughout the proceeding. It may also be helpful to have them switch sides from time to time so they don't develop a confirmation blinder in favor of the side they are presenting.

As arbitrators question witnesses they should make sure questions are asked that elicit the full story and not just questions that will confirm or support a preliminary view. If questions might be viewed as partial if asked by a party-

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[59] Nickerson, *supra*, note 53, at 193-194.

appointed arbitrator, the chair can be asked if he or she would be willing to pose those questions.

Whether such a process would lead to more dissents is a question that might be asked. The fact that there are very few dissents in commercial cases even where there are party-appointed arbitrators suggests that the risk is slim. In any case, it should be trumped by the importance of fairly hearing all sides of the case.

III. ATTITUDINAL BLINDERS – BACKGROUND AND EXPERIENCE

A. *Empirical Studies*

Study 1: In a striking study, researchers worked with staunch supporters of candidates Bush and Kerry in the 2004 U.S. presidential elections. Statements by the candidates were played for them while they were connected to a magnetic imaging device that measured the location and level of brain activity. The study demonstrated that only the intuitive parts of the brain (System 1) were triggered; the reasoning part (System 2) remained completely inactive as any negative information about their candidate was simply filtered out automatically. The same result was found when they played positive messages about the opposing candidates. The information never reached the deliberative part of the brain.[60]

Study 2: In an experiment conducted with arbitrators, twenty different panels of arbitrators listened to a tape of the same contract dispute. All were arbitrators, but half were brokers and half were manufacturers. The dispute concerned a sale of goods contract and the issue was whether or not the defendant broker had the right to cancel the contract. The comparison between the manufacturer arbitrators and broker arbitrators demonstrated that the brokers were far more likely to favor decisions for the broker defendant than were the manufacturers.[61]

B. *Implications for Arbitration*

Arbitrators are people and like all people have their own frames of reference, experiences and societal inputs that guide their thinking and their decision-making processes. Each arbitrator is uniquely influenced by his or her lifetime experiences and cultural influences and like judges is influenced by that background. As Justice Holmes said, "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices

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[60] Drew Westen et al., *Neural Bases of Motivated Reasoning An fMRI Study of Emotional Constraints and Partisan Political Judgment in the 2004 U.S Presidential Election,* 18(11) J. COGNITIVE SCIENCE 1947 (2006).

[61] Diamond, *supra* note 32, *citing* Ernest A. Haggard & Soia Mentschikoff, *Responsible Decision-Making in Dispute Settlement, in* LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES, 277 (June Louin Tapp and Felicia J. Levine eds., 1977).

which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." [62]

His comment was echoed by Justice Cardozo who said, "If you ask how [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge, just as the legislator gets it, from experience and study and reflection; in brief, from life itself."[63] The English judges similarly acknowledge that a judge's individual circumstances can predispose him/her. As Lord Phillips noted, "Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge toward a particular view of the evidence or issue before him."[64]

The influence of life's experience is best exemplified by Justice Stewart's words in a landmark obscenity case. In deciding that the offending item was not obscene, Justice Stewart summed up the basis for his conclusion, "I know it when I see it."[65]

Speaking of this aspect of human nature in the context of arbitrator decision-making, Shari Diamond referenced three psychological influences at the 2002 ICCA Congress. The "affinity effect" occurs when "decision-makers are influenced by their cultural backgrounds, their prior experiences, and their personal associations in formulating their understanding of and judging the behavior they must consider in reaching their decisions."[66] The "self-serving or egocentric bias" is the "tendency for people to reach judgments that are biased in a self-serving direction."[67] And, finally, the "expectancy effect" causes "beliefs about the world and preconceived notions about the likely credibility of particular types of witnesses [to] affect how decision-makers evaluate evidence" and causes decision-makers to be more "likely to reject information that is inconsistent with their beliefs and expectations."[68] Yet, people feel that they are free of prejudice or bias, the illusion of objectivity.[69]

IV. IMPROVING ARBITRATOR DECISION-MAKING

A great deal has been written about how a reasoned award should be written and what is required to satisfy the requirements of a reasoned award, but further attention should also be given to the process of reaching a decision on the merits and avoiding blinders in the process. Psychological studies conclude that simply

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[62] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Dover Publ'ns 1991) (originally published 1881); *see also* RICHARD A. POSNER, HOW JUDGES THINK (2008) (discussion of political and personal elements in judging).

[63] CARDOZO, *supra* note 16, at 71.

[64] *Re* Medicaments and Related Classes of Goods (No.2), [2001] 1 WLR 700, 711, ¶ 37.

[65] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J. concurring).

[66] Diamond, *supra* note 32, at 336-37.

[67] *Id.* at 337.

[68] *Id.* at 337-38.

[69] Mahzarin R. Banaji et al., *How (Un)ethical Are You ?*, HARV. BUS. REV. 3 (Dec. 2003).

understanding the need to avoid blinders and the desire to overcome one's blinders and to correct them is not sufficient to cure the problem. Awareness of the mental contaminant and motivation to correct it has been found not to lead to control. Human nature and the workings of the brain are such that, even if people know they have blinders and understand that they have predispositions, they do not believe those blinders infect their judgment.[70] Indeed, they recognize that the judgment of others is affected by blinders, but remain convinced that they themselves are unaffected. This has been labeled as the "bias blind spot."[71]

While there is strong support in the psychological literature for the bias blind spot conclusion, other psychologists argue, based on a different set of studies, that people will view information more objectively and rely less on intuitive reactions if they are motivated. Speaking about judges, they describe this as "bottom-up" decision-making (matching the formalist perspective on judicial decision-making) and conclude that it can be motivated by a fear of invalidity, a feeling of accountability for decisions taken, and/or a desire to be accurate. They report that given sufficient time availability, such motivations will lead to a more deliberative process.[72] Surely all of these motivations are applicable to arbitrators who care deeply about making the right decision and feel a strong personal sense of responsibility to the parties and to the other members of the tribunal to whom they are accountable.

While humans cannot function without the operation of the intuitive part of the brain and it certainly has a role to play in all arbitrator functions, arbitrators owe it to the parties to take whatever steps they believe would be effective to counter their unconscious blinders and prompt the deliberative portion of the brain to engage fully in the assessment of all aspects of the case. The psychological research on debiasing techniques is far less advanced than the research that identifies biases.[73] However, some work has been done and the following

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[70] Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations,* 116(1) PSYCHOLOGICAL BULLETIN 125-26 (1994); Emily Pronin, Thomas Gilovich, & Lee Ross, *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111(3) PSYCHOLOGICAL REVIEW 781-82 (2004).

[71] Emily Pronin, Daniel Y. Linn & Lee Ross, *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28(3) PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 369 (2002). The truth of this conclusion was confirmed in my own personal experience. I gave a talk on this subject at an arbitration conference and asked one of my esteemed colleagues during the break what he thought of the presentation. He said that the presentation was all about judges and we are arbitrators. The clear implication of his reaction was that somehow we arbitrators are different and not subject to the same biases and blinders as judges.

[72] Brandon Bartels, *Top-Down and Bottom-Up Models of Judicial Reasoning, in* THE PSYCHOLOGY OF JUDICIAL DECISION-MAKING, *supra* note 14, at 46, 48.

[73] Scott O. Lilienfeld, Rachel Ammirati & Kristin Landfield, *Giving Debiasing Away, Can Psychological Research on Correcting Cognitive Errors Promote Human Welfare?*, 4(4) PERSEPECTIVES ON PSYCHOLOGICAL SCIENCE 390, 391 (2009).

suggestions are offered to arbitrators to assist in assuring the active engagement of the brain's deliberative faculties and hopefully the reduction of the influence of unconscious blinders. Many arbitrators already take some of these steps, and the 2012 Arbitrator Survey suggests that many perform well in applying their deliberative functions to the decision-making process, but there is value in developing a list and reviewing it for applicability and action to further counter psychological blinders:

- As you consider your decision and as you write the award consider the opposite side, assuming each to be correct.[74]
- Identify why you may be wrong, what are the important pieces of evidence that go the other way and why are they not reliable or credible.
- Consult your co-arbitrators and review all aspects of the facts and law and conclusions with them.[75]
- Make sure you elicit the independent thinking of each member of the tribunal.[76]
- Create a checklist with columns for each party and list the facts that favor that party.[77]
- Create a checklist listing the legal claims and the elements of each claim and review how and whether they have been met, looking at it from each side's perspective.[78]
- Reduce your reliance on memory; look for record citations for all of the important facts for both sides to ensure that you have recalled them correctly.[79]
- Replay how you reached your conclusion and think about what evidence you rejected and why, in reaching that conclusion.[80]

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[74] Yves Derains, *The Arbitrator's Deliberation,* 27 AM. U. INT'L L. REV. 911, 923 (2012); Charles G. Lord, Mark R. Lepper & Elizabeth Preston, *Considering the Opposite A Corrective Strategy for Social Judgment*, 47(6) J. PERSONALITY AND SOCIAL PSYCHOLOGY 1231, 1231-32 (1984).

[75] Ronkainen, *supra* note 13, at 12.

[76] JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS 109 (2012).

[77] Bishop, *supra* note 6, at 808-809. Benjamin Franklin gave similar advice 250 years ago. *Benjamin Franklin's letter to Joseph Priestley* (Sept. 19, 1772), *available at* http://www.procon.org/view.background-resource.php?resourceID=1474. Checklists create a mental schema and a forcing function that promotes careful deliberative analysis by disrupting the automatic intuitive response.

[78] *Blinking on the Bench*, *supra* note 12, at 138-140.

[79] Hal R. Arkes, *Principles in Judgment/Decision Making Research Pertinent to Legal Proceedings*, 7(4) BEHAVIORAL SCIENCES & THE LAW 429, 451 (1989).

[80] Baruch Fischhoff, *For Those Condemned to Study the Past: Reflections on Historical Judgment*, 4 NEW DIRECTIONS FOR METHODOLOGY OF SOCIAL AND BEHAVIORAL SCIENCE 79, 85 (1980).

- Write down your reasoning, even if you are issuing a bare award at the request of the parties.[81]
- Estimate the odds of being wrong. If you conclude they are too high, rethink the case until you are more certain of your conclusion.[82]
- Try to identify any significant evidence that would be inadmissible or is unreliable that may have influenced you and consider the outcome without that evidence.[83]
- Focus especially on the blinders that have been shown to affect judicial decision-makers, such as the anchoring and hindsight blinders, and affirmatively and consciously consider whether you may have been influenced by them.
- Don't take too many cases. Make sure you leave enough time to think through all of the issues, both factual and legal.[84]
- Leave time to sleep on the award so that you can continue to think about it and then go back and review it with fresh eyes.[85]
- Consider what evidence you would have needed presented to you in order to come to the opposite conclusion, and consider whether in fact such evidence was presented.
- Ask yourself what the losing party would feel that you overlooked in your analysis.
- Consider, if somebody were to have concluded the other way, how would he or she write the award and where and how would it differ.[86]
- Stay informed as the study of arbitral decision-making and psychology develops to learn more about blinders and improve your practices.[87]

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[81] Arkes, *supra* note 54, at 307; *Blinking on the Bench*, *supra* note 12, at 135-136.

[82] Jason Zweig, *How to Ignore the Yes-Man In Your Head*, WALL STREET J., Nov. 19, 2009, *available at* http://online.wsj.com/article/SB10001424052748703811604574533680037778184.html.

[83] *See* Lilienfeld et al., *supra* note 73, at 395.

[84] *See* Bartels, *supra* note 72, at 46; *see also* Steven L. Neuberg, T. Nicole Judice & Stephen G. West, *What the Need for Closure Scale Measures and What it Does Not: Toward Differentiating Among Related Epistemic Motives*, 72(6) J. PERSONALITY AND SOCIAL PSYCHOLOGY 1396, 1396-97 (1997) (citing studies that showed that when a person is motivated by a desire for closure activated by time pressures they are likely to exhibit the impact of the primacy effect (persuaded by what was presented first), make stereotypical judgments, assimilate new information to existing active beliefs and, in the presence of prior information, resist persuasion).

[85] Shai Danziger, Jonathan Levav & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108:17 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA 6889 (2011), *available at* http://www.pnas.org/content/108/17/6889.full.pdf+html?sid=9a2ec5a6-0510-477a-bec3-c50c5a7c8950 (demonstrating that fatigue and lack of nourishment affect decision-making by judges).

[86] Lord et al., *supra* note 74, at 1240.

[87] Lilienfeld et al., *supra* note 73, at 393.

The 2012 Arbitrator Survey results described in this article provide some perspectives on current practices with respect to a few of these steps. A follow-up survey could review whether the specific suggestions listed are in fact part of arbitrators' current practice.

Question: Do you review the evidentiary record before you prepare the award?

Response:	
Always	69.9%
Usually	17.8%
Often	7.3%
Sometimes	5%
Never	0%

Question: When you deliberate as a panel, how often do you review the evidence in favor of what you have preliminarily assessed to be the losing side?

Always	31.4%
Usually	22.4%
Often	21.1%
Sometimes	19.3%
Never	5.8%

Based on these survey results, it appears arbitrators can do more to counter their blinders. As reported, 46% of arbitrators review the evidence that supported what was preliminarily viewed to be the losing side when deliberating 50% or less of the time. And it is not clear if the arbitrators' responses as to their own review of evidence referred to looking for citations to support a conclusion or a review of evidence that supports both sides. As arbitrators learn more about the blinders that affect their thinking, best practices to foster a more engaged deliberative process is likely to evolve to improve the quality of decision-making.

V. ADVICE FOR ARBITRATION COUNSEL

It is common wisdom that one of the most important, if not the most important step, in the arbitration for a party is the selection of the arbitrator. Because arbitrators are not all the same and, as discussed above, their decisions may be greatly influenced by their background and experience, many have argued that the party-appointed system for arbitrator selection is a *sine qua non* if arbitration is to prosper. Parties wish to have one arbitrator with whom they feel comfortable and to whom they feel they can craft a presentation that will appeal. It has not been established that only the party-appointed system, which has been both severely criticized and roundly defended by leading scholars in recent years,[88] is the only

[88] Edna Sussman, *The Debate Unilateral Appointment of Arbitrators,* American Bar Association Section of International Law, I(1) ARBITRATION COMMITTEE NEWSLETTER 2 (July 2013) (discussing the subject and citing the leading articles on the debate: Jan

way to identify arbitrators that the parties would trust. But, as the discussion above makes clear, arbitrator selection is a critical part of the arbitration from the party's perspective and will perhaps draw even more attention as the psychology of decision-making becomes better known.

Many sources offering guidance for effective advocacy have been published.[89] Such tips as reading everything a prospective arbitrator has written, developing an appealing "story," tailoring the manner and substance of the presentation to appeal to the specific arbitrators, are all practices which are, in fact, designed to understand and/or play to the unconscious of the arbitrator.

To the wealth of literature on the subject, consider one additional thought and two additional approaches for counsel addressed specifically to uncovering and addressing or deflecting unconscious blinders.

A. *How Many Arbitrators*

If the size of the case warrants it and the accuracy of the decision is paramount, consideration should be given to having three arbitrators rather than one. There are many issues to consider in deciding how many arbitrators to suggest, time and cost among them.[90] But the suggestion in the literature that "group decision-makers might be better equipped to combat some of the more pernicious cognitive blinders like hindsight bias"[91] should not be ignored. Groups can remember more facts than individuals and in deliberating with one another can share remembered information leading to a more accurate determination. Beyond recollection and focus on different facts, three arbitrators bring different backgrounds and experiences to the arbitration and bring to the deliberations "differing insights and views of the events and motivations" which "provide the group with a more complete perspective out of which a better quality decision can be made." [92]

B. *Tapping the Social Scientists*

Jury consultants have long been employed in the United States as a response to the importance of selection and messaging in winning cases. Users of jury

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Paulsson, *Moral Hazard in International Dispute Resolution*, 25(2) ICSID REV. 339 (Fall 2010) and Charles N. Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson–van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, 29 ARB. INT'L 7 (2013)).

[89] *See, e g*, discussions in THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION, *supra* note 23.

[90] Jennifer Kirby, *With Arbitrators, Less Can Be More: Why the Conventional Wisdom on the Benefits of Having Three Arbitrators May Be Overrated*, 26(3) J. INT'L ARB. 337 (2009) (questioning whether having three arbitrators, with two party-nominated co-arbitrators, generally improves quality and increases party confidence).

[91] Misjudging, *supra* note 7, at 452-453.

[92] Waites & Lawrence, *supra* note 58, at 115.

consultants find them useful[93] and their widespread use is a testament to their utility. The arbitration community is just beginning to explore the arbitrator's psychology. In cases that warrant such an additional expenditure, utilizing the services of social scientists to assist with an understanding of the psychological dimensions may be useful.

Waites and Lawrence concluded in the foremost article on the subject of psychology and arbitrators that, like the mock jury used to prepare for a jury trial, "the most useful scientific tool we have in preparing for an arbitration hearing is a mock arbitration panel study . . . Many, if not most, of the perceptions of the mock arbitrators will be close enough to those of the actual arbitration panel that the data will be valuable in developing recommendations for themes, case story, and other aspects of the actual presentation."[94]

Social scientists can be helpful from the beginning of the process with the selection of the arbitrators, just as they currently vet jury prospects and assist in jury selection. They may bring an understanding of human nature and ability to discern likely reactions which can be a useful additional input into the process of considering prospective arbitrators. With the globalization of commerce and the increased participation of arbitrators from many different cultures, such input may be particularly useful. [95]

Social scientists can also assist in developing the presentation of the case, as they now do for both juries and judges.[96] Many practitioners test their arguments or presentations with colleagues at the firm or with an arbitrator hired as a consultant to advise on procedure or strategy. That is a very useful exercise, but mock arbitration is different and should elicit different but still important information.

First, the social science consultant will try to find an arbitrator or arbitrators that match as closely as possible the characteristics and background of the real arbitrators. This in and of itself, knowing what we know now about psychology, makes the exercise infinitely more useful. In addition, conducted with the assistance of a social scientist, the exercise will not suffer from what is known as the "good subject" response or from confirmation bias which reduces the ability of the colleague or retained specialist to view the presentation with truly unbiased eyes.[97] Rather, the independent mock arbitrators will evaluate themes and facts without knowing which party the counsel presenting before it is representing in real life, since ideally both sides will be presented by that firm with equal effort.

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[93] Dr. Philip K. Anthony & Les J. Weinstein, *The Social Science Edge in Arbitration and Mediation*, 5(2) NEW YORK DISPUTE RESOLUTION LAWYER 17 (2012).

[94] Waites & Lawrence, *supra* note 58, at 118-19.

[95] *See also* Peter L. Michaelson, *Enhancing Arbitrator Selection: Using Personality Screening to Supplement Conventional Selection Criteria for Tripartite Arbitration Tribunals*, 76 ARB. 98 (2010) (urging psychological personality screening in the selection of three arbitrators to maximize the likelihood of their compatibility and so as to contribute to an efficient and high quality arbitral process).

[96] Anthony & Weinstein, *supra* note 93.

[97] *Id* at 18.

These mock arbitrators can provide a road map on such matters as how to refine or revise the theme developed to tell the story more sympathetically for the selected arbitrators, which legal theories to emphasize, whether particular kinds of graphics would be helpful and what kind of expert explanations would be most useful. Recalibration of the case based on these insights should result in a more persuasive presentation to the arbitrators actually sitting in the case.[98]

C. *Enhanced Arbitrator Interviews*

There is general approval of interviews of prospective arbitrators in the arbitral community, with only 12% of the respondents to the 2012 Queen Mary and White & Case International Arbitration Survey considering them inappropriate.[99] However, there was lack of agreement as to precisely what kinds of questions were permissible.

To assure an independent and impartial tribunal it is generally agreed that areas of permissible inquiry should be restricted.[100] Guideline 7 of the IBA Guidelines on Party Representation in International Arbitration [101] provides the most recent guidance on this issue. It permits a party representative to communicate with a prospective party-nominated arbitrator to determine "his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest." The comments to Guideline 7 explicitly bar "seeking the views of the prospective arbitrator on the substance of the dispute," but state that inquiries can be made as to "any activities . . . that may raise justifiable doubts as to the prospective Arbitrator's independence or impartiality" and with respect to "the general conduct of the proceedings."

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[98] STEPHEN TUHOLSKI, MOCK ARBITRATIONS: GETTING THE MOST VALUE FOR YOUR PROJECT 20 (providing guidance on how to structure a mock arbitration process); Edna Sussman, *Improving your Arbitration Presentation with a Mock Arbitration Two Case Studies* 15 (providing details of two actual mock arbitrations); Anthony & Weinstein, *supra* note 93 (providing background on the development of mock arbitrations and explaining the role of the consultant); all collected in 5(2) NEW YORK DISPUTE RESOLUTION LAWYER (2012).

[99] Queen Mary University of London and White & Case, *2012 International Arbitration Survey. Current and Preferred Practices and the Arbitral Process, available at* http://www.whitecase.com/files/Uploads/Documents/Arbitration/Queen-Mary-University-London-International-Arbitration-Survey-2012.pdf.

[100] For a collection and discussion of sources on the subject, see Guigi Carmanati, *A Review of the Principles Governing Arbitrator Pre-Selection Interviews*, American Bar Association, 1(1) INTERNATIONAL ARBITRATION COMMITTEE NEWSLETTER, *supra* note 88, at 14 (guidelines and commentators have suggested strict limiting protocols for arbitrator interviews).

[101] International Bar Association Guidelines on Party Representation in International Arbitration (2013).

With what we know now about arbitrators and psychology, how should these permissible areas be construed? Can we and should we now ask questions tailored to the dispute to flush out psychological drivers?

In the 2012 Queen Mary/White & Case Survey, 84% of the respondents believed that asking questions about the candidate's position on legal questions relevant to the case was not appropriate. However, only 64% felt that it was not appropriate to ask if the candidate was a strict constructionist or influenced by the equities; 59% felt it was inappropriate to ask for prior views expressed as an expert or arbitrator on a particular legal issue; 30% felt it was inappropriate to ask about attitudes towards particular procedures such as evidence by videoconference or bifurcation and only10% believed it was inappropriate to ask about experience and knowledge of a particular legal topic, technical environment or industry.[102]

Based on the Queen Mary/White & Case survey, it would appear that 70% of the arbitral community believes that questions related to matters of procedure, similar to the IBA guidelines permitting questions relating to the conduct of the proceedings, are appropriate. There are numerous questions that can be asked about procedure that could serve as an inquiry into, and in fact may likely prompt, the utilization of debiasing techniques. But is the danger too great that an expanded interview on procedural issues will be used to gain advantages that will influence the merits?

Little thought has been given to the nature of the questions about the candidate's personal history that might be appropriate. Ninety percent of the respondents believed that it is appropriate to ask about past experience and knowledge. While it has not been common to consider that question as relating to personal experiences as opposed to professional ones, should there be a difference? Would such questions be viewed as perfectly permissible, much as they would likely be if asked of a potential juror, or would they be viewed as subtly intimating and inquiring into views on the merits?[103]

Should we be concerned that an expansion of the permissible scope of an arbitrator's interview would create precisely the prejudice that the strictures on such interviews were intended to prevent? It might be argued that allowing an expansion of permissible questions would open a Pandora's Box and counsel could easily find themselves, even inadvertently, contaminating the neutrality of the prospective arbitrator. However, in the wake of the new information about psychology and the arbitrator, a more detailed discussion of what should or should not be permissible in an arbitrator interview may be inevitable.[104]

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[102] Queen Mary University of London/White & Case Study, *supra* note 99, at 6-8.

[103] Joe Matthews, *Identifying and Overcoming Arbitrator Bias – Advocacy in International Arbitration*, 5(4) TRANSNATIONAL DISPUTE MANAGEMENT 1, 15-16 (2008) (asking if expanded interviews "may be a proper and essential part of advocacy in international arbitration conducted in the 21st Century").

[104] Jeffery P. Aiken, *Due Diligence in Arbitrator Selection: Using Interviews and Written "Voir Dire"*, 64 DISPUTE RES. J. 28 (May/June 2009) (urging more thorough interviews of arbitrators).

In an administered arbitration, the interview can be conducted in a way that circumvents the potential problems. The American Arbitration Association and the International Centre for Dispute Resolution has a vehicle to enable such inquiries with its Enhanced Neutral Selection Process for Large Complex Cases.[105] Parties can develop questions, which after review and approval by the institution, are presented to prospective arbitrators for response to all parties either in writing or on a telephone conference. The arbitrator has the option of responding or declining the invitation to respond to any or all questions. The process works very well and can provide information that no amount of web research or calls to colleagues at other firms could uncover.

Consideration might also be given to a joint interview of a prospective chair with all parties participating to make the inquiries relevant to the case to assure the selection of a chair with the least prejudicial attitudinal blinders and a practice which strives to overcome informational and cognitive blinders.

VI. CONCLUSION

While legal principles and precedents provide a constraint and impose some rigor on decision-making by arbitrators, subconscious factors that inevitably influence every person also play a significant role. Many arbitrators already take steps to assure a sound award but, with the current recognition of the psychological influences, a reexamination of best practices in arbitrator decision-making is in order.

There are concrete debiasing steps that arbitrators can take to improve the quality of their decisions and to assure a more impartial result. Time and cost considerations must always be taken into account in deciding which additional steps to take. However, many of the steps that are suggested here for consideration do not take any more time or cost any more money.

A party's selection of an arbitrator most likely to come into the arbitration with unconscious predilections favorable to that party's position can be an important factor in maximizing the chances of winning. Similarly, counsel's framing of the dispute and the theme developed to tell the story to evoke a positive response from the arbitrators is known by all to be essential to a persuasive presentation. But more can be done to enhance the arbitrator selection process and to tailor the presentation to the particular arbitrators selected. Whether the additional steps suggested for consideration are cost justified in a particular case must be considered. With the significant dollar values now often seen in arbitration cases, additional effort to factor psychological influences into the selection of the arbitrator and into the case presentation may be desirable.

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[105] American Arbitration Association, *Enhanced Neutral Selection Process for Large Complex Cases*, *available at* http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003909.

Can Counsel Ethics Beat Guerrilla Tactics?: Background and Impact of the New IBA Guidelines on Party Representation in International Arbitration

By Edna Sussman

> *[The absence of common legal cultures] "does not mean that international practitioners are pirates sailing under no national flag; it only means that on the high seas, navigators need more than a coastal chart."*
>
> **V.V. Veeder**[1]

The call for something more than a "coastal chart" to govern counsel ethics in international arbitration has intensified in recent years and has led to action. Following a comprehensive review of the subject, in May of 2013 the International Bar Association issued its Guidelines on Party Representation in International Arbitration (the "Guidelines").[2] In developing its recommendations, the IBA's Arbitration Committee investigated the different ethical and cultural norms and disciplinary rules that apply to counsel in international arbitrations. While these are only Guidelines with no inherent authority, the Guidelines are likely to foster significant changes that will aid in the accomplishment of their objectives.

The Guidelines should inspire tribunals in international arbitrations to at the very least conduct a conversation with counsel at the inception of the case to clarify what ethical norms govern each party's counsel and whether there are strictures that apply to some but not all of the parties that create inequities. Agreements as to conduct can be incorporated into the first procedural order. But even absent agreement, awareness alone can enable the tribunal to make appropriate adjustments to ensure a fair process. And just knowing about the counsel's practices enables opposing counsel to be better prepared to counter them. If the Guidelines serve no other purpose than to enable and encourage a dialogue of this nature early in the proceeding, they will accomplish a great deal.

The Guidelines may serve to focus the arbitral institutions' attention more closely to counsel ethics and to what role they can play in ensuring the integrity of the process. It is the institutions that have the ability to establish an ethics regime that empowers tribunals with the enforcement powers necessary to drive conduct. In the wake of the Guidelines release, the arbitration community may look to the institutions to issue rules that proscribe unethical conduct or conduct that obstructs or delays the proceedings and authorize the tribunal to issue appropriate sanctions.

Practitioners should welcome the promulgation of the IBA Guidelines. Adherence to the Guidelines would not automatically protect counsel from being in violation of the ethical code of their home jurisdiction. But local ethical codes may provide, or be amended to provide for counsel to be governed by the ethical regime adopted by an international arbitral tribunal. The existence of the Guidelines and the growth of international arbitration as a practice area should encourage the development of such local ethical provisions.

I. Background

Consideration of issues relating to counsel ethics in international arbitration is not new. Michael Reisman and Detlev Vagts recognized the need for uniform ethical guidelines applicable to counsel in international arbitration long ago.[3] Jan Paulsson proposed the idea in 1992.[4] The topic gained prominence in recent years. Catherine Rogers, a leading scholar in the field, expressed the view in 2010 that this "ethical no-man's land"[5] should not be permitted to persist. A number of commentators believed that there can be no workable solution to this problem, that there were too many guidelines already confusing the field of international arbitration, and that regulation would diminish the flexibility of the process.[6] However, an increasing number supported the view that the adoption of a code of ethics specific to the conduct of counsel in international arbitration was long overdue. Several proposed solutions emerged.

Doak Bishop and Margrete Stevens proposed an *International Code of Ethics for Lawyers*[7] which adopted an approach of positing simple, elegant and essential rules for counsel's ethical duties. *The Hague Principles on Ethical Standards*, the work product of the International Law Association, provided another proposed set of ethical rules.[8] Cyrus Benson offered the *Checklist of Ethical Standards for Counsel in International Arbitration*, a proposal in the form of a checklist to be reviewed at the start of the arbitration by all parties and subject to the agreement of the parties.[9]

Sundaresh Menon's opening address at the ICCA Congress in 2012,[10] urging the development of "a code of conduct and practice to guide international arbitrators and international arbitration counsel," galvanized further debate on the issue. The concept gradually gained acceptability.[11] The survey broadly disseminated by the Arbitration Committee of the IBA in order to inform its work

helped identify specific divergent counsel practices that presented the greatest difficulties and confirmed support for the development of international guidelines for party representatives.

II. The Issues to Be Addressed

The Guidelines address the two issues relating to counsel conduct that have been the subject of discussion. First, it addresses the practices that are unethical under some national codes or rules of professional conduct but not under others. Second, it addresses what has come to be known as "guerrilla tactics," tactics used to delay, obstruct or subvert the arbitration process.

a. Divergence in Ethical Obligations

Differences in ethical obligations are inherent to an international forum where counsel come from different jurisdictions and often find themselves conducting an arbitration seated in a yet another jurisdiction and physically held in yet a third jurisdiction. Without an overriding ethical code there is no clear answer to the question of which ethical obligations are applicable as among all of these possible jurisdictions. Moreover, there is the potential for disadvantaging parties if their counsel is bound by the more restrictive ethical rules. Only a common set of ethical obligations can level the playing field.

The examples most frequently used to illustrate the significant divergences in ethical obligations of counsel include witness preparation, the nature of counsel's obligation to assure production of responsive documents, *ex parte* communications with the arbitrator, statements of fact to the tribunal known to be unsupported by the evidence, the obligation to report perjury, the obligation to advise the court of adverse legal authority and differences concerning lawyer communication with employees of an adverse corporate party.[12]

b. Guerrilla Tactics

Like counsel ethics, the use of "guerrilla tactics," those intended to obstruct, delay or derail an arbitration, has been the theme of a growing number of articles[13] and has been the subject of several recent international arbitration conferences. It was urged that any ethical regulation issued should include provisions that inhibit such conduct.[14]

Two reasons are typically offered for the changes in the practice of arbitration that have made this issue of such pressing concern. First, arbitration has evolved from a forum for a speedy, inexpensive and pragmatic decision on trade disputes to a forum that resolves sophisticated legal disputes with millions of dollars, and often hundreds of millions, at stake. With so much at stake, differences in ethical obligations that give a party an advantage are problematic and the size of the amount at stake can drive counsel over the line from zealous representation to guerrilla tactics. Second, as international arbitration has grown, both counsel and arbitrators new to the practice have become active. With the entry of new practitioners not schooled in the norms of the practice and not part of the former elite international arbitration "club," there is no shared understanding with the new entrants of how they perceive their role and no in-group induced constraint on their conduct. Whatever the cause, the reality was felt to require action.

A survey conducted to determine whether the use of guerrilla tactics in international arbitration was really a problem of sufficient frequency and moment to warrant attention confirmed the importance of the issue. Sixty-six percent of the 81 respondents reported that they had been subjected to or had witnessed guerrilla tactics. The most common examples of guerrilla tactics described included abuse of document production, delay tactics, creating conflicts, frivolous challenges of arbitrators, last-minute surprise, frivolous anti-arbitration injunctions and other approaches to courts, *ex parte* communications, witness tampering, lack of respect, courtesy towards the tribunal and opposing counsel and various strategies to frustrate an orderly and fair hearing.[15]

III. Guidelines Provisions Highlighted

The Guidelines address many of the issues frequently flagged as the most problematic ethical conflicts: The Guidelines:

- Preclude the creation of a conflict by barring taking on a party representation that would create a conflict with an arbitrator and states that the tribunal may exclude the new party representative who takes on a representation in violation of this guideline. Guidelines 5-6.
- Forbid *ex parte* communications (apart from circumscribed interview contacts and absent specific agreement by the parties to the contrary or party non-appearance). Guidelines 7-8.
- Bar knowingly presenting false evidence and provide guidance on action to be taken if falsity is later discovered. Guidelines 9-11
- Address the need to preserve documents and to produce responsive documents and prohibit the making of any request to produce documents for an improper purpose such as to harass or cause unnecessary delay. Guidelines 12-17.
- Permit counsel to meet and discuss with experts and lay witnesses to help prepare witness statements and prepare for prospective testimony but counsel may not invite or encourage false evidence. Guidelines 18-25.

While the provisions cover the most frequently cited ethical conflicts, a question remains whether these provisions are sufficient to curb the many faces of guerrilla

tactics. The Guidelines do specifically deal with two of the identified guerrilla tactics: creating a conflict with the arbitrator and document related tactics. Perhaps the wide variety of obstructive and delaying actions by counsel and the amorphous wording that would be required to describe them precluded their specific inclusion in the guidelines.

The Guidelines do, however, empower the tribunal to address "misconduct" by a party representative after giving the parties notice and a reasonable opportunity to be heard. Misconduct is broadly defined to include a "breach of the present Guidelines, or any other conduct that the Arbitral Tribunal determines to be contrary to the duties of a Party Representative."[16] We will have to wait and see if the word "misconduct" is read broadly enough to encompass a wide variety of guerilla tactics.

The Guidelines give the tribunal power to respond to behavior in violation of the Guidelines. The tribunal may admonish the party representative, draw inferences, apportion costs, and take other "appropriate measures in order to preserve the fairness and integrity of the proceeding." In determining the remedy, the tribunal is to consider the nature and gravity of the misconduct, the good faith of the party representative, the extent to which the party representative knew about or participated in the misconduct, the potential impact of a ruling on the rights of the parties, the need to preserve the integrity and fairness of the arbitral proceedings and the enforceability of the award. Guidelines 26-27.

IV. Implementation of the Guidelines

Like all guidelines, the Guidelines are just guidelines and have no weight beyond that given to them by counsel and/or the arbitrators. As they state, the Guidelines are not intended to displace otherwise applicable mandatory law, professional or disciplinary rules, or agreed arbitration rules that may be relevant or applicable to matters of party representation. Nor are they intended to vest arbitral tribunals with powers otherwise reserved to bar associations or other professional bodies. It is the intention of the drafters of the Guidelines that the parties may adopt the Guidelines by agreement or that arbitral tribunals may apply the Guidelines in their discretion, subject to any applicable mandatory rules, if they conclude they have the authority to do so.

While not automatically binding in an arbitration, the Guidelines provide an excellent opening for the tribunal to initiate a discussion with counsel as to what should be deemed to be appropriate conduct in the arbitration to equalize ethical norms, curb guerrilla tactics and ensure fundamental fairness. Those in the arbitral community who were of the view that no counsel ethics regulation should be issued because "if it ain't broke, don't fix it," may be persuaded that it is "broke" now and that corrective action is required.

The Guidelines provisions can be used as a jumping off point to see if other limiting parameters for conduct can be established by agreement. Reference to the Benson checklist, the Bishop & Stevens ethical code and the Hague Principles discussed above can provide specific ideas for expansion by agreement of the Guidelines scope to protect against additional areas of ethical conflict and of potential obstruction and delay. For example, if the tribunal wishes to go further in discouraging guerrilla tactics, the parties can be asked to consider whether they also wish to adopt one of Benson's checklist items: "A lawyer shall not assert a position, conduct a defense, question witnesses or take other action on behalf of the client when the lawyer knows, or when it is obvious that, such action is irrelevant to the case and/or would serve merely to (i) delay proceedings, (ii) cause undue burden or expense or (iii) harass or maliciously injure another."[17] It would be difficult for counsel to reject such a provision. But in balancing how far to go with the imposition of specific restraints on misconduct, a tribunal must keep in mind that such strictures could give rise to the possibility of repeated approaches to the tribunal during the pendency of the proceeding asserting violations and requesting sanctions, a scenario which the tribunal may not wish to encourage. Like so many things, judgment must be exercised as to what is best for the case and care must be taken in structuring any special process.

A system of counsel regulation cannot be truly effective unless the tribunal is authorized to take corrective action. The Guidelines limit the tribunal to actions they believe they have the authority to undertake and expressly take no position as to whether the tribunal has the authority to rule on matters of party representation or to apply the Guidelines in the absence of an agreement by the parties. Thus the Guidelines are limited by their very nature. In order to give effect to the Guidelines, in the absence of case-by-case agreement of the parties, action by the arbitral institutions is essential. While it would not comfortably be the institutions' role to enforce ethical codes, it is well within their purview to promulgate rules that impose ethical constraints and rules that empower the tribunal to impose appropriate remedies.

The institutions have already taken some steps in this direction and it appears further steps will be taken in the near future. For example, the ICDR addressed some of the concerns a few years ago. Article 7 of the ICDR International Dispute Resolution Procedures bars *ex parte* communications with the chair altogether and, like the Guidelines, limits communications with the party-appointed arbitrators to the interview. The ICDR Guidelines for Arbitrators Concerning Exchanges of Information seeks to put the parties on the same footing by providing that the tribunal should to the extent possible apply the same rules as to ethics and privilege to both sides, giving preference to the party's rule that provides the highest level of protection. By establishing a limited scope for disclosure

and empowering the arbitrator to exercise firm control, the ICDR Guidelines also serve to control many of the document disclosure-related guerrilla tactics.

The ICC 2012 arbitration rules revision now provides in Article 37(6) that in the allocation of costs the tribunal may consider the extent to which the party "conducted the arbitration in an expeditious and cost effective manner" thus specifically authorizing cost shifting if a party delays or obstructs the proceedings. The LCIA is reported to be planning to adopt a rule later this year which incorporates "basic norms expected of counsel in an arbitration under their auspices," and gives tribunals the power to exclude counsel who were found to be in serious and persistent violation of those norms.[18]

V. Conclusion

The Guidelines are likely to be accepted over time as a source of soft law with at least as much influence as has been achieved by the IBA Guidelines on Conflicts of Interest in International Arbitration, which deals with arbitrator conflicts and disclosure obligations. But it is likely that the Guidelines will have much greater impact than would result from their mere adoption in an arbitration. The Guidelines are likely to encourage a meaningful dialogue between the tribunal and the parties regarding ethical obligations that go beyond those dealt with in the Guidelines. The Guidelines are also likely to inspire institutional action to embrace the issue and adopt institutional rules that give the tribunal authority to enforce rules that foster a fair process undisturbed by obstructionist tactics.

Endnotes

1. *The 2001 Goff Lecture—The Lawyer's Duty to Arbitrate in Good Faith*, 18 Arbitration International 2002, no 4, p 431.
2. International Bar Association, *Guidelines on Party Representation in International Arbitration*, released May 25, 2013
3. See W. Michael Reisman, *Nullity and Revision The Review and Enforcement of International Judgments and Awards*, 116-17 (1971), Detlev F. Vagts, *The International Legal Profession A Need for More Governance?*, 90 Am J. Int'l L. 250, 250 (1996).
4. Jan Paulsson, *Standards of Conduct for Counsel in International Arbitration*, 3 Am. Rev Int'l Arb. 214 (1992)
5. Catherine A Rogers, *The Ethics of Advocacy in International Arbitration*, Penn State Law, Legal Studies Research Paper No 18-2010, at 2-3 (2010), *available at* http.//papers ssrn.com/sol3/papers cfm?abstract_id=1559012 Laurel S Terry, et al., *Transnational Legal Practice*, 42 Int'l Lawyer 833 (2008)
6. See authorities cited in Rogers, *supra* note 5 at fn 28.
7. Doak Bishop & Margrete Stevens, ICCA Congress 2010, *International Code of Ethics for Lawyers*, available at http://www arbitration-icca.org/media/0/12763302939400/stevens_bishop_draft_code_of_ethics_in_ia pdf, the code accompanied their keynote address on the subject, available at http //www arbitration-icca org/media/0/12763302233510/icca_rio_keynote_speech pdf
8. International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals, *The Hague Principles on Ethical Standards* (Sep. 27, 2010), *available at* www ucl.ac uk/laws/cict/docs/Hague_Sept2010.pdf
9. Cyrus Benson, *Can Professional Ethics Wait? The Need for Transparency in International Arbitration*, 3 Disp Resol Int'l 78 (Mar. 2009).
10. Sundaresh Menon, *International Arbitration, The Coming of Age for Asia (and Elsewhere)*, ICCA Congress 2012, available at http //www.arbitration-icca org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf.
11. Sebastian Perry, *Policing Ethical Conduct. Menon and Paulsson Debate Regulation*, Global Arbitration Review, June 5, 2013
12. See Rogers *supra* note 5, at 3-5, Benson *supra* note 9, at 82-85; Catherine A Rogers, *Lawyers Without Borders*, U Pa. J. Int'l L. Vol. 30 4 at 1036-1037 ((2009).
13. *See* articles collected in *Guerrilla Tactics in International Arbitration and Litigation* in Transnational Dispute Management, Volume 7(2) November 2010.
14. Edna Sussman & Solomon Ebere, *All's Fair in Love and War—Or Is It? The Call for Ethical Standards for Counsel in International Arbitration*, Am. Rev Int'l Arb 22 (2011)· 612
15. *Id.*
16. Guidelines, Definitions Section.
17. Benson, *supra* note 9, checklist Category 1(2)
18. Perry, *supra* note 11.

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DISPUTE RESOLUTION

ARBITRATION CONTRACT CLAUSES

By John H. Wilkinson

The recent trend toward arbitration of larger and larger commercial cases has led to a number of expensive elements that have traditionally been reserved for litigation. Devising an arbitration process that is significantly more efficient than litigation is not an easy task in the context of a complex commercial dispute. However, the scorched-earth mentality that frequently follows the inception of a dispute can often be countered, before the fact, through effective drafting of the arbitration clause in the underlying commercial contract.

An initial caution. Parties have expanded their arbitration contract clauses (Contract Clauses) in an effort to place meaningful limits on discovery and other aspects of any ensuing arbitration. Although this approach has the benefit noted above, it also has significant drawbacks that should be discussed at the outset, namely: (a) the drafter of the Contract Clause is setting forth the timing and discovery rules for a dispute that has not yet arisen, and (b) the dispute that ultimately emerges might better lend itself to a very different approach with respect to timing and discovery. In this regard, the following considerations are pertinent. It makes most sense to include discovery and timing limitations (Limitations) in a Contract Clause under circumstances where the contracting parties have a good idea as to the size and complexity of any dispute that might thereafter arise. If the parties are unsure as to what the scope of a later dispute might be, they can still put Limitations in the Contract Clause but, then, condition the applicability of the Limitations on there being substantial arbitrable claims, as defined by the parties in the particular context of their commercial relationship. Also, include a provision that the arbitrators are empowered to modify the Limitations upon a clear and compelling showing of good cause.

Set forth below is a discussion of some of the various types of Limitations that one might consider including in a Contract Clause.

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> **"The ultimate efficiency is settlement through mediation before any arbitration is even initiated."**

General scope of document discovery. It often makes sense for a Contract Clause to contain some broad language as to what the general scope of document discovery in an ensuing arbitration is going to be. Thus, for example, the Contract Clause might limit such discovery to "documents directly relevant to one or more of the issues," "documents needed for fair resolution of an issue of importance," "necessary documents that can be located and produced at a cost that is reasonable in the context of all surrounding facts and circumstances," or "documents for which there is a direct, substantial, and demonstrable need." This wording provides helpful guidelines for the parties and gives arbitrators a practical tool that can effectively be used to help keep document discovery under control.

E-discovery. Addressing e-discovery in the Contract Clause can be an effective means to place some realistic limits on the otherwise bottomless pit of e-disclosure. The New York State Bar Association and the Chartered Institute of Arbitrators provide examples of early language that might be used to put meaningful limits on e-discovery in appropriate circumstances, such as:

- "Production of electronic documents shall generally be limited to those located in sources that are used in the ordinary course of business. It will normally not be appropriate to order restoration of backup tapes; erased, damaged, or fragmented data; archived data; or data normally deleted in the ordinary course of business."
- "Electronic documents shall normally be furnished on the basis of generally available technology in a searchable format that is usable by the party receiving it and convenient and economical for the producing party."
- "When the cost and burden of e-discovery are disproportionate to the likely importance of the requested materials, the arbitrator may deny the requests or require that the requesting party advance the reasonable cost of production to the other side."

Restrictive clauses of this kind can be effectively incorporated at the time

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of the drafting of the Contract Clause.

Depositions. The absence of any depositions in a complex arbitration can significantly lengthen the cross-examination of key witnesses and unnecessarily extend the completion of the hearing on the merits. On the other hand, runaway deposition programs are extremely expensive, wasteful, and time consuming.

Balancing the foregoing considerations, it can sometimes make sense to include in the Contract Clause a provision such as the following with respect to depositions:

> Each side may take 4* discovery depositions in connection with an arbitration arising from or related to this agreement. Each side's depositions are to consume no more than a total of 15* hours. There are to be no speaking objections at the depositions. The total period for the taking of all depositions shall not exceed 6* weeks. (*The asterisked numbers can, of course, be changed to match the particular circumstances of each case.)

Prevailing party. Many Contract Clauses specify that: (a) the prevailing party in an arbitration is entitled to recover the reasonable costs and attorney fees incurred in connection with the arbitration, and (b) if the prevailing party wins on some but not all claims, then it is to recover an appropriate proportion of its reasonable costs and attorney fees.

This type of provision furthers efficient, cost-effective arbitration because (a) it discourages frivolous claims and counterclaims, and (b) it reduces the chances of scorched-earth discovery and hearing tactics.

Mediation in advance of arbitration. The ultimate efficiency in resolving a dispute is settlement through mediation before any arbitration is even initiated. Such mediation can be difficult to put in process in the charged atmosphere after a dispute arises because at that point both sides may be fearful that a suggestion of mediation will be taken by the other side as a sign of weakness. This problem disappears if the requirement of mediation prior to arbitration is contained in the Contract Clause of the underlying commercial contract. But if the parties opt to take that route, they should provide a tight deadline (perhaps 30 days) for the entire mediation as a way to preclude use of the mediation as a means to delay.

Appeal. As arbitration awards have involved increased amounts of money, there has been significantly more activity in the courts in trying to overturn them. This has substantially added to the time and cost of arbitration while seldom changing the result.

One approach that achieves the goal of a meaningful, expeditious, and cost-effective appeal from an arbitration award is to include in the Contract Clause a provision adopting the JAMS (Judicial Arbitration and Mediation Services, Inc.) Optional Arbitration Appeal Procedure (Appeal Procedure), which permits a cost-effective, expeditious appeal based on the same legal principles as would have pertained in court.

Deadlines. Contract Clauses are increasingly including provisions that place specific time limits on various phases of any arbitration arising under the agreement and, sometimes, an overall time limit for the period from the filing of the arbitration demand to the entry of an award.

Some practitioners are concerned that a failure to meet a Contract Clause's arbitration deadlines might leave the ensuing award vulnerable to a motion to vacate. Language such as the following addresses this concern while maintaining the possibility that a failure to meet such deadlines will have serious repercussions:

> Failure to meet any of the foregoing deadlines will not render the award invalid, unenforceable, or subject to being vacated. The arbitrator(s), however, may impose appropriate sanctions and draw appropriate adverse inferences against the party primarily responsible for the failure to meet any such deadlines.

While there are a number of possible approaches to making arbitration faster and more cost-effective, the most practical and effective means of achieving this goal may prove to be the inclusion of appropriate provisions in Contract Clauses.

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EXPERT EVIDENCE REPORT

Arbitration is the "wave of the future" in many complex cases, and there is an important role for expert witnesses to play in these proceedings, says alternative dispute resolution expert John Wilkinson. The author also responds to criticism that arbitration has become too much like litigation—with motions, interrogatories, depositions—and offers practical suggestions on how to strike a fair balance between the need for quick justice and fair resolution of complex claims.

The Future of Arbitration: Striking a Balance Between Quick Justice and Fair Resolution of Complex Claims

By John Wilkinson

John Wilkinson, Esq., a full time mediator and arbitrator with JAMS, The Resolution Experts, is a recognized authority on ADR, with over 20 years of arbitration and mediation experience primarily involving complex, multiple-party commercial disputes relating to antitrust, computer systems, construction, employment (executive), energy, entertainment, franchising, insurance, intellectual property, investment banking, mergers and acquisitions, partnership disputes, publications, real estate (commercial), securities, and telecommunications. Based in New York, the author can be reached at 212-751-2700 or jwilkinson@JAMSADR.com.

In order to meaningfully assess the future of arbitration, it is first necessary to focus briefly on the remarkable developments in the field over the last 10 to 15 years. This can almost be done through use of a single word—bigger, bigger, bigger! Yes, the growth has been spectacular, and it is largely attributable to the fact that general counsel have been putting more and more huge cases into arbitration, and they have been doing so in ever accelerating fashion. I recently chaired an arbitration panel, for example, where $20 billion was legitimately in dispute, and arbitrations in the $10 million to $100 million range have come to be commonplace.

An important aspect of arbitration's exponential growth is its increasing expansion into areas of big case litigation which had traditionally been reserved for the courts. In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003), for example, the Supreme Court opened the way for arbi-

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tration of class actions and, since then, the arbitration of class claims has increased at an accelerating rate. So too, many believe that arbitration is the wave of the future in large product liability cases and even in certain categories of toxic tort litigation. And the courts have already authorized arbitration of many other categories of large disputes, including antitrust, securities and patents.

The dramatic increase in the size and types of arbitrations has led to other significant changes in the overall arbitration process. Thus, for example:

- As arbitrations get bigger and bigger, parties have increasingly been trying to inject into them what had traditionally been reserved for litigation—things like dispositive motions, interrogatories, depositions and the like.
- Along with bigger and bigger have come better and better panels of arbitrators. The days when an arbitrator goes to sleep in an important case are long gone.
- As awards involve more and more money, it is certainly not surprising that there is vastly more activity in the courts in trying to overturn them.
- All of this has been accompanied by much longer and more detailed reasoned awards to accommodate the added complexity, and
- The increased size has also led to a striking upturn in the level of arbitration advocacy. Again, this is not surprising—as arbitrations get bigger and bigger, the large firms are of course jumping in and putting themselves in position to represent that they are accomplished experts in the field.

Addressing the Most *Common Criticism*

All this growth has brought us to a real crossroads in the life of large case arbitration. In my view, what lies in arbitration's future is completely dependent on how well we deal with a highly significant result of this growth, *i.e.*, the ever increasing complaint that arbitration is becoming too much like litigation. If there is significant and continuing validity to this commonly voiced criticism, then why would anyone arbitrate? The simple answer is that, in large part, they wouldn't—arbitration would make little if any sense in such circumstances.

The arbitration community has two fundamental expectations that bear on this problem and, in a sense, they are light years apart:

> ***FIRST***, There are expectations based on the notion that the purpose of arbitration has historically been to dispense quick and dirty rough justice that is over and done with in a blink, and
>
> ***SECOND***, There are the expectations of those who perceive that cases in arbitration are getting larger and more complex every year and that such cases cannot be fairly resolved without a comprehensive, sometimes rather extended pre-hearing and hearing process.

It is easy in the pre-hearing and hearing phases of a complex arbitration to accommodate one of the foregoing expectations, while ignoring the other. More particularly, for example, it is easy for an arbitrator to slash the discovery, refuse to allow inquiry into large segments of proof and, basically, shorten the case significantly by being invasive and peremptory. The problem with this, however, is threefold:

- It isn't fair.
- The case might well be reversed because one of the few grounds for vacatur under the Federal Arbitration Act is a refusal "to hear evidence pertinent and material to the controversy," and,
- We are left with two general counsel who will probably never use arbitration again.

At the other end of the spectrum, it is similarly easy for an arbitrator just to open the floodgates and permit mountains of pointless discovery and evidence—all in the interest of following the safe approach and permitting a full hearing. The problem with this, of course, is that such an arbitration may very well be as expensive and time-consuming or even more expensive and time-consuming than if the case had simply been litigated in court. And again, there would be two General Counsel who would likely never use arbitration again.

While it is certainly much easier said than done, the fact is that an arbitrator can and must strike a balance between the foregoing two extremes in a complex case. More particularly:

> 1) The arbitrator must be sufficiently assertive to ensure that the case will be resolved much less expensively and in much less time than if it had been litigated in court and ***at the same time***,
>
> 2) The arbitrator must be sufficiently patient and restrained to ensure that there is enough discovery and evidence to permit a fair result.

Available Tools

Fortunately, the arbitrator has many tools which are unique to arbitration and which can be used to facilitate an efficient and fair result in a complex case. Set forth below are a few of many examples:

- Time-consuming objections to admissibility of documents can be kept to a minimum in arbitration because few such objections will be sustained. Rather than excluding a document for lack of admissibility, an arbitrator will generally take the document into evidence and, then, consider any factors detracting from its reliability when ultimately deciding how much weight it should be accorded. This is far more efficient than engaging in endless arguments about admissibility and, given the fact the case is not being presented to a jury, it is eminently fair.
- Unlike a court, an arbitrator need not strictly apply the rules of evidence. This greatly enhances arbitration's informality, flexibility and efficiency and, again, is fair to the parties since there is no need for strict rules of evidence when the proof is being presented to an arbitrator, as opposed to a jury.
- Arbitration dispenses with the laborious process of authenticating every document that is offered into evidence. In arbitration, documents are presumed to be authentic, and arbitrators will only entertain argument about authenticity in extreme circumstances involving things such as a possible forgery. While this shortcut in no way reduces the likelihood of a fair result, it greatly speeds the arbitration process in relation to what one encounters in court.
- In arbitration, exhibits are typically arranged in tabbed binders, and everyone can simply fly from tab to tab, saving huge amounts of time. In a trial in court, on the other hand, documents are generally trotted out one by one, with each document being separately marked, distributed and pored over by counsel before it might ever be accepted in evidence.

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■ Serious scheduling and jurisdictional problems can sometimes be averted in arbitration by taking video testimony outside the presence of the arbitrators on the understanding that the arbitrators will review the entirety of the testimony before rendering their award.

■ There is generally no need to even offer a document in evidence in arbitration. If a questioning attorney begins to use a tabbed document and if opposing counsel does not promptly object, the document is deemed to be in evidence, without more, in most arbitrations.

■ Arbitration witnesses can be taken out of order to facilitate efficient and expeditious scheduling. Thus, for example, it is not at all unusual in arbitration to have a key witness for respondent testify in the middle of claimant's case. While this time-saving device in no way detracts from the fairness of presentations to an arbitrator, it would be literally unthinkable in a case being tried to a jury.

■ In arbitration, there is typically no need to qualify a witness as an expert. This eliminates the endless argument and voir dire which one so often encounters in court on that subject. This is not to say that lack of expert qualifications is ignored in arbitration but, rather, it is explored in orderly fashion on cross examination and is ultimately considered by the arbitrator in determining how much weight to accord the expert's testimony.

■ Testimony of both sides' experts is often taken in a single phase of an arbitration so that the arbitrator has one side's experts well in mind when hearing the expert testimony from the other side. So too, arbitration testimony of experts is often taken simultaneously in a kind of town meeting setting where the experts are seriatim responding to the same questions and where they even get to question each other. This can be highly effective and save a lot of time for the reason, among others, that experts' areas of disagreement really do narrow in this kind of face-to-face format.

■ The direct testimony of some if not all witnesses in an arbitration is often introduced in written form with the live testimony being limited to that which is adduced on cross examination. When used appropriately, this has time and again been proven to vastly increase the efficiency and cost-effectiveness of an arbitration, in relation to a trial in court, and,

■ Finally, there is great flexibility in scheduling arbitrations, with hearings not being unusual on Saturdays, Sundays and holidays, as well as during evenings. While this can often be a most effective tool for moving the process forward to a prompt conclusion, it is almost never an option in a trial in court.

The foregoing are just a few of many examples of tools that are available in arbitration, but not in court. An arbitrator who makes good use of the full array of such tools and who is intent on carefully balancing the need for efficiency, on the one hand, and the need for a fair hearing, on the other, is going to be a critically important factor in continuing the dramatic growth of arbitration in complex cases.

A Recent Important Trend

Many general counsel have come to understand that it can sometimes be difficult for an arbitrator to effectively balance efficiency and fairness in a complex arbitration and, as a result, general counsel have recently been injecting themselves into the process and have been taking some of the judgment calls out of the hands of the arbitrators. These general counsel have primarily been doing this by adding to their large, commercial contracts a variety of highly aggressive, detailed arbitration clauses which, for example, might:

■ Provide for a very limited scope of discovery in any upcoming dispute, with the totality of such discovery to be completed within 60 days of appointment of the arbitrator;

■ Require that the hearing will commence not more than 90 days from appointment of the arbitrator;

■ Mandate that a reasoned award will be rendered within 30 days of receipt of post-hearing briefs; and,

■ Provide that an arbitrator must agree to all of this before he or she accepts appointment

While it is sometimes necessary to further negotiate and refine such arbitration clauses in the context of the particular dispute that arises, the fact remains that these clauses really do work—they really do get the job done. And while they place a most difficult burden on both parties and arbitrators, they may nonetheless be commonplace in the not too distant future.[1]

A Recent, Important Decision

In *Hall Street Associates LLC v. Mattel Inc.* (No. 06-989, Slip Opinion, March 25, 2008), the Supreme Court cut back markedly on any trend toward arbitration's assuming the trappings of litigation. There, the issue was whether parties could contract to expand the standards of review of arbitration awards, as set forth in Sections 9-11 of the Federal Arbitration Act (FAA). More particularly, the question was whether parties could contract to inject traditional grounds for appeal into FAA arbitrations or whether they were limited to what was already provided in Sections 9-11 of the FAA, *e.g.*, "corruption," "fraud," "evident partiality," refusal to hear "pertinent and material" evidence, and acts exceeding the powers of the arbitrator. In holding that parties could not contract to introduce customary grounds of appeal into an FAA case, the court struck a telling blow in favor of efficient, cost-effective arbitration. As the court stated:

[1] There is still a need to clarify the legal consequences of missing one or more of the deadlines in one of these clauses. In this regard, however, it should be noted that the author has been involved in implementing a number of these clauses and has never encountered the missing of a deadline which led to a dispute among the parties.

> Instead of fighting the text [of Sections 9-11], it makes more sense to see the three provisions . . . as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can "rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process," . . . and bring arbitration theory to grief in [the] post-arbitration process. (Citations omitted.)

In the author's view, the criticism that arbitration has become too much like litigation in no way marks the beginning of the end of complex arbitration, as so many obliquely predict. Rather, the criticism presents a challenge to which the arbitration community can and must respond with understanding, imagination and resolve and if it does (and I fully expect it will), then complex case arbitration will be very healthy indeed for many years to come.

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Inside

Arbitration Dos and Don'ts for the Trial Lawyer

By Richard L. Mattiaccio

A client has just asked you to represent it in the arbitration of a contract dispute. The case looks pretty much like others you have taken to bench or jury trial victories. You think you are all set.

Think again. You would not try a jury trial as if it were a bench trial, or vice versa. Why assume that you should try a case in arbitration as if it were in court?

Arbitration rules, handbooks and training programs can provide valuable insight into the steps leading to the evidentiary hearing. The literature and training programs will take the practitioner in detail through the filing of claims; the initial administrative conference in administered cases; the arbitrator selection process; the first conference with the arbitrator(s) leading to the crucial first procedural order; the pre-hearing exchange of documents; limitations on discovery, motions, subpoenas on nonparties, and evidentiary objections; the filing of witness lists, pre-marked exhibits, witness statements, expert reports, and pre-hearing memos; and post-hearing confirmation or vacatur of awards. Relatively little can be found in the literature, however, about the evidentiary hearing itself.

In the real world, much depends on the arbitrator's background, so the common wisdom is that cases are frequently won or lost at the arbitrator selection phase. A second commonplace that should resonate with every trial lawyer is the need to learn as much as possible about the arbitrator and adapt attorney style to what works with an arbitrator assigned to the case. For example, some arbitrators like the hearing to feel like a bench trial. Others like every step in the process to function more like a business meeting. An attorney representing a party needs to know this in advance or take cues from the arbitrator during the preliminary conference.

Unlike jury selection, which often follows motions and discovery practice, an attorney in arbitration needs to determine at the beginning of the case what sort of arbitrator would be receptive to the case on the merits and to his or her style. Arbitrator selection is a subject worthy of dedicated study.[1] The mechanics of arbitrator selection can vary depending on the nature of the case, the governing rules, and the terms of the arbitration clause. Still, some characteristics do appear across the commercial arbitrator spectrum.

Commercial arbitrators generally like to think of themselves as problem solvers and look to counsel to provide the tools arbitrators need to solve those problems. Arbitrators like to see the attorneys (a) focusing on the merits, (b) finding common ground on preliminary matters, and (c) using the time allotted efficiently and cost-effectively. They do not appreciate extensive attorney wrangling over procedure either before or at the hearing.

Arbitrators pride themselves on getting the point the first time it is made. They do not appreciate duplicative argument, briefing or testimony. They rarely see the point of having multiple witnesses testify to the same facts. They appreciate effective cross-examination, but they expect the cross-examiner to remain courteous and stay within pre-agreed time limits.

A good deal of planning, preparation and compromise with opposing counsel goes into effectively representing a client at a low-key, business-like, problem-solving evidentiary hearing. The following "dos and don'ts" are some practical tips offered to help a lawyer get started thinking about how to work with, not against, arbitration custom and practice in order to achieve good results for clients.

Dos	Don'ts
A. Study the Rules and Guidelines	
Read the arbitration rules and guidelines from cover to cover. • Think about how they differ from what you are used to in court; • Assume the arbitrator(s) will enforce the rules and follow the guidelines; and • Review the literature on commercial arbitration, especially when it is addressed to counsel's obligations.[2]	Don't read only the published rules applicable to the case. Also review the most relevant guidelines and protocols that tend to shape the conduct of the arbitrator(s) in specific categories or phases of arbitration.[3]
B. Advise the Client About Arbitration	
Provide your early case assessment with the arbitration process in mind. • Positions can be stronger or weaker in arbitration; figure it out *before* you advise the client. • Provide the client with realistic projections of arbitration cost and time in your early case assessment, and update your assessments.[4]	Don't overlook the strategic and tactical advantages or potential disadvantages of arbitration when you provide the client with your case assessment. Don't assume your client knows what to expect in arbitration; determine its experience level and adjust your advice accordingly.
Introduce the concept of mediation as a related step in the arbitration process.[5] • Make clear that arbitrators are generally not expected or supposed to get involved in settlement discussions but appreciate it when the parties give it a try. • Point to the provider organization's policies or procedures that favor mediation and that may treat mediation as a normal step within the arbitration process.[6]	Don't be deterred by a client's concern that suggesting mediation may send a signal of weakness. Explain that, if the arbitrator(s) find out that your side wants to pursue mediation or some other settlement device, the only risk is that your side will come across as sane.
Send the client a few articles if it is skeptical. • Providers and bar groups offer guides for the lawyer and non-lawyer alike;[7] read them, send the best-suited one to your client, and have a discussion with the client about the pros and cons of the process.	Don't unnecessarily place stress on your credibility with a client that is highly resistant to the advice. You can point to provider institution user handbooks and to neutrals on record providing the same advice.
C. Map Case Strategy Before the First Conference with the Arbitrator(s)	
Have an early game plan, ideally, before arbitrator selection. • Before the first conference with the arbitrator(s), know what you need in terms of exchanges of documents and other information. The first procedural order is your road map for the case.	Don't improvise. Your game plan may have to be adjusted, but, without one, you will not make good use of those crucial early encounters with the arbitrator(s), and the first procedural order will feel like a straightjacket as the case evolves in unexpected ways.

Dos	Don'ts
D. Assume Very Little Discovery	
Develop your core case and defenses on the assumption of little or no discovery. • Search your client's records to dig out all the essential documents. • Line up, interview and lock in the availability of all of your key witnesses. • Use the Internet. • Consider a private investigator, if needed, to fill in the blanks. • Look to some limited discovery for the gravy and, whenever possible, not for the meat and potatoes. Prepare your basic discovery plan before arbitrator selection. • If discovery is essential to your case, select arbitrator(s) with an active case load in court, or with experience as counsel in litigation, or as a judge in a court that allows broad discovery.	Don't think that you can build a case out of the other side's files or deposition testimony of its witnesses. Broad discovery is rarely allowed in domestic arbitration, and is just not available in international commercial cases. Arbitrators are trained to limit discovery, related expense, and the time needed to get to an award.[8] Don't assume that all arbitrators appreciate the challenges you face as counsel. Look for clues in the arbitrator candidate's professional experience. Has the arbitrator ever tried a case in court or in arbitration? How important will arbitrator empathy for the trial lawyer be as you prepare and present your case?
E. Gear Up for Arbitrator Selection	
Network to find the right arbitrator(s). • Ask experienced arbitration counsel and other neutrals about potential arbitrators. • Select arbitrator(s), especially the chair or sole arbitrator, with a proven ability to manage the process.[9]	Don't rely entirely on an official arbitrator biography if you can reach out to lawyers who have had experience with that arbitrator. There are online resources to help in some circumstances.[10]
Know the rules governing arbitrator selection in your case before starting the selection process. • The process of arbitrator selection can vary depending on the arbitration clause and the governing rules and procedures. • To some degree, an arbitration clause can vary the procedures that are generally incorporated by reference.	Don't expect busy case managers to focus right away on any special provisions on arbitrator selection or qualifications in your arbitration clause; point out those provisions before the case manager gets too far along in the arbitrator selection process.
F. Ask for an Early Administrative Conference and Work Collaboratively with the Case Manager at All Times	
Ask for an administrative meeting with the case manager prior to arbitrator selection. • Make clear what your preferred criteria are for arbitrator selection. • Engage in *ex parte* communications with the case manager to the extent allowed by the rules. • Propose an administrative conference with all counsel present.	Don't miss any opportunity to show the case manager that you are trying your best to be practical and that you are a straight shooter. Counsel cannot have ex parte communications with arbitrators, but case managers can and do talk with the arbitrator(s), and vice versa, whenever they think it serves a purpose.

Dos	Don'ts
Treat case managers like the important people they are. • Be practical and helpful; it's a joint problem-solving exercise. • Case managers can help counsel avoid costly missteps.	Don't condescend. Case managers may or may not have law practice experience or law degrees, but they are hard-working professionals and they understand some aspects of the arbitral process better than counsel ever will.
G. Address Confidentiality Up Front	
Assess the confidentiality of the process before exchanging sensitive information. • Not all arbitration rules provide the same level of confidentiality.[11] • Determine whether express confidentiality protections should be negotiated with the other side or, failing agreement, whether a procedural order regarding confidentiality should be sought from the arbitrator(s).[12] • Ask the arbitrator(s) to embody any agreement in a procedural order.	Don't assume that the parties are bound to confidentiality without checking the rules. Don't rely on customary practice in litigation. Don't rely on informal agreements, especially if the confidentiality stakes are high.
H. Confer With Opposing Counsel to Work Out as Much as Possible	
Reach out to counsel for the other side to try to agree on the basics, including: • Selection criteria for panel-selected arbitrator(s); • The extent and timing of the exchange of documents and other information; and • When, during the arbitration, mediation is most likely to be fruitful. Develop an agenda for the administrative conference. • Try to develop, collaboratively with opposing counsel, a list of at least some points to be addressed at the first conference.	Don't just spot an issue, pick a fight, and run to the arbitrator(s) to resolve it. The case manager or arbitrator(s) may conclude that there are no other adults in the room besides themselves. That will not help you when you need to ask for some leeway on any number of issues. Don't expect case managers to be mind-readers. If you need something out-of-the-ordinary to be addressed, make sure it makes it onto the agenda.
I. File an Early Witness List	
File as comprehensive a list of witnesses as possible, as early in the case as possible. • Include in the witness list the current affiliations of witnesses.	Don't hold back on identifying your witnesses in the hopes of springing a surprise witness at the hearing. Generally, surprise is not allowed or is mitigated by allowing opposing counsel time to regroup. If you do hold back, you run the risk of arbitrator disclosures later in the case, resulting in (a) a disruptive replacement of an arbitrator mid-stream, or (b) continued service of an arbitrator who might not have been selected in the first place if the disclosure had been made earlier.

Dos	Don'ts
J. Propose Rather Than Impose	
Present joint proposals as just that: proposals for consideration by the arbitrator(s). • Arbitration is a creature of contract, but joint proposals that go too far in transforming arbitration into litigation can undermine the nature and integrity of the arbitral process.	Don't send the arbitrators edicts. Arbitrator(s) need to be persuaded that whatever you jointly propose is a reasonable approach because they are trained by the provider organizations to achieve efficiency and to maintain the distinctiveness of the arbitration process.
Prepare to present to the arbitrator(s) some of your own reasonable proposals to resolve open issues.	Don't just expect the arbitrator(s) to figure it out; you may not like how it goes, especially if opposing counsel offers solutions.
K. Remember the Golden Rule	
Be courteous and cooperative in dealing with arbitrators, case managers, opposing counsel and staff, and witnesses. • And, if you want to convey the impression to the arbitrator(s) that you think you have a good case, show good humor at all times.	Don't grandstand for clients or, if things seem to be going badly, shift into high (make-the-record-for-appeal) gear. There is no effective right of appeal. Don't go on the offensive, unless it is a charm offensive.
L. Be the Problem-Solver in the Room	
Anticipate practical needs and likely disputes. • Try to resolve disputes with opposing counsel. • Try to present unresolved disputes at scheduled conferences.	Don't pepper the arbitrator(s) with many disjointed requests that could have been presented at one time.
Keep your presentation interesting but low-key.	Don't waste time on theatrics. There is no jury to wake up or to impress. Would you bring a megaphone to a poker game?
M. Limit Discovery Requests to What Is Absolutely Essential	
Whatever discovery you might ask for in court, cut it back. • You may get more from opposing counsel than from the arbitrator(s). • Consider the legal limits on arbitrator power to compel discovery from non-parties.[13]	Don't assume Federal Rules-style discovery is inscribed in the Bill of Rights. Even if broad discovery is written into your arbitration clause, arbitrators have discretion to streamline the process, and they feel pressure from provider associations to do just that.
Consider tools to cut discovery time and costs. • Computer-assisted electronic document review a/k/a "predictive coding" is one example. • Arbitrators appreciate a creative and practical approach.	Don't underestimate arbitrator receptiveness to creative solutions or the ability of technology to solve or mitigate problems created by technology.

Dos	Don'ts
If the arbitration is international (i.e., between commercial parties of different nations): • Do not expect to be able to take *any* discovery depositions at all.[14] • Exchange of written fact witness statements in lieu of live direct is the norm.[15] – Fact witness statements are often the only way to avoid surprise under international procedures. • Document exchange is limited.[16] – Prepare extremely specific requests for documents you don't already have but really need.	Don't try to look for the needle in the other side's haystack. The world detests American-style discovery. International arbitration practice and procedure reflect that consensus. If the case is governed by international arbitration rules, the fact that arbitration is taking place in the U.S. does not make discovery any more available.
If the case is domestic in nature: • Expect to be told you can take, at most, a very limited number of depositions of limited duration.[17] –The smaller the case, the fewer and shorter the depositions, so figure out what you *really* need, and go for that.	Don't assume that proportionality is a term first coined in response to discovery excesses in Federal Rules practice. Providers have been training commercial arbitrators for years to limit discovery to what is needed *and* proportional.
Expect push-back in response to a litigation-like discovery plan: • Even if you work out a joint proposal and present it on a silver platter. • Advise your client realistically and up front about the limits of discovery in arbitration. There are guidelines and articles explaining the limits of discovery in arbitration. Send one or two to your client if it does not believe you when you explain the limitations on discovery in arbitration.	Don't panic if you are used to broad discovery before trial. In arbitration, the hearing-by-installment approach usually affords ample opportunity to regroup. Arbitrators have the flexibility to remedy genuine surprise and are sensitive to the need for procedural fairness.
N. Present Disputes Informally	
Provide the arbitrator(s) with a brief, written, jointly submitted or at least even-handed preview of the dispute.	Don't expect the arbitrator(s) to rule on complex and important discovery disputes at a conference without having had time to think about it and confer with one another.
O. Propose Dispositive Motions When They Meet Arbitration Standards	
Propose a dispositive motion only if it is likely to succeed *and* to streamline the case.[18] • Prepare a one or two-page letter outlining the grounds, likelihood of success, and likely economies to be achieved from the dispositive motion.	Don't ask to make dispositive motions just to condition arbitrator thinking in your favor. It is not efficient, and busy arbitrators might conclude that you are trying to make extra work for yourself.

Dos	Don'ts
P. Use Witness Statements and Exchange Experts' Reports	
Consider agreeing to the use of witness statements as part of direct testimony even if not required to do so. • Fact witnesses rarely crack on direct examination. • Exchange experts' reports. Parties rarely have an opportunity to take the deposition of opposing experts in arbitration. You may as well take some credit for adopting an approach that otherwise will be imposed. • Incorporate your expert report as an integral part of the expert's sworn testimony.	Don't fight tooth-and-nail against the witness statement procedure just because it is unfamiliar or can sometimes be abused; you can negotiate the ground rules to limit abuse. Don't assume that witness statements and experts' reports prevent the witness from telling her story. Arbitrators can be persuaded to let witnesses give brief overviews of direct testimony and to update or correct statements or reports just before cross-examination at the hearing.
Prepare fact witness statements with the witness and in the witness' own voice.	Don't submit a witness statement that reads like a memo of law. It will not be effective and your witness may deserve better.
Q. Design Helpful Hearing Submissions	
Organize hearing exhibits so that they are arbitrator-friendly. • Arbitrators pick up bundles of hearing exhibits and read them.	Don't submit exhibit volumes that resemble shuffled decks of playing cards.
Submit a separate volume of joint exhibits that are the key, undisputedly authentic documents in the case. • Parties may disagree as to the meaning of undisputedly authentic and relevant documents, but that does not mean the documents are not authentic or are not key to the dispute.	Don't create logistical challenges for the arbitrator(s) by burying the basic documents in larger document groupings. Many arbitrators work without any office support.
Provide documents in whatever form(s) the arbitrator(s) request. • Arbitrators on the same panel may have very different working styles. • Offer to have a courtesy paper set in the hearing room for each arbitrator.	Don't assume that all arbitrators have the same technological savvy. Some may consider the courtesy set to be essential; others may see it as unnecessary and wasteful. The key is to find out each arbitrator's preference.
Keep the record organized and make it easy for the arbitrator(s) to focus on what's important. • Consider with an open mind an arbitrator's request for authorization to work with a colleague on some aspects of a complex, large-record case. Arbitrators do not have access to law clerks and they cannot ask for help from law firm colleagues unless the parties expressly authorize it.	Don't automatically react negatively if an arbitrator, particularly in a complex, big-document commercial matter, asks for authorization to draw on a colleague for support for specific tasks. Depending on how the arrangement is structured, it could result in time and cost savings, and a better structured or reasoned award.
Keep Pre-Hearing Memos Concise. • Say things once.	Don't engage in repetition. Repetition tends to annoy arbitrators. Don't engage in repetition. Don't.

Dos	Don'ts
R. Decide on a Form of Award Well Before the Hearing	
Inform the arbitrator(s) before the evidentiary hearing as to what form of award is required. • Depending on the applicable rules, arbitrator(s) may decide on the form of award much sooner in the case, but the eve of the evidentiary hearing should be the absolute minimum notice so the arbitrator(s) can identify the tools they need to receive from the parties.	Don't ask for a reasoned award without agreeing to provide the arbitrator(s) with a hearing transcript or, if no transcript is made, to provide the arbitrator(s) with proposed findings of fact or some less formal version thereof.
S. Discuss the House Rules in Advance of the Hearing	
Clarify any restrictions on communicating with witnesses during their testimony, or on the witness' attendance during the testimony of other witnesses. • Ask the arbitrator(s) to set forth any restrictions in a procedural order.	Don't assume that you, the arbitrator(s) and opposing counsel all have the same practice experience background with respect to the handling of witnesses and other hearing-room conduct.
T. Propose Hearing Procedures That Maximize Time for Witness Testimony and That Help Keep the Arbitrator(s) Organized	
Keep housekeeping at the hearing to a minimum. • Try to limit discussion of administrative details to the beginning or end of the hearing day. • Try to work out problems off the record and then confirm agreements on the record.	Don't burden the transcript with lengthy discussions unrelated to the merits. The transcript (even in paper form) should be user-friendly for the arbitrator(s) in preparing the award.
Submit an order of presentation of witnesses in advance of the hearing. • Update the line-up at the end of each day for the next day.	Don't try to surprise the arbitrators with your next witness. Arbitrators like to prepare for witnesses too.
Have your next witness in the batter's box.	Don't waste expensive hearing time waiting for a witness who is stuck in traffic. Some arbitrators, and some clients who hear an arbitrator grousing about it, might hold it against you.
Make evidentiary objections briefly, in writing, and focused on significant matters; time the objections so as not to disrupt hearing flow. • Limit evidentiary objections during the hearing to important questions of time management, relevance, weight and confidentiality.	Don't use evidentiary objections to break a witness' rhythm or to run the clock. Arbitrators recognize the tactic, and may deduct points from your credibility score and/or help the witness get back on track. Don't fuss over prejudice unless the evidence is irrelevant and borders on the outrageous. Arbitrators think they are too sophisticated to have to worry about becoming prejudiced, but might draw the line at attempts to delve into clearly non-probative personal matters.

Dos	Don'ts
Ask the arbitrator(s) whether closing arguments or post-hearing briefs would be more helpful. • Ask the arbitrator(s) what points they would most like to be addressed in closing arguments and/or briefs, and adjust accordingly. • This is not just about being courteous. You want to know what might be troubling the arbitrator(s) and you want to deal with it as best you can. • Make use of arbitrator flexibility. For example, in some cases it might make sense to have a closing argument as to some issues plus a short brief on a point or two that are better addressed in writing, with a chart that the arbitrators might find helpful but requires a bit more time to prepare, etc.	Don't just repeat in closing the themes you have been developing all through the case; address what's on the mind(s) of the arbitrator(s) at that point in the hearing. It is your last chance to put the arbitrator(s) at ease with respect to what may be bothering them about your case or defenses. Don't repeat arguments that are not essential to your case and that have not gotten any traction with the arbitrator(s) just because your client likes to hear them. You are not there to entertain or soothe the client but to get the client the best possible result.
Provide the arbitrator(s) with hearing transcripts at the same time you receive them. • If you are getting daily copy, offer it. • Ask each arbitrator what form (paper, electronic, software) is preferred, and include any court reporter index.	Don't just do the minimum or the usual; go out of your way to make it as easy as possible for the arbitrator(s), particularly when doing so has no material impact on cost.
Supply a joint, definitive, final list of all the documents in evidence. • This is especially important in the larger-document cases or when exhibits have been moved into evidence without testimony. • Arbitrators like to have a reliable checklist to make sure they have reviewed and considered all the evidence in the record.	Don't rely on the court reporter to provide the exhibit list if there are exhibits in evidence that were not used with witnesses or not formally moved in evidence on the record.
U. Be Courteous to the End	
Thank the arbitrator(s) and case manager, each by name, for their service and attention. Acknowledge the members of your team at all levels. Thank the opposing attorney(s). If counsel was generally obstructive but cooperated in some small way, thank counsel specifically for that small detail even though (or perhaps because) it might seem like faint praise. Acknowledge the hard-working junior members of the other side's team, including non-lawyers, for their contribution and cooperation, even if you cannot utter a word of thanks to lead counsel.	Don't just say thank you; when you say it, say it like you mean it.

Endnotes

1. For a practical overview of some key considerations in arbitrator selection, *see* Charles J. Moxley, Jr., *Selecting the Ideal Arbitrator*, 2005 DISP. RESOL. J., 1, *available at* https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003897 (last visited Sept. 9, 2014).

2. *See* STIPANOWICH, ET AL., PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION 61-67 (2010), *available at* http://www.thecca.net/sites/default/files/CCA_Protocols.pdf (last visited Sept. 9, 2014) [hereinafter CCA Protocols].

3. *See generally*, NEWMAN, ET AL, GUIDELINES FOR ARBITRATORS CONDUCTING COMPLEX ARBITRATIONS (2012), *available at* http://www.c-pradr.org/Portals/0/Resources/ADR%20Tools/Tools/Arbitration%20Award%20Slimjim%20for%20download.pdf (last visited Sept. 9, 2014); NEWMAN, ET AL., GUIDELINES ON EARLY DISPOSITION OF ISSUES IN ARBITRATION (2009), *available at* http://www.cpradr.org/RulesCaseServices/CPRRules/GuidelinesonEarlyDispositionofIssuesinArbitration.aspx (last visited Sept. 9, 2014) [hereinafter CPR Early Disposition Guidelines]; NEWMAN, ET AL., PROTOCOL ON DISCLOSURE OF DOCUMENTS AND PRESENTATION OF WITNESSES IN COMMERCIAL ARBITRATION (2009), *available at* http://www.cpradr.org/RulesCaseServices/CPRRules/ProtocolonDisclosureofDocumentsPresentationofWitnessesinCommercialArbitration.aspx (last visited Sept. 9, 2014); N.Y. State Bar Ass'n, Section on Disp. Resol., *Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations* [hereinafter NYSBA Domestic Guidelines] and N.Y. State Bar Ass'n, Section on Disp. Resol., *Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitration* [hereinafter NYSBA International Guidelines], both *available at* http://old.nysba.org/Content/NavigationMenu/Publications/GuidelinesforArbitration/DR_guidelines_booklet_proof_10-24-11.pdf (last visited Sept. 9, 2014); *Protocol for E-Disclosure in Arbitration*, CHARTERED INST. OF ARB., Oct. 2008, *available at* http://www.ciarb.org/information-and-resources/E-Discolusure%20in%20Arbitration.pdf (last visited Sept. 9, 2014) [hereinafter CIArb E-Disclosure Protocol]; *Efficiency Guidelines for the Pre-Hearing Phase of International Arbitrations*, JAMS, Feb. 1, 2011, *available at* http://www.jamsinternational.com/wp-content/uploads/JAMS-International-Efficiency-Guidelines.pdf (last visited Sept. 9, 2014) [hereinafter JAMS Efficiency Guidelines]; Int'l Bar Ass'n, *IBA Rules on the Taking of Evidence in International Arbitration* (2010), *available at* file:///C:/Users/tmb/Downloads/IBA%20Rules%20on%20the%20Taking%20of%20Evidence%20in%20Int%20Arbitration%20201011%20FULL.pdf (last visited Sept. 9, 2014); THE CODE OF ETHICS FOR ARB. IN COM. DISP., *available at* http://www.americanbar.org/content/dam/aba/migrated/dispute/commercial_disputes.authcheckdam.pdf (last visited Sept. 9, 2014).

4. *See* CCA Protocols, *supra* note 2, at 61-63.

5. The AAA Commercial Arbitration Rules now provide for mediation in the course of arbitration unless the parties opt out. *See* Am. Arb. Ass'n, *Commercial Arb. Rules and Mediation Procedures R-9*, at 14 (2013), *available at* https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased (last visited Sept. 9, 2014) [hereinafter AAA Commercial Arb. Rules].

6. *Id.; see also* Luis M. Martinez and Thomas Ventrone, *The International Centre for Dispute Resolution Mediation Practice*, 494-95, *available at* https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002567 (last visited Sept. 9, 2014); Int'l Chamber of Com., Mediation Guidance Notes, ¶¶ 28-35, *available at* http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Mediation/Rules/Mediation-Guidance-Notes (last visited Sept. 9, 2014).

7. *See, e.g.*, Am. Arb. *Ass'n, A Guide to Commercial Mediation and Arbitration for* Business People (2013), *available at* https://www.adr.org/aaa/ShowPDF?doc=ADRSTAGE2019455 (last visited Sept. 9, 2014); Am. Bar Ass'n, *Benefits of Arbitration for Commercial Disputes, available at* http://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/arbitration/arbitrationguide.authcheckdam.pdf (last visited Sept. 9, 2014); Int'l Chamber of Com., *Introduction to ICC Arbitration, available at* http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/ (last visited Sept. 9, 2014).

8. *See, e.g.*, JAMES M. GAITIS, ET AL., THE COLLEGE OF COMMERCIAL ARBITRATORS GUIDE TO BEST PRACTICES 137-76 (3D ED. 2013) [hereinafter CCA Best Practices Guide]; CCA PROTOCOLS, *supra* note 2, at 72-73; CIArb E-Disclosure Protocol, *supra* note 3, at 6; INT'L DISPUTE RESOLUTION PROCEDURES, INT'L CENTRE FOR DISPUTE RESOL., art. 21.1, June, 2014, *available at* https://www.icdr.org/icdr/ShowProperty?nodeId=/UCM/ADRSTAGE2020868&revision=latestreleased (last visited Sept. 9, 2014) [hereinafter ICDR Dispute Resol. Procedures] ("The arbitral tribunal shall manage the exchange of information among the parties with a view to maintaining efficiency and economy."); Mitchell Marinello & Robert Matlin, *Muscular Arb. and Arbitrators Self-Mgmt. Can Make Arb. Faster and More Econ.*, 67 DISP. RESOL. J. 69, 73-75, *available at* http://www.novackmacey.com/wp-content/uploads/2013/06/Muscular-Arbitration-and-Arbitrators-Self-Management-Can-Make-Arbitration-Faster-and-More-Economical-Dispute-Resolution-Journal-Vol.-67-No.-4-2013-PDF.pdf (last visited Sept. 9, 2014).

9. *See* CCA Protocols, *supra* note 2, at 32-34.

10. *See, e.g., Due Diligence Eval. Tool for Selecting Arbitrators and Mediators*, INT'L INST. FOR CONFLICT PREVENTION & RESOL. (2010), *available at* http://www.cpradr.org/Portals/0/File%20a%20Case/Engagement%20Guidelines%20final.pdf (last visited Sept. 9, 2014); Energy Arbitrator's List, Int'l Centre for Disp. Resol., *available at* http://www.energyarbitratorslist.com/ealsearch/faces/eal?_adf.ctrl-state=1bae1uglv_4 (last visited Sept. 9, 2014).

11. *Compare* AAA Commercial Arb. Rules, *supra* note 5, M-10 (for mediation only), and ICDR Dispute Resol. Procedures, *supra* note 8, art. 37, and *Comprehensive Arb. Rules & Procedures*, JAMS, R-26, Oct. 1, 2010, *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2010.pdf (last visited Sept. 9, 2014) [hereinafter JAMS Comprehensive Arb. Rules], *with* Rules, Int'l Inst. For Conflict Prevention & Resol., Inc., R-20, July 1, 2013, *available at* http://www.cpradr.org/RulesCaseServices/Arbitration/AdministeredArbitration/Rules.aspx (last visited Sept. 9, 2014) [hereinafter CPR Rules], *and* ICC Rules of Arb., Int'l Chamber of Com., art. 22, Jan. 1, 2012, *available at* http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article_b1 (last visited Sept. 9, 2014) [hereinafter ICC Rules of Arb.]; see also CCA Best Practices Guide, *supra* note 8, at 439-40, Table 17.3.

12. *See* AAA Commercial Arb. Rules, *supra* note 5, art. R-23; CPR Rules, *supra* note 11, art. R-11; JAMS Comprehensive Arb. Rules, *supra* note 11, art. R-26(b).

13. If the arbitration is governed by the Federal Arbitration Act (FAA), the courts are split as to whether FAA Section 7 authorizes the arbitrators to issue subpoenas for discovery document production or deposition testimony, or whether Section 7 only extends to subpoenas for attendance at the evidentiary hearing. *See generally*, CCA Best Practices Guide, *supra* note 8, at 149-52. If the arbitration is governed by state arbitration law, the power of the arbitrator(s) to issue subpoenas to nonparties may vary from state to state.

14. ICDR Dispute Resol. Procedures, *supra* note 8, art. 21.10 ("10. Depositions…generally are not appropriate procedures for obtaining information in an arbitration under these Rules."); JAMS Efficiency Guidelines, *supra* note 3, at 3 ("In JAMS international arbitrations, the prevailing practice is that depositions are not

permitted."). *Compare* NYSBA Domestic Guidelines, *supra* note 3, at 13-14, *with* NYSBA International Guidelines, *supra* note 3, at 28.

15. *See, e.g.*, ICDR Dispute Resol. Procedures, *supra* note 8, art. 21.10 ("Unless otherwise agreed by the parties or directed by the tribunal, evidence of witnesses may be presented in the form of written statements signed by them."); JAMS Efficiency Guidelines, *supra* note 3, at 3 ("In international arbitrations, the use of written witness statements in lieu of direct testimony…is a common, broadly accepted practice.").

16. *See* NYSBA International Guidelines, *supra* note 3, at 27-28.

17. *See* NYSBA Domestic Guidelines, *supra* note 3, at 14.

18. *See* AAA Commercial Arb. Rules, *supra* note 5, R-33 ("The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case."); CPR Early Disposition Guidelines, *supra* note 3, Guideline 2.4 ("It is important to bear in mind that even if early disposition of an issue may be accomplished quickly and fairly, it nevertheless may not be appropriate if it is not likely, if granted, to result in a material reduction of the total time and cost in reaching final resolution of the case.").

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Expert Q&A: International Arbitration in New York

London and Paris traditionally have been the preeminent forums for complex international arbitration, with foreign parties routinely resisting efforts to arbitrate in the US. Recently, however, New York has emerged as an increasingly popular venue for the resolution of cross-border disputes. Practical Law asked *Richard L. Mattiaccio* of *Allegaert Berger & Vogel LLP* to discuss this trend and the reasons behind New York's growing status as a global center for international arbitration.

RICHARD L. MATTIACCIO
PARTNER
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Richard has over 35 years of experience in commercial and international arbitration and litigation in the federal and state courts of New York, and over 25 years of service as chair, panel, and sole arbitrator in commercial and international cases. He serves on AAA, ICDR, ICC, and CPR arbitration panels and is a Chartered Arbitrator and Fellow of the Chartered Institute of Arbitrators and a Fellow of the of the College of Commercial Arbitrators. Richard is Chair of the New York City Bar Association's International Commercial Disputes Committee, Vice Chair of the Chartered Institute of Arbitrators New York Branch, a Vice Chair of the New York International Arbitration Center, and a member of the CPR Institute Arbitration Committee.

New York has hosted more international arbitrations over the last several years than ever before. What are some of the reasons for this change?

One factor contributing to this change is an increase in cross-border transactions involving middle-market American companies, as well as large multinationals and classic trading and import companies, with foreign counterparties. As a result, there has been an overall increase in international arbitrations arising out of or relating to these transactions.

Additionally, concerns about discovery in the US have, in the past, made parties wary of pursuing international arbitration proceedings here. Because many foreign parties hail from jurisdictions that do not allow any discovery, they are often shocked and appalled at the scope of permissible and anticipated discovery in US courts. However, updated rules

from major arbitral institutions, along with protocols and guidelines from bar associations, make clear that international arbitration is treated differently from domestic arbitration and civil litigation, particularly with regard to the scope of discovery. This has increased parties' willingness to entertain US jurisdictions, including New York, as potential seats for arbitrating international disputes.

Recognizing and seeking to support these trends, in the past few years:

- The International Chamber of Commerce (ICC) established SICANA, Inc., which administers and supports arbitration in New York.
- The London-based Chartered Institute of Arbitrators (CIArb) started the CIArb New York Branch.
- The New York International Arbitration Center (NYIAC) opened its doors to provide state-of-the-art facilities for hearings, a high level of service to hearing participants, and a center for the study of international arbitration.

The availability of world-class facilities at NYIAC and sophisticated arbitrators with substantial legal and industry experience have also contributed to increased interest in New York as a place for international arbitration hearings, and reflect New York's growing importance as a global hub for arbitration.

Why have parties historically been reluctant to pursue New York as a venue for international arbitration, and how have these concerns been addressed?

As mentioned above, many foreign parties have been concerned that the level of discovery contemplated by the Federal Rules of Civil Procedure would be available if their arbitration took place in the US. However, the approach in some judicial systems outside the US, in which each party presents the documents on which it intends to rely and nothing further, has exerted a significant influence on the development of international arbitration practice in New York.

A number of guidelines published by the main arbitration providers in New York contain provisions that foreign parties would find familiar and consistent with their experience in international arbitrations seated abroad. These guidelines include:

- The International Centre for Dispute Resolution (ICDR) Guidelines for Arbitrators Concerning Exchanges of Information.
- The JAMS Efficiency Guidelines for the Pre-Hearing Phase of International Arbitrations.
- The International Institute for Conflict Prevention and Resolution (CPR) Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration.

These guidelines are consistent with practices that have developed in other major international arbitration centers, perhaps most notably in ICC arbitration. Similarly, the New York State Bar Association (NYSBA) issued the following two sets of guidelines on conducting discovery, which treat discovery in domestic commercial arbitration and international arbitration separately:

- Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations.
- Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitrations.

Like the guidelines and protocols promulgated recently by the major arbitral institutions, the NYSBA guidelines do not impose an absolute ban on discovery. They do clarify, however, that the exchange of information in international arbitration must be more restricted than in both domestic arbitration and civil litigation practice in some courts in the US. Because civil discovery in New York state courts typically has been more limited, New York attorneys tend to adapt well to the need to restrict discovery in arbitration.

Search Evidence in International Arbitration for more on the principles and procedures governing the presentation of evidence in international arbitration.

Some foreign parties have questioned the desirability of New York as a seat for arbitration based on the manifest disregard of the law doctrine. Are international arbitration awards issued in New York more vulnerable to being set aside?

Some advocates of keeping international arbitration outside the US have perpetuated the myth that arbitral awards by arbitrators sitting in the US are often vacated on grounds of manifest disregard of the law, and that manifest disregard challenges, even if unsuccessful, create uncertainty.

However, manifest disregard challenges mounted in domestic arbitration cases are rarely successful. US courts have made clear that an arbitral tribunal's interpretation and application of the law are not subject to judicial second-guessing, observing that *vacatur* of an arbitral award for manifest disregard of the law "is a doctrine of last resort," reserved for "those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent but where none of the provisions of the [Federal Arbitration Act] apply" (*Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003)).

US courts also have shown deference to an arbitrator's interpretation of a contract. According to the US Supreme Court, it is the arbitrator's construction of the contract that was bargained for, and the "arbitrator's construction holds, however good, bad, or ugly" (*Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 573 (2013)). If the arbitration agreement grants the tribunal the authority to render an award, the award must stand even where the tribunal misidentifies the source of its authority (see *Salus Capital Partners, LLC v. Moser*, 2018 WL 566409, at *7 (S.D.N.Y. Jan. 16, 2018)).

A party challenging an award on the basis of manifest disregard bears the heavy burden of showing the following:

- The arbitrator was made aware of a governing legal principle.
- The legal principle was well-defined, explicit, and clearly applicable to the case.
- The arbitrator chose to ignore the law.

(*Goldman v. Architectural Iron Co.*, 306 F.3d 1214, 1216 (2d Cir. 2002).) An award may not be vacated on grounds of manifest disregard of the law if there is even a "barely colorable justification" for the outcome (*Wallace v. Buttar*, 378 F.3d 182, 190 (2d Cir. 2004)).

Moreover, the New York City Bar Report of its International Commercial Disputes Committee (ICDC) in 2012 explained that the concern about manifest disregard is largely theoretical in international arbitration.

Search Enforcing Arbitration Awards in New York for more on manifest disregard and other grounds on which enforcement of an arbitration award might be challenged in New York.

What are some of the key differences in conducting an international arbitration in New York when compared to the traditionally popular venues such as London or Paris?

In theory, there should be no difference. Under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and related treaties and laws, international arbitration should proceed in its own autonomous realm, independent of local law and regulation.

In practice, however, there are several differences. The most obvious is that New York has a deeper bench of arbitrators and counsel who know New York law and applicable federal law. New York-based arbitrators also have a vast range of industry expertise.

Another potential distinction is the degree to which the arbitration providers that are most active in New York have emphasized the need to contain costs and avoid duplication in their arbitrator training and continuing education programs.

For example, there was at least one ICDR hearing that continued in midtown Manhattan right through Hurricane Sandy in 2012, which had stranded the parties, counsel, and one arbitrator in their hotels. Despite the treacherous storm, the arbitrators agreed to continue the hearing without interruption, saving the parties the additional expense and inconvenience of another trip to New York from the Midwest and Europe. Instances like this demonstrate how hard providers and arbitrators in New York are working to burnish New York's reputation as a practical, cost-effective international center.

What aspects of New York law and jurisprudence make New York an attractive venue for international arbitration?

New York has a stable, well-developed and predictable body of contract law that adheres to international commercial standards and offers a legal culture that is receptive to enforcing international treaties to which the US is a signatory.

New York law should be attractive to international commercial parties because it allows the parties maximum autonomy in negotiating the terms of their agreement and rarely imposes terms as a matter of public policy. For example, New York law allows commercial parties to:

- Limit recoverable damages, including punitive damages (for more information, search Punitive Damages in US Arbitration on Practical Law).
- Waive jury trials.
- Decide whether they want to shift attorneys' fees and expenses to the prevailing party in litigation or arbitration. By contrast, in England, an agreement that requires a party to pay the whole or part of the costs of the arbitration, regardless of outcome, is valid only if the agreement was reached after the dispute had arisen. This approach precludes parties from contracting in the arbitration agreement that each party will pay its own costs in any event or that one party will pay the other party's costs whatever the outcome of the arbitration. (For more information, search Costs in Arbitration Under English Law on Practical Law.)

New York law should be attractive to international commercial parties because it allows the parties maximum autonomy in negotiating the terms of their agreement and rarely imposes terms as a matter of public policy.

New York law also affords considerable deference to the parties' selection of venue and choice of law, subject to very few limitations. Unless a foreign party has been conducting unauthorized business in New York, it must meet only minimal requirements to avoid jurisdictional and *forum non conveniens* challenges. Therefore, even where New York otherwise might be considered an inconvenient forum, it will provide a forum to the foreign party if:

- The amount in dispute is in excess of a statutory threshold.
- The agreement in question provides for the application of New York law and the choice of New York as the forum.
- The foreign party contractually agrees to submit to the jurisdiction of the New York courts.

(N.Y. Gen. Oblig. Law §§ 5-1401 and 5-1402.)

Conversely, where business parties choose not to take advantage of the New York courts, and instead agree to arbitrate or litigate in another forum, they can rely on New York's strong presumption in favor of enforcing these agreements. As New York courts have recognized, this approach fosters predictability, an important goal in commercial relationships.

Search Anti-Suit Injunctions and Anti-Arbitration Injunctions in the US Enjoining Foreign Proceedings for guidance on the legal issues counsel should consider when seeking an anti-suit or anti-arbitration injunction in the US to enjoin foreign proceedings.

New York courts also offer a range of provisional remedies to aid arbitration so that arbitral awards are not rendered ineffectual.

Search Provisional Remedies in New York: Overview, Attachment in Aid of Arbitration in New York, and Interim, Provisional and Conservatory Measures in US Arbitration for information on provisional remedies.

At the conclusion of the case, New York courts routinely enforce arbitral awards (see, for example, *Kailuan (Hong Kong) Int'l Co. v. Sino E. Minerals, Ltd.*, 2016 WL 7187631, at *4 (S.D.N.Y. Dec. 9, 2016)). In one case, a New York state court even granted prejudgment attachment of the defendants' in-state assets pending the court's consideration of an action to recognize a Singapore judgment (that confirmed an arbitral award) under Chapter 53 of the Civil Practice Law and Rules (*Passport Special Opportunities Master Fund, L.P. v. ARY Commc'ns, Ltd.*, 2015 WL 7511540, at *3 (Sup. Ct. Nassau Co. Nov. 17, 2015)).

Additionally, there are substantive, sometimes technical considerations that make New York law attractive to commercial parties. For example, New York's well-developed law on secured transactions can provide assurance to foreign parties because it looks to the local law of the jurisdiction where the collateral is located to govern issues of perfection and the priority of a security interest in collateral.

New York also has a balanced approach to contract interpretation that corresponds to the expectations of commercial parties. This represents a middle ground between a formalistic, hard-and-fast prohibition against going beyond the language of an agreement, on the one hand, and freely allowing testimony on the meaning of language even when it is clear, on the other hand. As many attorneys may recall from law school, although New York's "four corners" rule allows for parol evidence only if there is ambiguity in a written agreement, it is a recognized principle that, under New York law, "a promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed" (*Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917)).

Further, New York law recognizes a duty of good faith and fair dealing in the performance of a contract, but does not impose, as some other jurisdictions do, a broad obligation of good faith on the part of commercial parties in their negotiation of an arm's length agreement.

The NYSBA released a brochure pointing out these and other advantages of choosing New York law to govern international contracts (NYSBA, Choose New York Local Law for International Commercial Transactions, available at *nysba.org*).

PRACTICE NOTES

The following related Practice Notes are available on Practical Law.

>> Simply search the resource title

- Attachment in Aid of Arbitration in New York
- Choosing an Arbitral Seat in the US
- Compelling and Staying Arbitration in New York State Supreme Court
- Compelling Evidence from Non-Parties in Arbitration in the US
- Drafting Arbitration Agreements Calling for Arbitration in the US
- International Litigation: Recognition and Enforcement of Foreign (Non-US) Judgments and Arbitration Awards
- Introduction to US Arbitral Institutions and Their Rules
- The Preclusive Effect of Arbitration Awards in the US

Since October 2013, all international arbitration cases have been assigned to a single justice within the Commercial Division of the New York Supreme Court. Has this change affected the resolution of these disputes?

Litigation related to international arbitration is limited and primarily conducted in federal court because either side can select federal court in cases governed by the New York Convention.

For those cases filed in New York State Supreme Court, New York County, the fact that all international arbitration-related matters are assigned to a single judge tends to reassure counsel that their matters will be heard by an individual with experience in international disputes. As a practical matter, however, the federal district court offers a deeper and broader level of experience as a by-product of the higher volume of international arbitration-related applications filed in federal court.

Search Practicing in the Commercial Division of the New York State Supreme Court for more on civil practice in the Commercial Division.

Arbitration Tips and Traps for Corporate Counsel

***Richard L. Mattiaccio,* Corporate Counsel**

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Arbitration is a field of study worthy of Hermann Rorschach. Parties who bring to it a preference for the formality and forensic opportunities of litigation see arbitration as the Wild West. Others, who prefer to resolve all business disputes quickly and informally, see it as just another form of litigation. Businesspeople who want to submit disputes to a business-oriented, neutral third party bound by rules that ensure basic fairness, but do not want all the bells and whistles of litigation, see arbitration as a happy medium.

In practice, the parties to a large extent create their own arbitration reality, starting from the time they choose the applicable rules and otherwise construct their arbitration clause, to the time the arbitrators close the hearing.

The following, admittedly partial list of "tips" and "traps" is offered to suggest practical ways to make arbitration work better for companies that rely on it as a more efficient and business-like way to resolve disputes than litigation in court.

The Arbitration Clause

Businesspeople in the throes of negotiating an agreement rarely want to spend time, energy or negotiating capital on the arbitration clause. Inside counsel can count on second-guessing, however, if a dispute goes to arbitration and it takes too long, costs too much and is decided by arbitrators who seem like aliens to the businesspeople.

The company that has a well-considered, consistent approach to arbitration clauses has a better chance of shaping the clause in any given contract, and is more likely to be satisfied with the arbitration process.

Tip: *Develop a standard arbitration clause and fallback positions in advance of negotiations.*

Trap: *Assuming all provider rules and arbitrator panels are the same.* Arbitration rules and panels can vary greatly, even within the same provider organization.

Tip: *Select the place of arbitration based on its law regulating the arbitration process and the quality of its arbitrator community.* Your corporate home might seem best, but its courts could interfere excessively in arbitration, or it might lack a deep bench of arbitrators suited to your dispute or industry.

Trap: *Selecting the place of arbitration for local advantage or proximity to your litigators.* A "home court" advantage is unlikely in arbitration. Good litigators are more easily found than good arbitrators.

Tip: *Think about the ideal number of arbitrators and consider the new appeal-within-arbitration options.* The trend is toward sole arbitrators in all but the highest-stakes cases. Leading providers now allow parties to opt-

in to a well-defined, expedited appeal process within the arbitration itself. The appeal process addresses concerns that some companies may have about the risk of a "runaway" sole arbitrator.

Trap: *Assuming the need for three arbitrators in all cases.* It is more difficult to schedule hearings with three arbitrators, resulting in an increased time lapse from filing to award. A full hearing with one arbitrator followed by an appeal within arbitration may involve much less time and expense than a three-arbitrator panel without any appeal.

Arbitrator Selection

As in jury selection, cases can be won or lost during arbitrator selection. Unlike jury selection, arbitrator selection happens at the beginning of a case. A party and its counsel should invest substantial time and effort in the selection process, and should understand the case as deeply as possible before selecting arbitrators.

Tip: *Front-load the planning of your case.* Having a strategy lets you select arbitrators who are more likely to be open and receptive to your arguments.

Trap: *Filing quickly and developing the case over time.* This approach results not only in less-effective arbitrator selection, but less-effective advocacy in those crucial early conferences.

Tip: *Select counsel familiar with the arbitrator pool and selection process.* An arbitrator's prior awards rarely are available to the public, and this hampers the evaluation of potential arbitrators. If counsel does not know or have access to those who know arbitrator candidates well, consider engaging specialized counsel to assist in arbitrator selection.

Trap: *Relying entirely on official arbitrator resumes.* Arbitrator bios tend to be designed to trigger keyword search hits; they rarely convey a sense of the individual.

Discovery

Discovery is the most debated and misunderstood phase of arbitration. Some parties complain that too much discovery is allowed, making arbitration time-consuming and expensive and too similar to litigation. Others complain that too little discovery is allowed, making it difficult to develop claims or defenses.

Arbitration providers train arbitrators to limit discovery so that the process keeps its promise of offering a faster and cheaper alternative to litigation. Parties may influence these ground rules to some degree by adding specific language about discovery to their arbitration clause or by presenting agreed discovery plans, but arbitrators retain discretion to limit discovery to what is proportional. Counsel needs to be ready to present a limited-stakes case with little document exchange beyond what each side plans to rely on at the hearing, and to proceed to hearing with limited or no discovery depositions, especially in international cases.

Tip: *Locate and preserve all relevant company documents early, and develop the facts from those documents and company witnesses*. In a high-stakes case, a party also should consider authorizing an ethically conducted investigation to supplement internally available information.

Trap: *Planning to build your case out of the other side's files.* Many factors work against this approach in arbitration.

Tip: *Identify and disclose your witnesses early in the case.* Arbitrators need this information to conduct effective conflicts checks.

Trap: *Holding back names to achieve surprise at the hearing.* The party who holds back witness names risks disruptive midstream replacement of an arbitrator, continued service of an arbitrator who might not have been selected or preclusion of a key witness.

Motions, Papers and Objections

Arbitration traditionally is a more hearing-driven and less paper-driven process than litigation. Thanks to a generational shift and to recent changes in provider rules, arbitrators are becoming more comfortable with dispositive motions and other complex written submissions. There remains, however, a strong emphasis in arbitration on looking carefully at whether a proposed motion would result in net savings of time and expense to the parties. Similarly, evidentiary objections work differently in arbitration than in litigation. Attorneys need to understand and use these differences to be effective advocates in arbitration.

Tip: *Be skeptical if your counsel wants to engage in extensive motions practice.* Arbitrators really need to be convinced not just that a motion likely has merit but that, if granted, the motion will save hearing time and net expense to the parties.

Trap: *Asking arbitrators to decide motions with little practical effect on case complexity.* Arbitrators might conclude that your side is playing for time or intentionally running up expenses, or that counsel just does not understand arbitration.

Tip: *Encourage counsel to keep memos of law short and focused on essentials.* Be sure counsel briefs clearly and succinctly all the law on which your side principally relies. Arbitrators are expected to work without associate or law clerk support in most cases and cannot be faulted for not finding the law themselves. Very few commercial arbitrators like to read learned treatises, however, so a memo of law needs to get quickly to the point.

Trap: *Repeating points for emphasis in papers.* Arbitrators generally read everything submitted and do not appreciate repetitive papers, especially repetitive rhetoric.

Tip: *Encourage counsel to make evidentiary objections briefly and only if focused on the most significant matters.* Arbitrators rarely sustain evidentiary objections. However, if an objection shows an important document to be unreliable, it can be effective even if overruled.

Trap: *Using objections to disrupt rhythm and flow.* Arbitrators recognize this tactic and can overcompensate when they help the witness get back on track.

Demeanor and Etiquette

Litigation sometimes resembles the combat of gladiators, but arbitration is more like chess and requires different approaches and skills.

Tip: *Encourage counsel to offer reasonable solutions to disputes with opposing counsel.* Arbitrators respect the problem-solver more than the die-hard.

Trap: *Expecting arbitrators to figure it out.* Opposing counsel may offer a solution, and your side may not like it.

Tip: *Insist that your counsel be courteous and cooperative in dealing with arbitrators, case managers, opposing counsel, staff and witnesses.* Arbitrators tend to pay more attention to the adults in the room.

Trap: *Encouraging counsel to be aggressive.* If you lose, you'll quickly forget how good it felt to hear your trial lawyer roar.

Tip: *Make sure that your lead counsel thanks the arbitrators for their service, attention and patience.*Most arbitrators are human. They tend to like it when others appreciate them.

Trap: *Appearing ungracious with opposing counsel.* Graciousness is particularly impressive when opposing counsel has done little to deserve it.

Richard L. Mattiaccio, a New York-based partner in Squire Patton Boggs (U.S.), has 30 years of experience as counsel in commercial arbitration and in cross-border and IP-related litigation. He has served as an arbitrator for 25 years; is a Fellow of the College of Commercial Arbitrators; co-chairs the International Dispute Resolution Committee of the New York State Bar Association Dispute Resolution Section; is a founding member and former co-chair of the New York City Bar In-House/Outside Litigation Counsel Group; and is a member of the executive committee of the New York International Arbitration Center Inc.

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GUIDELINES FOR ARBITRATORS CONDUCTING COMPLEX ARBITRATIONS

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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.

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GUIDELINES ON EARLY DISPOSITION OF ISSUES IN ARBITRATION

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CPR's Commitment – As we celebrate more than 30 years of achievement, we continue to dedicate the organization to providing effective, innovative ways of preventing and resolving disputes affecting business enterprises. We do so through leadership and advocacy, and by providing comprehensive resources, such as education, training, consultation, neutrals, as well as a networking and collaboration platform for business, the judiciary, government, and other institutions.

CPR Guidelines on Early Disposition of Issues in Arbitration

CPR INTERNATIONAL COMMITTEE
ON ARBITRATION

CPR GUIDELINES ON EARLY DISPOSITION OF ISSUES IN ARBITRATION

Introduction

In arbitration, as in other dispute resolution processes, there may be occasions when certain claims, defenses or other issues can and should be winnowed out from the more meritorious claims so that the disputes may be resolved more efficiently. How and when arbitrators and counsel may wish to seek this separation is addressed in these Guidelines, which are designed to strike a balance between, on the one hand, eliminating early on claims that do not justify full-blown hearings and, on the other hand, not providing encouragement to non-meritorious applications for early disposition.

The Guidelines set out the types of issues as to which early disposition may be appropriate and suggest ways they may be addressed and responded to – always providing that early disposition will result in overall efficiencies. The Guidelines also provide disincentives for the making of premature or meritless requests for early disposition by suggesting ways in which the tribunal may assess costs and fees against unsuccessful applicants.

It is hoped that arbitrators and other users of arbitration will find the balanced approach taken in these Guidelines to be of value in the management of arbitration proceedings.

These Guidelines are the product of drafting done by the Reporter, John Basinger, and the Chair and, very importantly, the scrutiny and vetting of the various drafts by the members of the Working Group listed at the end of this document.

Lawrence W. Newman
Chairman of the CPR International
Committee on Arbitration

CPR GUIDELINES ON EARLY DISPOSITION OF ISSUES IN ARBITRATION

These Guidelines address the circumstances under which it may be appropriate for an arbitral tribunal to undertake early disposition of one or more issues. The Guidelines are intended to provide guidance to the tribunal unless the rules selected by the parties expressly prohibit summary dispositions – which will rarely be the case.[1]

The term "early" is intended to refer to a preliminarily stage of the arbitration, before the parties proceed to a hearing of the entire dispute, before the taking of any evidence, or, where appropriate, after taking only limited evidence. The issues that may be dealt with through early disposition may be claims, counter-claims, defenses or factual or legal questions. Early disposition can have the effect of narrowing the issues in dispute in order to simplify and expedite the further hearing of the arbitration, or, where appropriate, disposing of the entire case.

The Guidelines are intended to provide guidance to the tribunal, parties and counsel on the processes by which claims, defenses and other issues may be disposed of early in proceedings, thereby streamlining the dispute resolution process. A number of principles provide a useful frame of reference for consideration of when and how applications for early disposition of issues should be entertained. In considering these principles and their implementation, it should be borne in mind that early disposition is only appropriate when greater overall efficiencies will be achieved through early disposition of one or more issues than if all issues were considered in a single proceeding.

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[1] Institutional rules, such as those of the CPR, AAA, ICDR, ICC and LCIA, do not expressly authorize early disposition, but have the flexibility to permit it. JAMS Comprehensive Arbitration Rule 18(a) explicitly authorizes early disposition. Indeed, of the commonly used rules, only the FINRA rules prohibit early disposition, with certain enumerated exceptions.

Guidelines

1. Arbitrator Initiatives

1.1. Arbitral tribunals should take an active role in promoting early identification and disposition of issues. Early in an arbitration proceeding, and thereafter, the tribunal should consider inquiring of the parties as to issues that might be appropriate for early disposition.

1.2. In considering whether and how to engage in early disposition of issues, the tribunal should give appropriate deference to the likelihood that parties and their counsel will have a broader understanding than they of the legal and factual matters at issue and of the commercial, political and other ramifications of the arbitration. The tribunal should also respect the parties' choices regarding early disposition, as may be reflected in their selection of institutional rules, the *ad hoc* procedures they adopt, and the joint positions they take in the arbitration proceedings.

1.3 In any event, the tribunal should consider, in the manner described herein, the practicality and advisability of entertaining applications for the early disposition of issues if at least one party requests it.

1.4. The tribunal should also consider setting out guidelines in its first scheduling order for dealing with early disposition of issues, taking into account the principles and modes of application set out below.

2. Principles Underlying Early Disposition

2.1. When a requesting party can demonstrate that early disposition of any factual or legal issue may be accomplished efficiently and fairly, or when all parties agree that early disposition of a particular issue would be desirable, the tribunal should ordinarily take steps to initiate early disposition procedures.

2.2. A variety of issues may be appropriate for early disposition. In each case, parties and the tribunal should weigh the difficulty and cost of establishing the issue in question (including the

amount of evidence and argument expected to be needed for an early decision to be reached), and the effect that early disposition of the issue can be expected to have on proceedings that will follow.

2.3. Issues for which early disposition may be appropriate include, but are not limited to, the following:

2.3.1. ***Jurisdiction and standing.*** Early disposition is generally appropriate where the tribunal must address such matters as the scope of their authority.

2.3.2. ***Claims or legal theories of recovery.*** Early disposition may be appropriate for claims or theories of recovery·

2.3.2.1. That can be accepted or rejected as a matter of law, without the need for an evidentiary hearing.

2.3 2.2. That may be barred by defenses, such as contractual covenants, prescription/limitation periods, statutes of fraud, release, settlements, *res judicata*, or collateral estoppel.

2.3.2.3. Where the claimant cannot demonstrate that it will be able to provide evidence to satisfy a required element of the claim or theory of recovery.

2.3 3. ***Defenses.*** As with early disposition of claims, it may be possible to resolve certain defenses because· the defense fails as a matter of law, the party asserting the defense will not be able to establish one or more required elements of the defense, or the party is barred from asserting the defense.

2.3.4. ***Damages.*** In some cases, issues relating to damages may be appropriate for early disposition. For example, early disposition of issues that significantly limit damages may help to resolve related merits issues or facilitate settlement.

2.4. It is important to bear in mind that even if early disposition of an issue may be accomplished quickly and fairly, it nevertheless may not be appropriate if it is not likely, if granted, to result in a material reduction of the total time and cost in reaching final resolution of the case.

3. Modes of Application

3.1. *Discussions during early scheduling or other conferences.* Initial conferences provide an opportunity for the tribunal and parties to focus their attention on the key elements at issue and to discuss ways of resolving them at an early stage of the proceeding. The tribunal should consider instructing the parties to come to such conferences prepared to discuss issues which might be appropriate for early disposition.

3.2. *Discussions among parties.* Should a party propose early disposition, the tribunal should require the proponent to confer with the other parties on whether agreement can be reached on the steps to be taken to present the issue for determination. Matters dealt with in such an agreement might include a limited exchange of documentary and other information and focused briefing. The tribunal, in considering whether and how to conduct early disposition proceedings, should defer to such party agreements.

3.3. *Scheduling order.* Should it be determined, as a result of these discussions, that early disposition is appropriate, a procedural order should be issued implementing the parties' agreement, providing, where necessary, for the exchange of information and presentation of evidence and supporting arguments. The scheduling order should also provide for the disposition of issues not subject to early disposition or that will have to be dealt with if early disposition should not be awarded.

3.4. *Preliminary applications.* Unless the parties have agreed to a process for early disposition, the tribunal should generally require that a party requesting early disposition submit a letter or other written preliminary application, subject to recognized page limits, briefly

explaining why the matter in question should be resolved before other issues in the case. The application should set forth. (1) the issue(s) to be resolved; (2) how disposition of the issue(s) will advance efficient resolution of the overall dispute; and (3) the applicant's proposal as to the procedure by which the issue(s) would be resolved. Such preliminary applications may be made before or after the parties have engaged in an exchange of documents or afforded other disclosure. Unless the tribunal concludes that the preliminary application fails to state a sufficient basis for the relief requested, they should afford an opportunity to the other parties to respond in writing to the application.

3.5. *Prompt review of applications.* The tribunal should review promptly the preliminary application and any responses and determine whether there is a reasonable prospect that hearing the application may result in increased efficiency in resolving the overall dispute. If the tribunal concludes that early disposition of the issue is appropriate, it should instruct the parties on the procedure to be followed thereafter.

3.6. *Deciding early disposition issues.* Many applications for early disposition may be resolved on the basis of written submissions. In appropriate cases, witness testimony by affidavit or otherwise in written form may be considered, or limited hearings may be held. The procedures adopted should assure a reasonable opportunity to a party opposing the motion to make factual and other presentations in opposition.

3.7 *Consideration of issues under bifurcated hearing schedule.* Where proceedings are bifurcated, such as between liability and damages, early disposition may still be appropriate to reduce issues in each of the separated proceedings.

3.8. *Decision on early disposition proceedings.* The tribunal's decision on early disposition may be to grant or deny (in whole or in part) the relief requested, or to defer decision on the issue until the arbitration proceeding has been completed. If the tribunal grants an application

for early disposition, it should give consideration to whether its decision should take the form of a procedural order, interim award, or partial final award. The tribunal should limit further proceedings in accordance with its decision.

4. Allocation of Costs

4.1. To the extent not barred by the parties' agreement or applicable institutional rules, the tribunal may, if it has the authority to do so, treat its award of costs (including, where permitted, attorneys' fees) attributable to early disposition separately from any award of costs relating to other elements of the arbitration proceeding.

4.2. In order to discourage premature or meritless requests for early disposition, or requests made for tactical advantage or delay, the tribunal may assess against the unsuccessful applicant the costs and fees attributable to early disposition proceedings, and in its decision should give its reasons for allowing or denying assessment of costs and/or fees with respect to the application for early disposition. The tribunal may require, as a condition of its considering a party's request for early disposition, that the applicant acknowledge that the tribunal may impose fees and costs attributable to unsuccessful requests against the applicant.

4 3. The consent of all parties to early disposition of an issue may make a separate award of costs and fees inappropriate.

4 4. Separate awards of costs and fees may be inappropriate when early disposition submissions, whether successful or not, substantially reduce the need for additional briefs or other submissions.

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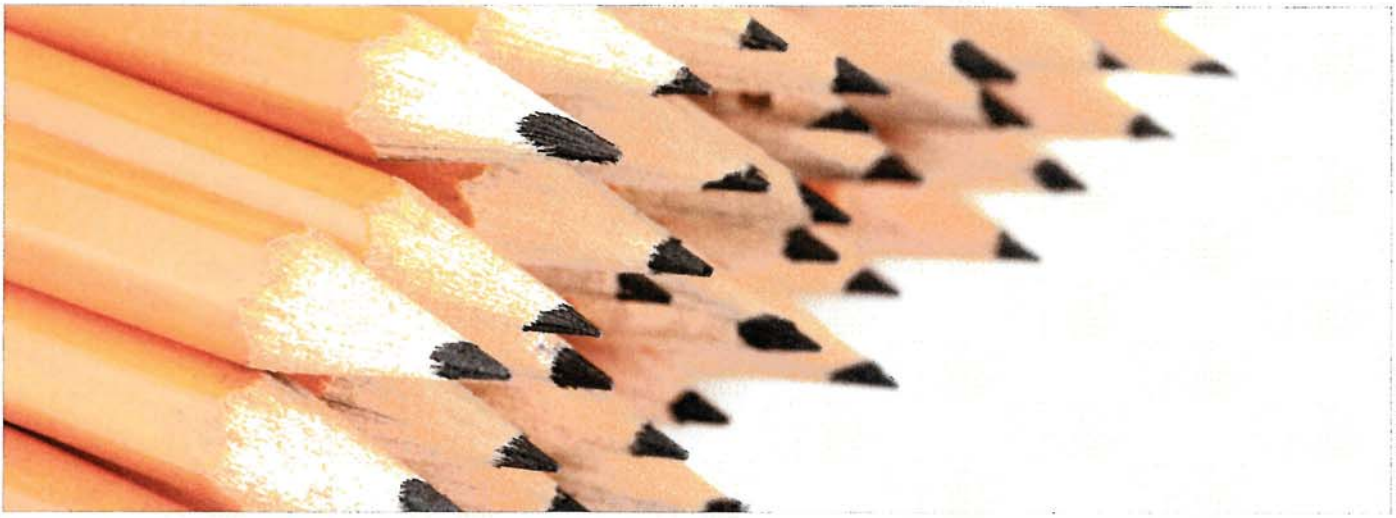

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Standard Arbitration Clauses for the AAA and ICDR

This excerpt of Standard Clauses from our website can be used when drafting an arbitration agreement applying the rules of the American Arbitration Association (AAA) or the International Centre for Dispute Resolution (ICDR). These clauses are modeled on the standard recommended arbitration clauses of the AAA and ICDR, and have integrated notes with important explanations and drafting tips. For the complete, continuously maintained version of this resource, which includes the standard recommended clauses of the International Chamber of Commerce (ICC) and the United Nations Commission on International Trade Law (UNCITRAL), visit Practical Law online.

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An arbitration agreement should identify or describe:

- The arbitral tribunal whose rules will govern the proceeding.
- The parties' rights to judicial review, including the parties' ability to appeal the arbitral award.
- The number of arbitrators and the method for their appointment.
- The specific disputes subject to arbitration, including any disputes that may be consolidated with the arbitration or parties that may be joined to the arbitration.
- The seat of the arbitration and the language used during the arbitration.
- The parties' expectations concerning the confidentiality of the arbitration and any materials used during the proceeding.
- The parties' ability to obtain interim or emergency relief.
- The remedies and damages that the arbitral tribunal may impose.

The provisions that follow are based on the text of various standard arbitration clauses recommended by the AAA and its international arm, the ICDR. The AAA is headquartered in New York and has administrative centers throughout the US, with a roster of more than 8,000 arbitrators. The AAA has specialized rules for various industries and is divided into the following sections:

- The Commercial Division.
- The Construction, Real Estate and Environmental Division.
- The ICDR.
- The Labor, Employment and Elections Division.
- The Government and Consumer Division.
- The AAA Mediation Services.

The ICDR has offices in the US, Mexico and Singapore, and has an international panel of approximately 400 arbitrators and mediators. It also has cooperative agreements with 62 arbitral institutions in 43 countries, allowing ICDR-administered arbitrations to be filed and heard in many parts of the world.

SELECTED PROVISIONS AND DRAFTING NOTES

AAA CLAUSES

1.1 Arbitration of future disputes.

(a) Scope, governing rules. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be determined by final and binding arbitration administered by the American Arbitration Association (**"AAA"**) under its Commercial Arbitration Rules and Mediation Procedures (**"Commercial Rules"**) [including, if appropriate, [the Procedures for Large, Complex Commercial Disputes] [,/and] [the International Commercial Arbitration Supplementary Procedures] [and] [the Supplementary Rules for Class Arbitrations]].

DRAFTING NOTE

GOVERNING RULES

The AAA Commercial Arbitration Rules and Mediation Procedures (Commercial Rules) are commonly used for domestic arbitrations conducted in the US between US parties. Unless the parties agree otherwise, the Commercial Rules used are those in effect when both:

- A demand for arbitration has been filed with the AAA.
- The administrative requirements to commence an arbitration have been satisfied.

(*R. 1(a), Commercial Rules.*)

Search AAA Arbitration: A Step-By-Step Guide for more on arbitrations under the Commercial Rules.

Complex Procedures

Where a party's claim or counterclaim is at least $500,000 (not including any claimed interest, attorneys' fees, arbitration fees or costs), the additional Procedures for Large, Complex Commercial Disputes apply unless the parties agree otherwise (*R. 1(c), Commercial Rules*). These rules require the parties to address certain procedural aspects of the arbitration at the preliminary conference with the arbitrator, including the scope of discovery and whether depositions may be taken (*L-3, Procedures for Large, Complex Commercial Disputes*).

By contrast, where no claim or counterclaim exceeds $75,000 (not including any claimed interest, attorneys' fees, arbitration fees or costs), the AAA's Expedited Procedures apply unless the parties provide otherwise

(*R. 1(b), Commercial Rules*). Among other things, the Expedited Procedures require a hearing to be set within 30 days of the arbitrator's appointment and the arbitrator must render an award within 14 days of the hearing (*R. E-7, E-8, E-9, Expedited Procedures*). Under certain circumstances, the parties may want an expedited arbitration even where the amount in dispute exceeds $75,000. However, an expedited process generally is not recommended for complex arbitrations.

International Arbitration

Where the parties have designated the Commercial Rules, or other domestic procedural rules, but the arbitration is deemed an international proceeding due to the nationality of the parties or their parent companies, the International Commercial Arbitration Supplementary Procedures (International Supplementary Procedures) also apply. Among other things, these procedures:

- Specify how an arbitrator may be challenged for alleged partiality or lack of independence (*R. 1, International Supplementary Procedures*).
- Require the default language of the arbitration to be that of the documents containing the arbitration agreement, subject to the authority of the tribunal to determine otherwise (*R. 5, International Supplementary Procedures*).
- Require the tribunal to state its reason for its award, unless the parties agree otherwise (*R. 6, International Supplementary Procedures*).

Class Arbitration

Since 2003, the Commercial Rules have included the Supplementary Rules for Class Arbitrations (Class Rules) for arbitrations where a party submits a dispute on behalf of or against a class or purported class (*R. 1, Class Rules*). Arbitrators have applied the Class Rules even where the arbitration clause was silent on the issue of class arbitration.

However, the US Supreme Court cast doubt on this practice with a 2010 decision that held a tribunal had exceeded its authority under the Federal Arbitration Act (FAA) by ordering class arbitration based on an arbitration provision that was silent on resolving class-wide claims. The decision stressed the importance of the parties' consent to class arbitrations and rejected the notion that parties can impliedly consent to class arbitration. (See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685-87 (2010).*)

The Supreme Court has gone on to provide additional guidance on the availability of the class-wide arbitration of claims. In *AT&T Mobility LLC v. Concepcion*, it upheld an arbitration agreement that included a waiver of class arbitration (*131 S. Ct. 1740, 1750-53 (2011)*). The Supreme Court also upheld a class arbitration waiver even where the cost of individually arbitrating the claim might be greater than the claimant's potential recovery (see *Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309, 2312 (2013)*). However, another recent decision upheld an arbitrator's determination that the parties' agreement permitted class arbitration, even though the clause was facially silent (see *Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2069-71 (2013)*).

Although the Class Rules explicitly provide that their existence should not be a factor in determining whether the parties consented to class arbitration, at least two federal district courts have held that invoking the AAA rules is relevant in determining whether a court or the arbitrator should decide if the parties have agreed to class arbitration. These courts found that the parties' inclusion of the AAA rules in arbitration agreements necessarily demonstrated their consent to the Class Rules, and therefore, to have the arbitrator decide whether the agreement allows class arbitration. (*Crook v. Wyndham Vacation Ownership, Inc., 2015 WL 4452111, at *1, *8 (N.D. Cal. Jul. 20, 2015); Chesapeake Appalachia, LLC v. Burkett, 2014 WL 5312829, at *8 (M.D. Pa. Oct. 17, 2014).*)

However, the Courts of Appeals for both the Third and Sixth Circuits have held that the

availability of class arbitration is a gateway issue to be decided by the court unless the parties have unambiguously provided otherwise (see *Opalinski v. Robert Half Int'l Inc., 761 F.3d 326, 332 (3d Cir. 2014)*; *Reed Elsevier, Inc. v. Crockett, 734 F.3d 594, 599 (6th Cir. 2013)*).

Given that this is a developing area of the law, parties who wish to preclude class arbitrations should include explicit language in their arbitration clauses making that intention clear.

Search Class Arbitration Waiver for more on class arbitration.

(b) Authority of tribunal, judicial review. The award rendered by the arbitrator[s] shall be final [,/and] [non-reviewable] [,/and] [non-appealable] and binding on the parties and may be entered and enforced in any court having jurisdiction[, and any court where a party or its assets is located (to whose jurisdiction the parties consent for the purposes of enforcing the award)]. [Judgment on the award shall be final and non-appealable.]

DRAFTING NOTE

JUDICIAL REVIEW

Judicial review of arbitral awards is limited under the FAA, which permits:

- Courts to vacate an award only if the award was the result of fraud or corruption, or if the arbitrators:
  - exceeded the scope of their authority;
  - engaged in misconduct; or
  - had evident bias.

  (*9 U.S.C. § 10(a)*.)
- Parties to appeal a district court's order confirming or vacating an award to the appropriate circuit court (*9 U.S.C. § 16(a)(1)(D), (E)*).

Some courts have held that arbitral awards may be vacated on the common law ground of manifest disregard of the law. This "can be established only where a governing legal principle is well defined, explicit, and clearly applicable to the case, and where the arbitrator ignored it after it was brought to the arbitrator's attention in a way that assures that the arbitrator knew its controlling nature." (*Goldman v. Architectural Iron Co., 306 F.3d 1214, 1216 (2d Cir. 2002)* (internal citations and quotations omitted).)

The availability of manifest disregard as a basis for vacatur has been questioned following the Supreme Court's decision in *Hall Street Assocs., L.L.C. v. Mattel, Inc.* In that decision, the court held that parties may not contractually expand the grounds for judicial review beyond those set out in the FAA (*552 U.S. 576, 584, 589-90 (2008)* (holding that parties may not include additional grounds for vacatur or modification of an arbitral award beyond those identified in Sections 10 and 11 of the FAA, but not addressing whether parties may further restrict the limited grounds for review under the FAA by contract)).

However, in a separate decision, the Supreme Court expressly declined to decide whether manifest disregard survived *Hall Street* "as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth" in Section 9 of the FAA (*Stolt-Nielsen, 559 U.S. at 672 n.3*).

After *Hall Street*, some federal district courts have held that parties may contract to waive their right to seek vacatur under Section 10(a)(4) of the FAA, which examines whether an arbitrator exceeded his authority, but cannot eliminate judicial review of other grounds under Section 10(a), such as fraud and corruption (see *Swenson v. Bushman Inv. Props., Ltd., 870 F. Supp. 2d 1049, 1056 (D. Idaho 2012)* (recognizing that parties can contractually eliminate judicial review of an arbitral award); *Kim-C1, LLC v. Valent*

Biosciences Corp., 756 F. Supp. 2d 1258, 1264-67 (E.D. Cal. 2010) (holding that an arbitration provision that stated that an arbitrator's rulings "shall be binding, non-reviewable, and non-appealable" demonstrated that "both parties agreed to waive their ability to seek vacatur")).

However, at least one circuit court has suggested that the grounds for vacatur identified by the FAA "may not be waived or eliminated by contract." The US Court of Appeals for the Ninth Circuit reasoned that the FAA provision governing confirmation of an award "carries no hint of flexibility" and "does not sound remotely like a provision meant to tell a court what to do just in case the parties say nothing else." (*In re Wal-Mart Wage & Hour Employment Practices Litig., 737 F.3d 1262, 1267-68 (9th Cir. 2013)*) (internal quotations omitted).)

(c) Selection of tribunal. There shall be one arbitrator agreed to by the parties within twenty (20) days of receipt by respondent[s] of the request for arbitration or in default thereof appointed by the AAA in accordance with its Commercial Rules.

OR

There shall be three arbitrators. The parties agree that one arbitrator shall be appointed by each party within twenty (20) days of receipt by respondent[s] of the Request for Arbitration or in default thereof appointed by the AAA in accordance with its Commercial Rules, and the third presiding arbitrator shall be appointed by agreement of the two party-appointed arbitrators within fourteen (14) days of the appointment of the second arbitrator or, in default of such agreement, by the AAA.

OR

There shall be three arbitrators agreed to by the parties within thirty (30) days of receipt by respondent[s] of the request for arbitration or, in default of such agreement, by the AAA.

DRAFTING NOTE

SELECTION OF TRIBUNAL

The Commercial Rules supply procedures to appoint arbitrators if the parties have not otherwise contracted an appointment method or cannot reach an agreement (*R. 12, 13, Commercial Rules*). A three-member tribunal is generally advisable for multi-million dollar disputes. For smaller disputes, a one-member tribunal may be preferable due to its lower cost and greater efficiency.

The AAA also appoints a case manager and supervisor for arbitrations conducted under its rules.

(d) Consolidation, joinder. If more than one arbitration is commenced under this Agreement and any party contends that two or more arbitrations are substantially related and that the issues should be heard in one proceeding, the arbitrator[s] selected in the first-filed proceeding shall determine whether, in the interests of justice and efficiency, the proceedings should be consolidated before [that/those] arbitrator[s]. [RELATED PARTIES] are bound to each other by this arbitration clause, provided that they have signed this Agreement or [OTHER RELATED AGREEMENTS]. Each related party may be joined as an additional party to an arbitration involving other parties under this Agreement or [OTHER RELATED AGREEMENTS].

DRAFTING NOTE

CONSOLIDATION AND JOINDER

If there are more than two parties to the agreement, the arbitration provisions should address the possible joinder of claims, in addition to any provisions permitting or prohibiting class arbitration (see above *Drafting Note, Governing Rules: Class Arbitration*). This clause provides for the consolidation of two or more separate arbitrations and the joinder of a third party, which is particularly useful if the agreement is linked to other agreements between the same, related or different parties.

(e) Seat of arbitration, languages. The seat or place of arbitration shall be [CITY, COUNTRY]. The arbitration shall be conducted and the award shall be rendered in the [LANGUAGE(s)] language[s].

DRAFTING NOTE

SEAT OF ARBITRATION AND LANGUAGES

The parties should choose a neutral or otherwise suitable venue that recognizes arbitration as a valid dispute resolution mechanism, such as jurisdictions that follow the UNCITRAL Model Law on International Commercial Arbitration. The AAA may choose the seat of the arbitration if the parties cannot reach agreement or failed to specify a location in the arbitration provisions (*R. 11(a), (c), Commercial Rules*).

When choosing the seat of the arbitration, parties should be aware of several differences between an arbitration conducted in the US and those conducted in other well-known international arbitration venues. The procedural law of the seat of the arbitration typically applies to issues such as court intervention and questions of arbitrability. Additionally, the law of the seat establishes the nationality of the award, and therefore the parties should choose a country that is a signatory to the New York Convention for enforcement purposes.

The arbitration agreement should specify the language of the arbitration. This clause also may address the selection and costs associated with a translator. Under the Commercial Rules, the party that desires and arranges for the translator assumes the costs (see *R. 29, Commercial Rules*).

(f) Confidentiality. Except as may be required by law, neither a party nor the arbitrator[s] may disclose the existence, content or results of any arbitration without the prior written consent of both parties, unless to protect or pursue a legal right.

DRAFTING NOTE

CONFIDENTIALITY

Arbitration often is assumed to be automatically confidential. However, the FAA and most state arbitration statutes do not address confidentiality. Further, many arbitration rules, including the AAA and ICDR rules, do not prescribe confidentiality duties on the parties themselves but instead

offer procedures for the parties to protect confidential materials (see, for example, *R. 23(a), Commercial Rules* (arbitrator shall have the authority to issue orders governing "any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing"); *Art. 37(2), ICDR International Arbitration Rules (ICDR Rules)* ("Unless the parties agree otherwise, the tribunal may make orders concerning the confidentiality of the arbitration or any matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.")).

Therefore, parties should expressly provide that the arbitration is confidential in their arbitration agreement, even if that information ultimately is disclosable by law or in litigation related to the arbitration.

(g) Remedies. The arbitrator[s] will have no authority to award [[punitive damages] [,/or/.] [consequential damages] [,/or/.] [liquidated damages] [,/or/.] [compensatory damages exceeding $[LIMIT OF COMPENSATORY DAMAGES]]].

DRAFTING NOTE

REMEDIES

The Commercial Rules permit arbitrators to grant any remedy or relief that they consider "just and equitable and within the scope of the agreement," unless the parties agree otherwise. This can include monetary damages and injunctive relief, including specific performance. (See *R. 47(a), Commercial Rules*.)

The Commercial Rules empower the tribunal to issue interim relief (*R. 37, Commercial Rules*), and provide for the appointment of a single emergency arbitrator who may grant interim relief (see *R. 38, Commercial Rules*).

Search Interim, Provisional and Conservatory Measures in US Arbitration for more on interim relief in arbitration.

Parties may consider specifying the powers of the tribunal to award compensatory damages (excluding punitive damages) and permanent injunctive relief. Depending on the applicable law, arbitrators may award punitive damages in arbitrations in the US governed by the FAA, unless the parties agree otherwise.

Search Punitive Damages in US Arbitration for more on punitive damages.

1.2 Arbitration of existing dispute.

(a) Scope, governing rules. We, the undersigned parties, hereby agree to submit to arbitration administered by the AAA under its Commercial Rules the following controversy: [BRIEF DESCRIPTION OF DISPUTE]. We further agree that the above controversy will be submitted to [one/three] arbitrator[s].

(b) Authority of tribunal, judicial review. We further agree that we will faithfully observe this Agreement and the Commercial Rules, that we will abide by and perform any award rendered by the arbitrator[s], and that a judgment of any court having jurisdiction may be entered upon the award.

DRAFTING NOTE

ARBITRATION OF EXISTING DISPUTE

This clause may be used where the underlying contract does not provide for arbitration, but the parties subsequently agree to submit an existing dispute under the contract to arbitration.

Parties submitting an existing dispute to arbitration also may apply any of the other clauses described above. However, because the parties may have a better sense of their respective arbitration needs after a dispute arises, they may assess these clauses differently.

ICDR CLAUSE

1.1 Arbitration. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with the International Arbitration Rules. [The number of arbitrators shall be [one/three].] [The place of arbitration shall be [CITY, COUNTRY].] [The arbitration shall be held, and the award rendered, in the [LANGUAGE(S)] language[s].]

DRAFTING NOTE

ICDR ARBITRATION

The ICDR Rules apply where the parties have provided for arbitration of an international dispute by the AAA or the ICDR, but have not specified whether the Commercial Rules or the ICDR Rules apply.

Where the ICDR Rules apply, the arbitration is subject to the version of the ICDR Rules in effect when the arbitration is commenced (*Art. 1(1), ICDR Rules*).

Selecting the Arbitral Tribunal

The ICDR appoints arbitrators where the parties have not provided otherwise or cannot reach an agreement (*Art. 12(3), (6), ICDR Rules*). Where there are two or more claimants or respondents, the ICDR appoints all of the arbitrators unless the parties agree otherwise (*Art. 12(5), ICDR Rules*).

The ICDR also assigns a case manager to each arbitration proceeding.

Designating the Arbitral Seat

If the parties have not agreed on the seat of the arbitration by a date set by the ICDR, the ICDR may initially determine the seat. Within 45 days of the tribunal's selection, it must determine finally the seat. (See *Art. 17(1), ICDR Rules.*)

Search ICDR Arbitration: A Step-by-Step Guide for more on arbitrations under the ICDR Rules.

Search ICDR Arbitration Flowchart for information on all the stages of an arbitration under the ICDR Rules.

The views expressed in this article are those of the authors and not necessarily those of Skadden, Arps, Slate, Meagher & Flom LLP or its clients.

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International Commercial Arbitration Clause

This excerpt of a Standard Clause on our website can be used when drafting an arbitration clause for many types of international commercial agreements. This Standard Clause has integrated notes with important explanations and drafting tips. For the complete, online version of this resource, visit practicallaw.com.

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An arbitration clause must include:

- The disputes the clause covers, commonly referred to as the scope of the arbitration agreement.
- An unambiguous statement that all of the disputes covered under the arbitration agreement are to be resolved only through arbitration.
- An unequivocal endorsement of arbitration to resolve the defined disputes in a binding and final manner.

Without all of these elements, an arbitration clause may be unenforceable.

In addition, an arbitration clause should indicate:

- The number of arbitrators and the method for their appointment.
- The place of arbitration or arbitral seat.
- The language of the arbitration, if the parties do not share the same language.

Although the absence of these elements may not render the clause unenforceable, it may delay the commencement or continuation of an arbitration while the parties argue over the appointment of arbitrators, the arbitral seat or the language of the arbitration.

Beyond these elements, arbitration allows the parties to select other features when designing their dispute resolution process to best suit their needs.

Search Drafting International Arbitration Agreements for more on issues that counsel should consider when finalizing an arbitration agreement.

SELECTED PROVISIONS AND DRAFTING NOTES

1.1 Arbitration.

(a) Any dispute, controversy or claim arising out of or relating to this Agreement or the breach, termination or validity thereof (**"Dispute"**), shall be submitted to mandatory, final and binding arbitration before [PREFERRED ARBITRAL INSTITUTION], in accordance with [RULES OF PREFERRED ARBITRAL INSTITUTION] in effect at the time of filing of the demand for arbitration, with the arbitration administered by [PREFERRED ARBITRAL INSTITUTION], subject to the provisions of this Section 1.1, pursuant to the United States Federal Arbitration Act, 9 U.S.C., Section 1, *et seq*.

DRAFTING NOTE

SCOPE AND SELECTION OF THE INSTITUTION

Mandatory and Exclusive Nature of Arbitration

The arbitration clause must specify that arbitration is the exclusive dispute resolution mechanism between the parties. It is imperative that the clause use the word "shall," instead of the word "may." For example, "[a]ny dispute . . . shall be determined by arbitration."

Occasionally, however, one of the parties may want to reserve the option to choose between arbitration and litigation. Clauses that include this option are referred to as sole option or asymmetrical arbitration clauses.

Scope

The arbitration clause should clearly delineate the disputes that fall within its scope. The scope of the clause should be as broad as possible, allowing all potential disputes between the parties relating to the agreement to be resolved only through arbitration. Otherwise, a party may argue that a particular claim lies outside of the arbitration agreement and should be brought in court, thereby making parallel

proceedings possible. (See *IBA: Guidelines for Drafting Arbitration Clauses* (IBA Drafting Guidelines).)

To cover all potential claims relating to the agreement, including not only contractual, but also potential tort and statutory claims, the language in Section 1.1(a) may be used, which is commonly referred to as a broad arbitration clause.

AD HOC VERSUS ADMINISTERED ARBITRATION

Arbitration administered by an arbitral institution is often preferable to ad hoc arbitration because it usually results in a more predictable procedural process. The benefits of administered arbitration include that the arbitral institution:

- Offers administrative services, such as:
  - confirming the appointment of arbitrators nominated by the parties; and
  - appointing arbitrators when the parties cannot agree.
- Fixes and collects arbitrators' fees.
- Considers challenges to the appointment of an arbitrator.

With an institution standing behind the arbitration, one party may avoid difficulties if the other party fails to comply with the arbitration agreement.

Ad hoc Arbitration

In an ad hoc arbitration, there is no arbitral institution in charge of administering the proceeding from beginning to end. Therefore, the parties need not pay administrative fees. However, in large commercial disputes, administrative fees are relatively lower than attorneys' and experts' fees and therefore should not determine whether the parties agree to administered arbitration.

Administered Arbitration

If the parties opt for institutional or administered arbitration, the arbitration agreement should make clear that the parties are choosing an institution to act as the administrator, thereby preventing a party from later arguing that the arbitration should be non-administered. Traditionally, courts have interpreted an arbitration clause stating that an arbitration will be held "in accordance with" an arbitral institution's rules to mean by inference that the designated institution will administer the arbitration (see *York Research Corp. v. Landgarten, 927 F.2d 119, 121-23 (2d Cir. 1991)*; *St. Lawrence Explosives Corp. v. Worthy Bros. Pipeline Corp., 111 F.3d 124 (table), 1997 WL 187332, at *1 (2d Cir. 1997)*; *Life Receivables Trust v. Goshawk Syndicate 102 at Lloyd's, 888 N.Y.S.2d 458, 459 (1st Dep't 2009), aff'd, 14 N.Y.3d 850, cert. den'd 131 S. Ct. 463 (2010)*).

However, the First Department of the New York Supreme Court Appellate Division held that an arbitration clause including the phrase "a decision of the matter so submitted shall be rendered promptly in accordance with the commercial rules of the American Arbitration Association (AAA) . . ." was only "a choice of law clause" and did not reflect an agreement that the arbitration be administered by the AAA (*Nachmani v. By Design, LLC, 901 N.Y.S. 2d 838, 839 (1st Dep't 2010)*). The *Nachmani* decision therefore counsels in favor of an arbitration clause expressly stating that the arbitral institution chosen by the parties will administer the arbitration.

The clause should also specify that the arbitral rules of the chosen institution will govern the arbitration, even though many institutional rules require arbitrations administered by that institution to proceed under that institution's rules. Certain institutions have more than one set of rules, however, and counsel should expressly select the appropriate body of rules.

Search Standard Arbitration Clauses for the AAA, ICDR, ICC and UNCITRAL and Standard Recommended Arbitration Clauses for sample arbitration clauses recommended by several arbitral institutions.

(ii) The language of the arbitration shall be [LANGUAGE]. The place of arbitration shall be [[CITY], [COUNTRY]].

DRAFTING NOTE

THE PLACE OF ARBITRATION

The place or seat of the arbitration should be a venue that recognizes arbitration as a valid dispute resolution mechanism and is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the New York Convention) (*21 U.S.T. 2517, 330 U.N.T.S. 3*) (enabling legislation codified at *9 U.S.C. § 201*). There are currently more than 140 parties to the New York Convention.

The New York Convention has two main functions:

- First, it provides that "[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration" (*New York Convention, Art. II(1)*).
- Second, "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon" save for limited circumstances where recognition and enforcement may be refused (*New York Convention, Arts. III and V*).

The chosen place of arbitration should be known to support, and not unduly interfere with, arbitration. For example, the parties should ensure that the courts at the place of arbitration allow for judicial injunctive relief in aid of arbitration to provide for the enforcement of the arbitration agreement or otherwise award interim relief.

Unless the parties agree otherwise, the law of the seat is also the governing arbitration law, also known as the procedural law. The governing law of the underlying agreement, usually set out in a section of the agreement separate from the arbitration clause, is generally understood as the substantive law of the agreement governing the rights and obligations of the parties, but not the procedural law of the arbitration. The parties should ensure that the choice of law clause does not also contain forum selection language that contradicts the arbitration agreement, thereby jeopardizing its enforcement. Additionally, an agreement should not contain two or more conflicting arbitration clauses.

The law of the seat also establishes the nationality of the award. The parties or the tribunal may choose to conduct hearings in another location, but this will not change the designated seat for legal purposes.

Usually a party seeking to set aside an award should do so in the seat (that is, the place where the award was issued).

(iii) [. . .]

(iv) By agreeing to arbitration, the Parties do not intend to deprive any court of its jurisdiction to issue a pre-arbitral injunction, pre-arbitral attachment, or other order in aid of arbitration proceedings and the enforcement of any award. Without prejudice to such provisional remedies as may be available under the jurisdiction of a court, the Tribunal shall have full authority to grant provisional remedies and to direct the Parties to request that any court modify or vacate any temporary or preliminary relief issued by such court, and to award damages for the failure of any Party to respect the arbitral tribunal's orders to that effect. In any such judicial action: (a) each of the Parties irrevocably and unconditionally consents to the [exclusive] jurisdiction and venue of the federal or state courts located in [[CITY], [COUNTRY]] (the **"[COUNTRY] Courts"**) for the purpose of any pre-arbitral injunction, pre-arbitral attachment, or other order in aid of arbitration proceedings, and to the non-exclusive jurisdiction of such courts for the enforcement

of any judgment on any award; (b) each of the Parties irrevocably waives, to the fullest extent they may effectively do so, any objection, including any objection to the laying of venue or based on the grounds of *forum non conveniens* or any right of objection to jurisdiction on account of its place of incorporation or domicile, which it may now or hereafter have to the bringing of any such action or proceeding in any [COUNTRY] Courts; and (c) each of the Parties irrevocably consents to service of process by first-class certified mail, return receipt requested, postage prepaid.

DRAFTING NOTE

JUDICIAL INJUNCTIVE RELIEF IN AID OF ARBITRATION

Authority to Grant Injunctive Relief

The rules of most arbitral institutions vest in the arbitral tribunal the power to issue injunctive relief. Nevertheless, the parties should make clear in their arbitration clause that the arbitral tribunal has this authority. The parties also should consider adding a provision allowing a party to seek injunctive relief in the courts to aid in arbitration proceedings.

Injunctive Relief Before Constitution of a Tribunal

Ensuring that a party may avail itself of judicial relief in aid of arbitration is important because it may wish to seek this type of relief before the constitution of the tribunal. For example, Company A commences arbitration against Company B according to their arbitration agreement. Before the constitution of the tribunal, Company B attempts to dilute its assets and divert them beyond the reach of Company A, the tribunal and the courts in the place of arbitration. To prevent Company B from doing this, Company A may need to seek court intervention.

For this reason, arbitration clauses often include a provision allowing a party to seek injunctive relief in aid of arbitration. Insofar as judicial relief in the place of arbitration is concerned, this provision may be unnecessary because the applicable statute or case law may provide for judicial assistance in aid of arbitration. Nonetheless, it is useful to clarify the parties' intent to be bound by interim judicial relief and, as appropriate, permit judicial action in aid of arbitration in a place other than the seat of the arbitration.

Emergency Arbitrator

Several arbitral institutions have rules providing for an emergency arbitrator to be appointed specifically to address requests for interim relief pending the constitution of the tribunal. These emergency procedures are welcome, but they may not effectively address the needs of a party facing a recalcitrant opponent who refuses to recognize the legitimacy of the arbitration process. In such cases, judicial relief may be more effective.

The proposed language of the first two sentences in the sample subclause makes clear that the designated courts and the arbitral tribunal both have the power to issue injunctive relief in aid of arbitration.

Designating an Exclusive Judicial Forum That May Grant Injunctive Relief in Aid of Arbitration

The advantages of designating an exclusive jurisdiction for the granting of injunctive relief, which is normally the jurisdiction where the arbitration is seated, are that:

- The parties know in advance where any court proceedings may be brought.
- It reduces the risk of a party seeking to undermine the arbitration by bringing judicial proceedings in a foreign state (for example, its state of residence, where the party may perceive it will receive a more favorable decision or delay the arbitration).

The disadvantage is that a party limits its ability to seek judicial injunctive relief to a single forum, which may reduce the effectiveness of the relief if the chosen forum is not the place of residence of the party against whom the relief is sought. Therefore, where a party seeks relief requiring enforcement in another jurisdiction (for example, where it needs to enjoin the

opposing party from selling assets located in a jurisdiction other than the selected forum), that type of relief may be foreclosed by the exclusive forum selection clause.

Even if the parties choose an exclusive forum in which to seek judicial injunctive relief, they should not provide that any venue has exclusive jurisdiction over actions brought to enforce a judgment on any award. A party must be free to enforce an award anywhere the opposing party may have assets.

Search Interim, Provisional and Conservatory Measures in International Arbitration for more on the range of interim measures available in the context of international arbitration.

(v) – (vi) [. . .]

(vii) [If a claim or Dispute arises under this Agreement, any Party [shall/may] request for the [TITLES OF COMPANY OFFICERS] to meet within [NUMBER] days at a mutually agreed time and place to discuss and negotiate the Dispute. The meeting may be held via telephone conference.

If the claim or Dispute has not been resolved by negotiation within [NUMBER] days after the scheduled meeting provided for above, then the [TITLES OF COMPANY OFFICERS] [shall/may] refer the matter to the [TITLES OF SENIOR COMPANY OFFICERS] of each Party who shall have authority to settle the Dispute (the **"Senior Representatives"**). The Senior Representatives will meet within [NUMBER] days after the end of the [NUMBER]-day period referred to above at a mutually agreeable time and place. The meeting may be held via telephone conference. In the event that the Senior Representatives are unable to resolve the claim or Dispute by negotiation within [NUMBER] days after their scheduled meeting, then any Party shall have the right to submit the Dispute to arbitration in accordance with the following arbitration clause. A party may submit the dispute to arbitration if any party fails to respond to a request to meet.]

DRAFTING NOTE

SETTLEMENT NEGOTIATIONS AS A PRECONDITION TO ARBITRATION

The parties may wish to provide for the option of negotiations before commencement of an arbitration. Counsel may consider the optional language above for pre-arbitration negotiations, which may be mandatory or permissive.

The arbitration clause should clearly state whether pre-arbitration negotiations are mandatory. If they are, the clause should set out clear time limits and either party should be entitled to commence an arbitration when they expire. This is necessary to avoid delays and disputes about whether:

- The parties have complied with a negotiation provision.
- A party may commence arbitration, and if so, when.

(See *IBA Drafting Guidelines, para. 87*.)

(viii) – (xi) [. . .]

For more on drafting clauses concerning the procedure for appointing arbitrators, providing for interim and provisional relief, and the payment of costs, among others, see the complete, online version of this resource. Search International Commercial Arbitration Clause.

PEMEX and US Enforcement of Foreign Arbitration Awards Nullified in Their 'Home' Courts

Skadden

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One of the benefits of using arbitration to resolve international disputes is the availability of worldwide mechanisms to enforce an arbitral award. For example, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the 1975 Inter-American Convention on International Commercial Arbitration (Panama Convention) state that a "winning" party may take an award rendered in a signatory country and enforce it in the courts of any other signatory country where the losing party's assets are located. Moreover, these treaties provide only very narrow grounds upon which a court may refuse enforcement of a foreign award. Such grounds include violation of fundamental due process, the absence of an arbitration agreement or a breach of international public policy.

The New York Convention also empowers a court to decline enforcement of an award that had been "set aside ... by a competent authority of the country in which, or under the law of which, that award was made." The Panama Convention has a similar provision. A "set aside" sometimes occurs where the "losing" party resided in the country where the award was made and/or was affiliated with that country's government and persuaded its own local courts to annul the award, leading to claims that it used its "home court advantage."

Historically, the attitude of U.S. courts toward foreign set-aside decisions has varied. Several courts have taken the view that, where an award was annulled in the place where arbitration occurred, the award can no longer be enforced in the United States. A few U.S. decisions have taken a different view. In 2016, in *COMMISA v. PEMEX*, the U.S. Court of Appeals for the Second Circuit held that, under the right circumstances, U.S. courts may enforce international arbitration awards even when foreign jurisdictions annul them.

Enforcement in US Courts

PEMEX arose from a dispute between private enterprise COMMISA, a Mexican subsidiary of the Texas-based corporation KBR Inc., and state-owned Mexican petroleum company PEMEX concerning two contracts to build oil platforms in the Gulf of Mexico. Those contracts provided for arbitration of disputes in Mexico. In 2009, an arbitral tribunal awarded COMMISA over $350 million in damages for breach of the construction contracts. In 2011, however, a Mexican court set aside the award, on the grounds that Mexican administrative law did not permit arbitration of claims against a state instrumentality.

Undeterred, COMMISA sought enforcement of the award in U.S. courts. In 2013, a New York federal judge held that the award should be enforced because the Mexican court judgment had offended "basic notions of justice" by retroactively applying administrative laws in such a manner that rendered the case nonarbitrable. The Second Circuit affirmed the lower court's decision on August 2, 2016.

The Second Circuit's ruling is in sharp contrast with previous rulings on the issue, including in *TermoRio S.A. E.S.P. v. Electranta S.P.* (D.C. Cir. 2007), in which the U.S. Court of Appeals for the District of Columbia Circuit held that, absent "extraordinary circumstances," awards that were set aside by the courts of the country in which they were made should not be enforced in the United States. That case involved annulment by the Colombian courts of an international arbitration award rendered in that country.

Several recent U.S. decisions have followed the *TermoRio* approach. In *Thai-Lao Lignite (Thailand) Co. v. Gov't of Lao People's Democratic Rep.* (S.D.N.Y. 2014), a New York

PEMEX and US Enforcement of Foreign Arbitration Awards Nullified in Their 'Home' Courts

federal court denied enforcement of an arbitration award rendered in Kuala Lumpur that was subsequently set aside by Malaysian courts. And in *Getma Int'l v. Rep. of Guinea* (June 9, 2016), the U.S. District Court for the District of Columbia denied enforcement of an award rendered by a regional West African arbitral tribunal that had been set aside by Ivory Coast courts on the grounds that the arbitrators allegedly were paid above ordinary scale.

In *PEMEX*, the Second Circuit held that under the Panama Convention's enforcement framework, a U.S. court "*must* enforce an arbitral award rendered abroad unless a litigant satisfies one of the seven enumerated defenses [in Article V of the Convention]; if one of the defenses is established, the district court *may* choose to refuse recognition of the award" (emphasis in original). Here, one of those defenses was established, *prima facie*, because the award had been set aside in the courts of the place in which it was made.

Although the Panama Convention provided "discretion" as to whether to give effect to the Mexican court's ruling, the Second Circuit held that this discretion "is constrained by the prudential concern of international comity," which treats the judgment of a foreign court as conclusive "*unless* ... the enforcement of the foreign judgment would offend the public policy of the state in which enforcement is sought — which requires the US court to analyze whether the foreign set-aside decision violated fundamental notions of what is decent and what is just" (citation and internal quotations omitted; emphasis in original).

The Second Circuit held that the Mexican court's decision in setting aside the award violated these principles. In particular, it found that: (1) the Mexican court had allowed an "eleventh hour" sovereign immunity defense to succeed, even though PEMEX had not timely raised this defense during the arbitration; this "shattered" COMMISA's "investment-backed expectation in contracting" and "impair[ed]" a "core" precept of contract law; (2) the Mexican court's decision allowed Mexico's statutes to be enforced on a "retroactive" basis so as to shield PEMEX from arbitration; (3) the set-aside decision deprived COMMISA of any effective forum for seeking relief; and (4) the net effect of the decision was to expropriate assets, without compensation. Thus, the lower court's decision affirming the award, and entering judgment against PEMEX, was affirmed.

In reaching its conclusion, the Second Circuit panel wrote that a court should "act with trepidation and reluctance in enforcing an award that has been declared a nullity by the courts having jurisdiction over the forum in which the award was rendered." However, it concluded that the *PEMEX* case was not one of the U.S. courts "second-guess[ing]" a foreign judicial decision. Rather, in this "rare" case, enforcement of the foreign award was necessary to uphold "public confidence in laws" and to prevent the diminishment of "personal rights and liberty."

PEMEX, having failed to obtain *en banc* review of the Second Circuit's decision, will likely seek to appeal the matter to the U.S. Supreme Court. Regardless of whether the Court weighs in on the issue, *PEMEX* is not likely to be the last case to deal with awards that are vacated in the losing party's "home" court — and the U.S. courts are not the only courts to have addressed this issue. For example, in 2016, the French courts held that a large arbitration award against Russia (brought by the former shareholders of Yukos) may be enforced, even though it was annulled by a first-instance judge in the Netherlands, where the arbitration occurred.

These cases thus serve as a timely reminder not only of the importance of choosing an appropriate arbitration seat but also of the complex enforcement issues that may arise once an award is rendered. They also show that, although the U.S. courts generally will respect the decisions of foreign courts (such as those in Mexico), that deference is far from absolute, and foreign judicial decisions will not be enforced where they violate basic U.S. conceptions of fairness and due process.

Challenging Arbitrators for Alleged 'Conflict of Interest' in US-Based International Arbitrations

Skadden

10/12/16

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

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A number of significant international arbitrations, particularly involving claims by investors against sovereign states, are venued in Washington, D.C. A September 30, 2016, decision by the U.S. District Court for the District of Columbia provides guidance on the issue of whether the losing party may seek to vacate the award on the grounds that one of the arbitrators had a conflict of interest that impaired his or her impartiality or independence.[1] In particular, the case holds (1) that where a "challenge" to an individual arbitrator occurred during the course of the arbitration, a U.S. court can take into account the "challenge decisions" issued under the rules of the relevant arbitral institution while the arbitration was pending; and (2) that in the courts of Washington, D.C. (as is the case in New York), a challenge based on "evident partiality" will only succeed where the court finds that the facts would cause a reasonable person to conclude that the arbitrator was "actually partial" — mere "impressions" or "suspicions" are not sufficient.

The case of *Republic of Argentina v. AWG Group*[2] arose after a U.K. investor — the former holder of interests in water and sewage concessions in Buenos Aires, Argentina — obtained a $20.9 million damages award in 2015 from a Washington, D.C.-based arbitral tribunal.[3] The tribunal, constituted under the U.K.-Argentina bilateral investment treaty[4] and the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), held that Argentina's treatment of the water concessions had violated its treaty obligation to accord "fair and equitable" treatment to investors.[5] Argentina moved to vacate the award, and AWG cross-moved to enter the award (plus interest) as a final judgment.

The arbitration, which ran in tandem with a parallel claim by various co-investors led by the Suez group, had a 12-year history. Shortly after Suez and AWG commenced their claims in 2003, they appointed professor Gabrielle Kaufmann-Kohler, a Swiss lawyer, as their party-appointed arbitrator. Argentina appointed professor Pedro Nikken of Venezuela. A third arbitrator, professor Jeswald W. Salacuse of the United States, was then appointed as presiding arbitrator.

In 2006, the tribunal held that it had jurisdiction to hear and determine AWG's claims against Argentina.[6] In 2007, in the wake of that decision, Argentina sought to disqualify the claimant-appointed arbitrator, Ms. Kaufmann-Kohler, on several grounds. One was that Ms. Kaufmann-Kohler had recently (in 2006) been appointed a nonexecutive director at an international bank, whose investment portfolio included an interest in one of the claimants. By prior agreement,[7] both challenges were heard and rejected by the

[1] This article is a follow-up to our January 2016 *Insights* article, "Challenging the Selection of Party-Appointed Arbitrators," which discussed the same case.

[2] *Argentina v. AWG Group Ltd.*, No. 15-1057 (BAH) (D.D.C. Sept. 30, 2016) (AWG (*Confirmation Opinion*)).

[3] The tribunal awarded a total of $20,957,809 to AWG. *AWG Group v. Argentina*, Decision on Liability (UNCITRAL 2015). In a companion case, $383,581,241 was awarded to AWG's co-investors. ***See Suez,*** *Sociedad General de Aguas de Barcelona S.A. & Vivendi Universal S.A. v. Argentina*, No. ARB/03/19, Award ¶ 105 (ICSID 2015).

[4] Agreement for the Promotion and Protection of Investments Between the United Kingdom and Argentina, 1990.

[5] See *AWG* Group Ltd. v. Argentina, Decision on Liability (UNCITRAL 2010) (finding liability under U.K.-Argentina bilateral investment treaty for governmental measures that impaired investments in Buenos Aires water concessions); *see also Suez, Sociedad General de Aguas de Barcelona S.A. & Vivendi Universal S.A.*, No. ARB/03/19 (parallel finding of liability in favor of French investors).

[6] *AWG Group Ltd. v. Argentina*, Decision on Jurisdiction (UNCITRAL 2006).

[7] Ordinarily, challenges in an UNCITRAL arbitration are resolved by a third party (the "appointing authority") — often an arbitral institution or a neutral lawyer or judge. Because the *AWG* case operated in tandem with the *Suez* case — which was governed by the 1965 Convention on Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) — it was agreed that arbitral challenges would be determined in the manner applicable to the ICSID Convention, *i.e.*, by the two nonchallenged arbitrators.

Challenging Arbitrators for Alleged 'Conflict of Interest' in US-Based International Arbitrations

two other members of the tribunal, which noted, first, that Ms. Kaufmann-Kohler had been unaware of the bank's investment and, in any event, that the investment did not compromise her independence or impartiality, among other things, because the size was not material.[8]

After the award was rendered in April 2015, Argentina commenced proceedings to vacate the award before the U.S. District Court for the District of Columbia. Among the grounds advanced by Argentina was that the arbitrator's ties revealed "evident partiality," warranting *vacatur* under Section 10(a)(4) of the Federal Arbitration Act[9] (FAA).

In her opinion issued on September 30, 2016, Judge Beryl Howell first addressed the standards to be applied to the challenge. These included three threshold issues:

- What deference, if any, should be given to the 2007 reasoned decision by Ms. Kaufmann-Kohler's co-arbitrators, rejecting the challenge to her independence and impartiality. Judge Howell determined that she should accord deference to this decision, particularly given that it took into account considerations that were relevant and applicable to the "evident partiality" test under the FAA.
- What deference, if any, should be given to a 2010 arbitral decision in a related case (*Vivendi v. Argentina*) that also analyzed the alleged "conflict" and arrived at a decision that was not only very critical of Ms. Kaufmann-Kohler for failing to detect the bank's connections with Vivendi, but also implied that arbitrators were subject to a particularly stringent test in ascertaining potential "conflicts of interests."[10] In Judge Howell's view, the 2010 decision warranted no deference because, among other things, it failed to inquire into the "materiality" of the bank's investment in Vivendi.[11]
- By what standard "evident partiality" should be assessed. In this respect, Judge Howell referred to the seminal 1968 United States Supreme Court case *Commonwealth Coatings Corp v. Continental Casualty Co.*, a plurality decision of the Supreme Court, which contains no clear majority holding. In that decision, she noted, the justices articulated two competing tests for arbitrator challenges. In his concurring opinion, Justice Byron White advocated a pragmatic test, which required a party to prove that an arbitrator had a "substantial interest in a firm which has done more than trivial business with a party." In contrast, Justice Hugo Black advocated a stricter standard, which held arbitrators to a quasi-judicial standard, to "avoid even the appearance of bias."

On this issue, Judge Howell noted that the D.C. Circuit had adopted Justice White's approach and that the burden on a challenging party for vacating an arbitral award due to "evident partiality" requires the challenging party to demonstrate facts that would cause a reasonable person to conclude that an arbitrator was partial to one party to the arbitration.[12] Judge Howell considered that this test was functionally identical to the 2nd Circuit standard (applicable in New York)[13] — but was not the same as the (stricter) 9th Circuit standard, which follows Justice Black's opinion and looks to whether there is an "impression" of partiality.[14]

Applying the D.C. standard, Judge Howell held that Argentina's evidence was "wholly insufficient" and that the bank's investment was "inconsequential" because it consisted mainly of shares held on behalf of third parties. The record showed that the arbitrator had no involvement in the investment decisions of the bank and that the arbitration would have a "negligible effect" on the bank's financial fortunes.[15] Because the arbitrator had served in a nonexecutive capacity and only for a three-year period during the course of the 12-year arbitration, the court held that Argentina had not demonstrated that there was "evident partiality."[16] After rejecting the remainder of Argentina's challenges to the award, it confirmed the award, with the result that the judgment will be entered upon the full award sum (including interest).

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[8] *See Suez, Sociedad General de Aguas de Barcelona S.A. & Vivendi Universal S.A. v. Argentina*, No. ARB/03/19, Decision on Second Challenge to Gabrielle Kaufmann-Kohler, ¶¶ 36-40 (UNCITRAL/ICSID 2006). Indeed, Judge Howell's opinion noted that the investment represented a mere 0.056 percent of the bank's total portfolio. *AWG* (*Confirmation Opinion*) at 25.

[9] Argentina further argued that the tribunal had exceeded its powers in awarding damages.

[10] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID No. ARB/97/3, Decision on Annulment ¶ 222 (UNCITRAL/ICSID 2010) ("In the view of the ad hoc Committee, this does not only require an arbitrator becoming or having become a member of the board of a major international bank first to specifically investigate whether the bank has any connection with or interest in any of the parties in its pending arbitrations but, if such an arbitrator decides in principle to continue, also to notify the parties in each arbitration of such a connection or interest. This imposes a continuous duty of investigation.").

[11] *AWG* (*Confirmation Opinion*) at 27, n. 23 (D.D.C. Sept. 30, 2016).

[12] *See id.* at 22 ("Following the lead of Justice White's concurrence, the D.C. Circuit, in *Al-Harbi v. Citibank*, instructed that 'the burden on a claimant for vacation of an arbitration award due to "evident partiality" is heavy, and the claimant must establish specific facts that indicate improper motives on the part of an arbitrator.'") citing *Al-Harbi v. Citibank*, 85 F.3d 680, 683 (D.C. Cir. 1996) (internal citations omitted).

[13] *Id.* at 23 ("Other circuits to have considered the issue have employed an objective test that 'evident partiality ... will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.") quoting Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 84 (2d. Cir. 1984).

[14] *See New Regency Prods., Inc. v. Nippon Herald Films Inc.*, 501 F.3d 1101, 1103 (9th Cir. 2007) (vacating award because there was a "reasonable impression of partiality" even though there was no evidence the arbitrator was aware of the potential conflict. The arbitrator's failure to disclose the facts of his employment and ongoing negotiations with one of the parties was sufficient to create a reasonable impression of partiality to warrant vacatur.")

[15] *AWG (Confirmation Opinion)* at 25.

[16] *Id.* at 27.

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If affirmed, the decision provides guidance for parties whose arbitrations are seated in Washington, D.C., New York and other locations whose federal judicial circuits have adopted Justice White's test from *Commonwealth Coatings*.[17] It confirms that in the event of a post-award challenge, an arbitrator may only be found to have displayed "evident partiality" upon a showing of specific facts and not just the mere "appearance of bias." Moreover, the case provides a useful example of a U.S. court being willing to consider (and potentially give deference to) the reasoned "arbitrator challenge" decisions made during the course of the arbitration.

[17] For jurisdictions such as California, which are governed by the 9th Circuit view of *Commonwealth Coatings*, the ruling is of potentially less significance.

International litigation and arbitration associate ***Eva Y. Chan*** *assisted in the preparation of this alert.*

Discovery in Arbitration

CPR
International Institute for
Conflict Prevention & Resolution

Protocol on Disclosure of Documents & Presentation of Witnesses in Commercial Arbitration

"Thank you for the protocol. It was the most succinct and lucid compendium of options for arbitration evidence that I have seen. It will be the basis of my future discussions with counsel concerning discovery and evidence at hearings. Well done!" - Hon. William A. Dreier of Norris, McLaughlin & Marcus, P.A.

Introduction

The CPR Protocol addresses concerns often expressed by users of arbitration, that there is, particularly in disputes involving parties of different nations, a lack of predictability in the ways in which the arbitration proceedings are conducted and that arbitration is becoming increasingly more complex, costly and time-consuming. The Protocol addresses these concerns by providing guidance in the form of recommendations as to practices that arbitrators may follow in administering proceedings before them, including proceedings conducted under the CPR Rules or under other *ad hoc* or institutional rules. The practices recommended deal with ways in which reasonable limitations may be placed on disclosure and efficiencies gained in the presentation of witness testimony in arbitration hearings.

Recognizing that there may be different interests and expectations on the part of arbitration users and their counsel, the Protocol offers various "modes" of disclosure and presentation of witnesses, ranging from minimal to extensive, so that the parties to an agreement to arbitrate may choose, at the time of entering into their agreement or thereafter, the general way in which their arbitration proceedings will be conducted in the important areas of document disclosure and witness presentation.

The Protocol is the product of two working groups of the Information Exchange Subcommittee chaired by Prof. Thomas J. Stipanowich of the CPR Arbitration Committee. The Working Group on the presentation of witnesses was chaired by Ben H. Sheppard, Jr. and the other Working Group, on documentary disclosure, was chaired by me. Members of those groups and members of the Arbitration Committee who have participated in the several meetings over the time since early in 2007 when this project was started are listed on the last page of this document.

Lawrence W. Newman
Chairman of the CPR International
Committee on Arbitration

Preamble

1. This Protocol has two purposes. The first is to assist the arbitrators in CPR or other tribunals (hereinafter "the arbitrators" or "the tribunal") in carrying out their responsibilities under Rule 11 of the CPR Rules by setting out general principles for dealing with requests for the disclosure of documents and electronic information[1] and for establishing procedures for the testimony of witnesses. The second purpose is to afford to the parties to an arbitration agreement the opportunity to adopt, before or after a dispute arises, certain modes of dealing with the disclosure of documents and the presentation of witnesses, as they may select from Schedules 1, 2 and 3.

2. The tribunal is encouraged to direct the attention of the parties to this Protocol at the outset of the arbitration and to draw upon it in organizing and managing the proceeding.

3. References to CPR Rules are to the CPR Non-Administered Arbitration Rules effective November 1, 2007. However, arbitrators are encouraged to draw upon this Protocol in organizing and managing arbitrations under any of the CPR arbitration rules or under the rules of any other institution.

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[1] As used herein, the term "documents" is intended to refer to all types of stored or recorded information, whether in the form of physical documents or not, including electronic information.

Section 1. DISCLOSURE OF DOCUMENTS

General Considerations

(a) Philosophy Underlying Document Disclosure

Whether or not the parties adopt any of the modes of disclosure as provided herein, parties whose arbitrations are conducted under the CPR Rules should understand that CPR arbitrators are expected to conduct proceedings before them in accordance with the general principle that arbitration be expeditious and cost-effective as well as fundamentally fair. Consistent with this philosophy, it is expected that the parties will ensure that their counsel appreciate that arbitration is not the place for an approach of "leave no stone unturned," and that zealous advocacy in arbitration must be tempered by an appreciation for the need for speed and efficiency. Since requests for information based on possible relevance are generally incompatible with these goals, disclosure should be granted only as to items that are relevant and material and for which a party has a substantial, demonstrable need in order to present its position. CPR arbitrators should supervise any disclosure process actively to ensure that these goals are met.

(b) Attorney-Client Privilege and Attorney-Work-Product Protection

No documents obtained through inadvertent disclosure of documents covered by the attorney-client privilege or attorney work-product protection may be introduced in evidence and any documents so

obtained must upon request of the party holding the privilege or work product protection, be returned forthwith, unless such party expressly waives the privilege or work product protection. The arbitrators should apply the provisions of applicable law that afford the greatest protection of attorney client communications and work product documents.

(c) Party-Agreed Disclosure

The parties to an arbitration may provide, in their agreement to arbitrate, or separately thereafter, for certain modes of disclosure that they and the tribunal will follow. Suggested modes are set forth in Schedule 1 hereto and may be agreed to by the parties in such language as the following:

"The parties agree that disclosure of documents shall be implemented by the tribunal consistently with Mode [?> in Schedule 1 to the CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration."

If the parties have agreed on the applicability of any one of such modes, the tribunal shall issue orders for disclosure of documents pursuant to a time schedule and other reasonable conditions that are consistent with the parties' agreement. Any mode of disclosure so chosen by the parties shall be binding upon the parties and the tribunal and shall govern the proceedings, unless all parties thereafter agree on a different form of disclosure. Disclosure of documents different from that which is provided for in the mode of disclosure selected by the parties may be ordered by the tribunal if it determines that there is a compelling need for such disclosure.

(d) Disclosure of Electronic Information

(1) General Principles

In making rulings on disclosure, the tribunal should bear in mind the high cost and burdens associated with compliance with requests for the disclosure of electronic information. It is frequently recognized that e-mail and other electronically created documents found in the active or archived files of key witnesses or in shared drives used in connection with the matter at issue are more readily accessible and less burdensome to produce when sought pursuant to reasonably specific requests. Production of electronic materials from a wide range of users or custodians tends to be costly and burdensome and should be granted only upon a showing of extraordinary need. Requests for back-up tapes, or fragmented or deleted files should only be granted if the requesting party can demonstrate a reasonable likelihood that files were deliberately destroyed or altered by a party in anticipation of litigation or arbitration and outside of that party's document-retention policies operated in good faith.

(2) Modes of Disclosure

In order to give themselves greater assurance of predictability as to the extent of disclosure of electronic information, the parties may wish to provide, in their agreement to arbitrate or separately thereafter, for certain modes of disclosure of electronic information as set out in Schedule 2, pursuant to such language as the following:

"The parties agree that disclosure of electronic information shall be implemented by the tribunal

consistently with Mode [?> in Schedule 2 to the CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration.

If the parties do not select a mode of disclosure for electronic documents under Schedule 2, the mode of disclosure selected by the parties from Schedule 1 shall apply to both electronic information and non-electronic documents.

(3) Preservation of Electronic Information

In view of the high cost and burden of preserving documents, particularly in the form of electronic information, issues regarding the scope of the parties' obligation to preserve documents for potential disclosure in the arbitration should be dealt with at an early scheduling conference, or as soon as possible thereafter. The parties' preservation obligations should comport with the Schedule 2 mode of disclosure of electronic information selected.

(e) Tribunal Orders for the Disclosure of Documents and Information

The arbitrators should ensure that they are sufficiently informed as to the issues to be determined, the burden and costs of preserving and producing requested documents and other information, and the relative value of the requested information to the issues to be determined, so as to enable the arbitrators to make a fair decision as to the requested disclosure.

Whether or not the parties have selected one of the modes for disclosure in Schedules 1 and/or 2, the tribunal, in making rulings on the disclosure of documents and information, should bear in mind the points set forth below:

(1) Timing of Disclosure

The tribunal should establish a reasonable and expeditious timetable for disclosure. Any issues or disagreements regarding disclosure should be identified and resolved as early as possible, preferably at a scheduling conference with the parties held early in the proceeding for the purpose of discussing the scope and timing of disclosure, identifying areas of disagreement and adopting expeditious procedures for resolving any such disagreements.

(2) Burdens versus Benefits

Arbitrators should carefully balance the likely value of documents requested against the cost and burdens, both financial and temporal, involved in producing the documents or information requested. Where the costs and burdens of disclosure requested are likely to be substantial in comparison to the amount in dispute or the need for the information to aid in resolving the dispute, the tribunal should ordinarily deny such requests. If extraordinary circumstances justify production of the information, the tribunal should condition disclosure on the requesting party's paying to the requested party the reasonable costs of a disclosure.

(3) Documents for Use in Impeachment in Cross-examination

Except for the purpose of impeaching the testimony of witnesses, the tribunal should not permit a party to use in support of its case, at a hearing or otherwise, documents or electronic information unless the party has presented them as part of its case or previously disclosed them. But the tribunal should not permit a party to withhold documents or electronic information otherwise required to be disclosed on the basis that the documents will be used by it for the impeachment of another party's witnesses.

SCHEDULE 1

Modes of Disclosure

Mode A. No disclosure of documents other than the disclosure, prior to the hearing, of documents that each side will present in support of its case.

Mode B. Disclosure provided for under Mode A together with pre-hearing disclosure of documents essential to a matter of import in the proceeding for which a party has demonstrated a substantial need.

Mode C. Disclosure provided for under Mode B together with disclosure, prior to the hearing, of documents relating to issues in the case that are in the possession of persons who are noticed as witnesses by the party requested to provide disclosure.

Mode D. Pre hearing disclosure of documents regarding non-privileged matters that are relevant to any party's claim or defense, subject to limitations of reasonableness, duplication and undue burden.

SCHEDULE 2

Modes of Disclosure of Electronic Information

Mode A. Disclosure by each party limited to copies of electronic information to be presented in support of that party's case, in print-out or another reasonably usable form.

Mode B. (1) Disclosure, in reasonably usable form, by each party of electronic information maintained by no more than [specify number] of designated custodians. (2) Provision only of information created between the date of the signing of the agreement that is the subject of the dispute and the date of the filing of the request for arbitration. (3) Disclosure of information from primary storage facilities only; no information required to be disclosed from back up servers or back up tapes; no disclosure of information from cell phones, PDAs, voicemails, etc. (4) No disclosure of information other than reasonably accessible active data.

Mode C. Same as Mode B, but covering a larger number of custodians [specify number] and a wider time period [to be specified]. The parties may also agree to permit upon a showing of special need and relevance disclosure of deleted, fragmented or other information difficult to obtain other than through forensic means.

Mode D. Disclosure of electronic information regarding non-privileged matters that are relevant to any party's claim or defense, subject to limitations of reasonableness, duplicativeness and undue burden.

Parties selecting Modes B, C, or D agree to meet and confer, prior to an initial scheduling conference with the tribunal, concerning the specific modalities and timetable for electronic information disclosure.

Section 2. PRESENTATION OF WITNESSES

The CPR Non-Administered Arbitration Rules provide that the testimony of witnesses "may be presented in written and/or oral form as the Tribunal may determine is appropriate." Rule 12.2.

(a) Testimony of Witnesses in Written Form (Witness Statements)

Witness statements are detailed presentations in writing of the testimony, including references to documents that are also presented, that a witness would give if questioned before the tribunal. These statements are exchanged prior to the presentation of oral evidence at a hearing. Witnesses then appear at the hearing to be questioned concerning their written statements.

Witness statements have been found to save considerable time that would otherwise be spent in hearings before the tribunal and offer other advantages as well: They serve to eliminate surprise, narrow the issues and permit more focused questioning of the witness at the hearings. They may also eliminate the need for oral testimony from uncontroversial or distant witnesses. Witness statements also allow the arbitrators and the parties to become acquainted with material facts in advance of the hearing, and they may therefore promote settlement.

The use of witness statements is referred to in the rules of the major international arbitral institutions, in the UNCITRAL Arbitration Rules and in the IBA Rules on the Taking of Evidence in International Commercial Arbitration.
The following are procedures that generally apply to the use of witness statements:

1. Each statement should be signed by the witness, contain an affirmation of its truth and be sufficiently detailed to constitute the entire evidence of that witness.

2. Each witness who has provided a statement must appear for examination at the evidentiary hearing by the opposing parties and the tribunal unless the parties and the tribunal agree otherwise. The tribunal may disregard the statement of any witness who fails to appear in support of it.

3. The parties may agree or the tribunal may direct that the witness statement shall serve as the direct testimony of the witness. In that event, the witness should, at a hearing before the tribunal, swear or affirm to tell the truth, confirm her/his witness statement following an opportunity to make any needed corrections to the statement and then be subject to cross-examination. However, absent party agreement, the tribunal may consider whether to permit witnesses who have submitted a statement to respond to questions from the sponsoring party before being cross-examined so long as this oral testimony is brief and does not introduce matters not contained in the written statement. This allows the witness to "warm to the seat" and permits the tribunal to hear the witness testify in her/his own words.

4. The tribunal may wish to explore with the parties alternative forms of witness statements. Although such statements are commonly submitted in narrative form, they may also be submitted in question and answer format, as they are in some administrative proceedings in the United States. Testimony submitted in

question and answer format is potentially more interesting and persuasive than a narrative text and more nearly replicates the presentation of oral testimony.

5. The tribunal should also explore with the parties whether witness statements are to be submitted simultaneously or sequentially, as well as the need for reply or rejoinder submissions.

6. A party may elect, a reasonable time prior to the hearing, not to question a witness presented by an opposing party. In such event, the tribunal should consider whether it wishes to have the witness appear before it for questioning by members of the tribunal.

(b) Testimony of Witnesses in Oral Form

In the absence of a witness statement, the testimony of a witness is presented at a hearing through questioning by counsel and the tribunal. Since the oral process permits the witness to present the evidence in her/his own words, the tribunal may benefit, especially where the credibility of a witness is important, from having the opportunity to observe the demeanor of witness in presenting his or her position in the case.

(c) Depositions

Depositions are recorded sessions at which witnesses are questioned by the parties outside the presence of the tribunal, enabling the parties to obtain information from witnesses in advance of their testifying at the hearings. Depositions should be permitted only where the testimony is expected to be material to the outcome of the case and where one or more of the following exigent circumstances apply: Witness statements are not being used, the parties agree to the taking of the deposition and/or the witness may not be available to testify, in person or by telecommunication, before the tribunal. The tribunal should impose strict limits on the number and length of any depositions allowed. Deposition transcripts may, as the tribunal determines, be used at hearings or otherwise be made part of the record before the tribunal.

(d) Determining the Appropriate Forms of Witness Evidence

The tribunal in its agenda for the initial pre-hearing conference should call to the attention of the parties the options for the presentation of witness testimony and should explore those options with the parties at the conference. The “Modes of Presenting Witnesses” set forth on Schedule 3, to the extent not previously agreed on by the parties, may be useful for this purpose. See Section 2(h) below. Any of the “modes” or variants of them can be effective methods for the presentation of witness testimony depending upon the circumstances of the particular case. Any procedure elected should be applied consistently with the expectations of the parties and their counsel and with the cost-effective resolution of the dispute.

(e) Presentations by Party-Appointed Experts

Although the tribunal is empowered to appoint neutral experts, this authority appears to have been seldom employed. Instead, the prevailing practice is for the parties to present the evidence of experts retained by them in support of their positions.

The following procedures may be applied to the use of party-appointed experts.

1. At the initial conference with the parties, the tribunal should ascertain whether the parties intend to present the evidence of expert witnesses and, if so, establish a schedule for the submission of expert reports.

2. Each expert witness should submit a signed report, setting forth the facts considered and conclusions reached in sufficient detail to serve as the entire evidence of the expert, together with a curriculum vitae or other biographical information describing the qualifications and experience of the witness.

3. The tribunal should discuss with the parties whether expert reports will be submitted simultaneously or sequentially, and whether there will be a need for reply or rejoinder submissions from the experts.

4 Each expert who has submitted a report must appear at a hearing before the tribunal unless the parties agree otherwise and the tribunal accepts this agreement. The tribunal may disregard the report of an expert who fails to appear at a hearing.

5. The tribunal may wish to consider directing that, within a specified period of time after the exchange of expert reports, opposing experts on the same issues meet and confer, without the parties or their counsel and prior to the submission of any reply expert reports, for the purpose of narrowing the scope of disputed issues among the experts.

6. The sequencing of expert testimony may be important. In order to avoid having experts on the same issue testify days or weeks apart, the tribunal may wish to arrange for such witnesses to testify sufficiently close to one another in time to enable the tribunal most effectively to consider the subjects of their testimony.

(f) Hearings

As a supplement to the applicable arbitration rules, the following procedures may also apply to the conduct of hearings:

1. The tribunal should require every witness to affirm, in a manner determined appropriate by the tribunal, that she or he is telling the truth. If the witness has submitted a witness statement or expert report, he or she should confirm the statement or report and note any corrections to it. In the tribunal's discretion the witness whose testimony has been presented in writing may thereafter be briefly questioned by the party presenting the witness, provided that no new testimony other than corrections is presented in this way.

2. The tribunal may consider whether to direct that expert or fact witnesses appear before them at the same time for questioning, in a process known as "witness conferencing." A typical application is for expert witnesses to provide their written or oral testimony separately and then appear jointly for further questioning by the tribunal and counsel.

(g) Cross examination of Witnesses

Any witness whose testimony is received by the tribunal must be made available for examination by other parties and the tribunal. The form and length of cross examination should be such as to afford a fair opportunity for the testimony of a witness to be fully clarified and/or challenged.

(h) Party-Agreed Procedures for the Presentation of Witnesses

The parties to an arbitration may provide, in their agreement to arbitrate, or separately thereafter (as in an initial conference with the tribunal – see paragraph (d) above), for certain modes of witness presentation that they and the tribunal will follow. Suggested modes are set forth in Schedule 3 hereto and may be agreed to by the parties in such language as the following:

"The parties agree that the presentation of witnesses shall be implemented by the tribunal consistently with Mode [?> concerning witness presentation selected from Schedule 3 to the CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration."

If the parties have agreed on the applicability of any one of such modes, the tribunal shall issue orders and shall conduct the proceeding consistently with the parties' agreement. Any agreed mode of witness presentation shall be binding on the parties and the tribunal and shall govern the proceedings, unless all parties thereafter agree on a different form of witness presentation. The tribunal may direct the use of procedures apart from the mode of presentation selected by the parties if it determines that there is a compelling need for such procedure.

SCHEDULE 3

Modes of Presenting Witnesses

Mode A. Submission in advance of the hearing of a written statement from each witness on whose testimony a party relies, sufficient to serve as that witness's entire evidence, supplemented, at the option of the party presenting the witness, by short oral testimony by the witness before being cross-examined on matters not outside the written statement. No depositions of witnesses who have submitted statements.

Mode B. No witness statements. Direct testimony presented orally at the hearing. No depositions of witnesses.

Mode C. As in Mode B, except depositions as allowed by the tribunal or as agreed by the parties, but in either event subject to such limitations as the tribunal may deem appropriate.

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Attachments: Protocol on Disclosure of Documents & Presentation of Witnesses in Commercial Arbitration PDF

Discovery in Commercial Arbitration: *How Arbitrators Think*

By Charles J. Moxley, Jr.

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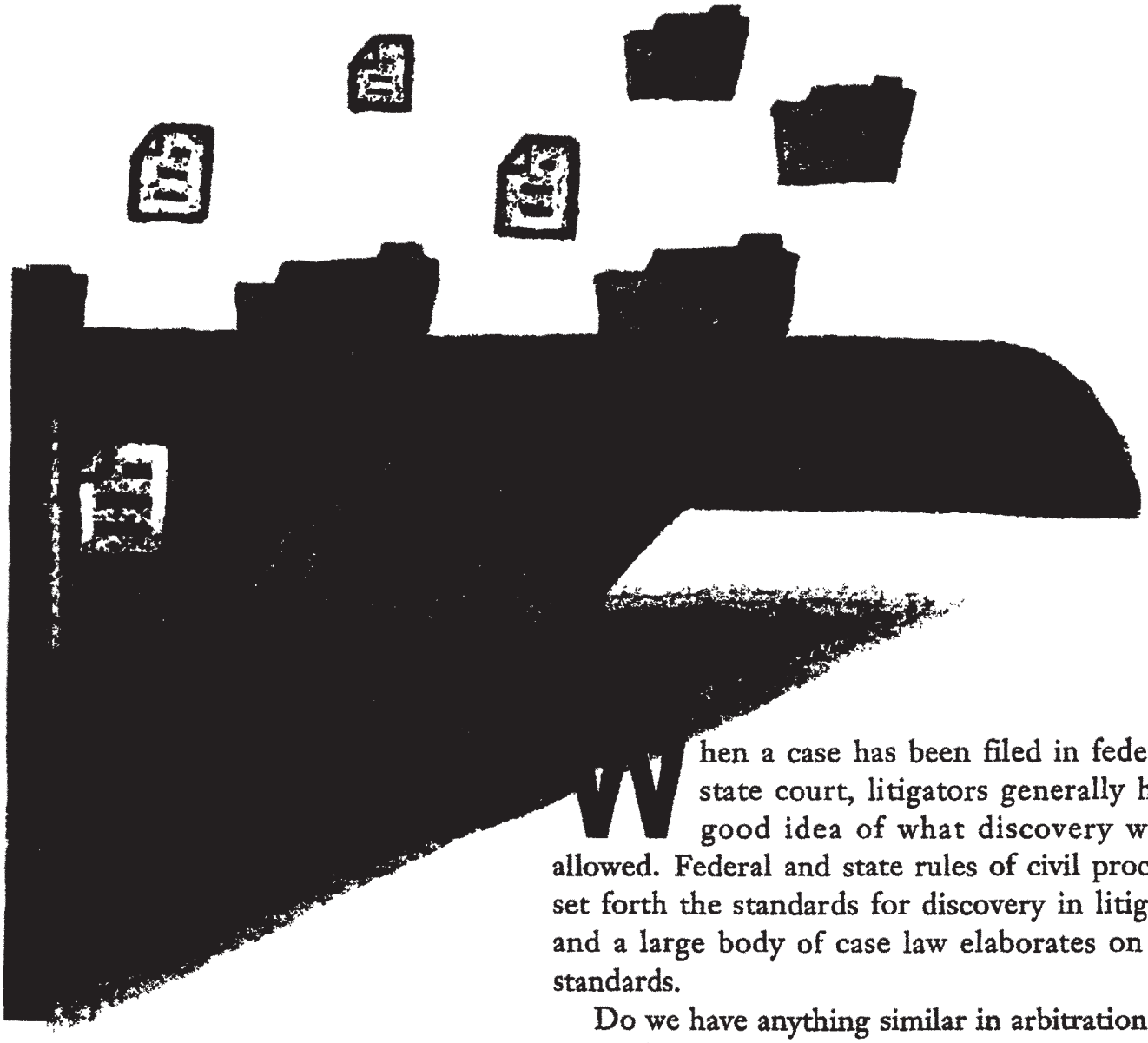
Discovery in arbitration is different from the virtually unlimited discovery process used in litigation. The reason is that the arbitrator's job is to deliver a faster and less expensive process. This article discusses how arbitrators handle discovery in arbitration and the considerations they take into account when deciding how much and what type of discovery to allow. It also discusses the approaches to discovery taken in arbitration rules and the Revised Uniform Arbitration Act.



When a case has been filed in federal or state court, litigators generally have a good idea of what discovery will be allowed. Federal and state rules of civil procedure set forth the standards for discovery in litigation, and a large body of case law elaborates on these standards.

Do we have anything similar in arbitration? Can counsel and the parties know with reasonable certainty how much discovery will be allowed in their commercial arbitration? What kind of discovery is typically permitted? Are the answers to these questions entirely within the discretion of the arbitrator? Is there a governing standard?

Given the confidentiality of arbitration, there are generally no published arbitral decisions on discovery questions in arbitration. So in this article I set forth some tentative answers to these questions in the context of domestic commercial arbitration based on my personal experience as an arbitrator in over 125 commercial cases, the varied experience of arbitrators with whom I have served. I also discuss the relevant rules of the American Arbitration Association (AAA) and other arbitration institutions, as well as the treatment of discovery in the Revised Uniform Arbitration Act (RUAA).

Rationale for Discovery in Arbitration

Arbitrators generally have three primary objectives in deciding discovery disputes in a commercial case: (1) a speedier disposition than in litigation; (2) a less expensive process than litigation; and (3) a fair opportunity for both sides to prepare and try the case. Satisfying each of these objectives depends in large measure on the amount of discovery allowed in the arbitration. To obtain a speedier and less costly disposition, discovery, which consumes the bulk of time and attorney fees in litigation, needs to be more limited than in litigation. Yet the parties must have the discovery they need for a fair hearing.

To obtain a speedier and less costly disposition, discovery needs to be more limited than in litigation. Yet the parties must have the discovery they need for a fair hearing.

As a result, the discovery that is automatic and often virtually unlimited in litigation is subject to close scrutiny in arbitration. The arbitration goals cited above cause arbitrators to require the parties to *justify* the discovery they seek. There is a bedrock amount of discovery in arbitration, particularly the reasonable disclosure of the parties' claims and defenses and the exchange of relevant documents. But beyond that, parties are generally only allowed to take depositions and serve interrogatories if they can demonstrate a real need for them. Of course, the parties' counsel may agree to more extensive discovery, although that can compromise the two main benefits of arbitration.

Discovery in Commercial Litigation

The discovery phase in a multi-million dollar commercial litigation typically takes years, not months. First counsel for the parties prepare and serve very broadly worded document discovery requests that ask to see all documents "in connection with or relating to" one subject or another. They also invariably prepare lengthy interrogatories and sometimes "requests to admit." They have to review and number their client's documents for document production purposes. Often, each side files objections to the other side's document requests, which could include claims of attorney-client privilege or attorney work product. The parties could end up in protracted motion practice fighting about these documents. Meanwhile, each side serves deposition notices on the other. It is not unusual to receive a dozen or even dozens of such notices. Attorneys for the parties commonly seek to depose everyone who may have relevant information, even if the testimony is likely to be cumulative or redundant. They don't want to leave any stone unturned.

Litigators hate surprises and they generally find it unacceptable to wait until trial to take the testimony of important witnesses who are not under their control. They typically seek to depose every witness who could possibly show up at trial, even those who are fully on the record in documents and hence whose testimony is readily subject to cross-examination.

Although depositions are scheduled for months down the road, they rarely take place as scheduled because the attorneys or the witnesses are busy that day. It is common to defer depositions multiple times. A year could go by and they still have not been taken. Finally one party may get fed up and seek an order compelling the completion of discovery. If not, the judge may see that this case is not moving forward and will take matters into his or her own hands. The process initially developed to foster fair trials by avoiding unfair surprise at trial has taken on a life of its own, one that eats up years of time and incurs huge expenses for each side, often without telling counsel much that they did not already know from the documents and their own witnesses.

When depositions are taken, the lawyer taking

them may make the session as long as possible in order to be sure to exhaust the deponent's knowledge. Sometimes, depositions result in disputes that have to go before a judge. This can occur when the deponent's counsel directs the witness not to answer or unilaterally cuts short the deposition.

Meanwhile, each side "responds" to the other's interrogatories and requests to admit, usually by giving the narrowest possible answer or no answer.

Discovery in Arbitration

This is all very different in commercial arbitration. Arbitrators usually want the hearing to be scheduled within three to eight months. It would be a rare arbitration, and a particularly large or complex one at that, in which the arbitrators would be happy with an expanded hearing schedule that exceeds eight months. Arbitrators on the panel of the American Arbitration Association (on which I serve) are trained to believe it is their job to deliver the expedited proceeding that arbitration promises and the parties bargained for.

Thus, arbitrators generally have a different perspective on discovery. They do not want the parties to engage in a fishing expedition of the kind that is typical of discovery in litigation. They want to allow just enough discovery to permit each side to prepare and try its case, but no more. Arbitrators have a strong belief that witnesses should testify only once, and that is at the hearing. So there is no need to incur the expense of earlier (and generally protracted) depositions.

If a party reasonably needs to examine a person under the control of the adversary and asks the arbitrator to order this witness to be produced, the arbitrator will usually obtain the adversary's agreement to produce the witness at the hearing. Similarly, when the exigencies of a case require the testimony of a non-party witness who reside within subpoena-range of the hearing, the arbitrator will subpoena the witness but generally only for purposes of the hearing (i.e., not for a deposition).

When non-party witnesses reside beyond subpoena range, they could still agree to testify, and when they do agree, arbitrators prefer to have them testify live at the hearing. When it is difficult getting them there in person, video-conference technology makes it possible to have them virtually present at the hearing. Testimony by telephone, which involves little expense, is also possible and frequently used where it makes sense in the context of the particular case.

This does not mean that depositions are never allowed in arbitration. That is not the case. If the parties make a convincing case that a reasonable number of depositions of limited duration seem necessary, arbitrators will generally permit them.

Despite their penchant for deposing every witness, litigators who arbitrate have learned that they have the skills to capably cross-examine the other side's witnesses without depositions. To conduct the cross, they use the information they have learned from their informal investigation of the facts of the case, documents, witness lists and expert reports exchanged before the hearing. The huge number of depositions typically taken in litigation is not as important as litigators have come to believe.

What Is Reasonable?

The amount of discovery reasonably needed to arbitrate a particular case depends on the facts and circumstances. It is reasonable to need documents specifically related to the dispute. It is also reasonable to need to know the particulars of the other side's claims, defenses, purported damages and the like. If requested, arbitrators will generally direct that such information be provided.

Arbitrators typically establish the idea at the preliminary hearing that they expect counsel to work out any discovery issues that arise. When the parties' attorneys cannot resolve these issues by themselves, arbitrators are prepared to direct them if necessary.

The Size of the Case

Parties are increasingly submitting huge commercial cases to arbitration. Cases in the tens and hundreds of millions of dollars and more are not uncommon. Some general counsel prefer to arbitrate cases of all sizes for the opportunity it gives them to pick a highly experienced arbitrator (or panel of arbitrators) with knowledge of the subject matter who can be selected with eyes open, rather than take a chance on the spin of the wheel in the court clerk's office.

Some general counsels at large corporations have stressed the importance of preserving the speed and economy in arbitration. Yet some cases have so much at stake that both parties may agree that they want the "no stone unturned" approach to discovery in arbitration. This is their right since arbitration is a process that belongs to the parties.

In large cases involving multiple issues, arbitrators will generally recognize the need for more substantial document exchanges, and possibly more than a couple of depositions and a limited number of targeted interrogatories. But they nonetheless try to keep the cases moving more expeditiously than would typically happen in court.

The Easy Case

Discovery is easiest when the parties' arbitration clause specifies the scope of discovery. Occasionally the parties provide in their arbitration clause that the federal or state rules of procedure shall apply to discovery in arbitration, resulting essentially in pseudo-litigation before a private judge. In my experience, this is relatively rare (I would say anecdotally that it occurs in fewer than 5% of cases).

Arbitrators will apply the procedures specified in the parties' arbitration agreement. However, they are not prevented from trying to "jawbone" the parties' counsel into agreeing that what they actually need is more limited discovery, not more. ("Jawboning" is the term I use for the practice many arbitrators follow of probing for consensus on pre-hearing issues before ruling on them.) Arbitrators who educate themselves about the case can engage in a meaningful dialogue with the attorneys about what discovery is reasonably necessary (as distinguished from what they have stated is needed) and then build on that foundation to create consensus on a reasonable discovery plan.

In large cases involving multiple issues, arbitrators will generally recognize the need for more discovery.

To do this effectively, arbitrators try to develop an early understanding of the case. This is one of the reasons arbitrators invite counsel to discuss the case at the preliminary conference and at interim conferences throughout the discovery period. It is in counsels' interest to project their case as fully as possible whenever the opportunity arises.

The Most Typical Case

Although the parties could include the scope of discovery in their arbitration agreement, they rarely do. Usually the arbitration clause is silent as to the scope of discovery. However, if the agreement calls for arbitration by a particular arbitration institution or provides for arbitration under specific institutional rules, the institution's rules will be incorporated by reference, including the discovery provisions. (For example, an arbitration clause may provide for AAA arbitration or arbitration under the AAA Commercial Arbitration Rules.)

Discovery is normally one of the issues on the table at the first preliminary conference, which, in most instances, is conducted via a conference call. In a commercial case, counsel for the parties usually decide on the scope of discovery before the call is scheduled and advise the arbitrator of their agreement during the course of the conference call. The attorneys commonly agree to exchange relevant documents and to depose two or three of the adversary's witnesses.

Until a dispute arises, arbitrators generally will not get involved in document production issues. The attorneys know their case and if they can agree on document discovery, great.[1]

As to depositions, arbitrators will consider whether their use is really needed. Why depose a witness who lives within subpoena-range of the hearing or a witness under the control of the adversary? Counsel may need to be reminded that arbitration is different from litigation and has economy and efficiency as two of its goals. Often counsel will respond to this by agreeing that depositions are not necessary. Should this lead to concern that they are merely being deferential to the person who will resolve the dispute? Theoretically that is possible. But as a practical matter it should not be a concern if the attorneys understand that the arbitration process is supposed to be different from litigation, the arbitration involves a dispute between parties who are familiar with the matters in contention, and the relevant documents and witnesses will be available at the hearing.

When Both Sides Want Depositions

When cajoling by the arbitrator does not work and both sides want to depose multiple witnesses, the arbitrator must step back and accept the idea that there will be more, rather than fewer, depositions in the case. But the arbitrator can continue to try to limit their number and duration.

In the unusual case where this does not work, arbitrators generally will respect counsels' agreement on the subject and allow the depositions to be taken, after warning them of the effect on the time and cost of the arbitration.

When One Side Does Not Want Depositions

What if one side wants depositions and other discovery and the other side objects? In that situation, there is a discovery dispute on which the arbitrator must rule. The arbitrator will generally decide based on what he or she thinks is fair, con-

sidering the need for an expeditious and economical process.

Some arbitrators will decide discovery disputes based on the parties' briefs. Others will hold a conference with the attorneys for both sides after the briefs are submitted, at which point the arbitrator will have a serious talk with counsel as they go through each disputed item one by one. I think this approach yields more enlightened rulings. Often, it is only necessary for the arbitrator to go through a few disputed items or types of items to establish guidelines, whereupon the attorneys work out the rest. Notwithstanding positions taken in party briefs, the attorneys tend to move towards consensus when the arbitrator suggests restraint on both sides in the service of figuring out what discovery would provide the requesting party with information it reasonably needs while protecting the objecting party's interests. When a sensible accommodation of each side's rights and interests is reached, the arbitrator will incorporate it in a ruling.

Where no consensus is reached, the arbitrator will have to go it alone, deciding the dispute based on the goals of arbitration and the interests and needs of both sides. The ruling will often bear a striking resemblance to the approaches the arbitrator suggested in the conference with the parties on the discovery dispute.

AAA Rules

Decision making by arbitrators on discovery questions is not typically based on rules. This is because most arbitration rules give wide discretion to the arbitrator to determine the scope of discovery. Attorneys rarely argue for or against discovery based on an institution's arbitration rules. Yet it is interesting to see that the "expeditious/economical/fair" mantra that arbitrators generally use to decide discovery disputes reflects principles in the arbitration rules of leading arbitration organizations.

The AAA Commercial Arbitration Rules focus on information exchanges.[2] Rule 21(a) provides that the arbitrator, "consistent with the expedited nature of arbitration," may direct "the production of documents *and other information.*" (Emphasis added) Rule 21(c) provides that the arbitrator "is authorized to resolve any disputes concerning the exchange of information." Thus, this rule places discovery issues in the discretion of the arbitrator, subject to the need for an expeditious proceeding.

The AAA Procedures for Large, Complex Commercial Disputes (which are included in the AAA Commercial Arbitration Rules) recognize the goals of having "a just, speedy and cost-effective resolution." Rule L-4(a) provides that "[a]rbitrator(s) shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution...." These rules also recognize the discretion of arbitrators in discovery matters. Rule L-4(c) provides: "The parties may conduct such discovery as may be agreed to by all the parties provided, however, that the arbitrator(s) may place such limitations on the conduct of such discovery as the arbitrator(s) shall deem appropriate." The rule contemplates that if the parties cannot agree on discovery, "the arbitrator(s), consistent with the expedited nature of arbitration, may establish the extent of the discovery."[3] Interestingly, Rule L-4(c) gives the arbitrator the discretion, in the interests of an expedited process, to override even the parties' agreement as to discovery.

Rule L-4(d) also explicitly addresses the issue of depositions and interrogatories. They may be permitted "in the discretion of the arbitration(s) and upon good cause shown ...consistent with the expedited nature of arbitration" if the person to whom they are addressed has information "determined by the arbitrator to be necessary to determination of the matter."

Finally, Rule L-4(g) authorizes the arbitrator to resolve any discovery disputes.

The AAA's Employment Arbitration Rules use different language but are the same in principle. Rule 9 authorizes the arbitrator to order "discovery, by way of deposition, interrogatory, document production or otherwise" if the arbitrator "considers it necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration."[4]

Other Providers and the RUAA

Rule 17 of the JAMS Arbitration Rules is comparable to the AAA Rules, except that it contemplates one deposition per side, while leaving additional depositions to the discretion of the arbitrator based on "the reasonable need" for the information, the availability of other discovery options, and the burdensomeness of the request."[5]

Rule 11 of the Rules for Non-Administered Arbitration promulgated by the International Institute for Conflict Prevention and Resolution's provides that arbitrators may permit such discovery as they deem appropriate, "taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective."[6]

The RUAA's[7] discovery provisions are similar to the provider rules above. The arbitrator's authority as to discovery is in Section 17(c). It pro-

vides: "An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective." This provision covers discovery depositions.

Comment 3 to Section 17 states in the first paragraph that the approach to discovery in subsection (c) "follows the majority approach" under the case law involving the Federal Arbitration Act (FAA) and the 1955 Uniform Arbitration Act, which is that "unless the contract specifies to the contrary, discretion rests with the arbitrators whether to allow discovery." The second paragraph notes that, although Section 17(c) allows an arbitrator to permit discovery so that the parties can obtain necessary information, "the intent of the language is to limit that discovery by considerations of fairness, efficiency, and cost."

Depositions for purposes of the hearing are addressed in Section 17(b). This section states: "In order to make the proceedings fair, expeditious, and cost effective, upon request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing." This provision goes on to say that "[t]he arbitrator shall determine the conditions under which the deposition is taken."

Non-Party Witnesses

The above focuses on party discovery. Complex and largely unsettled issues arise when information is needed from non-party witnesses who are beyond subpoena-range of the site of the arbitration.[8] These issues include the extent to which, under the FAA[9] and other laws, a non-party witness may be compelled to produce documents or give testimony at a deposition or in a formal "hearing session" where he or she is located, and the related question of whether the arbitrators (or one member of a panel) may preside over the taking of this witness's testimony at that locale. These issues are beyond the scope of this article. However, it is worth noting again that non-party witnesses who are outside the jurisdiction of an arbitrator's subpoena are frequently willing to testify by teleconference or telephone conference at a time convenient to them in response to an informally transmitted subpoena, even though they could challenge the subpoena in court, or even ignore it and await enforcement proceedings. Some witnesses agree because of the potential time and expense of contesting the subpoena. Others do so out of a spirit of cooperation or respect for the arbitration process.

Conclusion

The principles for resolving discovery-related issues in arbitration are clear, sensible and workable. The vast majority of party discovery disputes in commercial cases are worked out among counsel. When counsel cannot agree, arbitrators will rule on the discovery issues by balancing the arbitration objectives of providing an expeditious and economical yet fair proceeding. Parties may provide for more expanded discovery in their arbitration agreements or they may subsequently agree to such discovery before the hearing. ■

ENDNOTES

[1] The subject of electronic discovery is beyond the scope of this article. Parties in arbitrations are often willing to limit electronic discovery in the interests of having an expeditious and economical proceeding, although there will increasingly be cases where it will be important. See, e.g., Irene C. Warshauer, "Electronic Discovery in Arbitration: Privilege Issues and Spoliation of Evidence," 61(4) *Disp. Res. J.* (Nov. 2006/Jan. 2007).

[2] The AAA rules are available at www.adr.org.

[3] The extent of an arbitrator's power to order sanctions against parties for discovery abuse is addressed in Philip D. O'Neill, "The Power of Arbitrators to Award Monetary Sanctions for Discovery Abuse," 60(3) *Disp. Resol. J.* (Nov. 2005/Jan. 2006); Philip D. O'Neill, "Update: Mass. Allows Arbitrators to Award $$ Sanctions to Remedy Discovery Abuse," 60(2) *Disp. Resol. J.* (May-July 2006).

Section 17(d) of the RUAA provides, that the arbitrator may "take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this state." The RUAA is available at www.nccusl.org.

[4] The AAA Employment Arbitration Rules are available at www.adr.org.

[5] JAMS Comprehensive Arbitration Rules and Procedures are available at www. jamsadr.com.

[6] CPR's rules are available at www.cpradr.org.

[7] See n. 5.

[8] See, e.g., Leslie Trager, "The Use of Subpoenas in Arbitration," 62(4) *Disp. Resol. J.* (Nov. 2007/Jan. 2008).

[9] 9 U.S.C. § 7.

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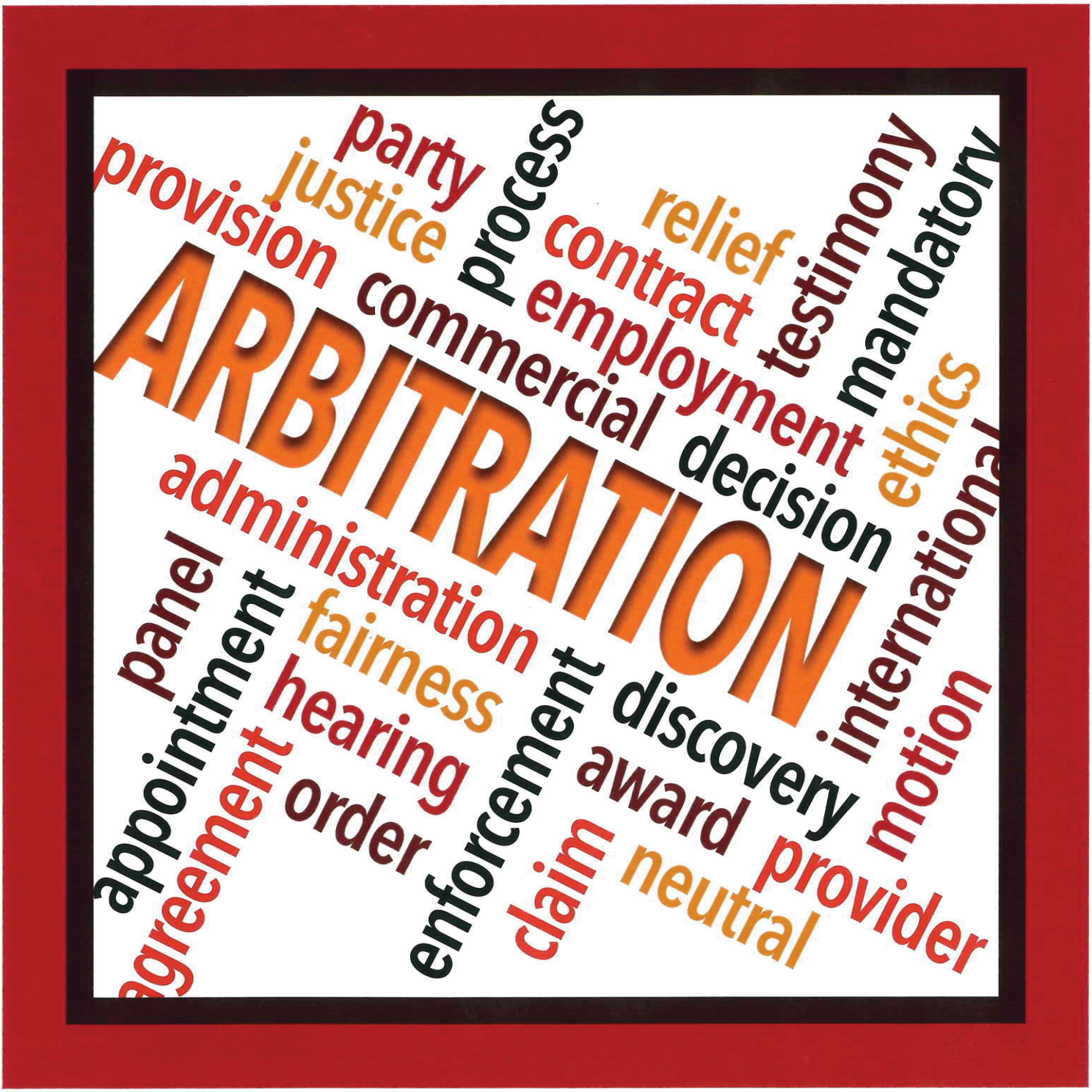

Arbitration Discovery

Getting It Right

By John Wilkinson

When I started practicing as an arbitrator, the scope of discovery in arbitration was not an issue. Arbitrated cases were relatively small, and arbitrating parties typically were content with a swift dose of rough justice without any discovery at all. More recently, however, the size of cases has increased dramatically, to the point where arbitrations involving millions of dollars are almost commonplace.

As the amounts at stake in these cases have increased, there has been an effort to include in arbitration many of the expensive, time-consuming elements of cases litigated in court such as interrogatories, broadly worded document requests, extensive depositions, dispositive motions, and even appeals. This is understandable, since a multi-million-dollar corporate dispute clearly requires more intense preparation than has historically been available in arbitration. The problem, however, is that: (i) arbitration must still be significantly faster and more cost-effective than litigation since otherwise, arbitration will lose much of its value; and (ii) contrary to this core principle, a few arbitrators have taken expanded arbitration discovery to an extreme and have opened the floodgates by permitting oppressive, expensive, and unnecessary discovery. While these instances are relatively rare, they get more than their share of publicity. Such publicity is misleading, though, because statistics furnished by the largest arbitration providers indicate that the average time from commencement of a domestic commercial arbitration to issuance of a final award ranges from 7 to 7.3 months. By contrast, the median length of time in 2011 from the filing of a civil case in district court to the disposition of appeal by the US Circuit Courts of Appeal was 30.8 months – and in some of the busier courts, considerably longer.[1]

Statistics aside, criticism of the time and cost of commercial arbitration persists, with the result that many constructive, remedial measures have been introduced. The American Arbitration Association and other arbitration providers, for example, have adopted rules aimed at maintaining the speed and cost-effectiveness of arbitration while at the same time allowing for sufficiently broad discovery to permit a fair result in a complex case.[2] After months of exhaustive study, the New York State Bar Association issued *Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic, Commercial Arbitrations* (*NY Guidelines*).[3] And subsequent to the *NY Guidelines*, the College of Commercial Arbitrators released its *Protocols for Expeditious, Cost-Effective Commercial Arbitration*, which address arbitration discovery issues from the varying perspectives of business users, in-house counsel, arbitration providers, outside counsel, and arbitrators.

The purpose of this brief article is to present in summary form some of the more important practices that help achieve limited, cost-effective, and sufficiently comprehensive discovery in arbitration.[4]

First Preliminary Conference

Shortly after appointment of the arbitrator[5] in a commercial dispute, the arbitrator typically convenes a conference with the parties for the purpose of planning the entire case. This conference is the single most important event in an arbitration; it is the engine that makes the process run and can be the foundation for a limited, cost-effective discovery program. Following the conference, the arbitrator typically drafts and circulates a procedural order that sets forth dates for everything that needs to be done between the conference and the hearing on the merit and establishes the dates for the actual hearing. Equally as important, the procedural order will, in most cases, set forth rules and guidelines for the cost-effective conduct of discovery.

The Occasional Problem of Comprehensive Discovery

Occasionally, both sides come to the first preliminary conference in agreement that there will be comprehensive discovery in accordance with the Federal Rules of Civil Procedure. If the parties persist with this approach, there is little the arbitrator can do, since he or she has no power other than what is conferred by agreement of the parties. In these situations, I recommend that the arbitrator make a concerted effort to dissuade the parties from following the Federal Rules – an effort I have found to be successful in a surprising number of instances. Outside counsel, for example, often want all-encompassing discovery; if the arbitrator is able to include in-house counsel (who pay the bills) in the arbitration planning process, the approach to discovery often can be significantly reduced from what outside counsel initially proposed.[6]

First Procedural Order

Assuming both sides are receptive to limiting arbitration discovery in a reasonable way, a number of measures can be included in the first procedural order to help accomplish this. Some of the more important ones are discussed below.

Scope of Document Requests

The scope of document discovery should always be discussed at the first preliminary conference. In many cases, the parties are able to devise their own reasonable standard for inclusion in the procedural order. In other cases, the parties might adopt the limited document discovery suggested in the *NY Guidelines*[7] or in the International Centre for Dispute Resolution *Guidelines for Arbitrators Concerning Exchanges of Information* (*ICDR Guidelines*).[8] (See an excerpt from the *ICDR Guidelines* on the right of this page.)

***ICDR Guidelines* on the Scope of Document Requests**

> . . . the tribunal may, upon application, require one party to make available to another party documents in the party's possession, not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case. Requests for documents shall contain a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case.

When the parties adopt a reasonable standard for document production at the start of an arbitration, the arbitrator is well on the way to achieving the goal of an expeditious, cost-effective, and fair proceeding.

eDiscovery

By far the most expensive and time-consuming aspect of discovery in both arbitration and litigation arises from the recent growth of electronically stored information ESI (See the article by Susan H. Nycum on page 15 of the magazine.) The delay and increased cost arising from ESI is attributable to the following, among other things:

1. Unlike paper files, ESI is typically located in a wide variety of storage media such as company servers, clouds, personal computers, smartphones, iPads and other tablets, and social media.
2. ESI can be stored in many different formats, some of which may not be readable by humans.
3. To locate and present ESI in forms readable by human beings, many different information technology mechanisms are often required.
4. ESI is often widely disseminated, which means electronic documents may have many custodians. This can lead to expensive, time-consuming redundancies if all or most potential sources of electronic documents are searched.
5. Most electronically stored documents are accompanied by metadata, which tell the history of the document. When significant amounts of metadata are included in the eDiscovery process, discovery's time and cost increase dramatically.[9]

While it is unrealistic to expect arbitrators to be experts in the enormously complex technology of eDiscovery, they should at least familiarize themselves generally with the kinds of technological questions that might arise. Having done that, they should ask the parties to look carefully at eDiscovery issues that might potentially be in dispute and to be prepared to discuss

them (perhaps including a technological expert) at the first preliminary conference.

When discussing eDiscovery at the first preliminary conference, the goals of the arbitrator should include the following:

- Limit the custodians of data whose hard drives must be searched.
- Restrict the scope of eDiscovery to matters that are directly relevant and material to the outcome of the case.
- Narrow the number of storage devices to be searched.
- Define a reasonable time period to be covered by the search.
- Reduce to the extent possible the number of search terms to be used when scanning the ESI for relevant data.

The procedural order following the first preliminary conference should encourage the parties to finalize limits on eDiscovery along the above lines. In addition, the *NY Guidelines* suggest that the order contain language such as the following with respect to other aspects of eDiscovery (see the shaded box below).

New York Guidelines eDiscovery Recommendations

There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from back-up servers, tapes or other media.

Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format which is usable by the party receiving the e-documents and convenient and economical for the producing party. Absent a showing of compelling need, the parties need not produce metadata with the exception of header fields for email correspondence.

When the costs and burdens of e-discovery are disproportionate to the nature and gravity of the dispute or to the relevance of the materials requested, the arbitrator shall either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to further allocation of costs in the final award.

Discovery Disputes

If there are no ground rules at the outset concerning presentation and resolution of discovery disputes, an arbitration can grind to a halt as the participants attempt to deal with voluminous discovery motions accompanied by lengthy briefs, affidavits, and hours of oral argument. To avoid such a result, the first preliminary conference should include discussion of possible disputes over discovery, and the first procedural order should contain guidelines such as the following:

- In cases involving a three-arbitrator panel, any discovery disputes should be decided by one of the three. This should be done with agreement of the parties and with the understanding that the deciding arbitrator can consult with the other panel members if an issue appears particularly important. This approach avoids the time and expense of having three arbitrators plod through and come to agreement on every objection to every document request. And if there is to be argument, the single-arbitrator approach avoids the scheduling delays that can typically occur with three busy arbitrators.
- Objections to document requests should be exchanged on a date certain, after which the parties should be required to engage promptly in a good-faith "meet and confer" to resolve any objections.
- If all objections are not resolved at the meet and confer, on a specified date shortly after that gathering, the parties should submit four- or five-page letter briefs succinctly explaining their discovery differences and why they think their respective positions are correct.
- Following receipt of the letter briefs, the tribunal should render a prompt decision on the basis of the letters or quickly convene a telephonic conference for the purpose of addressing the discovery issues. Only in extraordinary circumstances should the tribunal take more than two weeks from the time of receipt of the letter briefs to decide the issues presented.
- Following resolution of the discovery issues, the parties should promptly produce documents responsive to requests as to which objections were overruled. This production should be on an expedited basis, generally not later than two or three weeks following the tribunal's decision, and
- In no event should resolution of discovery objections delay compliance with document requests as to which there was no objection.[10]

Depositions

Traditionally, depositions have not been a part of arbitration, and that is one of the distinctions drawn as to why arbitration is so much more cost-effective and efficient than litigation. But as the use of arbitration has mushroomed and as general counsel have put increasingly complex matters into arbitration, we have seen increased use of depositions in arbitration. If kept in control, this is not a bad development. Absent depositions, cross-examination at arbitration hearings can slog aimlessly through one fruitless area after another as the questioner gropes for even a tidbit of helpful information. Thus the arbitration can sometimes resemble a discovery deposition, and when it does, the testimony can go on for much too long on issues that are largely unimportant.

While depositions no doubt have a place in complex, commercial arbitrations, they must never approach the scope of deposition discovery in court. In light of this, the procedural order following the first preliminary conference in a commercial arbitration must place meaningful limits on any depositions. For example, each side might be allocated 10, 15, or 20 hours of depositions to be taken over a four- or five-week period. Or each side might be allowed a few two-hour depositions – again, over a limited period. Either way, speaking objections should not be permitted because the lawyer defending the deposition could use up most of the allotted deposition time with objections.[11]

Final Analysis

Arbitrators and parties must strike a delicate balance in commercial arbitrations, especially in complex cases, working to ensure that the discovery will allow the case to be resolved more quickly and less expensively than it would be in litigation while at the same time providing sufficient discovery to allow for a truly fair resolution.

Achieving such a balance is no doubt challenging, but as participants have become increasingly knowledgeable and focused on the need to attain this goal, effective and efficient arbitration discovery has more and more become a reality that parties have a right to expect. ◆

Endnotes

1 ABA Section of Dispute Resolution, Benefits of Arbitration for Commercial Disputes.

2 *See* The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration 144 (James M. Gaitis et al. eds., 3rd ed. 2013) (hereinafter CCA Best Practices Guide) (citing International Institute for Conflict Prevention & Resolution [CPR], Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration, *available at* http://www.cpradr.org/RulesCaseServices/CPRRules/ProtocolonDisclosureofDocumentsPresentationofWitnessesinCommercialArbitration.aspx).

3 The New York State Bar Association has also issued similar Guidelines for the Conduct of the Pre-Hearing Phase of International Arbitrations.

4 Thomas Stipanowich has compiled what many different institutions have done to enhance arbitration efficiency. *See* Thomas J. Stipanowich, *Soft Law in the Organization and General Conduct of Arbitration Proceedings*, *in* Soft Law in International Arbitration 73 (Lawrence W. Newman & Michael J. Radine eds., 2014).

5 For the sake of simplicity, this article will refer to "arbitrator" in the singular, although many cases involve a panel of three arbitrators.

6 *See* CCA Best Practices Guide, *supra* note 2, at 140, 141; *See also* New York State Bar Association, Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic, Commercial Arbitrations at 15, 16 (hereinafter NY Guidelines).

7 NY Guidelines, *supra* note 6, at 8.

8 The International Centre for Dispute Resolution ("ICDR") is the international arm of the American Arbitration Association.

9 See CCA Best Practices Guide, *supra* note 2, at 160-161 for a discussion of the various problems that are generated by eDiscovery.

10 *See* NY Guidelines, *supra* note 6, at 15.

11 *See* John Wilkinson, *Streamlining Arbitration of the Complex Case*, 55 Disp.Resol. J., no. 3, Aug.-Oct. 2000, at 8; *See also*, NY Guidelines, *supra* note 6, at 13-14.

John Wilkinson *is on the arbitration and mediation panels of the American Arbitration Association, including the panel for Large, Complex Commercial Disputes. He is immediate past Chair of the Dispute Resolution Section (Section) of the New York State Bar Association (NYSBA) and has previously chaired the Section's Arbitration and Mediation Committees. He is a primary author of NYSBA's* Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic, Commercial Arbitration. *His website is www.johnwilkinsonlaw.com.*

Other Pre-Hearing Conference Issues

A MODEL FEDERAL ARBITRATION SUMMONS TO TESTIFY AND PRESENT DOCUMENTARY EVIDENCE AT AN ARBITRATION HEARING

By the International Commercial Disputes Committee
and the Arbitration Committee of the New York City Bar Association

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Introduction

This annotated model federal arbitration witness summons (so titled because the Federal Arbitration Act ("FAA") uses the term "summon" rather than "subpoena" in Section 7) brings together in one resource guidance on law and practice in regard to the issuance by arbitrators of compulsory process for evidence to be obtained from non-party witnesses.[1] A major impetus for this project was the amendment of Rule 45 of the Federal Rules of Civil Procedure in December 2013, which in relevant part provided for nationwide service of a federal judicial subpoena. By implication, a federal arbitral witness summons, which per FAA Section 7 is to be served in the same manner as a federal judicial subpoena, now may be served nationwide. The consequences are likely to be (i) more extensive proposed and actual use of arbitral subpoenas than was the case when an arbitrator could compel attendance only of a witness found within 100 miles of the place of arbitration, and (ii) a greater frequency of litigation concerning the witness's duty of compliance.

The structure of this document, as the Table of Contents indicates, is to provide a Model Summons and a series of annotations that discuss applicable law and/or issues of practice and policy. The annotations are keyed to aspects of the Model Summons by footnotes (or hyperlinks) in the Model Summons, so the reader can readily refer to the analysis that underlies the various components of the Model Summons.

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[1] The subject of non-party evidence in international arbitration has been addressed in two recent reports by the International Commercial Disputes Committee of the New York City Bar Association. *See Obtaining Discovery from Non-Parties in International Arbitration in the United States*, 20 Am. Rev. Int'l Arb. 421 (2009); *28 U.S.C. § 1782 as a Means of Obtaining Discovery in Aid of International Commercial Arbitration — Applicability and Best Practices*, http://www.nycbar.org/pdf/report/1782_Report.pdf (2008).

CASE NO. [if applicable][2]

[OPTIONAL: CAPTION IDENTIFYING THE PROVIDER ORGANIZATION AND/OR APPLICABLE RULES OF ARBITRATION]

IN THE MATTER OF AN ARBITRATION
BETWEEN:

X COMPANY, INC.,

Claimant,

And

Y LLC,

Respondent.

ARBITRATION SUMMONS[3] TO TESTIFY AND PRESENT DOCUMENTARY EVIDENCE AT AN ARBITRATION HEARING[4]

TO: [J. Smith][5]
[Z Corporation][6]
[address]
[City], [State][7]

By the authority conferred on the undersigned arbitrators[8] by Section 7 of the United States Arbitration Act (9 U.S.C. § 7), you are hereby SUMMONED to

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2 *See* Annotation L (Procedure in Regard to Arbitral Subpoenas Governed by FAA Section 7).

3 *See* Annotation A (Denomination as "Witness Summons").

4 *See* Annotation K (Arbitral Role in Deciding Enforceability of Subpoenas).

5 *See* Annotation B (Natural Person As Witness Summons Recipient).

6 *See* Annotation J (Arbitral Subpoena Based on FRCP 30(b)(6)).

7 *See* Annotation C (Location of the Witness/Nationwide Service).

attend as a witness at a hearing before one or more of the undersigned arbitrators[9] to be held on [insert date providing reasonable notice] at 10:00 a.m. at the offices of the [X Law Firm], [insert address], [City], [State],[10] and to bring with you to the hearing the documents identified in Schedule A annexed to this SUMMONS.[11]

Provided that this SUMMONS has been served upon you in the same manner as is required of a judicial subpoena under Rule 45 of the Federal Rules of Civil Procedure,[12] then if you shall refuse or neglect to obey this SUMMONS, upon petition the United States District Court for the District of [State][13] or a competent court of the State of [State][14] may compel your attendance, or punish you for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

You may address questions concerning this SUMMONS to the attorneys [or the Case Manager [if applicable]][15] identified below. Any application by you to quash or modify this SUMMONS in whole or in part should be addressed to the arbitral tribunal[16] in writing [and sent via the Case Manager [if applicable]], with copies to counsel for the parties, except that a motion upon the ground that the SUMMONS is unenforceable under Section 7 of the U.S. Arbitration Act may also

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8 *See* Annotation D (Who May Issue a Subpoena).

9 *See* Annotation E (Viability of Pre-Hearing Discovery Subpoenas).

10 *See* Annotation F (Place of Hearing).

11 *See* Annotation G (Scope of "Duces Tecum" Witness Summons).

12 *See* Annotation C (Location of the Witness/Nationwide Service).

13 *See* Annotation F (Place of Hearing).

14 *See* Annotation H (Subject-Matter Jurisdiction to Enforce Witness Summons).

15 The Model encourages the witness to communicate with counsel for the parties and the Case Manager, if applicable, to avoid *ex parte* communications between the witness and the arbitral tribunal.

16 *See* Annotation I (Proper Setting for Witness to Raise Objections)

be addressed to the United States District Court for the District of [State] or a competent court of the State of [State].[17]

The attorneys for the Claimant in this arbitration are [identify firm] (attn. [responsible attorney]), [address] [phone] [email address].

The attorneys for the Respondent in this arbitration are [identify firm] (attn. [responsible attorney]), [address] [phone] [email address].

[The Case Manager [if applicable] is [identify] [phone] [email address].]

Dated: [Month] [Day], [Year]

[name], Arbitrator	[name] Presiding Arbitrator	[name], Arbitrator
[Address]	[Address]	[Address]

[17] Annotation H (Subject-Matter Jurisdiction to Enforce Witness Summons).

Annotation A: Denomination as "Witness Summons"

FAA Section 7 refers to the compulsory process issued by an arbitrator as a "summons" and states that it should be served "in the same manner as subpoenas." We therefore make this formal distinction in the text of the Model Summons. In our annotations, however, we use interchangeably the terms "summons" and "subpoena" to refer to an arbitrator's compulsory process to a non-party witness.

Annotation B: Natural Person as Witness Summons Recipient

It is recommended to identify a natural person as the witness whenever possible. In a judicial proceeding, a party might in discovery serve a subpoena based on Rule 30(b)(6) of the Federal Rules of Civil Procedure ("FRCP") and require the corporate recipient to identify a representative to testify. Uncertainty exists about whether such an approach is permissible in arbitration. For further explanation, *see* Annotation J (Arbitral Subpoena Based on FRCP 30(b)(6)).

Annotation C: Location of the Witness/Nationwide Service

The Summons may be issued to a witness residing at a considerable distance from the place of the arbitration. This is the consequence of amendments to Rule 45 of the Federal Rules of Civil Procedure ("FRCP") in December 2013 that provide for nationwide service of process of a judicial subpoena. *See* Annotation F (Place of Hearing). Section 7 of the FAA provides that the arbitral witness summons "shall be served in the same manner as subpoenas to appear and testify before the court." FRCP 45(b)(2) as amended December 1, 2013 provides that "[a] subpoena may be served at any place within the United States."

Annotation D: Who May Issue a Subpoena

Statutory background. Section 7 of the FAA provides that "*the arbitrators, or a majority of them*" (emphasis supplied) may "summon in writing any person to attend before them or any of them." Section 7 further provides that "[said] summons shall issue in the name of the arbitrator or arbitrators, or a majority of them." Section 7 therefore provides no authority for the issuance by counsel of a summons or subpoena, signed by such counsel, for a party to testify or produce records in an arbitration. In this respect Section 7 of the FAA differs from Section 7505 of the New York Civil Practice Law and Rules ("CPLR"), which provides: "An arbitrator *and any attorney of record in the arbitration proceeding* has the power to issue subpoenas" (emphasis supplied).

Caselaw. Federal court decisions suggest, even if they do not squarely hold, that state laws and rules conferring power on attorneys to issue subpoenas are not applicable in an arbitration to which the FAA applies , at least unless the parties have expressly agreed upon use of state law rules of arbitral procedure. *See*, *e.g.*, *Nat'l Broadcasting Co.* v. *Bear Stearns & Co.*, 165 F.3d 184, 187 (2d Cir. 1999) (Section 7 "explicitly confers authority only upon *arbitrators*; by necessary implication, the *parties* to an arbitration may not employ this provision to subpoena documents and witnesses"); *St. Mary's Med. Center* v. *Disco Aluminum*

Prods., 969 F.2d 585, 591 (7th Cir. 1992); *Burton* v. *Bush*, 614 F.2d 389, 390 (4th Cir. 1980); *Kenney, Becker LLP* v. *Kenney*, 2008 WL 681452, at *2 (S.D.N.Y. Mar. 10, 2008) (citing *NBC* for the proposition that "under the Federal Arbitration Act . . . only arbitrators – and not parties to an arbitration – have the authority to issue subpoenas"); *Suratt* v. *Merrill Lynch, Pierce Fenner & Smith, Inc.*, 2003 WL 24166190, at *2 (S.D. Fla. July 31, 2003) (granting motion to quash attorney-issued subpoena because "[t]he FAA does not allow attorney-issued subpoenas in arbitration actions"). To the extent these cases held that an attorney-issued subpoena was improper, they did so on the basis that FAA Section 7 did not provide for it.

But these courts were not asked to find that a state law or rule allowing attorney-issued subpoenas in arbitration was pre-empted by the FAA. No federal court, to our knowledge, has directly answered the question whether FAA Section 7 pre-empts state arbitration rules concerning the powers of arbitrators or parties to issues subpoenas to non-parties for evidence to be used in an arbitration. Thus if an attorney in a New York-seated arbitration issued a subpoena upon the purported authority of CPLR 7505, in a case involving interstate or international commerce, it would apparently be a question of first impression in the Second Circuit whether CPLR 7505 is pre-empted by FAA Section 7.

Party agreement on state procedures. Federal case law suggests that one approach that may authorize use of state law procedures in an FAA arbitration would be for the parties to agree to such procedures, thereby triggering the federal policy in favor of enforcing the parties' agreed-upon procedures. *See Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63-64 (1995) (generic choice-of-New-York-law clause in contract containing arbitration clause to which the FAA applies should be construed to make applicable only substantive principles of New York law and not New York law restricting the powers of arbitrators); *Volt Info. Sciences, Inc.* v. *Board of Trustees of Leland Stanford Univ.*, 489 U.S. 468, 476 (1989) (FAA does not reflect congressional intent to occupy the entire field of arbitration, and FAA does not prevent enforcement of agreements to arbitrate under rules different from those set forth in the FAA itself); *Savers Prop. & Cas. Ins. Co.* v. *Nat'l Union Fire Ins. Co.*, 748 F.3d 708, 715-16 (6th Cir. 2014) ("Although the FAA generally preempts inconsistent state laws and governs all aspects of arbitrations concerning 'transaction[s] involving commerce,' parties may agree to abide by state rules of arbitration, and 'enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA'"); *Bacardi Int'l Ltd.* v. *V. Suarez & Co.*, 719 F.3d 1, 13 n.16 (1st Cir. 2013) ("[T]o use local arbitration rules instead of the FAA, the contract must say so

unequivocally"); *Ario* v. *Underwriting Members of Syndicate 53 at Lloyd's*, 618 F.3d 277, 288 (3d Cir. 2010) ("We have interpreted the FAA and *Volt* to mean that 'parties [may] contract to arbitrate pursuant to arbitration rules or procedures borrowed from state law, [and] the federal policy is satisfied so long as their agreement is enforced.'").

Annotation E: Viability of Pre-Hearing Discovery Subpoenas

Federal court decisions addressing pre-hearing document discovery. Some federal courts of appeals have interpreted the text of Section 7 to require the appearance of the witness at a hearing before one or more members of the arbitral tribunal, and thus have concluded that Section 7 does not permit a documents-only arbitral subpoena for pre-hearing production of documents by a non-party witness. This was the position taken by the Third Circuit (in an opinion authored by then Circuit Judge Samuel Alito) in *Hay Group, Inc.* v. *E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004). The Second Circuit agreed with the Third Circuit in *Life Receivables Trust* v. *Syndicate 102 at Lloyd's of London*, 549 F.3d 210 (2d Cir. 2008).

The implication of the reasoning in both decisions – that the language of Section 7 requires the attendance of a witness at a hearing before one or more arbitrators – is that Section 7 also precludes an arbitral subpoena for a pre-hearing discovery deposition, but this issue was not directly presented in either case. Both of these courts rejected the view adopted by the Eighth Circuit that, under Section 7, "implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing." *In Re Sec. Life Ins. of Am.*, 228 F.3d

865, 870-71 (8th Cir. 2000). The Second and Third Circuits also rejected the view adopted by the Fourth Circuit that, while Section 7 generally precludes discovery subpoenas, discovery subpoenas may be allowed exceptionally upon a showing of special need or hardship. *COMSAT Corp.* v. *Nat'l Sci. Found.*, 190 F.3d 269, 276 (4th Cir. 1999).

For federal cases that follow *Life Receivables* and *Hay Group* and deny enforcement of pre-hearing discovery outside the presence of an arbitrator, *see Chicago Bridge & Iron Co.* v. *TRC Acquisition, LLC*, 2014 WL 3796395 (E.D. La. July 29, 2014); *Ware* v. *C.D. Peacock, Inc.*, 2010 WL 1856021 (N.D. Ill. May 7, 2010); *Empire Fin. Group* v. *Pension Fin. Servs., Inc.*, 2010 WL 742579 (N.D. Tex. Mar. 3, 2010); *Kennedy* v. *Am. Express Travel Related Servs.*, 646 F. Supp. 2d 1342 (S.D. Fla. 2009). For a district court case following the Eighth Circuit position that the power to require pre-hearing discovery is implicit in Section 7, *see Ferry Holding Corp.* v. *GIS Marine, LLC*, 2012 WL 88196, at *2-3 (E.D. Mo. Jan. 11, 2012). An older case predating the emergence of the conflict between the Circuit courts finds the position that arbitrators may not order pre-hearing non-party discovery to be "unfounded." *See Stanton* v. *Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241, 1243 (S.D. Fla. 1988).

New York State court decisions addressing pre-hearing document discovery. The Appellate Division of New York Supreme Court, First Department, in a 2005 case (pre-dating *Life Receivables)* held that in a case governed by the FAA, it would apply Section 7 to permit discovery depositions of non-parties pursuant to a summons "where there is a showing of 'special need or hardship,' such as where the information sought is otherwise unavailable." *ImClone Sys. Inc.* v. *Waksal*, 22 A.D.3d 387, 388 (1st Dep't 2005). The Court stated that it would adhere to this view "in the absence of a decision of the United States Supreme Court or unanimity among the lower federal courts." *Id.* We are not aware of any New York State appellate decision after *Life Receivables* that either follows or overrules *ImClone* in light of *Life Receivables*. At least one New York State trial court has followed *Imclone* after and notwithstanding *Life Receivables*, finding that pre-hearing document discovery by subpoena under FAA Section 7 to a non-party may be ordered upon a showing of special need or hardship (although in that case the court found that this test was not satisfied). *Connectu* v. *Quinn Emanuel Urquhart Oliver & Hedges*, No. 602082/08, slip op. at 10 (Sup. Ct. N.Y. Cnty. Mar. 11, 2010).

Implications of federal-state split in New York. For New York practitioners, the divergence between the position of the Appellate Division of the New York

Supreme Court and the Second Circuit, if it continues, may be significant, as many Section 7 subpoenas in domestic cases involving interstate commerce may have to be enforced in the New York courts because federal subject matter jurisdiction is absent. *See, e.g.*, *Stolt-Nielsen SA* v. *Celanese AG*, 430 F.3d 567, 572 (2d Cir. 2005) (holding that Section 7 of the FAA does not, by virtue of its reference to federal district courts as courts that may compel compliance, create federal question subject matter jurisdiction for enforcement of subpoenas in FAA-governed arbitrations, and that Section 7, like other provisions of FAA Chapter 1, requires an independent basis for federal subject matter jurisdiction). *See* Annotation H (Subject-Matter Jurisdiction to Enforce Arbitral Witness Summons).

Practice question: how should a tribunal conduct document production? Assuming that a tribunal adopts the position in *Life Receivables* and *Hay Group*, a practice question is presented: How should the tribunal conduct the procurement of documents from the non-party witness if the parties and witness do not agree? (If there is agreement, the non-party often will elect to avoid the inconvenience of a testimonial appearance by a documents custodian by delivering the requested documents to counsel for the parties. Thus pre-hearing non-party discovery may often occur simply because it is the path of least resistance).

The Model Summons contemplates that, absent agreement of the parties, the documents sought will be received into evidence in conjunction with testimony from a non-party witness at a hearing at which the parties and one or more members of the tribunal would be present. We believe this is required by the text of Section 7, which contemplates that document production should be an adjunct to the testimony of a witness. This interpretation of Section 7 is supported by the fact that, as the Third Circuit in *Hay Group* observed, the forerunner of modern Rule 45 of the Federal Rules of Civil Procedure ("FRCP") as it was at the time Section 7 was adopted did not permit a documents-only subpoena.

Tribunals retain discretion, however, to conduct a witness hearing in any fashion that comports with due process and so it is not inevitable that the physical presence of the arbitrator and the witness in the same place is necessary. If the parties waive cross-examination, the witness's testimony could be presented through a witness statement or declaration. There should be no obstacle to the fulfillment of the testimonial requirement, if the witness consents, via a telephonic or video-conferenced hearing during which the documents are received by an

electronic submission.[18] In order to comply with the view that this is not discovery but a hearing preceding the final merits hearing, the tribunal should receive the documents as evidence and may then rely upon them in an award whether or not the parties in their further submissions refer to them.

In practice, arbitrators will continue to be asked to issue pre-hearing subpoenas for discovery, especially when the witness resides in a location within a federal judicial circuit that either takes an approach to Section 7 that permits an arbitral summons for discovery in at least some instances (*e.g.*, the Fourth and Eighth Circuits) or has not taken a position on the question. We believe the Second and Third Circuit decisions are well reasoned, and faithful to the text of Section 7, and that in practice it makes sense for arbitrators to issue witness summonses that conform to the evidentiary-hearing model. The Model Summons is therefore structured along those lines. If the witness agrees to a discovery-like procedure, the interests of the party that sought compulsory discovery are not prejudiced, and the subpoena functions as a sort of predictable back-up method for obtaining the non-party's evidence.

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[18] As we discuss in Annotation F, while we believe that taking testimony telephonically or by videoconference does not require a witness to consent, it may be prudent to obtain that consent where possible.

Subpoenas for pre-hearing witness testimony. In the *Life Receivables* and *Hay Group* cases, the Second and Third Circuits, respectively, reversed orders of the district courts that had enforced subpoenas for pre-hearing document production by non-party witnesses. The decisions therefore implied that a subpoena requiring pre-hearing document production at a hearing held in the presence of one or more of the arbitrators would be enforceable. But the question of enforceability of a subpoena for witness testimony was not directly involved in the *Life Receivables* and *Hay Group* cases, and therefore those decisions did not squarely answer the question of whether Section 7 permits a non-party subpoena for witness testimony at a proceeding held in the presence of one or more arbitrators that is not the arbitration hearing on the merits.

Prior to *Life Receivables*, the Second Circuit in *Stolt-Nielsen SA* v. *Celanese AG*, 430 F.3d 567, 577 (2d Cir. 2005), had affirmed enforcement of a subpoena for witness testimony at a hearing before the arbitrators to be held prior to the arbitration merits hearing, and rejected the contention that the pre-merits timing of the non-party witness hearing converted the proceeding into a deposition not permitted under Section 7. The Second Circuit held that "there is nothing in the language of Section 7 that requires, or even suggests," that the non-party witness may only be required to attend and testify at the merits hearing. *Id.* at 579-80.

Based upon *Life Receivables* and/or *Hay Group*, arbitral subpoenas that specifically required a witness to appear and give testimony at a pre-merits hearing have been enforced. *E.g.*, *Bailey Shipping Ltd.* v. *Am. Bureau of Shipping*, 2014 WL 3605606 (S.D.N.Y. July 18, 2014); *In re Nat'l Fin. Partners Corp.*, 2009 WL 1097338 (E.D. Pa. April 21, 2009).

Annotation F: Place of Hearing

The Model Summons envisions that the arbitrators will convene a hearing to secure the testimony of a witness (or receive documents) at or near the place where the witness is located, rather than at the place of arbitration. This procedure results from the interplay of the nationwide service of process provisions of Rule 45 of the Federal Rules of Civil Procedure ("FRCP"), the limitations in that Rule on how far a witness may be compelled to travel and the language of FAA Section 7 that calls for the summons to be enforced by "the United States district court for the district in which such arbitrators, or a majority of them, are sitting."

Nationwide service of process and distant witnesses. FAA Section 7 provides in part that the arbitral witness summons "shall be served in the same manner as subpoenas to appear and testify before the court." As amended effective December 1, 2013, FRCP 45(b)(2) provides that a judicial subpoena may be served anywhere in the United States. Previously the subpoena could be served only within the judicial district of the issuing court, within 100 miles of the courthouse of the issuing court, or state-wide where the judicial district was within a state whose civil procedure law provided for state-wide service of process. The new availability of nationwide service of process has implications for a witness

summons issued by an arbitral tribunal under FAA Section 7 to a witness located at a considerable distance from the seat of the arbitration.

If the witness does not indicate willingness to comply, the arbitral summons served in a far-flung corner of the country with the benefit of the new Rule 45 provision for nationwide service of process may need to be enforced by the federal court or a competent state court in the judicial district where the arbitrators are "sitting." *See* Annotation H (Subject-Matter Jurisdiction to Enforce Arbitral Witness Summons). Section 7 states: "[T]he United States district court for the district in which such arbitrators, or a majority of them, *are sitting* may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States." (Emphasis added.)

Court decisions on place of hearing prior to nationwide service rule. The new statutory authorization for nationwide service of process clears at least one procedural hurdle to such enforcement: that there must be statutory authorization for the service of process as a precondition to personal jurisdiction over the witness in the enforcing federal district court. That was a problem under FAA Section 7 before the recent Rule 45 amendment. In *Dynegy Midstream Servs., LP* v.

Trammochem, 451 F.3d 89 (2d Cir. 2006), an arbitral tribunal sitting in New York issued a subpoena to a Houston witness calling for production of documents at a Houston location. When the witness ignored the subpoena, a motion to compel compliance was made in the U.S. District Court for the Southern District of New York, the motion was granted, and the Houston witness appealed on grounds that the New York federal district court lacked personal jurisdiction. The Second Circuit agreed, holding that personal jurisdiction over the Houston witness could not exist because FAA Section 7 in conformity with Rule 45 did not authorize a New York-based arbitral tribunal summons to be validly served on a Houston witness in Houston, just as Rule 45 would not allow a Southern District of New York trial subpoena to be validly served on a Houston witness in Houston.

A similar outcome occurred in *Legion Ins. Co.* v. *John Hancock Mutual Life Ins. Co.*, 33 Fed. Appx. 26 (3d Cir. April 11, 2002). There, the Third Circuit held that the U.S. District Court for the Eastern District of Pennsylvania did not have power to enforce a subpoena, issued by an arbitral tribunal in Philadelphia, directed to a non-party witness located in Florida, which required the witness to appear for deposition in Florida and to bring with him certain documents and papers. The Court relied on the language in Section 7 that arbitration subpoenas "shall be served in the same manner as subpoenas to appear and testify before the

court," and held: "In light of the territorial limits imposed by Rule 45 upon the service of subpoenas, we conclude that the District Court did not commit error in denying John Hancock's motion to enforce the arbitration subpoena." *Id.* at 28.

Remaining limits on personal jurisdiction. Rule 45(b)(2) as amended to permit nationwide service of a judicial subpoena, and by extension nationwide service of an arbitral summons to a non-party witness, solves the threshold personal jurisdiction problem found to exist in *Dynegy* and in *Legion Insurance*. But this does not mean that the federal district court at the seat of the arbitration will always have personal jurisdiction over a witness upon whom valid personal service of the arbitral summons has been made. Statutory authorization for nationwide service of process is a necessary step to establish personal jurisdiction, but there are two more steps: personal jurisdiction must be available under the law of the state in which the district court is located, and if that law extends personal jurisdiction to the federal Constitutional limit, the subpoena must also comport with due process under the U.S. Constitution. *See Licci* v. *Lebanese Canadian Bank*, 673 F.3d 50, 60-61 (2d Cir. 2012).

Now that nationwide service of an arbitral summons is possible, two questions linked to personal jurisdiction over the non-party witness for enforcement purposes arise:

1) Can an arbitral summons require the witness to appear at a hearing at the place of arbitration even though it is far distant from his or her domicile?

2) If the summons calls for a hearing near the domicile of the witness, with arbitrators in attendance, do the local courts have power under Section 7 to enforce compliance?

Can a summons require the witness to travel to the place of arbitration? On the first question, as to where the witness might be required to attend a hearing, the Rule 45 amendments have not fundamentally changed the Rule's geographic boundaries for the place of compliance, but merely consolidate them in amended Rule 45(c). Rule 45(c)(1) now provides, "A subpoena may command a person to attend a trial, hearing, or deposition only as follows: (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person (i) is a party or a party's officer; or (ii) is commanded to attend a trial and would not incur substantial expense." Thus, an arbitral summons cannot properly call for a non-party witness to travel to a hearing more than 100 miles from where the witness resides, is employed or regularly transacts business, except that the witness can be required to travel further within the state if the witness would not incur substantial expense.

What court enforces the summons? As for the enforcing court, the amendments to Rule 45 now make it clear that the federal district court at the place of compliance with a judicial subpoena is the court in which enforcement should be sought, unless that court elects to transfer the enforcement case to the federal district where the action is pending. This effects no real change in judicial practice as to enforcement, except that previously the federal district court at the place of compliance was the court in whose name a judicial subpoena for pre-trial discovery was issued by an attorney as an "officer of the court," and now such a subpoena is issued in the name of the federal district court where the action is pending. In parallel to federal judicial subpoena practice, we believe that the federal district court at the place of proposed compliance with the arbitral subpoena (or a state court if there is no basis for federal subject-matter jurisdiction, *see* Annotation H (Subject-Matter Jurisdiction to Enforce Arbitral Witness Summons)) should be the enforcement court.

Limitations in FAA Section 7 on where the witness hearing can take place. The question arises whether an arbitral summons can call for attendance at a hearing to be held at a place other than the seat/locale of the arbitration. As illustrated by the *Dynegy* and *Legion Insurance* cases, before the December 1, 2013 amendment, Rule 45's territorial limitation on service of process answered

the place-of-compliance question, making it impossible to secure non-party evidence from witnesses not within striking distance of the place of arbitration. But now that an arbitral summons, like a federal subpoena, may be served nationwide, the question is squarely presented whether there are territorial limits on where a witness served with an arbitral summons may be required to appear to give evidence in the arbitration.

Section 7 lodges power to enforce the arbitral summons by an order compelling the witness to appear, or by an order of contempt for non-compliance, in "the United States district court for the district in which such arbitrators, or a majority of them, are sitting." If the arbitrators (or a majority of them) elect to convene a hearing in the district where the witness resides, there is no obstacle to personal jurisdiction over the witness in the local federal district court, and that court (provided it has subject-matter jurisdiction (Annotation H)) may enforce the subpoena under Section 7 if the arbitrators "are sitting" in that district. Federal courts to our knowledge have not considered this question. In the case of a federal judicial discovery subpoena, whether for documents or a deposition, amended Rule 45 specifically provides that the enforcement court shall be the federal district court embracing the place of residence or employment of the witness. If that is the correct paradigm for arbitral subpoena practice, then it would follow that the

federal district court embracing the place of compliance with the arbitral subpoena, or the competent state court at that place, should be the enforcement court.

If, by contrast, the place where the arbitrators "are sitting" under Section 7 refers to a single fixed location that has been designated as the place of arbitration – the seat of the arbitration, in international arbitration parlance – then there is only one federal judicial district where courts (federal and state) have enforcement power, and their ability to exercise that power over a distant witness would depend upon those courts having personal jurisdiction over the witness. But if the arbitrators "are sitting," in Section 7 terms, at the hearing location specified in their summons, then enforcement power will be lodged in the federal judicial districts where witnesses served with arbitral summonses are found.

We favor this interpretation for several reasons. First, it ensures that enforceability of an arbitral subpoena will not depend on personal jurisdiction over the witness in a court at the place of arbitration, a criterion which would make the availability of non-party testimony unpredictable and would invite collateral litigation over the personal jurisdiction issue. Second, it is logical that the witness should not face the inconvenience and cost of defending a motion to compel compliance in a court at a distant place of arbitration, when that burden is not imposed on a witness served with a federal deposition subpoena because such a

witness must be compelled in a proceeding before the federal district court in the locale of the witness. Third, this interpretation aligns judicial enforcement power in international arbitrations seated in the United States with the typical provisions of international arbitration rules permitting arbitrators to convene hearings at any place convenient for obtaining evidence.[19] Fourth, this interpretation does no violence to the language of Section 7 because the term "sitting" does not clearly and unambiguously refer to the legal seat of the arbitration as opposed to the place where the arbitrators gather to hear evidence. Fifth, this interpretation does not violate, and indeed can be seen as consistent with, the expressed intent of Congress

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[19] From an arbitration procedure perspective, there is usually no difficulty in having the arbitrators venture out physically or virtually to a location other than the place of arbitration to conduct proceedings. For example, under Rule 11 of the Commercial Arbitration Rules of the American Arbitration Association: "The arbitrator, at the arbitrator's sole discretion, shall have the authority to conduct special hearings for document production purposes or otherwise at other locations (i.e., other than the agreed or designated 'locale' of the arbitration) if reasonably necessary and beneficial to the process." Further, Rule 32(c) of the Commercial Rules provides: "When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provide an opportunity for cross-examination." *See also*, to similar effect, Rules 17(2) and 20(2) of the International Arbitration Rules of the International Centre for Dispute Resolution, and Article E-9 of the International Expedited Procedures, effective as of June 1, 2014. This is in conformity with the provisions that have long been included in the UNCITRAL Arbitration Rules and most institutional rules for international arbitration, permitting the tribunal to convene hearings at locations other than the seat of the arbitration.

in the enactment of Section 7 – as it appears to have been Congress's intent that Section 7 would evolve in parallel with changes in federal judicial practice with regard to non-party witnesses. If, after the 2013 Rule 45 amendments, the "are sitting" language were construed to refer only to the court at the place of arbitration, the ability of the parties and arbitrators in an arbitration to obtain relevant and material testimony from non-parties would be significantly less than in litigation before the federal courts.

The more restrictive interpretation, *i.e.*, that only a court at the place of arbitration is located where the arbitrators "are sitting," significantly limits the actual impact on arbitral evidence gathering of the extension of nationwide service of process to arbitral witness summonses. This may be said to conform to a view of arbitration as a private method of dispute resolution between the parties that involves less fact gathering and places fewer burdens on non-disputants than does court litigation. As set forth in a separate annotation to this Model Summons (*see* Annotation E (Viability of Pre-Hearing Discovery Subpoenas)), our interpretation of Section 7 supports this view of arbitration in the requirement that evidence should be gathered from non-parties in the presence of the arbitrator. We believe that the Congress that enacted Section 7 in 1925 left the matter of where arbitrators might "sit" to hold such hearings without specific restriction.

Hearing witnesses by video link. Suppose, for example, that an arbitral tribunal sitting in New York does wish to hear from an unwilling non-party witness residing in Seattle. Suppose the tribunal issues a subpoena that calls for the witness to appear and give testimony by video conference at the offices of a Seattle law firm or in the Seattle regional office of the AAA, with a video link to a New York location where the arbitrators, or at least one of them, will be present. In our view, Section 7's objectives (as considered by some courts) of requiring a hearing are achieved, even though the witness and the arbitrators come together by electronic means. Electronic presence of the arbitrator is an adequate substitute for physical presence, because the arbitrator *could* lawfully attend in person. However, the use of technology in this fashion ought not to become entangled with the enforceability of the witness summons by a federal or state court where the witness is located. Some recalcitrant witnesses may argue that the tribunal is not "sitting" in the federal district where the witness is found if the subpoena provides for a video link.

While we believe FAA Section 7 is reasonably read not to impose any requirement that the arbitrator appear in the physical presence of the witness – that *adjudicative* presence of the arbitrator (to rule on objections and declare evidence admitted) is the touchstone of Section 7 according to the interpretation given in the

Life Receivables and *Hay Group* decisions – it is prudent to avoid controversy on this point by providing in the subpoena that the arbitrators will attend in person unless otherwise agreed. However, if a subpoena does call for video-linked hearing, enforceability of the subpoena might be supported by reference to FRCP 43, which expresses the judicial preference for testimony in open court but provides that "for good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." FRCP 43(a).

Annotation G: Scope of "Duces Tecum" Witness Summons

Section 7 of the FAA refers to production of a document or record that "may be deemed material as evidence in the case." Under the present version of Rule 26(b)(1) of the Federal Rules of Civil Procedure, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." That Rule further provides, "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The latter clause is widely understood – and evidently misunderstood[20] – as the benchmark for a very broad scope of discovery in federal litigation.

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[20] The Judicial Conference of the United States has proposed an amendment of Rule 26(b)(1) that would replace the "reasonably calculated to lead" phrase with the following language: "Information within this scope of discovery [*i.e.*, relevant to a claim or defense] need not be admissible in evidence to be discoverable." The report of the Judicial Conference observes that the original intent of the "reasonably calculated" language was only to prohibit objections to discovery based on rules governing admissibility of evidence at trial, and that the amendment should dispel the common misperception that the phrase expands the scope of discovery beyond what *is* relevant to sources that *might contain* relevant information. *See* Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States, Appendix B-1 at pp. 9-10 (September 2014), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf.

"Materiality" embraces an assessment of the importance of the evidence to resolution of the case. When requests for information are reasonably specific, arbitral tribunals can more effectively assess the importance of the evidence than when a request seeks all documents containing information within a broad category of subject matter. As a general practice, tribunals should require a high degree of specificity in the "duces tecum" portion of a subpoena, aiming for non-cumulative evidence known to exist (or perhaps reasonably believed to exist), not available from sources within the party's control, and reasonably necessary to establish a fact in dispute. While in exceptional cases a party may demonstrate a clear need for a broader search for evidence, this narrower approach will fulfill the statutory mandate that the subpoena seek material evidence,[21] not sources or repositories of potential evidence.

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[21] Specificity of requests for information, and/or a substantial showing of importance of the requested information, is emphasized in many rules and guidelines applicable to international and U.S. domestic commercial arbitration. *See, e.g.*, International Arbitration Rules of the International Centre for Dispute Resolution, Rule 21(4) ("Requests for documents shall contain a description of specific documents or classes of documents . . . ."); CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration, Section 1(a) ("[D]isclosure should be granted only as to items that are relevant and material and for which a party has a substantial, demonstrable need in order to present its position."); JAMS Recommended Arbitration Discovery Protocols For Domestic, Commercial Cases (document requests "should be restricted in terms of time frame, subject matter and person or entities to which the requests pertain, and should not include broad phraseology such as 'all documents directly or indirectly related to.'"); IBA Rules on the Taking of Evidence in International Arbitration, Article 3(3)(a)(ii) ("A Request to Produce shall contain . . . a description in

Annotation H: Subject-Matter Jurisdiction to Enforce Arbitral Witness Summons

Court decisions holding that FAA Section 7 does not provide subject-matter jurisdiction. The text of the Model Summons takes into account that a federal district court may or may not have subject-matter jurisdiction to enforce the arbitral witness summons, and that enforcement may have to be sought in a state court if there is no independent basis for federal subject-matter jurisdiction. The two federal circuit courts of appeals that have addressed the issue have held that Section 7 of the FAA does not confer subject-matter jurisdiction on federal district courts, notwithstanding that Section 7 empowers those courts to compel compliance and punish non-compliance with an arbitral witness summons. The position taken in these decisions is that an "independent" basis of subject-matter jurisdiction, *i.e.* a source of subject-matter jurisdiction other than the text of Section 7, must exist. *Stolt-Nielsen SA* v. *Celanese AG*, 430 F.3d 567, 572 (2d Cir. 2005); *Amgen, Inc.* v. *Kidney Ctr. of Delaware Cnty., Ltd.*, 95 F.3d 562, 567 (7th Cir. 1996).

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sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist . . . .").

District courts in other circuits have found these decisions persuasive. *See, e.g.*, *Chicago Bridge & Iron Co.* v. *TRC Acquisition LLC*, 2014 WL 3796395 (E.D. La. July 14, 2014); *Schaieb* v. *Botsford Hosp.*, 2012 WL 6966623 (E.D. Mich. Nov. 13, 2012). *But see Ferry Holding Corp.* v. *GIS Marine LLC*, 2012 WL 88196 (E.D. Mo. Jan. 11, 2012) (holding that Section 7 confers subject matter jurisdiction on the federal district court for the district in which the arbitrators are sitting).

FAA Chapters 2 and 3 provide jurisdiction in international cases. When the witness summons is issued by a tribunal in an international arbitration seated in the United States, FAA Chapter 2 and/or 3 provides the necessary basis for subject-matter jurisdiction. An action or proceeding under Chapter 2 or 3 is deemed to arise under the laws and treaties of the United States because the eventual award in the arbitration is subject to recognition and enforcement under either the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") or the Inter-American Convention on International Commercial Arbitration ("Panama Convention"). *See* 9 U.S.C. §§ 202, 203, 302. FAA Section 7 is included in FAA Chapters 2 and 3 covering international arbitrations by virtue of the provisions in those chapters for residual application of non-conflicting sections of FAA Chapter 1. *See* 9 U.S.C. §§ 208, 307.

Federal court may have jurisdiction if it has previously acted with respect to the arbitration. Federal subject-matter jurisdiction may also exist if the federal district court had previously entered an order relating to enforcement of the agreement to arbitrate. *See, e.g.*, *Stolt-Nielsen*, 430 F.3d at 572 (admiralty jurisdiction provided basis for jurisdiction to enforce subpoena because the parties to the arbitration had previously appeared before the court, based on admiralty jurisdiction, in the context of a motion to stay the arbitration).

Diversity jurisdiction to enforce an arbitral summons. The application of diversity jurisdiction principles to an enforcement proceeding under FAA Section 7 is not a well-developed area of law. The few decisions on point in federal district courts have held that diversity jurisdiction must exist over the enforcement proceeding, *i.e.*, between the movant and the witness. *See, e.g.*, *In re Application of Ann Cianflone*, 2014 WL 6883128, at *1-2 (N.D.N.Y. Dec. 4, 2014) (dismissing petition to enforce arbitral subpoena, finding no diversity jurisdiction where there was "no allegation or plausible indication" that the amount in controversy between the petitioner and the witness exceeded $75,000); *Chicago Bridge & Iron Co.*, 2014 WL 3796395, at *2 (rejecting amount in controversy in the underlying arbitration as reference point for diversity jurisdiction over arbitral subpoena enforcement case, and finding no facts of record to support amount in controversy

exceeding $75,000 between movant and the witness). But if the amount in controversy between movant and witness is decisive, it may be wondered how the requirements for diversity jurisdiction may be satisfied in most cases.

Jurisdiction based on the underlying arbitration? Federal courts may wish to consider whether federal subject-matter jurisdiction based on diversity should be measured by the citizenship of the parties to the underlying arbitration and the amount in dispute in that arbitration (and likewise whether federal question jurisdiction may be based on the subject matter of the underlying arbitration). Even if Congress did not intend Section 7 to be a jurisdiction-conferring statute, the enforcement of a subpoena brings before the court one aspect of enforcing the parties' agreement to arbitrate – not the right to arbitrate itself, but the enjoyment of a key procedural attribute of the arbitration the parties bargained for. In this view, a federal court would have jurisdiction to enforce the subpoena whenever it would have jurisdiction to compel arbitration – that is, whenever the court would have plenary jurisdiction over the dispute but for the agreement to arbitrate.[22] Further, from a broader perspective, Section 7 does clearly contemplate

[22] Section 4 of the FAA provides "any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties" has jurisdiction to enter an order compelling arbitration under a written arbitration agreement.

proceedings in federal district courts and calls upon judges to invoke the remedies provided by federal law to compel compliance or punish non-compliance. The statutory language indicates at least that Congress intended that there would be a meaningful involvement of federal district courts in arbitral subpoena enforcement, and that level of involvement would not exist if, for example, the "amount in controversy" requirement for diversity jurisdiction must be measured as between the movant and the witness.

State court jurisdiction to enforce FAA summons. In all events, the FAA applies in state courts when the arbitration involves interstate or foreign commerce. *See, e.g.*, *Nitro-Lift Technologies, L.L.C.* v. *Howard*, 133 S. Ct. 500, 501 (2012); *Vaden* v. *Discover Bank*, 556 U.S. 49, 58-59 (2009), *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Thus, a state court would be obligated either to enforce the arbitral subpoena under Section 7 or to provide for enforcement of the arbitral subpoena in a fashion that does not derogate from the enforcement rights the applicant would enjoy under Section 7 before a federal district court.

Annotation I: Proper Setting for Witness to Raise Objections

We have included in the Model Summons a sentence that directs that any motion to quash the subpoena should be made to the arbitral tribunal, except that a motion to quash based on the position that the subpoena violates FAA Section 7 may also be made to a competent court. This language is based on court decisions described below that direct that objections to the relevance, materiality, privileged nature or confidentiality of evidence sought, as opposed to objections based on the limitations imposed by FAA Section 7, be asserted before the arbitral tribunal in the first instance, rather than a court. Witnesses unfamiliar with the arbitral process might naturally assume that the proper forum in which to raise such issues is a competent court. The inclusion of such language may tend to overcome that assumption, and thus avoid the delay associated with a judicial adjudication that may well lead to such issues being remanded to the arbitral tribunal for determination.

Objections to power to issue subpoena under FAA Section 7. The text of Section 7 refers only to a potential motion to compel compliance with an arbitral subpoena. Unlike Rule 45 of the Federal Rules of Civil Procedure, Section 7 does not refer to a motion to quash by the recipient of an arbitral subpoena. We know of no federal decision that squarely holds, based on the text of Section 7, that a

motion to quash made by the recipient is improper. However, those instances in which courts have granted motions to quash have largely been where the witness asserted that the arbitrators lacked power to issue the subpoena under Section 7, and the subpoena was found to have transgressed a specific textual limitation on arbitral power under Section 7. *See, e.g.*, *In re Proshares Trust Sec. Litig.*, 2010 WL 4967988, at *1 (S.D.N.Y. Dec. 1, 2010) (granting motion to quash arbitral third-party document discovery subpoena that was "plainly inappropriate" under Section 7 in view of the Second Circuit's holding in the *Life Receivables* case); *Ware* v. *C.D. Peacock, Inc.*, 2010 WL 1856021, at *3 (N.D. Ill. May 7, 2010) (granting motion to quash arbitral deposition subpoena, based on district court adopting position of Second and Third Circuits that Section 7 only empowers arbitrators to compel testimony at a hearing in presence of one or more arbitrators).

Objections to relevance, materiality, privilege, confidentiality, etc. In contrast, when motions to quash made by the witness, or a witness's objections to a motion to compel, have presented such issues as relevance and materiality of the evidence sought, attorney-client privilege, or confidentiality, courts have denied these motions or objections on the basis that the determination of these matters in the first instance is left to the arbitrators. *See, e.g.*, *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870, 71 (8th Cir. 2000) (Section 7's requirement that information

sought by arbitral subpoena be "material as evidence" does not entitle the witness to judicial assessment of materiality, as such a requirement would be "antithetical to the well-recognized policy favoring arbitration, and compromises the panel's presumed expertise in the matter at hand"); *Am. Fed. of Television & Radio Artists* v. *WJBK-TV*, 164 F.3d 1004, 1010 (6th Cir. 1998) (relevance of information sought by arbitral subpoena should be determined by arbitrator in the first instance); *Bailey Shipping Ltd.* v. *Am. Bureau of Shipping*, 2014 WL 3605606, at *2-4 (S.D.N.Y. July 18, 2014) (denying motion to quash that sought independent judicial review of materiality of evidence sought by arbitral subpoena and holding that once an arbitral tribunal has determined that evidence sought by subpoena may affect the outcome of its deliberations, a court may not "draw[] an independent conclusion on the same topic") (citing and quoting from *In re Security Life* with approval); *Walt Disney Co.* v. *Nat'l Ass'n of Broadcast Emps. & Technicians*, 2010 WL 3563110, at *4 (S.D.N.Y. Sept. 10, 2010) (denying motion to quash and granting cross-motion to compel compliance with arbitral subpoena, on the ground that issues of attorney-client privilege associated with information sought by the arbitral subpoena are reserved to the arbitrator "at least in the first instance"); *Festus & Helen Stacy Found.* v. *Merrill Lynch, Pierce Fenner & Smith, Inc.*, 432 F. Supp. 2d 1375, 1379 (N.D. Ga. 2006) (denying motions to quash and granting

cross-motions to enforce subpoena on the basis that issues of relevance and materiality should be determined by the arbitrators); *Odfjell Asa* v. *Celanese AG*, 348 F. Supp. 2d 283, 288 (S.D.N.Y. 2004) (denying motion to quash on basis that "objections on the grounds of privilege and the like should first be heard and determined by the arbitrator before whom the subpoena is returnable" and expressing "considerable doubt" that a district court is the proper forum to hear such matters "since the FAA nowhere explicitly gives a person subpoenaed to an arbitration the right to move in a federal district court to quash the subpoena").

Annotation J: Arbitral Subpoena Based on FRCP 30(b)(6)

The Model Summons, by naming in brackets both a natural person and a corporation as the witness, seeks to identify a possible enforcement problem where only a legal person such as a corporate entity is named, and the entity is expressly or by implication directed to designate a representative. This problem is avoidable if the subpoena can be addressed to an individual located in the United States. Parties and arbitrators are therefore encouraged to avoid the potential enforceability issues by using available means to identify an individual witness who is subject to arbitral subpoena power pursuant to Section 7 of the FAA.

But if the individual witness with most pertinent knowledge cannot be so identified, or is located abroad but in the employ of a U.S. company, there is uncertainty as to whether an arbitral witness summons may, like a deposition subpoena under Rule 30(b)(6) of the Federal Rules of Civil Procedure ("FRCP"), be addressed to the corporation and call for the appearance of a corporate representative found within the United States to testify about the designated subject matter. Only one federal district court decision, to our knowledge, has addressed this question, and that decision held that Section 7 does not permit enforcement of

such an arbitral subpoena. *Progenics Pharm., Inc.* v. *IMS Consulting Group*, No. 14 Misc. 245 (RA) (S.D.N.Y. Aug. 13, 2014) (unpublished).[23]

Our Committees take no position on whether a FRCP 30(b)(6) type of procedure should be available under Section 7, but do think it is helpful to identify issues that may arise when courts or arbitrators consider this question.

FRCP 30(b)(6) as a pre-trial discovery procedure. One way of framing the issue is to focus on the fact that FRCP 30(b)(6) is a pre-trial discovery procedure. Thus, courts that interpret Section 7 of the FAA as not permitting pre-hearing discovery – as perhaps most now do (*see* Annotation E "Viability of Pre-Hearing Discovery Subpoenas") – may conclude that the FRCP 30(b)(6) procedure has no place under Section 7. However, a court might read cases like *Life Receivables* and *Hay Group* only to say that, under Section 7, non-party evidence must be adduced in the presence of an arbitrator, and not that such evidence must (or should) be received at "the" merits hearing. Under this view, the "discovery

[23] In another recent case, the arbitral subpoena was issued to a New York bank, not an individual, and the subpoena was enforced, although the bank evidently did not raise the "30(b)(6)" objection. The court stated that the subpoena was "a straightforward exercise of the panel's power to command third parties to appear for testimony before it and to bring with them documents related to the subject of their testimony." *Bailey Shipping Ltd.* v. *Am. Bureau of Shipping*, 2014 WL 3605606, at *4 (S.D.N.Y. July 18, 2014).

objection" to proceeding with an arbitral subpoena by analogy to Rule 30(b)(6) is not necessarily an obstacle to enforcement.

FAA Section 7 and federal trial subpoenas. A second issue flows from reading the statute to mean that the Section 7 arbitral summons procedure must be in procedural lockstep with a federal trial subpoena. This reading focuses on the final sentence of Section 7, which provides that the arbitral summons shall be enforceable by a federal district court by the same methods (orders compelling compliance, contempt) used to "secure[] the attendance of witnesses . . . in the courts of the United States." Under this reading, one must answer the question whether a FRCP 30(b)(6)-type of subpoena may be used at trial. The courts seem to be split on this issue. *Compare Donoghue* v. *Orange County*, 848 F.2d 926, 932 (9th Cir. 1987) (affirming district court order quashing "30(b)(6)" trial subpoena) *and Dopson-Troutt* v. *Novartis Pharm. Corp.*, 295 F.R.D. 536, 539-40 (M.D. Fla. 2013) (quashing "30(b)(6)" trial subpoena) *with Conyers* v. *Balboa Ins. Co.*, 2013 WL 2450108, at *1-2 (M.D. Fla. June 5, 2013) (enforcing trial subpoena that required corporate witness to designate representative) *and Bynum* v. *Metro. Transp. Auth.*, 2006 WL 6555106, at *2-3 (E.D.N.Y. Nov. 21, 2006) (upholding "30(b)(6)" trial subpoena to labor union).

Interpreting Section 7's final sentence to require procedural lockstep with judicial trial subpoenas is not, however, the only possible interpretation. The language might be understood to mean simply that judges have available to enforce arbitral subpoenas the same arsenal of coercive devices as federal law provides for enforcing judicial subpoenas. And the statutory phrase "attendance . . . in the courts" might be understood to refer to *any testimonial appearance* in a judicial proceeding, not only an appearance at a trial. 9 U.S.C. § 7. If this language in Section 7 is given this less restrictive construction, then the enforcement of an arbitral witness summons to a corporation would not be linked to the question whether a trial subpoena may be addressed to an entity by analogy to Rule 30(b)(6). Further, because Section 7 specifically contemplates a separate hearing to obtain evidence from the non-party witness that is *not* the merits hearing – the hearing may be held before only one of three arbitrators – there is specific support in the text for the view that Section 7 enforceability need not turn on whether the same procedure could be used to compel a witness to testify at a judicial trial.

Policy issues relating to use of Rule 30(b)(6) procedures. There are also a number of policy issues to consider. On the view that, by agreeing to arbitrate, a party agrees to a more limited evidentiary process that does not involve all the evidence gathering tools available in court, a court may hesitate to say that Section

7 permits a hybrid procedure that combines elements of a federal trial subpoena and a federal deposition subpoena. Furthermore, with regard to international arbitration, there is already a perception abroad that arbitration in the United States is characterized by discovery similar in scope to what occurs in our courts. Importing Rule 30(b)(6) into Section 7 will further reinforce that perception. There is a concern that foreign criticism of U.S. evidence gathering methods will intensify, and the perception in some foreign circles of the United States as an inhospitable environment for international arbitrations will be reinforced, if a common practical effect of Rule 30(b)(6) arbitral subpoenas is to compel foreign-resident employees of U.S.-based companies to testify in U.S.-seated arbitrations.

Another possible view is that concerns about expansion of evidence gathering from non-parties in arbitration should not necessarily lead to the position that Section 7 categorically provides no power to enforce a "30(b)(6)" arbitral subpoena. Under this view, such concerns may be addressed on a case-by-case basis (i) by arbitrators in considering whether to issue a particular subpoena, and/or (ii) by courts in the enforcement context under the rubric of "undue burden" under FRCP 45.

Annotation K: Arbitral Role in Deciding Enforceability of Subpoenas

The tribunal's handling of a request for issuance of a subpoena is properly subject to judicial review during the arbitration to the extent provided for in Section 7 of the FAA, unlike other procedural orders the tribunal may issue. Section 7 provides that "if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person for contempt." The prospect of interlocutory review in the context of subpoena enforcement raises the question of what is the proper role of the tribunal, at the time a proposed subpoena is presented for signature, with respect to the legal validity and enforceability of the subpoena.

The role of the tribunal – administrator or gatekeeper. As to the interplay between Rule 45 of the Federal Rules of Civil Procedure ("FRCP") and the effectiveness of the subpoena, some tribunals conceive their role as more or less administrative. On this view, the tribunal acts as a proxy for the requesting party, provides the signature for issuance that a party's attorney is permitted to furnish in a judicial proceeding (or in arbitration under some state statutes, including Section 7505 of New York's Civil Practice Laws and Rules), and leaves questions about

the conformity of the subpoena with FAA Section 7 and the requirements of FRCP 45 to be decided by a judge if the recipient of the subpoena resists enforcement and the proponent of the subpoena moves in court to compel compliance.

An alternative view is that Section 7 of the FAA is – uniquely among the provisions of the FAA – a rule governing the conduct of arbitrators during the arbitration and not a rule mainly concerning judicial enforcement of arbitration agreements and awards. We believe this view is to be preferred, for reasons that are both textual and practical, but we say this with an important caveat: The law concerning the permitted scope of subpoenas under Section 7 is not uniform nationally, and the implications for arbitration of the recent Rule 45 amendment to permit nationwide service of process have yet to be addressed by courts. Arbitral tribunals should hesitate to deny issuance of a proposed subpoena based on their preferred view of the law, or based upon a prediction of how an issue may be decided by a court that is not bound by *stare decisis* to decide it in a particular fashion.

Reasons supporting view that arbitrators should consider enforceability of proposed subpoenas. With that caveat, we encourage arbitrators to consider carefully the enforceability of proposed subpoenas as a condition of issuance. First, had Congress intended the arbitral role to be purely administrative, it could

have permitted attorneys in arbitrations to issue subpoenas as they do in cases before the courts, or the FAA might have provided for signature by any member of a three-member tribunal rather than a majority or for the pre-issuance reference of any Rule 45 issue to the federal district court. The fact that Section 7 was written to require issuance by a majority of a three-member tribunal connotes that the issuance is adjudicative. The fact that no distinctions were drawn between elements primarily in the domain of the tribunal (relevance and materiality) and matters relating to Rule 45 suggests that Congress intended that arbitrators should apply Rule 45 subject to judicial review as provided in Section 7.

Second, Section 7 vests arbitrators with the same authority that courts possess in regard to a subpoena, to command a party to appear and give testimony. The subpoena, if drafted by reference to standard judicial subpoena forms, will "command" the witness to appear, and the fact that a tribunal rather than counsel for a party has issued the subpoena carries a stronger implication of the legal validity of the "command" than does a judicial subpoena signed not by a judge but by the attorney for a party. Arbitral tribunals that allow an inference of validity to be drawn by a non-party witness who may not be represented by counsel, if the tribunal has in fact formed a judgment that the subpoena would not be enforced by

the relevant court, risk misleading a non-party, and inducing compliance through the apparent authority of the subpoena.

Third, on a purely practical level, the tribunal should handle subpoenas in a fashion that minimizes, to the extent possible, collateral litigation over enforceability, by making well-conceived decisions based on clearly applicable case law, so that the tribunal rules at the point of issuance of a subpoena as it would rule if it were a judge deciding a motion to compel compliance. This is of course subject to the caveat stated above. If the law in the relevant jurisdiction that would have power to enforce the subpoena concerning permissibility of non-party discovery under FAA Section 7 is unsettled, the tribunal by issuing the subpoena permits judicial review of that issue if the witness does not agree to appear. If the tribunal on the other hand denied issuance of the subpoena based on its own preferred view of that issue, and the issue is unsettled in the court where enforcement could be sought, the tribunal's denial of issuance of the subpoena is not judicially reviewable and the party seeking the subpoena is deprived of the opportunity to establish enforceability through the courts.

Illustrations of the proper role of the arbitral tribunal. As illustrations of the approach a tribunal might take, in different situations, we provide the following:

***Illustration #1 – The "Discovery" Subpoena*:** The party proposing a subpoena submits a draft that calls for production of documents at an office of the witness or in proximity to the witness' place of residence, but does not provide for the documents to be brought to a hearing to be held in the presence of one or more arbitrators. It is a "discovery" subpoena. We believe the tribunal should modify the proposed subpoena to provide for a hearing before one or more of the arbitrators, at which the witness will testify and bring the requested documents. Although some federal courts may permit the "discovery" subpoena, by providing for the hearing any doubts about enforceability are removed. The proponent of the subpoena may seek the consent of the witness to produce the documents without a hearing. *See* Annotation E (Viability of Pre-Hearing Discovery Subpoenas).

***Illustration #2 – The Subpoena Calls for the Witness to Travel to the Place of Arbitration*:** The party proposing a subpoena submits a draft that calls for a witness residing in Alaska to appear for a hearing before one or more of the arbitrators in New York, which is the seat of the arbitration. We believe the tribunal should modify the proposed subpoena to provide for a place of compliance that is within 100 miles of the place of residence or place of business of the witness. As it is relatively clear that the geographic limitations of compliance under Rule 45 apply to arbitral subpoenas, and that a subpoena that does not

respect these geographic limitations would not be enforced, the tribunal should not, by issuing a subpoena that is likely to be unenforceable, imply the contrary. To do so, in the Committees' view, risks an abuse of power by the tribunal. *See* Annotation F (Place of Hearing) and Annotation C (Location of the Witness/Nationwide Service).

***Illustration #3 – The "30(b)(6)" Subpoena*:** The party proposing a subpoena submits a draft that identifies a corporation or other legal person as the witness and directs the legal person to designate a natural person as its representative to appear at a witness hearing and bring along the requested documents. The tribunal may wish to inquire of the parties whether there is a natural person with particular knowledge of the matters in issue who might be identified as the recipient of the subpoena, calling the attention of the parties to the uncertain status of arbitral subpoenas to legal persons. If no natural person can be identified, the tribunal should issue the subpoena to the legal person. Where the enforceability of the subpoena is uncertain because the law is not well developed, as is the case for example with regard to a subpoena that seeks a corporate representative witness designation by analogy to FRCP Rule 30(b)(6), the tribunal should not deprive the subpoena proponent of the opportunity to obtain the evidence with the consent of the witness nor should the tribunal, by denying

issuance, deprive the proponent of a judicial forum to litigate the enforceability question. *See* Annotation J (Arbitral Subpoena Based on FRCP 30(b)(6)).

Annotation L: Procedure in Regard to Arbitral Subpoenas Governed By FAA Section 7

Addressing need for use of arbitral subpoenas at early procedural conferences. Procedure relating to requests to arbitral tribunals for issuance of arbitral subpoenas often receives less attention than it deserves in early-stage procedural conferences. One possible explanation is that counsel may be less familiar than arbitrators with the nature of arbitral subpoena power and the procedure surrounding it. Or they may assume that, as is the case under the arbitration law of New York and some other states, attorneys themselves may issue subpoenas as they routinely do in judicial proceedings. *See* Annotation D (Who May Issue a Subpoena). Thus, even in those arbitrations in which the parties are invited to agree insofar as possible on an initial procedural order, it is not unusual to find that the parties do not establish a timetable or a procedure for dealing with subpoenas for non-party witnesses.

If not addressed in the procedural timetable, subpoena-related issues may threaten delay and disruption of the schedule. Parties and arbitrators will open their calendars to find mutually available dates for merits hearings, but they may overlook the need to hold pre-merits hearings to obtain evidence from non-party witnesses. Parties and arbitrators need to focus on the need for these hearings to be

held in the presence of one or more of the arbitrators unless the parties and the witnesses otherwise agree, and identify dates when members of the tribunal can be available to attend in person a hearing in a location where the witness will agree to attend or could be compelled to attend. An adverse party may not agree that a proposed subpoena should be issued, and the briefing, hearing and determination of that issue (and ancillary issues such as the scope of the subpoena and the timing of the witness' appearance) may require considerable time. Judicial proceedings that might ensue concerning enforcement of a subpoena bring into play the timetable applicable in the enforcement court, which may or may not be able to tailor its schedule to the timetable of the arbitration.

It is therefore suggested that the tribunal advise the parties that the issue of subpoenas is one the parties should address in their draft of the initial omnibus procedural order, and that the tribunal should endeavor to resolve disagreements over this aspect of procedure at the time the initial procedural order is made.

Matters relating to subpoenas that might be addressed in initial procedural order. The tribunal might provide for a deadline for: the parties to submit proposed subpoenas, the submission of an accompanying statement as to relevance, materiality and need, *see* Annotation G (Scope of "Duces Tecum" Witness Summons), and a timetable for briefing and resolving disputes over

proposed issuance. The parties might also be invited to declare by a particular date whether it is proposed to receive the testimony at the merits hearing or in advance thereof, and if the latter, at what location and whether it is proposed that the full tribunal or one of its members should be present. If a party proposes to seek issuance of a discovery subpoena, either for document production or a deposition, the party should be invited to make a *prima facie* legal showing that, in the relevant jurisdiction(s) (*e.g.*, embracing the place of arbitration or the place where the witness will attend), Section 7 of the FAA is applied to permit such practice, and the tribunal may wish to draw the attention of the parties to the conflicting positions of federal circuit courts of appeals in this respect, *see* Annotation E (Viability of Pre-Hearing Discovery Subpoenas), and the uncertainty about enforcement that may arise if a subpoena seeks discovery.

Risks of denying a requested subpoena. The tribunal's refusal to issue a requested subpoena might lead the aggrieved party to challenge the award based on denial of a fair hearing. For examples of unsuccessful challenges, *see*, *e.g.*, *Doral Fin. Corp.* v. *Garcia-Velez*, 725 F.3d 27 (1st Cir. 2013), and *Rubenstein* v. *Advanced Equities, Inc.*, 2014 WL 1325738 (S.D.N.Y. 2014). Reasons for refusal to issue a requested subpoena might include – in addition to territorial scope, *see* Annotation F (Place of Hearing) – that the proposed evidence is not relevant and

material, that it is cumulative, or that the request is untimely. In one decision, *Tempo Shain Corp.* v. *Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997), the Second Circuit refused to confirm an award on the ground that the arbitrators decided not to keep hearings open to hear from a witness whom one of the sides wanted to call (albeit not through a subpoena) but who became unavailable as a result of family medical issues. The district court confirmed the award but the Second Circuit reversed, holding that the arbitrators did not sufficiently explain why they believed the excluded evidence would merely be cumulative. Although it would be a truly exceptional case where an award would be vacated because a party was denied the opportunity to obtain evidence from a non-party witness, the risk of this contention being made in a motion to vacate context to obstruct enforcement of an award is sufficiently present that arbitrators who elect to deny issuance of a subpoena might find it useful to explain in a written procedural order the basis for having refused to issue a subpoena rather than merely issuing a one-sentence order stating that the proposed subpoena is denied.

Appendix: Model Subpoena Without Annotations

CASE NO. [if applicable]

[OPTIONAL: CAPTION IDENTIFYING THE PROVIDER ORGANIZATION AND/OR APPLICABLE RULES OF ARBITRATION]

IN THE MATTER OF AN ARBITRATION
BETWEEN:

X COMPANY, INC.,

Claimant,

And

Y LLC,

Respondent.

ARBITRATION SUMMONS TO TESTIFY AND PRESENT DOCUMENTARY EVIDENCE AT AN ARBITRATION HEARING

TO: [J. Smith]
[Z Corporation]
[address]
[City], [State]

By the authority conferred on the undersigned arbitrators by Section 7 of the United States Arbitration Act (9 U.S.C. § 7), you are hereby SUMMONED to attend as a witness at a hearing before one or more of the undersigned arbitrators to be held on [insert date providing reasonable notice] at 10:00 a.m. at the offices of the [X Law Firm], [insert address], [City], [State], and to bring with you to the hearing the documents identified in Schedule A annexed to this SUMMONS.

Provided that this SUMMONS has been served upon you in the same manner as is required of a judicial subpoena under Rule 45 of the Federal Rules of

Civil Procedure, then if you shall refuse or neglect to obey this SUMMONS, upon petition the United States District Court for the District of [State] or a competent court of the State of [State] may compel your attendance, or punish you for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

You may address questions concerning this SUMMONS to the attorneys [or the Case Manager [if applicable]] identified below. Any application by you to quash or modify this SUMMONS in whole or in part should be addressed to the arbitral tribunal in writing [and sent via the Case Manager [if applicable]], with copies to counsel for the parties, except that a motion upon the ground that the SUMMONS is unenforceable under Section 7 of the U.S. Arbitration Act may also be addressed to the United States District Court for the District of [State] or a competent court of the State of [State].

The attorneys for the Claimant in this arbitration are [identify firm] (attn. [responsible attorney]), [address] [phone] [email address].

The attorneys for the Respondent in this arbitration are [identify firm] (attn. [responsible attorney]), [address] [phone] [email address].

[The Case Manager [if applicable] is [identify] [phone] [email address].]

Dated: [Month] [Day], [Year]

[name], Arbitrator	[name] Presiding Arbitrator	[name], Arbitrator
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OBTAINING EVIDENCE FROM NON-PARTIES IN INTERNATIONAL ARBITRATION IN THE UNITED STATES

The International Commercial Disputes Committee
of the Association of the Bar of the City of New York

Introduction

Section 7 of the Federal Arbitration Act ("FAA")—which applies to any arbitration in the United States involving interstate or international commerce—provides:

> The arbitrators . . . or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case . . . . Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.[1]

Under Section 7, the ability of the parties to and arbitrators in domestic or international arbitrations to obtain documents and testimony from non-parties is far more circumscribed than the ability of litigants in US litigation to obtain evidence from non-parties in federal court. It is subject, in the first instance, to the discretion of the arbitrators, who must issue any subpoena and, potentially, to the review of the federal district court in the place where the arbitrators are sitting, which must enforce it.[2]

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[1] 9 USCS § 7.

[2] In these respects, the procedure for obtaining evidence from non-parties under Section 7 is comparable to the procedure under the law of a number of foreign jurisdictions. For example, in England and Wales, Section 43(1) of the Arbitration Act 1996 permits a party to arbitral proceedings to "use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence." Under Section 43(2), "This may only be done with the permission of the tribunal or the agreement of the other parties." Arbitration Act 1996, c. 23 (Eng.). *See also*, Section 1050 of the German Civil Procedure Statute: "[T]he arbitral tribunal or a party with the approval of the arbitral tribunal may request court assistance in taking evidence or performance of other judicial acts which the

Two main issues have confronted courts under Section 7. The first issue is whether it authorizes arbitrators to compel *pre-hearing* document production or testimony from non-parties.[3] There is a conflict regarding this issue among the circuits and between federal and state courts in New York. The Second[4] and Third[5] Circuits have held that Section 7 does *not* authorize arbitrators to order the pre-hearing production of documents or testimony from non-parties; rather, non-parties may be ordered to provide documents and testimony only at a hearing before one or more of the arbitrators. The Fourth Circuit has suggested that a federal court may compel a non-party to comply with an arbitrator's subpoena for prehearing document production or testimony upon a showing of "special need or hardship."[6] In New York, the Appellate Division for the First Department, purporting to follow the Fourth Circuit, has held that, under Section 7, courts may require pre-hearing document production and testimony from non-parties in cases of "special need."[7] The Sixth[8] and Eighth Circuits[9] have concluded that arbitrators are authorized by Section 7 to issue orders requiring pre-hearing production of documents from non-parties, but have not addressed the question whether pre-hearing testimony is also permitted.

The second issue is whether Section 7 imposes any territorial limitation on an arbitrator's power to summon a non-party to testify and produce documents, or upon the power of a federal district court to enforce such an order. There is a split of authority on this question as well. The Second Circuit has held that Section 7 does *not* authorize nationwide service or enforcement of arbitral orders for testimony or production of documents and that the territorial limitations set forth in Fed. R. Civ. P. 45 for service and enforcement of subpoenas issued by district courts

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arbitral tribunal is not empowered to carry out. Unless it regards the application as inadmissible, the court shall execute the request according to its rules on taking evidence or other judicial acts. The arbitrators are entitled to participate in any judicial taking of evidence and to ask questions." Zivilprozeßordnung [ZPO] [Civil Procedure Statute] Jan. 1, 1998, Bundesgesetzblatt, Teil I [BGBl. I], § 1050 (F.R.G.); Article 35(1) of the Japanese Arbitration Law): "The arbitral tribunal or a party may apply to a court for assistance in taking evidence by any means that the arbitral tribunal considers necessary as entrustment of investigation, examination of witnesses, expert testimony, investigation of documentary evidence (excluding documents that the parties may produce in person) or inspection (excluding that of objects the parties may produce in person) prescribed in the Code of Civil Procedure." Chusai Ho [Arbitration Law], Law No. 138 of 2003, art. 35 (Japan); Article 184 of the Swiss Private International Law Act: "Where the assistance of state authorities is needed for taking evidence, the arbitral tribunal or a party with the consent of the arbitral tribunal may request the assistance of the court of the seat of the arbitral tribunal. Such court shall apply its own law." Bundesgesetz über das Internationale Privatrecht (IPRG) [Private International Law Act], Dec. 18, 1987, AS 1776 (1988), art. 184, ¶ 2 (Switz.); and Section 27 of the UNCITRAL Model Law: "The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent Court of this state assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.".

[3] Courts have accepted that arbitrators have power to require pre-hearing discovery from the *parties* to the proceeding. *See* Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 217 (2d Cir. 2008) ("Although section 7 does not distinguish between parties and non-parties to the actual arbitration proceeding, an arbitrator's power over parties stems from the arbitration agreement, not section 7. . . . Where agreements so provide, that authority includes the power to order discovery from the parties in arbitration since 'the FAA lets parties tailor some, even many features of arbitration by contract, including . . . procedure.' . . . . An arbitrator can enforce his or her discovery order through, among other things, drawing a negative inference from a party's refusal to produce . . . and, ultimately, through rendering a judgment [sic] enforceable in federal court. . . .") (citations omitted).

[4] Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210 (2d Cir. 2008).

[5] Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404 (3d Cir. 2004).

[6] COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269 (4th Cir. 1999).

[7] ImClone Sys. v. Waksal, 22 A.D.3d 387, 802 N.Y.S.2d 653 (N.Y. App. Div. 2005).

[8] Amer. Fed'n of TV & Radio Artists v. WJBK-TV, 164 F.3d 1004 (6th Cir. 1999).

[9] Sec. Life Ins. Co. of Am. v. Duncanson & Holt, Inc., 228 F.3d 865 (8th Cir. 2000).

apply to arbitral orders.[10] The Third Circuit, in an unpublished opinion, has reached the same conclusion.[11] In contrast, the Eighth Circuit has held that Section 7 permits nationwide service of arbitral orders for non-party production of documents and that a district court in the place where the arbitrators are sitting has jurisdiction to enforce such orders, even against non-parties located elsewhere.[12] One federal district court has adopted what has been characterized as a "compromise position," holding that the territorial limits of Rule 45 apply but that a court in the place of arbitration may avoid those limits by authorizing an attorney for a party to the arbitration to issue a subpoena in the enforcement proceeding as an officer of a federal district court in the place where discovery is sought.[13]

The FAA was enacted in 1925, before discovery was commonly available in U.S. courts. Under Section 7, arbitrators were given power to require testimony and production of documents from non-parties comparable to that of federal courts of that era. Considering the language of Section 7 and the historical background against which it was enacted, this Committee agrees with the reasoning of those decisions that have held that Section 7 does *not* authorize courts to enforce arbitral subpoenas for pre-hearing document production or testimony from non-parties and does *not* authorize nationwide service or enforcement of arbitral subpoenas. Despite these limitations, as a practical matter, documents and testimony can, under Section 7, be obtained from non-parties prior to the hearing on the merits. Both the Second and Third Circuits have held that an arbitral subpoena may require production of documents or testimony at a "pre-merits" hearing convened for that purpose—a hearing that may then be adjourned to give the parties time to review the material produced.[14] In order to avoid the territorial limitations imposed on service and enforcement of arbitral subpoenas, the pre-merits hearing may be scheduled for a place within 100 miles of the person subject to the subpoena. The need to employ these measures has been the subject of a good deal of debate.

In the Committee's view, the ability under the FAA to obtain documents and testimony from non-parties as evidence in arbitrations should remain limited and subject to the control of the arbitrators and the courts. However, with respect to production of documents, Section 7 should be modified to remove procedural obstacles and lacunae that are vestiges of a bygone era and that impose unnecessary burdens and costs on all concerned—the parties, the arbitrators and the non-parties who are subject to the subpoena. The Committee does not advocate a piecemeal amendment of the FAA merely to correct these deficiencies. As explained below, amending only Section 7 of the FAA might be perceived as an expansion of the scope of arbitrators' authority to obtain evidence from non-parties—a perception that could potentially discourage some parties and their counsel from agreeing to arbitrate in the United States.

If and when other provisions of the FAA are amended, the Committee believes that Section 7 should be amended in two respects:

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[10] Dynegy Midstream Servs. v. Trammochem Div. of Transammonia, Inc., 451 F.3d 89 (2d Cir. 2006).
[11] Legion Ins. Co. v. John Hancock Mut. Life Ins. Co., 33 Fed. Appx. 26 (3d Cir. 2002).
[12] Security Life Ins. Co. of Am. v. Duncanson & Holt, Inc., 228 F.3d 865 (8th Cir. 2000).
[13] Amgen, Inc. v. Kidney Ctr. of Del. County, 879 F. Supp. 878, 882-83 (N.D. Ill. 1995).
[14] Stolt-Nielsen Transp. Group, Inc. v. Celanese AG, 430 F.3d 567 (2d Cir. 2005); Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 413 (3d Cir. 2004). With respect to documents, as noted in a concurring opinion in *Hay Group*, "the inconvenience of making such a personal appearance may well prompt the witness to deliver the documents and waive presence." *Id.*

First, Section 7 should be amended to eliminate any requirement of appearance at a hearing for production of documents by non-parties.[15] Because providing testimony potentially imposes a greater burden on non-parties than document production, the Committee would retain Section 7's requirement of an arbitrator-attended hearing for the taking of testimony from non-parties.

Second, Section 7 should be modified to permit arbitral subpoenas directed to non-parties outside the district in which the arbitrators are sitting to be served and enforced in the place where the prospective witness or document custodian is located.

This report also contains the Committee's recommendations for best practices with respect to the procedures available under existing law for obtaining evidence from non-parties in international arbitrations[16] The Committee believes that rules, practices and expectations concerning disclosure and evidence-taking in international arbitration differ in significant respects from the rules, practices and expectations prevailing in domestic arbitration and that best practices for international cases should reflect those differences. Accordingly, while the Committee believes that Section 7 provides a useful means of obtaining essential non-party evidence in appropriate cases, it also recommends that in international arbitrations in the United States, arbitrators should limit resort to Section 7 to exceptional circumstances, issuing subpoenas for non-party evidence only when the evidence sought is unavailable from any of the parties to the arbitration and is required for the fair and just resolution of the parties' dispute. The Committee also believes that, in issuing such orders, arbitrators in international cases should be guided by international standards for the scope of disclosure and evidence, such as those reflected in the IBA Rules on the Taking of Evidence in International Arbitration (adopted 29 May 2010), and should take measures to minimize the burden that such orders impose upon non-parties.

I. The current state of U.S. law

A. There is a split among the Circuits and between federal and state courts in New York as to whether section 7 of the FAA authorizes arbitrators to issue subpoenas for pre-hearing document production and testimony from non-parties.

The Circuits are divided on whether Section 7 authorizes arbitrators to require pre-hearing production of documents and testimony from non-parties. The Second and Third

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[15] For cases in federal court, Rule 45(c)(2)(A) provides that no such appearance is required either for discovery or for trial. FED. R. CIV. P. 45(C)(2)(A). This provision is considered to be protective of non-parties and to avoid undue burden and expense. This Committee sees no justification for a different rule for production of documents by non-parties in arbitration.

[16] Under 9 U.S.C. § 202, the New York Convention applies to agreements for arbitration in the United States between citizens of different countries or between citizens of the United States if the relationship between them "involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." Bergesen v. Joseph Muller Corp., 710 F.2d 928, 933 n.2 (2d Cir. 1983); *see also* Yusuf Alghanim & Sons v. Toys 'R' Us, Inc., 126 F.3d 15, 18–19 (2d Cir. 1997), *cert. denied,* 522 U.S. 1111 (1998); Lander Co. v. MMP Invs., Inc., 107 F.3d 476, 481–82 (7th Cir. 1997), *cert. denied,* 522 U.S. 811 (1997).

Circuits, relying upon the plain language and historical background of Section 7, have held that the FAA does not provide arbitrators with such authority. The Fourth Circuit has agreed, but has indicated that Section 7 would permit a district court to enforce an arbitral subpoena for pre-hearing document production or testimony from a non-party when a "special need" is shown—a position that has been rejected by the Second and Third Circuits. The Sixth and Eighth Circuits have concluded that the power expressly granted to arbitrators under Section 7 to require non-parties to appear and produce documents at a hearing implicitly includes the "lesser power" to require production of documents prior to a hearing. The Second, Third and Fourth Circuits have rejected this notion.[17]

There is also a conflict between federal and state courts in New York. In New York, the Appellate Division for the First Department, purporting to follow the Fourth Circuit, has held that, under the FAA, courts may compel pre-hearing discovery from non-parties in cases of "special need." [18]

1. The Second and Third Circuits have held that Section 7 does not authorize pre-hearing document production or testimony from non-parties.

In *Hay Group, Inc. v. E.B.S. Acquisition Corp.*,[19] the Third Circuit reversed a district court order requiring pre-hearing production of documents from a non-party witness. Focusing on the "plain language" of Section 7, the Court held that the statute did not authorize arbitrators to order pre-hearing document production from non-parties:

> The only power conferred on arbitrators with respect to the production of documents by a non-party is the power to summon a non-party "to attend before them or any of them as a witness *and* in a proper case *to bring with him or them* any book, record, document or paper which may be deemed material as evidence in the case." *9 U.S.C. § 7* (emphasis added). The power to require a non-party "to bring" items "with him" clearly applies only to situations in which the non-party accompanies the items to the arbitration proceeding, not to situations in which the items are simply sent or brought by a courier. In addition, the use of the word "and" makes it clear that a non-party may be compelled "to bring" items "with him" only when the non-party is summoned "to attend before [the arbitrator] as a witness." Thus, *Section 7*'s language unambiguously restricts an arbitrator's

[17] The Seventh and Eleventh Circuits do not appear to have decided this question and there are conflicting decisions among the lower courts within these circuits. In the Seventh Circuit, see *Matria Healthcare, LLC v. Duthie*, 584 F. Supp.2d 1078 (N.D. Ill. 2008) (holding that Section 7 does not authorize pre-hearing non-party discovery) and *Amgen Inc. v. Kidney Center of Delaware County, Ltd.*, 879 F.Supp. 878 (N.D.Ill. 1995) (holding that implicit in the arbitrators' power to compel testimony and production of documents for purposes of a hearing is the "lesser" power to compel pre-hearing testimony and document production). In the Eleventh Circuit, see *Kennedy v. Am, Express Travel Related Servs. Co.*, 646 F.Supp.2d 1342, 1344 (S.D. Fla. Aug. 12, 2009) (finding that an arbitrator is not statutorily authorized under the FAA to issue summonses for pre-hearing depositions and document discovery from non-parties) and *Festus & Helen Stacy Found., Inc. v. Merrill Lynch, Pierce Fenner & Smith Inc.*, 432 F. Supp. 2d 1375, 1379 (N.D. Ga. 2006) (holding that the FAA impliedly permits an arbitration panel to order document discovery prior to a hearing). We have not found any cases addressing this issue in the First, Fifth, Ninth, Tenth or D.C. Circuits.

[18] ImClone Sys. v. Waksal, 22 A.D.3d 387, 388, 802 N.Y.S.2d 653, 654 (1st Dep't 2005).

[19] 360 F.3d 404 (3d Cir. 2004) (Alito, J.).

> subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time.[20]

As noted in a recent district court decision,[21] the historical background against which Section 7 was enacted also supports the conclusion that it was not intended to authorize pre-hearing document production from non-parties:

> That Congress had in mind in § 7 testimony by a witness at the arbitration and not at a deposition is apparent not only from the plain language of § 7 but from the historical background against which it was enacted. The Federal Arbitration Act was enacted in 1925 . . . . The Federal Rules of Civil Procedure, with their provisions for depositions and other mechanisms for discovery, were more than a decade away.
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> While it was possible to apply to equity for a bill of discovery to require the production of documents in advance of trial, such pretrial production was anything but common and could not in any circumstances call for an adversary's documents . . . . Prior to 1937 there had long been a statute that allowed a court in an action at law to compel one party to produce in advance of trial books and papers for examination and inspection of his adversary. *See* § 724 of the revised statutes (U.S.Comp.Stat.1901, p. 583) . . . . But the Supreme Court . . . held that the statute only required production at the trial.
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> Thus, Congress could not have intended when it enacted § 7 of the FAA in 1925 to have authorized arbitrators and district courts to require pre-hearing production in arbitrations when such production was not authorized by § 724 in actions at law . . . . Moreover, the language of the current version of § 7 is identical to the 1925 version . . . . The fact that Congress has not changed the language of § 7 in eighty years is compelling evidence that the original limitations inherent in § 7 were intended to remain undisturbed . . . .[22]

In *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*,[23] the Second Circuit joined the Third Circuit in holding that Section 7 does not authorize arbitral orders for pre-hearing document production or testimony from non-parties:

> The language of section 7 is straightforward and unambiguous. Documents are only discoverable in arbitration when brought before arbitrators by a testifying

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[20] *Id.* at 407.

[21] Matria Healthcare, LLC v. Duthie, 584 F. Supp. 2d 1078, 1080-1081 (N.D. Ill. 2008).

[22] *Id* (citations omitted). In *Matria*, a merger agreement established an escrow account to satisfy potential post-closing claims and provided for arbitration of certain disputes in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA"). A subpoena was issued in the arbitration for the depositions of two former officers of one of the merged corporations. Initially, the former officers agreed to be deposed on condition that their attorneys' fees and expenses in connection with the depositions would be paid. When a dispute arose as to whether those fees were reasonable the former officers refused to be deposed.

[23] 549 F.3d 210 (2d Cir. 2008).

> witness. The FAA was enacted in a time when pre-hearing discovery in civil litigation was generally not permitted. The fact that the Federal Rules of Civil Procedure were since enacted and subsequently broadened demonstrates that if Congress wants to expand arbitral subpoena authority, it is fully capable of doing so. There may be valid reasons to empower arbitrators to subpoena documents from third parties, but we must interpret a statute as it is, not as it might be, since "courts must presume that a legislature says in a statute what it means and means in a statute what it says . . . ." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 . . . . (1992). A statute's clear language does not morph into something more just because courts think it makes sense for it to do so. Thus, we join the Third Circuit in holding that section 7 of the FAA does not authorize arbitrators to compel pre-hearing document discovery from entities not party to the arbitration proceedings.[24]

Although faced with requests for the production of documents, the Third Circuit in *Hay* and the Second Circuit in *Life Receivables* made it clear that Section 7 also precludes orders for pre-hearing testimony.[25]

2. Both the Second and Third Circuits have held that an arbitral subpoena may require production of documents or testimony at a "pre-merits" hearing convened for that purpose.

The Second and Third Circuits have each concluded that, notwithstanding the absence of any statutory authority for pre-hearing discovery from non-parties, documents and testimony may be obtained from non-parties in advance of any hearing on the merits at a "pre-merits" hearing convened especially for that purpose. In *Stolt-Nielsen Transp. Group, Inc. v. Celanese AG*, the Second Circuit held that "Section 7 unambiguously authorizes arbitrators to summon non-party witnesses to give testimony and provide material evidence before an arbitration panel . . . ."[26] The court in *Stolt* rejected the argument of the non-party seeking to quash a subpoena that Section 7 permits arbitrators to summon witnesses "only to a merits hearing akin to a full-blown trial." [27]

In *Hay*, Judge Chertoff, in a concurring opinion, observed that, although Section 7 did not authorize pre-hearing document discovery, it could, as practical matter, be obtained in many cases by ordering production of the documents at a pre-merits hearing:

> Under *section 7 of the Federal Arbitration Act*, arbitrators have the power to compel a third-party witness to appear with documents before a single arbitrator,

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[24] *Id.* at 216-217.

[25] *See* Life Receivables, 549 F.3d at 216 (citing Odjfell ASA v. Celanese AG, 328 F. Supp. 2d 505, 507 (S.D.N.Y. 2004), *aff'd*, Stolt-Nielsen Transp. Group. v. Celanese AG, 430 F.3d 567 (2d Cir. 2005) (quashing a deposition subpoena); *Hay Group*, 360 F.3d at 410 ("Nowhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during pre-hearing discovery.") (quoting COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269 (4th Cir. 1999)).

[26] 430 F.3d 567, 581 (2d Cir. 2005).

[27] *Id.* at 579.

> who can then adjourn the proceedings. This gives the arbitration panel the effective ability to require delivery of documents from a third-party in advance, notwithstanding the limitations of section 7 *of the FAA*. In many instances, of course, the inconvenience of making such a personal appearance may well prompt the witness to deliver the documents and waive presence . . . . To be sure, this procedure requires the arbitrators to decide that they are prepared to suffer some inconvenience of their own in order to mandate what is, in reality, an advance production of documents. But that is not necessarily a bad thing, since it will induce the arbitrators and parties to weigh whether advance production is really needed.[28]

In *Life Receivables*, the Second Circuit expressed its agreement with the views of Judge Chertoff of the Third Circuit:

> Interpreting section 7 according to its plain meaning "does not leave arbitrators powerless" to order the production of documents. *Hay Group*, 360 F.3d at 413 (Chertoff, J., concurring). On the contrary, arbitrators may, consistent with section 7, order "any person" to produce documents so long as that person is called as a witness at a hearing. 9 U.S.C. § 7 . . . . In *Stolt-Nielsen*, we held that arbitral section 7 authority is not limited to witnesses at merits hearings, but extends to hearings covering a variety of preliminary matters . . . . As then-Judge Chertoff noted in his concurring opinion in *Hay Group*, the inconvenience of making a personal appearance may cause the testifying witness to "deliver the documents and waive presence." 360 F.3d *at* 413 (Chertoff, J., concurring). Arbitrators also "have the power to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings." Section 7's presence requirement, however, forces the party seeking the non-party discovery -- and the arbitrators authorizing it -- to consider whether production is truly necessary. *See id.* at 414 . . . . In sum, arbitrators possess a variety of tools to compel discovery from non-parties. However, those relying on section 7 of the FAA must do so according to its plain text, which requires that documents be produced by a testifying witness.[29]

3. The Fourth Circuit has held that an arbitral subpoena for pre-hearing discovery may be enforced when there is a showing of "special need or hardship."

In *COMSAT Corp. v. Nat'l Science Foundation*,[30] the Fourth Circuit also concluded that Section 7, by its terms, did not authorize arbitrators to issue orders requiring either pre-hearing testimony or production of documents from nonparties. The court held, however that, a non-party

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[28] *Hay Group*, 360 F.3d at 413-14.

[29] 549 F.3d at 218 (citations omitted). *Accord* Guyden v. Aetna, Inc., 544 F.3d 376, 386-387 (2d Cir. 2008) ("The FAA . . . provides the arbitrator with further authority to compel the production of evidence and witnesses at a pre-merits hearing . . . . Guyden thus has both a contractual and a statutory basis for further discovery should it prove necessary for her claim.").

[30] 190 F.3d 269, 276 (4th Cir. 1999).

could be compelled by a district court to comply with such an order upon a showing of "special need or hardship." In this regard, the court said:

> Yet COMSAT argues quite persuasively that in a complex case such as this one, the much-lauded efficiency of arbitration will be degraded if the parties are unable to review and digest relevant evidence prior to the arbitration hearing. For this reason, in *Burton* we contemplated that a party might, under unusual circumstances, petition the district court to compel pre-arbitration discovery upon a showing of special need or hardship. 614 F.2d *at* 391.
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> We do not now attempt to define "special need," except to observe that at a minimum, a party must demonstrate that the information it seeks is otherwise unavailable COMSAT did not attempt such a showing before the district court, and we infer from the record that no such showing would be possible.[31]
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> [W]e hold today that a federal court may not compel a third party to comply with an arbitrator's subpoena for prehearing discovery, absent a showing of special need or hardship. [32]

The court in *COMSAT* did not cite any case in which an arbitral subpoena for prehearing discovery was enforced upon a showing of special need or hardship. Instead, it relied upon cases involving requests by one party to an arbitration agreement for pre-arbitration discovery from the other party.[33]

Shortly after its decision in *COMSAT*, the Fourth Circuit had occasion to address a claim of "special need." Again, unlike *COMSAT*, the context was a request by one party to an arbitration agreement for pre-arbitration discovery from the other party. In *Deiulemar Compagnia di Navigazione S.P.A. v M/V Allegra*,[34] the court held that Fed. R. Civ. P. 27 permitted pre-arbitration discovery when the petitioner, the charterer of a vessel under a charter party containing a London arbitration clause, "sought evidence from a ship that was soon leaving United States waters" for the "perpetuation of evidence that, if not preserved, was going to disappear or be materially altered [and which] was necessary to its arbitration claim . . . ."[35] The

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[31] *Id.* at 276. The court observed that COMSAT had already obtained many of the documents through FOIA requests and that other documents were available from the opposing party in the arbitration.

[32] *Id.* at 278. Because there was no showing of "special need," the *COMSAT* court's views regarding the possible enforcement of arbitral subpoenas in the case of "special need" have been characterized as "*dicta*." *Hay Group*, 360 F.3d at 410.

[33] The court in *COMSAT* referred to its *dictum* in *Burton v. Bush*, 614 F.2d 389, 391 (4th Cir. 1980), which, in turn, cited *Bigge Crane & Rigging Co. v. Docutel Corp.*, 371 F. Supp. 240, 246 (E.D.N.Y. 1973) and *Ferro Union Corp. v. SS Ionic Coast*, 43 F.R.D. 11 (S.D. Tex. 1967).

[34] Deiulemar Compagnia di Navigazione S.P.A. v. M/V Allegra, 198 F.3d 473, 481 (4th Cir. 1999), *cert. denied*, 529 U.S. 1109 (2000).

[35] 198 F.3d at 481. Rule 27(a)(1) provides, in pertinent part that

> A person who wants to perpetuate testimony about any matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must

court in *Deiulemar* observed that its holding was narrow:

> We . . . do not intimate that by recognizing Rule 27 discovery in aid of arbitration in these specific facts, we intend to open all forms of prearbitration discovery in circumstances of "special need." To the contrary, we limit our holding today to Rule 27 perpetuation in the specific circumstances described above. We leave for future determination the proper scope of the "special need" exception as it applies to other forms of discovery in aid of arbitration.[36]

All but one of the reported cases in which federal courts have ordered discovery in aid of arbitration, whether or not they rely on Rule 27, have involved circumstances similar to those in *Deiulemar*—the need to obtain and preserve from a departing vessel and its crew evidence that might otherwise disappear or be materially altered.[37] We have found no subsequent cases in the Fourth Circuit delineating further the scope of the "special need" exception or applying it to enforce an arbitral order for non-party discovery.[38]

Both the Second and Third Circuits have rejected the suggestion in *COMSAT* that a federal court might, under Section 7, enforce an arbitral subpoena for pre-hearing non-party

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show:

(A) that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought;

(B) the subject matter of the expected action and the petitioner's interest;

(C) the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it;

(D) the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known; and

(E) the name, address, and expected substance of the testimony of each deponent.

The Fourth Circuit in *Deiulemar* concluded that it was sufficient to satisfy the requirements of Rule 27(a)(1)(A) that, at the time of the petition, the charterer expected to be a party to an action to compel the owner to arbitrate even though it soon became clear that no such proceeding would be necessary.

[36] *Id.* at 481 n.10.

[37] *See In re* Compania Chilena de Navegacion Interoceanica S.A., 03 cv 5382, 2004 U.S. Dist. LEXIS 6408 (E.D.N.Y. 2004) (granting charterer's Rule 27 request for deposition of crew members and production of documents from vessel about to leave port when charterparty provided for London arbitration); *In re* Deiulemar, 153 F.R.D. 592, 593 (E.D. La. 1994) (same); Koch Fuel International, Inc. v. M/V South Star, 118 F.R.D. 318 (E.D.N.Y. 1987) (refusing in an admiralty action commenced under 28 U.S.C.S. § 1333, to vacate an order for the expedited depositions of crew members of vessel about to depart the country when the charterparty provided for London arbitration); Ferro Union Corp. v. SS Ionic Coast, 43 F.R.D. 11 (S.D. Tex. 1967) (granting a vessel owner's request, under Section 3 of the FAA to stay trial of an matter pending a New York arbitration, but denying the owner's motion to quash or vacate deposition notices of the master and crew members and granting charterer's motion under Fed. R. Civ. P. 34 for production and inspection of documents on board a vessel about to leave the port). The one exception is *Bigge Crane*, where the court, in declining to stay discovery, found a sufficiently extraordinary circumstance in the fact that formal discovery would hasten the ultimate resolution of the parties' dispute. 371 F. Supp. at 246.

[38] If its requirements are satisfied, Rule 27 can be used to obtain discovery from non-parties. *See, e.g., In re* I-35w Bridge Collapse Site Inspection, 243 F.R.D. 349, 352 n.3 (D. Minn. 2007) ("Rule 27 authorizes such an order to be entered against both parties and non-parties to anticipated litigation.") (citing 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2456, at 29 (2d ed. 1995) ("A subpoena duces tecum also may issue pursuant to a court order without the commencement of an action for the perpetuation of testimony under Rule 27.").

discovery based upon a showing of "special need or hardship." In *Hay Group*, the Third Circuit reversed the district court's holding that "special need" justified enforcement of a subpoena for pre-hearing document production, stating that "there is simply no textual basis for allowing any "special need" exception."[39] In *Life Receivables*, the Second Circuit also expressed disagreement with *COMSAT*, referring, with approval, to the "emerging rule" that "the arbitrator's subpoena authority under FAA § 7 does not include the authority to subpoena nonparties or third parties for prehearing discovery even if a special need or hardship is shown."[40]

4. The First Department has held that courts may issue orders for pre-hearing discovery in arbitration when there is a showing of "special need or hardship."

There is a conflict between federal and state courts in New York as to the availability of pre-hearing document production and testimony from non-parties under Section 7 of the FAA. Citing *COMSAT*, the Appellate Division for the First Department has held that the FAA does permit parties to an arbitration agreement to obtain pre-hearing discovery from non-parties in cases of "special need." In *ImClone Sys. v. Waksal*,[41] the First Department affirmed a lower court order issuing "open commissions in aid of arbitration."[42] The open commissions provided for pre-hearing depositions of out of state non-party witnesses.[43] The lower court observed that they were issued at the joint request of the parties to the arbitration and that "the arbitrators [had] determined that it [was] appropriate to take such depositions."[44] The lower court denied a subsequent motion of the non-party witnesses to vacate its order, holding that New York law applied and that the depositions were authorized by CPLR 3102(b), which has been held to permit pre-hearing discovery from non-parties when sought pursuant to a stipulation between the parties to an arbitration.[45]

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[39] 360 F.3d 404, 410.

[40] 549 F.3d at 216 (citation omitted).

[41] 22 A.D.3d 387, 802 N.Y.S.2d 653 (1st Dep't 2005).

[42] *Id.*

[43] *Id.* CPLR 3108 permits the issuance of commissions "where necessary or convenient for the taking of a deposition outside of the state. The deposition to be taken can be on oral or written questions, as the parties may agree or as the court directs. If on oral questions, it is commonly called an 'open' commission." DAVID D. SIEGEL, NEW YORK PRACTICE § 360, at 589 (4th ed. 2005).

[44] *See* ImClone v. Waksal, No. 602996/02, 2005 WL 5351321, slip. op. at 2 (N.Y. Sup. Ct. April 4, 2005).

[45] *Id.* at 2. In this regard, the lower court cited *Textron, Inc. v. Unisys Corp.*, 138 Misc. 2d 124, 126 (Sup. Ct. N.Y. County 1987) ("Both parties to the arbitration, by stipulation and joint application, sought the contested disclosure resulting in the commissions here, and the matter is authorized by CPLR 3102 (b) where stipulated disclosure is favored.") and *In re* ACE American Insurance Co., 800 N.Y.S.2d 342 (Sup. Ct. N.Y. County 2004) (unpublished table decision) (same). The lower court in *ImClone* held that any restrictions that might otherwise be imposed by CPLR 3102(c), which permits disclosure "to aid in arbitration," applied to a request for discovery only "when one party is resisting it, not where the parties agree." Slip op. at 2. CPLR 3102(c) provides: "Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order. The court may appoint a referee to take testimony." N.Y. C.P.L.R. 2004. *Textron* stated that this provision was intended to apply to discovery sought by one party from the other. In any event, as one commentator has observed, it has "been generally understood to require very special circumstances before court aid will be offered for this purpose, although one occasionally sees cases that seem to take a more liberal view of the matter." DAVID D. SIEGEL, NEW YORK PRACTICE § 597, at 13 (4th ed. 2005). Among the "liberal" cases is *Hendler & Murray P.C. v. Lambert*, 127 A.D.2d 820, 821, 511 N.Y.S.2d 941, 942 (2d Dep't 1987) (permitting an order requiring discovery from party when "the respondent has demonstrated that the documents are required 'to present a proper case to the arbitrator'" (quoting Moock v. Emanuel, 99 A.D.2d 1003, 473 N.Y.S.2d 793 (1st Dep't 1984))). Federal courts in the Second Circuit have also indicated that discovery in aid of arbitration is available. *See* Oriental

On appeal in *ImClone*, the First Department affirmed on different grounds. First, the court determined that the arbitration in question was subject to the FAA. The court assumed that Section 7 of the FAA preempted state procedural rules such as CPLR 3102 that permit a court to require discovery in aid of arbitration.[46] The court observed that "it is an open question in the Second Circuit whether prehearing nonparty depositions are authorized under the FAA[47] . . . and there is substantial federal authority that they are not . . . ."[48] Then, citing the decisions of the Fourth Circuit in *COMSAT* and *Deiulemar*, the court held that:

> depositions of nonparties may be directed in FAA arbitration where there is a showing of "special need or hardship," such as where the information sought is otherwise unavailable . . . . This view properly takes into consideration the realities and complexities of modern arbitration.[49]

The First Department held that the showing required to demonstrate "special need or hardship" was what the court in COMSAT described as the "minimum"—that the information was unavailable from sources other than the non-party:

> Here, the information sought would plainly be unavailable from other sources, since the crucial issue in plaintiff's attempt to vitiate the agreement is its claim that it was induced by fraud, and the nonparties defendant seeks to depose are the officers and directors who took part in its drafting and negotiation. It was unnecessary for defendant to state in so many words that such information was otherwise unavailable or that exceptional circumstances, special need or hardship exist.[50]

Commercial & Shipping Co. v. Rosseel, N.V., 125 F.R.D. 398, 400 n.3 (S.D.N.Y. 1989) ("Discovery in aid of arbitration is permitted by federal courts in this Circuit under essentially the same standard as under New York law."); Bigge Crane and Rigging Co. v. Docutel Corp., 371 F. Supp. 240 (E.D.N.Y. 1973) (pre-arbitration discovery permitted as consistent with Federal Arbitration Act and New York law).

[46] We note that *ImClone* was decided before *Dynegy Midstream Servs. v. Trammochem Division of Transammonia, Inc.*, 451 F.3d 89 (2d Cir. 2006), discussed below, which held that Section 7 imposed territorial limitations on issuance and enforcement of arbitral subpoenas. Based on the very broad view of the court in *ImClone* concerning the preemptive effect of Section 7, it could conceivably be argued that these territorial limitations would also apply to issuance of commissions for taking of discovery from out of state witnesses.

[47] *ImClone* was decided before *Life Receivables* resolved this question in the Second Circuit. *Life Receivables* is not, in any event, binding on New York state courts interpreting the FAA. *See* Flanagan v. Prudential-Bache Security, Inc., 67 N.Y.2d 500, 506, 504 N.Y.S.2d 82, *cert. denied*, 479 U.S. 931 (1986) ("When there is neither decision of the Supreme Court nor uniformity in the decisions of the lower Federal courts . . . a State court required to interpret the Federal statute has the same responsibility as the lower Federal courts and is not precluded from exercising its own judgment or bound to follow the decision of the Federal Circuit Court of Appeals within the territorial boundaries of which it sits . . . .").

[48] 22 A.D.3d at 388; 802 N.Y.S.2d at 654 (citing Hay Group, Inc. v E.B.S. Acquisition Corp., 360 F.3d 404, 410 (3d Cir. 2004); Integrity Ins. Co. v Am. Centennial Ins. Co., 885 F Supp 69, 71-73 (S.D.N.Y. 1995); Odjfell ASA v Celanese AG, 328 F Supp 2d 505, 506 (S.D.N.Y 2004)). Each of these cases concerned whether arbitrators had authority to require non-party discovery under Section 7—*not* whether a state court could order such discovery under state procedural rules.

[49] *Id.* at 388.

[50] *Id.* It is questionable whether the Fourth Circuit would find a "special need" to exist in these circumstances. *See* Deiulemar Compagnia di Navigazione S.P.A. v. M/V Allegra, 198 F.3d 473, 479 (4th Cir. 1999) (observing that courts have allowed discovery in aid of arbitration "where a movant can demonstrate 'extraordinary circumstances,"

Since the decision of the Second Circuit in *Life Receivables*, there has been a conflict between state and federal courts in New York regarding the availability and extent of pre-hearing discovery from non-parties under Section 7 of the FAA. As a recent state court decision put it:

> The hardline rule of the Second Circuit permitting document discovery of non-parties only when it is part-and-parcel of the non-parties' giving of testimony at an arbitration hearing is at odds with the First Department's decision in *ImClone* . . . . The law in the First Department is that under the FAA a court may compel compliance with arbitrators' subpoenas for pre-hearing depositions and document discovery if a "special need or hardship" exists . . . .[51]

5. The Sixth and Eighth Circuit have concluded that arbitrators have an "implied power" under Section 7 to require pre-hearing production of documents.

In *Security Life Ins. Co. of Am. v. Duncanson & Holt, Inc.*, the Eighth Circuit held that the power expressly granted to arbitrators under Section 7 to require non-parties to appear and produce documents at a hearing included the implicit power to require production of such documents prior to a hearing.[52] The court relied upon *Meadows Indem. Co. Ltd. v. Nutmeg Ins. Co.*,[53] which held that the authority conferred by Section 7 to require production of documents from non-parties at a hearing implicitly included the "lesser power" to compel the production of documents prior to the hearing. The court in *Security Life* also observed that allowing production of documents would assist in the efficient resolution of disputes:

> Although the efficient resolution of disputes through arbitration necessarily entails a limited discovery process, we believe this interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing. We thus hold that implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing.[54]

In *AFTRA v. WJBK-TV*,[55] the Sixth Circuit held, upon similar grounds, that a labor arbitrator had authority under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to issue a subpoena requiring a non-party to produce documents either before or at an arbitration hearing. The court held that the arbitrators' power under the LMRA was as broad as that of arbitrators under the FAA and that "the FAA's provision authorizing an arbitrator to compel the production of documents from third parties for purposes of an arbitration hearing has been held

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such as "where a vessel with crew members possessing particular knowledge of the dispute is about to leave port," or where there is a "special need for information which will be lost if action is not taken immediately.").

[51] Connectu, Inc. v. Quinn Emanuel Urquhart Oliver & Hedges, No. 602082/08, slip op. at 10 (Sup.Ct. N.Y., Mar. 11, 2010).

[52] 228 F.3d 865 (8th Cir. 2000).

[53] 157 F.R.D. 42, 44-45 (M.D. Tenn. 1993).

[54] 228 F.3d at 870-71.

[55] 164 F.3d 1004 (6th Cir. 1999).

to implicitly include the authority to compel the production of documents for inspection by a party prior to the hearing."[56]

Neither the Sixth Circuit in *AFTRA* nor the Eight Circuit in *Security Life* reached the question of whether the implied power they found in section 7 authorized arbitrators to order depositions of non-parties.[57] The district court cases that have addressed this issue (many of which were decided by courts in the Second Circuit prior to *Life Receivables*) have almost uniformly held that the implied power does *not* extend that far and that arbitrators may *not* order the deposition of non-parties.[58] In each of the cases, the distinguishing factor was that depositions imposed a greater burden on non-parties than document production. As stated in *Integrity Ins. Co. v. Amer. Centennial Ins. Co.*:

> Documents are only produced once, whether it is at the arbitration or prior to it. Common sense encourages the production of documents prior to the hearing so that the parties can familiarize themselves with the content of the documents. Depositions, however, are quite different. The nonparty may be required to appear twice—once for deposition and again at the hearing. That a nonparty might suffer this burden in a litigation is irrelevant; arbitration is not litigation, and the nonparty never consented to be a part of it. Furthermore, as the deposition is not held before the arbitrator, there is nothing to protect the nonparty from harassing or abusive discovery. The nonparty would, of necessity, turn to the court, obligating the court to become enmeshed in the merits of the matter being arbitrated. This would leave "the parties with one foot in court and the other in arbitration."[59]

In *Hay Group*, the Third Circuit rejected altogether the "implied power" approach, stating:

> We disagree with this power-by-implication analysis. By conferring the power to compel a non-party witness to bring items to an arbitration proceeding while saying nothing about the power simply to compel the production of items without summoning the custodian to testify, the FAA implicitly withholds the latter power. If the FAA had been meant to confer the latter, broader power, we believe that the drafters would have said so, and they would have then had no need to spell out the more limited power to compel a non-party witness to bring items

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[56] *Id.* at 1009 (citing Meadows Indem. Co. v. Nutmeg Ins. Co., 157 F.R.D. 42 (M.D. Tenn. 1994); Stanton v. Paine Webber Jackson & Curtis, Inc., 685 F. Supp. 1241 (S.D. Fla. 1988)).

[57] *Id.* at 1009 ("We do not reach the question of whether an arbitrator may subpoena a third party for a discovery deposition relating to a pending arbitration proceeding"); *Security Life*, 228 F.3d at 871 (declining to reach the question of whether Section 7 authorized arbitrators to issue orders requiring depositions of nonparties, as that issue had become moot through the nonparties' compliance with that portion of the subpoena.).

[58] Atmel Corp. v. LM Ericsson Telefon, AB, 371 F. Supp. 2d 402 (S.D.N.Y. 2005); Nat'l Union Fire Ins. Co. v. Marsh USA, Inc. (*In re* Hawaiian Elec. Indus.), No. M-82, 2004 U.S. Dist. LEXIS 12716 (S.D.N.Y. July 9, 2004); Procter and Gamble Co. v. Allianz Ins. Co., No. 02-cv-5480(KMW), 2003 U.S. Dist. LEXIS 26025 (S.D.N.Y. Dec. 3, 2003); *In re* Meridian Bulk Carriers, Ltd, No. 03-2011, 2003 U.S. Dist. LEXIS 24203 (E.D. La. July 17, 2003); Integrity Ins. Co. v. Amer. Centennial Ins. Co., 885 F. Supp. 69 (S.D.N.Y. 1995). *But see* Amgen, Inc. v. Kidney Center of Delaware County, 879 F. Supp. 878, 882-83 (N.D. Ill. 1995) (enforcing compliance with a subpoena requiring the deposition and production of documents by a nonparty).

[59] 885 F. Supp. at 73 (citations omitted).

> with him to an arbitration proceeding. As mentioned above, until its amendment in 1991, Rule 45 of the Federal Rules of Civil Procedure was framed in terms quite similar to Section 7 of the FAA, but courts did not infer that, just because they could compel a non-party witness to bring items with him, they could also require a non-party simply to produce items without being subpoenaed to testify.[60]

B. There is a split of authority among the Circuits as to whether Section 7 of the FAA imposes any territorial limitation on an arbitrator's power to summon a non-party to testify and produce documents or upon the power of a federal district court to enforce such an order.

Section 7 does not contain any express territorial limitation on the power of the arbitrators to summon "any person" to attend before him and produce documents or upon the power of courts to enforce such orders. The statute does state, however, that such orders "shall be served in the same manner as subpoenas to appear and testify before the court." Regarding judicial enforcement of such orders, Section 7 provides that

> if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition *the United States district court for the district in which such arbitrators, or a majority of them, are sitting* may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

9 U.S.C. § 7 (2006) (emphasis added).

Fed. R. Civ. P. 45(b)(2) governs service of subpoenas to appear and testify in proceedings in federal court. It imposes certain territorial limits on service, providing that:

> a subpoena may be served at any place
>
> (A) within the district of the issuing court;
> (B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;
> (C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or
> (D) that the court authorizes on motion for good cause, if a federal statute so provides.

Regarding issuance of subpoenas, Fed. R. Civ. P. 45(a)(2) provides:

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[60] 360 F.3d at 408-9.

> (2) A subpoena must issue as follows:
> (A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;
> (B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and
> (C) for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

Under Rule 45, motions to compel compliance with a court issued subpoena or to quash or modify it are decided by the issuing court. In the case of a subpoena for the production of documents, that court would ordinarily be the court for the district where the production or inspection is to be made.

There is a split of authority among the circuit courts as to (a) whether the requirement in Section 7 that arbitral subpoenas be served in "the same manner as subpoenas to appear and testify before the court" incorporates the territorial limits on service of such subpoenas imposed by Fed. R. Civ. P. 45(b)(2); and (b) whether a "district court in which such arbitrators . . . are sitting" may enforce an arbitral subpoena served upon a witness beyond those limits.

1. The Second and Third Circuits have held that Section 7 does not authorize nationwide service or enforcement of arbitral subpoenas.

In *Dynegy Midstream Servs. v. Trammochem, Division of Transammonia, Inc.*,[61] the Second Circuit held that a federal district court in New York could not enforce a *subpoena duces tecum* issued by a New York arbitral tribunal requiring the pre-hearing production of documents in Houston, Texas by Dynegy, a non-party located in Houston. The court observed that "the Federal Rules governing subpoenas to which *Section 7* refers do not contemplate nationwide service of process or enforcement; instead, both service and enforcement proceedings have clear territorial limitations." *Id.* at 95. The Second Circuit rejected the district court's conclusion that Section 7 authorizes nationwide service and enforcement of arbitral subpoenas.

> Contrary to the district court's reading of the statute, nothing in the language of FAA Section 7 suggests that Congress intended to authorize nationwide service of process. In fact, the language of Section 7 specifically suggests that the ordinary rules applicable to the district courts apply by stating that subpoenas under the section "shall be served in the *same manner* as subpoenas to appear and testify before the court" and the district court may compel attendance "in the *same manner provided by law* for securing the attendance of witnesses . . . in the courts of the United States." 9 U.S.C. § 7 (emphasis added).[62]

In *Legion Ins. Co. v. John Hancock Mut. Life Ins. Co.*,[63] the Third Circuit, in an

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[61] 451 F.3d 89 (2d Cir. 2006).
[62] *Id.* at 95.
[63] 33 Fed. Appx. 26, 2002 U.S. App. LEXIS 6797 (3d Cir. 2002).

unpublished opinion, reached the same conclusion. The Third Circuit held that a district court in Philadelphia properly denied a motion to enforce an arbitration subpoena requiring a nonparty to appear for a deposition in Florida.[64] Like the Second Circuit in *Dynegy*, the Third Circuit held that service and enforcement of arbitral subpoenas were subject to the territorial limits set forth in Fed. R. Civ. P. 45.

2. The Eighth Circuit has held that the territorial limitations of Rule 45 do not apply to the issuance by arbitrators or to the enforcement by a federal district court of subpoenas for the pre-hearing production of documents.

In *Security Life Ins. Co. of Am. v. Duncanson & Holt, Inc.*,[65] the Eighth Circuit held that a district court in Minnesota had the power to enforce a *subpoena duces tecum* issued by an arbitral tribunal sitting there requiring pre-hearing production of documents from a nonparty in California.[66] The court's conclusion seems to have been based upon its view that there was an implied power in Section 7 to require production of documents from nonparties and its perception of the minimal burden upon the non-party of producing documents at a distance. In this regard, the court said: "[W]e do not believe an order for the production of documents requires compliance with Rule 45(b)(2)'s territorial limit. This is because the burden of producing documents need not increase appreciably with an increase in the distance those documents must travel."[67] At least two district courts have followed the decision in *Security Life*.[68]

One district court has reached what has been described as a "compromise position." In *Amgen, Inc. v. Kidney Center of Delaware County*,[69] a federal district court in Illinois was asked to enforce compliance with a subpoena issued by an arbitrator sitting there requiring the deposition of and production of documents by a nonparty in the Eastern District of Pennsylvania. A federal district court in Pennsylvania had previously refused to enforce the subpoena, holding that under Section 7, only the court in the place where the arbitrators were sitting could do so.[70]

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[64] *But see In re* Nat'l Fin. Partners Corp., No. 09-mc-00027, 2009 U.S. Dist. LEXIS 34440 (E.D. Pa. Apr. 21, 2009) (refusing to quash a subpoena issued by arbitral tribunal in Pennsylvania for the deposition of a non-party in Florida).

[65] 228 F.3d 865 (8th Cir. 2000).

[66] As noted above, the court in *Security Life* did not reach the question whether Section 7 authorized arbitrators to issue orders requiring depositions of nonparties, as that issue had become moot through the nonparties' compliance with that portion of the subpoena. 228 F.3d at 871.

[67] *Id.* at 872.

[68] SchlumbergerSema, Inc. v. Xcel Energy, Inc., 02-4302, 2004 U.S. Dist. LEXIS 389 (D. Minn. Jan. 9, 2004), (holding that a district court in Minnesota was authorized to compel compliance with a subpoena duces tecum issued by an arbitral tribunal there requiring the deposition of and production of documents by a nonparty located in the Eastern District of New York, notwithstanding the provisions of Fed.R.Civ.P 37 that a motion to compel disclosure or discovery from a nonparty must be made in the court where the discovery is or will be taken); Festus & Helen Stacy Found., Inc. v. Merrill Lynch, Pierce Fenner, & Smith Inc., 432 F. Supp. 2d 1375, 1378-1379 (D. Ga. 2006) (holding that Section 7 authorized the court to enforce a subpoena issued by an arbitral tribunal sitting in Atlanta, Georgia requiring production of documents from a nonparty in the Southern District of New York and that Rule 45 did not circumscribe its authority.).

[69] 879 F. Supp. 878, 882-83 (N.D. Ill. 1995)

[70] Amgen Inc. v. Kidney Ctr., No. 94-mc-0202, 1994 U.S. Dist. LEXIS 15451, at *3 (E.D. Pa. Oct. 19, 1994) ("Since the arbitrator in the underlying arbitration is sitting in Chicago, it was incumbent upon Amgen, pursuant to the plain language of Section 7, to bring its petition to compel compliance in the United States District Court for the

The Illinois court concluded that, although Section 7 "does not provide for extraterritorial service or extraterritorial enforcement" of arbitral subpoenas, failing to enforce such a subpoena would leave an unsatisfactory "gap in the law":[71]

> KCDC's argument is unavailing because it leaves a gap in the law, which is contrary to Congressional intent, and unnecessary. By definition, the FAA applies only to actions involving interstate commerce, 9 U.S.C. § 2; indeed, the Act itself is based on congressional power to regulate interstate commerce. *Seymour v. Gloria Jean's Coffee Bean Franchising Corp.*, 732 F. Supp. 988 (D. Minn. 1990). By enacting the FAA, Congress declared a national policy favoring arbitration. *Perry v. Thomas*, 482 U.S. 483, 96 L. Ed. 2d 426, 107 S. Ct. 2520 (1987). The arbitration of any action affecting interstate commerce is likely to involve parties and witnesses located in more than one district or state. To find that the wording of the FAA precludes issuance and enforcement of an arbitrator's subpoena of a witness outside the district in which he or she sits, particularly where, as here, such discovery is agreed upon by the parties to the arbitration, would likely lead to rejection of arbitration clauses altogether. That would be contrary to the intent of Congress in enacting a national policy favoring arbitration.[72]

In order to avoid the territorial limitations of Rule 45 on service and enforcement, the federal court in Illinois authorized an attorney for a party to the arbitration to issue a subpoena as an officer of the Pennsylvania court, using the case name and number of the action pending in the Illinois court as permitted by Fed. R. Civ. P. 45(a)(3)(B).[73]

In *Dynegy*, the Second Circuit rejected the approach used by the court in *Amgen*:

> Appellees . . . ask us either to adopt the compromise position created in Amgen, Inc. v. Kidney Center of Delaware County, 879 F. Supp. 878, 882-83 (N.D. Ill. 1995), where the district court enforced an arbitration subpoena against a distant non-party by permitting an attorney for a party to the arbitration to issue a subpoena that would be enforced by the district court in the district where the non-party resided, or to suggest another method to get around this gap in enforceability. We decline to do so. We see no textual basis in the FAA for the *Amgen* compromise. Indeed, we have already held that Section 7 "explicitly confers authority only upon *arbitrators*; by necessary implication, the *parties* to

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Northern District of Illinois.").

[71] 879 F. Supp at 882-883.

[72] *Id.* at 882.

[73] Rule 45 (a)(3) (B) provides that an attorney "may issue and sign a subpoena as an officer of . . .. a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending." The same procedure was later used by the district court in *Security Life*. The Eighth Circuit did not reach the question whether it was authorized, however, because of its holding that an order requiring the production of documents did not require compliance with the territorial limitations of Rule 45. 228 F.3d at 872 On appeal in *Amgen*, the Seventh Circuit questioned whether the district court had subject matter jurisdiction and remanded for the district court to make and certify a finding of jurisdictional facts. *Amgen, Inc. v. Kidney Ctr.*, 95 F.3d 562, 567 (7th Cir. 1996). The district court concluded that it lacked either federal question or diversity jurisdiction, and the Court of Appeals accordingly dismissed the action. *Amgen, Inc. v. Kidney Ctr., 1996 U.S. App. LEXIS 28250* (7th Cir. Oct. 28, 1996).

> an arbitration may not employ this provision to subpoena documents or witnesses." NBC v. Bear Stearns & Co., 165 F.3d 184, 187 (2d Cir. 1999). Moreover, we see no reason to come up with an alternate method to close a gap that may reflect an intentional choice on the part of Congress, which could well have desired to limit the issuance and enforcement of arbitration subpoenas in order to protect non-parties from having to participate in an arbitration to a greater extent than they would if the dispute had been filed in a court of law.[74]

C. The role of state statutes permitting pre-hearing discovery from non-parties.

There are a number of state statutes, such as those based upon the Revised Uniform Arbitration Act ("RUAA"),[75] which allow arbitrators to require pre-hearing discovery from non-parties without the restrictions that have been imposed under Section 7.[76] Under Section 17 (c) of the RUAA, an arbitrator may "permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective."[77] Official Comment 5 of the RUAA states that "sometimes arbitrations involve outside, third parties who may be required to give testimony or produce documents. Section 17(c) provides that the arbitrator should take the interests of such 'affected persons' into account

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[74] 451 F.3d at 96. It is questionable whether the "gap" in Section 7 can be seen as an "intentional choice" on the part of Congress. When the FAA was enacted in 1925, federal courts had nationwide subpoena authority. A federal statute provided: "Subpoenas for witnesses who are required to attend a court of the United States, in any district, may run into any other district: *provided*, That in civil cases, no writ of subpoena shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding without the permission of the court being first had upon proper application and cause shown. . . ." Act of September 19, 1922, ch. 344, 42 Stat. 848 (1922) (codified as amended at 28 U.S.C. 654 (1925-1926)). *See* James B. Sloan and William Gotfryd, *Eliminating The 100 Mile Limit For Civil Trial Witnesses: A Proposal To Modernize Civil Trial Practice*, 140 FED.RULES DECISIONS 33, 36 (1992) ("[A]fter the end of World War I, Congress pressed the Executive branch to pursue civil damage actions against war material contractors who had defrauded the United States. In response to the entreaties of the Justice Department, which protested its inability to assure the appearance and testimony of all necessary witnesses, Congress passed an amendment to the general subpoena statute which provided that for a period of three years, 'the permission of the court being first had upon proper application and cause shown' a trial subpoena could be served anywhere in the United States. Although the Congressional intent was to provide broader subpoena power only to the Justice Department in the prosecution of war fraud cases, and specifically to allow all such cases to be brought before courts in the District of Columbia, no such restrictions were written into the Statute. The Statute was subsequently amended again to provide for another three-year extension of nationwide service power."). Arguably, any gap in enforcement of arbitral subpoenas developed in 1928 when the statute authorizing nationwide service of subpoenas expired with no corresponding amendment of Section 7. *See* Vincennes Steel Corp. v. Miller, 94 F.2d 347, 349 (5th Cir. 1938); Barnett v. Merck & Co. (*In re* Vioxx Prods. Liab. Litig.), 438 F. Supp. 2d 664, 667 (E.D. La. 2006) ("[E]xcept for a six year period between 1922 and 1928, the 100 mile rule has always remained a part of the federal subpoena's life . . . .").

[75] NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM ARBITRATION ACT (2000), http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.pdf (hereinafter "RUAA").

[76] The RUAA has been adopted in the following states: Alaska, Colorado, District of Columbia, Hawaii, Nevada , New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, and Washington. In 2010, legislation to enact the RUAA has been introduced in Alabama, Arizona, Massachusetts, Minnesota and Pennsylvania. *See* National Conference of Commissioners of Uniform State Laws, A Few Facts About the Uniform Arbitration Act (2000), http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-aa.asp (last visited July 8, 2010).

[77] RUAA at 58.

in determining whether and to what extent discovery is appropriate."[78] Section 17(d) provides that [i]f an arbitrator permits discovery under subsection (c), the arbitrator may . . . issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding . . . ."[79] According to Official Comment 6, "Section 17(d) explicitly states that if an arbitrator allows discovery, the arbitrator has the authority to issue subpoenas for a discovery proceeding such as a deposition."[80] Taking note of cases such as *COMSAT*, which held that, under the FAA, arbitrators generally did not have authority to issue subpoenas to non-parties for pre-hearing discovery, Comment 6 further states: "Because of the unclear case law, Section 17(d) specifically states that arbitrators have subpoena authority for discovery matters under the RUAA."[81]

Under Section 17(g) of the RUAA, courts in states where the RUAA has been enacted may enforce subpoenas issued by arbitral tribunals in other jurisdictions. Section 17(g) provides:

> The court may enforce a subpoena or discovery-related order for the attendance of a witness within this State and for the production of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another State upon conditions determined by the court so as to make the arbitration proceeding fair, expeditious, and cost effective. A subpoena or discovery-related order issued by an arbitrator in another State must be served in the manner provided by law for service of subpoenas in a civil action in this State and, upon [motion] to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this State.[82]

Other state statutes may also permit pre-hearing discovery from non-parties.[83]

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[78] *Id.* at 61.
[79] *Id.* at 58.
[80] *Id.* at 61.
[81] *Id.*
[82] *Id.* at 59. Official Comment 9 to Section 17(g) states: "Section 17(g) is intended to allow a court in State A (the State adopting the RUAA) to give effect to a subpoena or any discovery-related order issued by an arbitrator in an arbitration proceeding in State B without the need for the party who has received the subpoena first to go to a court in State B to receive an enforceable order. This procedure would eliminate duplicative court proceedings in both State A and State B before a witness or record or other evidence can be produced for the arbitration proceeding in State B. The court in State A would have the authority to determine whether and under what appropriate conditions the subpoena or discovery-related orders should be enforced against a resident in State A. Similar to the language in 17(b) and (c), the statute directs the court to enforce subpoenas and discovery-related orders to 'make the arbitration proceeding fair, expeditious, and cost effective.' The last sentence of 17(g) requires that the subpoena be served and enforced under the laws of a civil action in State A where the request to enforce the subpoena is being made." *Id.* at 63.
[83] For example, in *Hay Group*, then Judge Alito cited the original Uniform Arbitration Act, as enacted in Delaware and Pennsylvania, as an example of statutes that "explicitly grant arbitrators the power to issue pre-hearing document production subpoenas on third parties." 360 F.3d at 407 n.1 (citing DEL. CODE ANN. tit. 10, § 5708(a) (2003) ("The arbitrators may compel the attendance of witnesses and the production of books, records, contracts, papers, accounts, and all other documents and evidence, and shall have the power to administer oaths.") and 42 PA.CONS.STAT. ANN. § 7309 (2003) ("The arbitrators may issue subpoenas in the form prescribed by general rules for the attendance of witnesses and for the production of books, records, documents and other evidence.")). In Judge Alito's view, "The language of these state statutes clearly shows how a law can give authority to an arbitrator to issue pre-hearing document-production orders on third parties." 360 F.3d at 407 n.1. A number of states have

Significantly, there is authority for the proposition that state procedural rules are not pre-empted by the FAA. As the Supreme Court observed in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford University*,[84] "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."[85] In *Volt*, a contractual choice of law clause had been determined by the state courts to incorporate not only California substantive law but also California procedural law governing arbitration—including § 1281.2(c) of the California Civil Procedure Code, which permits a court to stay an arbitration pending the outcome of litigation involving one of the parties. The Supreme Court held that the FAA did not bar the enforcement of such an agreement, even though no such stay of arbitration is available under the FAA. In this regard, the Court said: "There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."[86] Since *Volt*, a number of state courts have held that the FAA does not preempt state arbitral procedural rules, as long as those rules do not defeat the substantive right to arbitration granted by the FAA, and have applied state arbitration rules regarding procedural matters.[87]

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enacted International Commercial Arbitration Acts, some of which confer broad powers upon arbitrators to order pre-hearing discovery from non-parties. *See e.g.*, HAW. REV. STAT. ANN. § 658D-7 (2010) which provides, in pertinent part, "that any arbitral tribunal or other panel established pursuant to such rules shall: . . .

> (2) Be able to utilize any lawful method that it deems appropriate to obtain evidence additional to that produced by the parties;
>
> (3) Issue subpoenas or other demands for the attendance of witnesses or for the production of books, records, documents, and other evidence;
>
> (4) Be empowered to administer oaths, order depositions to be taken or other discovery obtained, without regard to the place where the witness or other evidence is located . . . ."

One case in Pennsylvania has indicated that discovery in aid of an arbitration taking place in another state or foreign country is available under the Uniform Interstate and International Procedure Act (UIIPA). Quijada v. Unifrutti of Am. Inc., 12 Pa D. & C.4th 225 (Pa. Ct. Com. Pl. 1991). Jurisdictions that have enacted the relevant provisions of the UIIPA include Massachusetts: MASS. GEN. LAWS ch. 223A, §§ 1-14 (2000); Michigan: MICH. COMP. LAWS §§ 600.1852, 600.2114a, 600.2118a (1970); Pennsylvania: 42 PA. CONS. STAT. §§ 5321-5329 (2010); and the Virgin Islands: V.I. CODE ANN. tit. 5, §§ 4901-4943 (2010). Section 3.02(a) of the UIIPA provides in relevant part: "[A court] of this state may order a person who is domiciled or is found within this state to give his testimony or statement or to produce documents or other things for use in a matter pending in a tribunal outside this state. The order may be made upon the application of any interested person or in response to a letter rogatory and may prescribe the practice and procedure, which may be wholly or in part the practice and procedure of the tribunal outside this state, for taking the testimony or statement of producing the documents or other things." UNIF. INTERSTATE & INT'L PROCEDURE ACT § 3.01(a), 13 U.LA. 355 (1986). The commentary to this section of UIIPA states provides that "the term 'tribunal' is intended to encompass any body performing a judicial function." *Id.*

[84] 489 U.S. 468, 477 (U.S. 1989)

[85] *Id.* at 477.

[86] *Id.* at 476.

[87] *See, e.g.*, *In re* Houston Pipe Line Co., No. 08-800, 2009 Tex. LEXIS 468, at *5 (Tex. 2009) (holding that "[w]hen Texas courts are called on to decide if disputed claims fall within the scope of an arbitration clause under the Federal Act, Texas procedure, [including rules permitting pre-arbitration discovery,] controls that determination); Clites v. Clawges, 685 S.E.2d 693, 696 (W. Va. 2009) (holding that the FAA did not preempt state law permitting appeal from a writ of prohibition staying all judicial proceedings pending arbitration of the dispute between the parties); Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586 (Cal. 2008) (holding that the FAA did not preempt California law permitting the parties to an arbitration agreement to contract for an expanded scope of judicial review); St. Fleur v. WPI Cable Sys./Mutron, 879 N.E.2d 27, 34 (Mass. 2008) (holding that state law procedure for petitions to enforce or vacate arbitral awards did not "undermine the purposes" of the FAA and therefore, was not preempted by the FAA); Moscatiello v. Hilliard, 939 A.2d 325, 330 (Pa. 2007) (holding that the FAA did not preempt state procedural law setting a thirty-day time limit for challenging an arbitration award);

However, as noted above, in *ImClone Sys. v. Waksal*,[88] the First Department concluded that Section 7 of the FAA preempted state procedural rules such as CPLR 3102 that permit a court to order discovery from non-parties in aid of arbitration. In reaching this conclusion, the court in *ImClone* first examined the choice of law clause in the contract between the parties and found it to be a "generic" New York law clause, which did not specifically incorporate New York procedural rules. Therefore, the court reasoned, the FAA preempted New York law.

The court in *ImClone* evidently assumed that, unless specifically incorporated by the parties in their agreement, state procedural rules governing arbitration were preempted by the FAA. However, in the absence of any express pre-emptive provision in the FAA or any Congressional intent to occupy the entire field, it may be argued that there is no basis for such a presumption. In this view, whether a choice of law clause is "generic" will be relevant for a state court only when that court must determine whether it may apply provisions of state law that impose substantive restrictions on the parties' rights under the FAA or "special rules limiting the authority of arbitrators."[89] In such cases, the federal policy favoring arbitration requires

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Scottish Re Life Corp. v. Transamerica Occidental Life Ins. Co., 647 S.E.2d 102, 105 (N.C. Ct. App. 2007) (holding that the FAA did not preempt application of RUAA provisional remedies); Walther v. Sovereign Bank, 872 A.2d 735, 742 (Md. 2005) ("In enforcing § 2 of the FAA . . . state courts are not bound by the federal procedural provisions of the FAA, which are found in §§ 3 and 4 of the FAA, but may generally apply their own procedures."); Webb v. Am. Employers Group, 684 N.W.2d 33, 40 (Neb. 2004) (holding that the FAA did not preempt state procedural law regarding appeal of an order denying a motion to compel arbitration); Sultar v. Merrill Lynch, No. CV040527411S, 2004 Conn. Super. LEXIS 3003 (Oct. 13, 2004) (holding that the Connecticut deadline for petitions to vacate an arbitration award applied and not the longer period set forth in the FAA.); Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co., 586 S.E.2d 581, 584 (S.C. 2003) (holding that the FAA does not preempt South Carolina's procedural rule on appealability of arbitration orders): Bush v. Paragon Prop., Inc., 997 P.2d 882, 887-88 (Ore. 2000) (en banc) (holding that provisions in the FAA for interlocutory appeal of an order denying a petition to compel arbitration did not preempt state law that failed to provide state court jurisdiction for such an appeal); Simmons Co. v. Deutsche Fin. Servs. Corp., 532 S.E.2d 436, 439-440 (Ga. Ct. App. 2000) ("[W]e find that the Georgia rule allowing a preliminary appeal from an order compelling arbitration does not undermine the purposes or objectives of the FAA to enforce arbitration agreements."); Collins v. Prudential Ins. Co., 752 So. 2d 825, 828-29 (La. 2000) ("[S]tates are free to follow their own procedural rules regarding appeals, unless those rules undermine the goals and principles of the FAA."); S. Cal. Edison Co. v. Peabody W. Coal Co., 977 P.2d 769 (Ariz. 1999) (same); Superpumper, Inc. v. Nerland Oil, Inc., 582 N.W.2d 647, 651 (N.D. 1998) ("[A] state is not obligated to altogether ignore its own procedural requirements in light of the procedural aspects of the FAA, provided the state enacted procedure does not defeat the rights granted by Congress."); Manson v. Dain Bosworth Inc., 623 N.W.2d 610, 614 (Minn. Ct. App. 1998) (holding that FAA governs arbitrability of dispute and Minnesota law governs all other issues, including procedural ones); Duggan v. Zip Mail Servs., Inc., 920 S.W.2d 200, 203 (Mo. Ct. App. 1996) ("Our courts are not bound by the procedural provisions of the FAA and state procedural rules may be applied when arbitration is pursuant to the FAA."); *In re* Propulsora Ixtapa Sur, S.A. De C.V. v. Omni Hotels Franchising Corp., 621 N.Y.S.2d 569, 211 A.D.2d 546, 548 (N.Y. App. Div. 1995), *app. denied*, 85 N.Y.2d 805, 650 N.E.2d 415 (1995) (holding that the FAA did not preempt the twenty-day limitation period for petitions to compel or stay arbitration under CPLR 7503(c)).

[88] 802 N.Y.S.2d 653 (N.Y. App. Div. 1st Dept. 2005).

[89] Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52, 64 (1995). The cases relied upon by the court in *ImClone* are not to the contrary. *See* Diamond Waterproofing Sys. v. 55 Liberty Owners Corp., 4 N.Y.3d 247, 253, 793 N.Y.S.2d 831, 834-835 (N.Y. 2005) (holding that a generic choice-of-law clause in a contract containing a broad arbitration agreement was insufficient to withdraw from the arbitrators the authority to decide whether a claim was barred by New York's statute of limitations); Smith Barney Shearson Inc. v. Sacharow, 91 N.Y.2d 39, 47 (N.Y. 1997) (holding that a generic New York choice-of-law clause was not sufficient to withdraw from the arbitrators the authority to decide questions of arbitrability when a broad arbitration clause specifically incorporated by reference rules providing that the arbitration panel shall have the power to rule on its own jurisdiction).

something more than generic language to incorporate such restrictions or limits.

In the Prefatory Note to the RUAA, the Commissioners on Uniform State Laws addressed the pre-emption issue.[90] They expressed the view that the FAA would probably not preempt the RUAA's provisions on discovery. ("It is likely that matters not addressed in the FAA are also open to regulation by the States. State law provisions regulating purely procedural dimensions of the arbitration process (e.g., discovery [RUAA Section 17], consolidation of claims [RUAA Section 10], and arbitrator immunity [RUAA Section 14]) likely will not be subject to preemption.")[91]

If the FAA does not preempt state procedural rules concerning non-party discovery, then, under current law, the availability and extent of pre-hearing discovery from non-parties in FAA cases may depend on whether enforcement of orders for non-party discovery is sought in federal court or state court.[92] For purely domestic arbitrations, this may depend on such fortuities as whether there is complete diversity between the parties to the arbitration or whether there is some other independent basis for federal court jurisdiction. Even where there is a basis for federal jurisdiction, parties may choose to proceed in state court in order to take advantage of state procedural rules. The inconsistency between state and federal procedural law creates a potential for forum shopping.

A further potential anomaly under Section 7 is that another federal statute, 28 U.S.C. § 1782, has been held to allow courts to order both document discovery and depositions from non-parties anywhere in the United States for private international arbitrations seated outside the United States.[93] As a result, access to pre-hearing discovery from non-parties, at least when it is

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[90] *See* RUAA at 1.

[91] *Id.* at 5.

[92] Whether a federal court sitting in diversity should apply state law rules authorizing courts to order discovery in aid of arbitration is an *Erie* question. *See generally* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996); Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). We have found no authority directly addressing this question. Although arguments can be made to the contrary, we assume for the purpose of this discussion that such rules would be regarded as procedural and would not be applied in federal court.

[93] *See In re* Application of Chevron Corporation, No. M-19-111, 2010 U.S. Dist. LEXIS 47034 (S.D.N.Y. May 10, 2010); OJSC Ukrnafta v. Carpatsky Petroleum Corp., No. 3:09 MC 265 JBA, 2009 U.S. Dist. LEXIS 109492 (D. Conn. Aug. 27, 2009); Comision Ejecutiva Hidroelectrica del Rio Lempa v. Nejapa Power Co., LLC, No. 08-135-GMS, 2008 U.S. Dist. LEXIS 90291 (D. Del. Oct. 14, 2008), *appeal dismissed as moot*, No. 08-3518, 2009 U.S. App. LEXIS 17289 (3d Cir. Aug. 3, 2009); *In re* Application of Hallmark Capital Corp., 534 F. Supp. 2d 951 (D. Minn. 2007); *In re* Application of Babcock Borsig AG, 583 F. Supp. 2d 233 (D. Mass. 2008); *In re* Oxus Gold PLC, No. Misc. 06-82, 2006 WL 2927615 (D.N.J. Oct. 11, 2006); *In re* Roz Trading Ltd., 469 F. Supp. 2d 1221 (N.D. Ga. 2006). In a report on § 1782, this Committee has concluded that the statute applies to private international arbitrations. *See* Association of the Bar of the City of New York, International Commercial Disputes Committee, *28 U.S.C. § 1782 as a Means of Obtaining Discovery in aid of International Commercial Arbitration—Applicability and Best Practices*, http://www.nycbar.org/pdf/report/1782_Report.pdf (2008) (hereinafter "*§1782—Applicability and Best Practices*"). A minority of cases have held that the Section 1782 does not apply to private international arbitrations, El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa, No. 08-20771, 341 Fed. Appx. 31, 2009 U.S. App. LEXIS 17596 (5th Cir. Aug. 6, 2009); *In re* Operadora DB Mex., S.A., No. 6:09cv383, 2009 U.S. Dist. LEXIS 68091 (M.D. Fla. Aug. 1, 2009); *In re* Arbitration in London between Norfolk Southern Corp. v. Gen. Sec. Ins. Co., 626 F. Supp. 2d 882 (N.D. Ill. 2009).

authorized by the arbitrators,[94] may be granted to parties to foreign arbitrations[95] but denied, under Section 7, to parties to U.S. arbitrations.[96]

II. The Views of the Committee

A. Section 7 of the FAA does not authorize arbitrators to issue orders for pre-hearing testimony or document production from nonparties

The Committee agrees with the reasoning of the decisions of the Second and Third Circuits holding that Section 7 of the FAA does not authorize arbitrators to require pre-hearing testimony or production of documents. The only authority expressly granted to arbitrators under Section 7 is the authority to "summon in writing any person to attend *before them or any of them* as a witness and in a proper case to *bring with him or them* any book, record, document, or paper . . . ." [97] The statute does not, by its terms, grant any authority to arbitrators to require testimony or production of documents from non-parties prior to a hearing. It would be anachronistic to impute to the Congress that enacted Section 7 in 1925 an intent to grant such authority to arbitrators when, at the time, federal courts had no such authority and "the Federal Rules of Civil Procedure, with their provisions for depositions and other mechanisms for discovery, were more than a decade away."[98]

The Committee does not agree with the reasoning of the courts in *Security Life* and other cases that have held the power to require production of documents at a hearing includes the "lesser" power to require such production prior to a hearing.[99] It is debatable whether the power to require pre-hearing document production is, in fact, a lesser power included within the power to require production of documents at a hearing or whether it is something qualitatively different.[100] To assume that it is a "lesser" power effectively begs the question.[101] As to the assertion that such a reading would further the interest in the efficient resolution of disputes, we

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[94] In its report on § 1782, the Committee has suggested that courts should be deferential to arbitrators in exercising and issue such orders only upon the request of the arbitral tribunal. *§1782—Applicability and Best Practices* at 30-32.

[95] In its § 1782 report, a majority of the Committee concluded that discovery in aid of arbitration should be available only in those private international arbitrations seated outside the United States. *Id.* at 35.

[96] If they wish to do so, parties to international commercial arbitrations seated in New York may possibly be able to avoid application of state procedural rules which provide broader access to non-party discovery by removing any enforcement proceedings to federal court under Section 205 of the FAA., 9 U.S.C. § 205, which provides that the defendant in any state court action relating to an arbitration agreement falling under the New York Convention may remove such action to federal court. We have, however, found no case in which the removal statute has been employed in a proceeding to enforce or quash an arbitral subpoena.

[97] Matria Healthcare, LLC v. Duthie, 584 F. Supp. 2d 1078, 1080-1081 (N.D. Ill. 2008) (emphasis added).

[98] *Id*

[99] As one commentator has observed, "Despite its prevalence and appeal, the argument that the greater includes the lesser must be used cautiously." Michael Herz, *Justice Byron White and the Argument that the Greater Includes the Lesser*, 1994 B.Y.U.L. Rev. 227, 241.

[100] *Id.* (noting that one "obvious error in relying on the greater-includes-the-lesser argument occurs when one proposition is not in fact 'the lesser' of the other.").

[101] In this regard, we note that, before the enactment of the federal rules allowing for pretrial discovery, the Supreme Court held that section 24 of the revised statutes (U.S. Comp. Stat. 1901, p. 583), which allowed courts to require parties to produce books or writings "in the trial of actions at law," did *not* authorize courts to require such production *prior to* the trial. Carpenter v. Winn, 221 U.S. 533 (1911).

agree with the Second and Third Circuits that, while there may be valid reasons to empower arbitrators to require pre-hearing testimony and production of documents from non-parties, a "statute's clear language does not morph into something more just because courts think it makes sense for it to do so."[102]

One leading commentator has suggested that the reliance in *Hay* and *Life Receivables* upon the plain language of the FAA and the historical context of its enactment reflects an excessively narrow minded approach to statutory interpretation and laments the fact that courts have not been more flexible in interpreting the FAA.[103] Among other things, he observes that the "plain meaning" approach reflects an underlying assumption that "a rational legislature would have wished to freeze the structure of an arbitration in the amber of 1925—rendering irrelevant any later evolution in our notions of procedure . . . ."[104] *At* 12. While the Committee agrees that the current state of the law is unsatisfactory, we believe that the solution is for Congress, at the appropriate time, to amend the statute and not for courts to continue to interpret it in ways that they think appropriate (or that they think a rational legislature would have found appropriate) – a process which, thus far, has resulted in conflicting decisions.

We also agree with the reasoning of the Second and Third Circuits that Section 7 does not confer upon federal courts authority to enforce arbitral orders for pre-hearing non-party discovery in the case of "special need or hardship," as suggested by the court in *COMSAT*. We note that there is authority for the proposition that federal courts may order discovery under Fed.R.Civ.P 27 in order to preserve evidence for arbitrations.[105] However, the Committee believes that, in most cases, the requirement of Rule 27 that the party seeking such discovery "expects to be a party to an action cognizable in a United States court"[106] would be an obstacle to the use of Rule 27 in connection with arbitrations.

It is true that, under current law, advance production of documents can be obtained in many cases by holding a pre-merits hearing or by threatening one, as suggested by Judge Chertoff in *Hay Group*. It is also true that territorial limitations on service and enforcement of arbitral subpoenas can possibly be avoided by relocating the arbitral tribunal or one of its members, or by threatening to do so. However, as explained below, the Committee believes that, ideally, Section 7 should be amended to provide for a more straightforward and less burdensome

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[102] Life Receivables, 549 F.3d at 216.

[103] Alan Scott Rau, Evidence and Discovery in American Arbitration: The Problem of "Third Parties", 19 AM. REV. INT'L ARB. 1, 9 (2008). Professor Rau found the decisions in *Hay* and *Life Receivables* "eerily reminiscent of the Supreme Court's equally wooden reading of § 10 in the recent *Hall Street* decision." *But see* Hayden v. Pataki, 449 F.3d 305, 367 (2d Cir. 2006) (Calabresi, J., dissenting). ("[I]t might be a good idea if . . . courts were permitted to read the law according to what they perceived to be the will of the current Congress, rather than that of a long-gone-by one. . . . But whatever the merits of such an arrangement in the abstract, it is simply not a part of our legal system.").

[104] Rau, *supra* note 102, at 12.

[105] 198 F.3d at 481. Although *Deiulemar* involved a request for interparty discovery, discovery may also be obtained from non-parties under Rule 27. *See, e.g*, *In re* I-35w Bridge Collapse Site Inspection, 243 F.R.D. 349, 352 n.3 (D. Minn. 2007) ("Rule 27 authorizes such an order to be entered against both parties and non-parties to anticipated litigation.") (citing 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2456, at 29 (2d ed. 1995) ("A subpoena duces tecum also may issue pursuant to a court order without the commencement of an action for the perpetuation of testimony under Rule 27.")).

[106] FED.R. CIV. P. 27(a)(1)(A).

procedure for obtaining documents and testimony from non-parties.

B. Section 7 of the FAA should be amended in due course.

The Committee recommends that Section 7 of the FAA be amended in due course to eliminate any requirement of a hearing for production of documents from non-parties, and to allow arbitral subpoenas to be served and enforced in the place where the testimony or production is to take place. We do not advocate, however, an amendment of the FAA solely for the purpose of revising Section 7; we believe that such a piecemeal amendment could send the wrong message to the international arbitration community. Amending only Section 7 of the FAA might be perceived as an expansion of the scope of arbitrators' authority to obtain evidence from non-parties—a perception that could potentially discourage discovery-adverse parties from agreeing to arbitrate in the United States. Accordingly, the Committee believes that the revisions it recommends to Section 7 below be made only if and when other sections of the FAA are amended as well, as part of a broader review and amendment of the FAA.[107]

1. Section 7 should be amended to eliminate any requirement of a hearing for production of documents from non-parties.

The Committee believes that, as part of a broader amendment of the FAA, Section 7 should eventually be amended to eliminate any requirement of a hearing for production of documents from non-parties. Most of the decisions that have addressed the question appear to recognize that allowing pre-hearing document production from non-parties would enhance the efficiency of arbitration and would not impose any undue burden. The Second and Third Circuits have recognized that the efficient, cost effective resolution of disputes is an important goal of arbitration, but have concluded that the prospect of enhanced efficiency cannot cause the language of the statute to morph into something else. Congress should eventually act to rectify the problem.

The requirement for arbitrators to hold a hearing or to employ the stratagem proposed by Judge Chertoff in order to obtain pre-hearing document production from non-parties has been sharply criticized. As Professor Siegel has observed:

> What can happen . . . suggests the court as one way around the restriction, is for the arbitrator to subpoena the nonparty to appear, with designated materials, after which the hearing can be adjourned, presumably affording the boning-up opportunity—analogous to pretrial disclosure in litigation—by that route. Maybe the party seeking the documents can just bargain with the nonparty: we'll save you the trouble of an appearance if you'll just give us the documents without one. Extorting a circuitous gambol like that suggests in any event that maybe the

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[107] There has been debate among commentators as to the potential benefits and risks for international arbitration of amending the FAA. *See* William W. Park *Amending the Federal Arbitration Act*, 13 AM. REV INT'L ARBITRATION 1(2002); William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT'L LAW 1241 (2003); Jan Paulsson, "International Arbitration is Not Arbitration," John E. C. Brierley Memorial Lecture McGill University, Montreal, 28 May 2008. *Cf.* J. Townsend *The Federal Arbitration Act Is Too Important To Amend*, THE INTERNATIONAL ARBITRATION NEWS (ABA), Summer 2004.

federal cases on the other side of the conflict have the better of the argument.[108]

Another commentator was equally blunt:

> It is supposed to be more flexible and less costly than litigation. The decisions in *Hay* and *COMSAT* invite an absurd subterfuge that is inconsistent with the purposes of arbitration. Judge Chertoff's concurring opinion in *Hay* actually endorses this subterfuge. He wrote that "arbitrators have the power to compel a third-party witness to appear with the documents before a single arbitrator, who can then adjourn the proceedings." He dismissed the cost issue, stating, "To be sure, this procedure requires the arbitrators to decide that they are prepared to suffer some inconvenience of their own in order to mandate what is, in reality, an advance production of documents." But it is not the arbitrators who will be inconvenienced; it is the parties, who will have to pay the arbitrators for wholly unnecessary activity.[109]

The Committee shares these concerns. Although it may be necessary and appropriate for arbitrators to hold hearings to rule on disputed issues of privilege or other document production issues that might be ripe for decision prior to a merits hearing, in many cases the identity of the documents to be produced may not be in dispute. In such cases, the requirement of a hearing and an appearance by the witness to obtain production of documents is a relic of a distant era. There is no longer any comparable requirement for production of documents by a non-party witness in cases in litigation in U.S. federal court. Since 1937, the federal rules have permitted pre-trial document production from non-parties without any requirement of a hearing. In 1991, Rule 45 was amended to eliminate any requirement of an appearance by a witness for document production, whether for discovery or at a hearing or trial.[110] In the Committee's view, the ability under the FAA to obtain documents from non-parties should remain limited and subject to the control of the arbitrators and the courts. However, it is difficult to conceive of any justification for maintaining the requirement of a hearing and an appearance by the witness for document production in arbitration. It potentially imposes unnecessary burdens and costs on all concerned—the parties, the arbitrators and the non-parties who are subject to the subpoena. Indeed, Rule 45(c)(2)(a), which eliminated the requirement of an appearance by the witness for production of subpoenaed documents, is one of a number of provisions listed under the heading "Protecting a Person Subject to a Subpoena."[111]

Judge Chertoff sought to rationalize Section 7's requirement of a hearing for document production with one or more arbitrators present by suggesting that it "will induce the arbitrators and parties to weigh whether advance production is really needed."[112] While it is conceivable

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[108] David D. Siegel, *Under Federal Arbitration Act, While Arbitrator can Subpoena Nonparty as Witness, it Can't Separately Compel Discovery; What's N.Y. Rule?* SIEGEL'S PRAC. REV. 2, December 2008.

[109] Lowell Pearson, *The Case for Non-Party Discovery Under the Federal Arbitration Act*, DISP. RESOL. J., AUG.-OCT. 2004, at 46, 52.

[110] Rule 45(c)(2)(A) provides that "a person commanded to produce documents . . . need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial." FED. R. CIV. P. 45(c)(2)(A).

[111] FED. R. CIV. P. 45(c).

[112] 360 F.3d at 414.

that it will have that effect, it may also cause arbitrators and parties to forego advance production even when there is a legitimate need.

2. The requirement of Section 7 of a hearing for testimony of non-parties should be maintained.

Under *Life Receivables* and *Hay Group*, any examination of non-party witnesses must take place with one or more arbitrators in attendance. The Committee believes that this requirement should be maintained. In this regard, the Committee agrees with the concerns expressed by the court in *Integrity Ins. Co. v. Am. Centennial Ins. Co.*, including the concern that the non-party might be required to appear twice (once for a deposition and again at the hearing) and the concern that, without the presence of the arbitrators, there is nothing to protect the non-party from harassing or abusive discovery, with the result that the non-party would be obliged to turn to the court for protection.[113]

3. Section 7 should be amended to allow arbitral subpoenas directed to non-parties to be served and enforced in the place where the non-parties are located, in same manner as subpoenas issued under Rule 45(a)(3)(B).

Rule 45 (a)(3)(B) provides that an attorney "may issue and sign a subpoena as an officer of . . . a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending."[114] The Rule effectively permits nationwide service and enforcement of discovery subpoenas for litigation in federal courts as long as they are issued in the name of a district court for the district where the deposition or document production is to take place and served either within that district, outside that district but within 100 miles of the place specified for the deposition or document production, or within the state of the issuing court. As these provisions of Rule 45 recognize, commerce, communications and business enterprises in the United States transcend state lines and the borders of judicial districts. In many cases, information necessary for the fair and efficient resolution of a dispute subject to arbitration will be in the hands of parties more than 100 miles from the place where the arbitrators are sitting. The Committee sees no reason why similar mechanisms for service and enforcement should not also be available for subpoenas for pre-hearing document production and testimony issued by arbitral tribunals.

There may be ways, under current law, to overcome the territorial limitation imposed in such cases as *Dynegy* on the service and enforcement of arbitral subpoenas. For example, as the authors of one article have observed: "One way for an arbitral panel to overcome this territorial jurisdictional obstacle is temporarily to relocate the arbitration hearing to within 100 miles of the subject of the subpoena."[115]

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[113] 885 F. Supp. at 71-72.

[114] FED. R. CIV. P. 45(a)(3)(B).

[115] Paul D. Friedland & Lucy Martinez, *Arbitral Subpoenas under U.S. Law and Practice*, 14 AM. REV. INT'L ARB. 197, 227 (2003). *See also* Robert W. DiUbaldo, Evolving Issues in Reinsurance Disputes: the Power of Arbitrators, 35 FORDHAM URB. L.J. 83, 99 (2008) ("[A]n arbitration panel could decide to 'sit' in a location other than where the arbitration is taking place but within 100 miles of the nonparty from whom discovery is sought for the sole purpose of complying with the territorial limits of FRCP 45 and section 7 to obtain nonparty discovery."); Teresa Snider, *The Discovery Powers of Arbitrators and Federal Courts under the Federal Arbitration Act*, 34 TORT & INS. L.J. 101,

Most institutional international arbitration rules permit arbitral tribunals to conduct hearings and meetings at locations other than the arbitral *situs*.[116] It is possible that, even in *ad hoc* arbitrations, the authority of arbitrators to establish their own procedural rules includes the authority to hold hearings elsewhere.[117]

At least one court has upheld a subpoena requiring a non-party to appear and testify before a relocated tribunal. In *In re Nat'l Fin. Partners Corp.*,[118] a federal district court in Pennsylvania refused to quash a subpoena issued by a sole arbitrator in Philadelphia ordering a non-party witness to appear and testify and to produce documents at a pre-merits hearing to be held within 100 miles of her home in Florida.[119] The court rejected the argument that the arbitrator lacked authority to issue such an order, holding: "The arbitrator apparently has concluded that the third-party testimony is relevant and is important enough to warrant travel to Florida, and I see no basis to disturb that determination." [120]

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108 (1998) ("To deal with the difficulty created by the FAA's limits on enforcing subpoenas of nonparty witnesses, the parties can change the locale of the arbitration to coincide with the judicial district where the nonparty witnesses reside."); Leslie Trager, *The Use of Subpoenas in Arbitration*, DISP. RESOL. J., NOV. 2007-JAN. 2008, at 14, 17 ("To circumvent this issue, we should ask whether the arbitrator could hold a separate document production hearing in the district where the witness resides and have the subpoena made returnable to that hearing. If the witness did not appear, then the party requesting the subpoena could ask the district or state court in that location to enforce the subpoena and for purposes of §7 of the FAA, the arbitrators would be sitting in that district.")

[116] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 427, 458 (2d ed. 2001); ALAN REDFERN, LAW AND PRACTICE OF INTERNATIONAL ARBITRATION 275-6 (4th ed. 2004). *See, e.g.*, UNCITRAL Rules 16(2) ("[The arbitral tribunal] may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration."); ICC Arbitration Rules 14(2) ("The Arbitral Tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate unless otherwise agreed by the parties."); AAA International Dispute Resolution Procedures Rule 13(2) ("The tribunal may hold conferences or hear witnesses or inspect property or documents at any place it deems appropriate. The parties shall be given sufficient written notice to enable them to be present at any such proceedings."). *But see* Trager, *supra* note 115. at 5 ("Because it is not entirely clear that arbitrators have the authority under the AAA rules to conduct a special hearing for document production purposes at a location other than the one originally chosen, the AAA may wish to consider whether it is necessary to make this authority explicit.").

[117] On the authority of arbitrators to fashion procedural rules, see *Commercial Risk Reinsurance Co. Ltd. v. Security Insurance Company of Hartford* 526 F.Supp.2d 424, 428 (S.D.N.Y.) (stating that arbitrators "possess broad latitude to determine the procedures governing their proceedings, to hear or not hear additional evidence, to decide what evidence is relevant, material or cumulative, and otherwise to restrict the scope of evidentiary submissions.").

[118] *In re* Nat'l/Fin. Partners Corp., No. 9-mc-00026, 2009 U.S. Dist. LEXIS 34440 (E.D. Pa. Apr. 21, 2009).

[119] *Id.* at *2.

[120] *Id.* It is questionable whether the Pennsylvania court in *National Financial Partners* had authority to decide a motion to quash a subpoena issued for documents and testimony from a non-party witness in Florida. First, in the district court in *Stolt*, Judge Rakoff questioned whether federal courts have authority under Section 7 to quash a subpoena, observing that "the FAA nowhere explicitly gives a person subpoenaed to an arbitration the right to move in a federal district court to quash the subpoena." 348 F. Supp.2d 283, 288 (S.D.N.Y. 2004). Judge Rakoff noted that there is some authority for the idea that the right to bring a motion to quash goes hand in hand with the court's power to enforce or refuse to enforce an arbitration subpoena, citing *Integrity Insurance Co. v. American Centennial Insurance Co.*, 885 F. Supp. 69, 72 (S.D.N.Y. 1995). On appeal in *Stolt*, 430 F.3d 567 (2d Cir. 2005), the Second Circuit seemed to assume that there was such authority. In *National Financial Partners*, however, the only possible basis for the arbitrator's authority to issue the subpoena was that he was (or would be) "sitting" in Florida. Therefore, under Section 7, the only court that would have authority either to enforce or quash that subpoena would be a court in the place where the arbitrator was or would be "sitting"—a federal district court in Florida.

However, in the absence of an express rule permitting the arbitrators to do so, it may be possible for a recalcitrant party to object to the holding of hearings in any place other than the agreed place of arbitration.[121] One commentator has suggested that there is some uncertainty as to whether federal courts would, in fact, enforce a subpoena issued by an itinerant panel, noting the absence of any case law on this issue and observing that some cases have equated Section 7's reference to "the place where the arbitrators are sitting" with the *situs* of the arbitration.[122]

In New York, another possible approach to obtaining evidence from a distant non-party would be to do what the parties did in *ImClone*: obtain open commissions from a state court permitting the taking of evidence from out of state non-parties. However, under *Life Receivables*, such evidence-taking measures will not be available to parties who find themselves in federal court.

The Committee believes that Section 7 should be amended in order to provide clear authority for the service and enforcement of arbitral subpoenas in much the same manner as subpoenas issued Rule 45(a)(3)(B). However, the Committee would not change the requirement of Section 7 that only the arbitrators are authorized to issue such subpoenas, subject to review by the courts. The Committee would not extend that right to the attorneys for the parties as permitted under Rule 45.

C. Recommended Best Practices Under the Current Law.

The Committee believes that Section 7 of the FAA provides parties and arbitrators in U.S.-based international arbitrations with useful means of obtaining evidence from non-parties located in the United States where such evidence is necessary for the fair and efficient resolution of the parties' dispute. As indicated above, the Committee believes that certain aspects of Section 7 could, and eventually should, be amended to provide more efficient means of obtaining necessary evidence from non-parties. The availability of these means of obtaining evidence from non-parties is entirely consistent in principle with international arbitration norms, as reflected in the IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules") which codify prevailing international arbitration evidence-taking procedures and which specifically contemplate the possibility of obtaining evidence from non-parties.[123]

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[121] *See* Snider, *supra* note 115,. at 101 ("However, many arbitration agreements require the consent of all parties to change the locale of the arbitration hearing, and a party may resist moving the hearing in order to preclude court enforcement of a subpoena."). The assertion that "many" arbitration agreements contain such specific limitations is questionable.

[122] DiUbaldo, *supra* note 115, at 99. *See* Gresham v. Norris, 304 F. Supp. 2d 795, 796 (E.D. Va. 2004) ("[A] district court maintains jurisdiction over such a petition [to enforce a subpoena under 9 U.S.C. § 7] if the *situs* of the pending arbitration is within its jurisdiction."). *But see In re* Nat'l Fin. Partners Corp., No. 09-mc-00027-JF, 2009 U.S. Dist. LEXIS 34440 (E.D. Pa. Apr. 21, 2009).

[123] A new version of the IBA Rules was issued on May 30, 2010. *See* http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx. With respect to documents, Article 3.9 of the IBA Rules provides: "If a Party wishes to obtain the production of Documents from a person or organisation who is not a Party to the arbitration and from whom the Party cannot obtain the documents on its own, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the requested documents or seek leave from the Arbitral Tribunal to take such steps itself.. The Party shall submit such request to the Arbitral Tribunal and to the other Parties in writing, and the request shall contain the particulars set forth in Article 3.3, as applicable. The Arbitral Tribunal shall decide on this request and shall take,

The Committee believes, however, that control over the process of obtaining evidence from non-parties must remain with the arbitrators (as opposed to the parties), and that arbitrators should exercise their discretion to subpoena evidence from non-parties only in exceptional circumstances where necessary to obtain evidence indispensible for the fair and just resolution of the parties' dispute. This arbitral control and discipline over the process of obtaining non-party evidence is necessary not only to protect the efficiency of the arbitral process against attempts by parties to obtain a broader scope of discovery or evidence from third parties than the arbitrators might otherwise allow, but also to respect the interests of non-parties who have not agreed to arbitration and are not parties to the arbitration. More specifically, in exercising control and discipline over the non-party evidence process, the Committee believes that arbitrators in international arbitrations: (i) should limit the scope of documents and testimony sought from non-parties to the tailored scope of disclosure and evidence ordinarily available in international arbitration as reflected in the IBA Rules;[124] (ii) should issue arbitral subpoenas for non-party evidence only when the evidence sought is unavailable from any of the parties to the arbitration and is indispensible to the fair and just resolution of the parties' dispute; and (iii) should ensure that the non-parties are burdened as little as possible by the demand for non-party evidence. Thus, arbitrators should subpoena non-parties only for "evidence" as opposed to "discovery," should request only evidence without which the case cannot likely be fairly decided, and should ordinarily ensure that a non-party need only testify once (rather than twice, first at a "pre-merits" hearing and again at the merits hearing). Finally, while Section 7 provides that non-party evidence may be taken "before [the arbitrators] or any of them," the Committee believes that all arbitrators should be present when a non-party provides testimony in an international arbitration. This is recommended both to ensure that arbitrators carefully weigh whether the non-party's testimony is "really needed" (to borrow Judge Chertoff's words), and to protect the enforceability of the arbitrators' eventual award from any challenges under the FAA or the New York Convention.[125]

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authorize the requesting Party to take, or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that *(i)* the Documents would be relevant to the case and material to its outcome, *(ii)* the requirements of Article 3.3, as applicable, have been satisfied and *(iii)* none of the reasons for objection set forth in Article 9.2 applies. With respect to testimony, Article 4.10 provides: "If a Party wishes to present evidence from a person who will not appear voluntarily at its request, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the testimony of that person, or seek leave from the Arbitral Tribunal to take such steps itself. In the case of a request to the Arbitral Tribunal, the Party shall identify the intended witness, shall describe the subjects on which the witness's testimony is sought and shall state why such subjects are relevant to the case and material to its outcome. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that the testimony of that witness would be relevant to the case and material to its outcome."

[124] Article 3(3) of the IBA Rules, for example, requires that Requests to Produce describe each requested "Document" or "a narrow and specific . . . category of Documents that are reasonably believed to exist," contain a statement as to how the Documents requested are "relevant to the case and material to its outcome." Under Article 9(2)(c) of the IBA Rules, the Arbitral Tribunal must exclude from evidence or production any document or testimony "an unreasonable burden to produce the requested evidence."

[125] For instance, a losing party could argue that testimony taken from a non-party outside the presence of the arbitrator appointed by that party was "not in accordance with the agreement of the parties" that the case be heard and decided by all of the arbitrators within the meaning of Article V(1)(d) of the New York Convention. In this regard, we note that some arbitration rules require the presence of all of the arbitrators for the taking of evidence. For example, Rule 31 of the AAA Commercial Rules provides: "All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default or has waived the right to be

When arbitrators have concluded, based on the factors outlined above, that it is appropriate to issue an order for the production of documents or testimony from non-parties, questions may arise as to the procedure to be followed. As discussed above, there is conflict among the Circuits and between state and federal courts as to the availability of pre-hearing evidence from non-parties. The Committee believes that, in formulating orders for the production of documents by non-parties, the best practice for arbitrators under current law is to endeavor to follow the clearly authorized path prescribed in such cases as *Life Receivables* and *Hay Group*. This will involve the issuance of an order for the production of documents at a "pre-merits" hearing convened especially for that purpose. In order to comply with the requirements of *Stolt*, the order should command the non-party "to appear . . . in an arbitration proceeding" and "to bring with [them] and produce at that time and place any and all documents and things, of which [they] have custody or control, which are responsive" to the requests contained in the subpoena.[126]

It is possible that, as Judge Chertoff suggested, the inconvenience of making such a personal appearance may well prompt the non-party witness to deliver the documents and waive presence. When a non-party witness is located outside the jurisdiction of the United States district court for the district in which the arbitrators are sitting, the arbitrators should be prepared to hold the pre-merits hearing at a place within 100 miles of the subject of the subpoena. Again, it is possible that even distant non-parties will deliver documents in response to such a subpoena without the need for the tribunal to relocate. A similar approach may be followed where the arbitrators believe that it is appropriate to require the testimony of a non-party prior to or in connection with a hearing on the merits.[127]

In states that have enacted the RUAA or other statutes permitting pre-hearing depositions of non-parties without the presence of the arbitrators, arbitrators may be asked to issue subpoenas for such depositions. In arbitrations subject to the FAA, courts that are asked to enforce arbitral subpoenas will also be faced with the question whether the FAA preempts state procedural law in this regard. The Committee believes that, whether or not state law is preempted by the FAA, arbitrators in international arbitrations should *not* issue subpoenas for depositions of non-party witnesses. As the International Centre for Dispute Resolution's

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present." Some state statutes also seem to impose such a requirement. *See, e.g.*, N.Y. C.P.L.R. § 7502(e), which provides: "The hearing shall be conducted by all the arbitrators, but a majority may determine any questions and render an award."

[126] *See* Odfjell ASA v. Celanese AG, 348 F. Supp. 2d 283, 285 (S.D.N.Y. 2004).

[127] In New York, an arbitral tribunal may be asked to cooperate with one or more of the parties in requesting the assistance of a state court in obtaining evidence from out of state non-parties. In *ImClone*, the First Department interpreted the FAA to permit pre-hearing discovery, including the issuance of commissions for the deposition of out of state witnesses, in "special circumstances" which, the court held, meant only that the information was unavailable from sources other than the non-party. In the lower court decision in *ImClone*, such commissions were issued at the joint request of the parties to the arbitration where "the arbitrators [had] determined that it [was] appropriate to take such depositions." ImClone v. Waksal, No. 602996/02, 2005 WL 5351321, slip. op. at 2 (N.Y. Sup. Ct. April 4, 2005). The Committee believes that state courts should require such a finding from the arbitrators before issuing commissions for obtaining evidence from out of state non-party witnesses. This decision should be left to the arbitrators in order to minimize the intrusion of courts into the sphere of arbitration and to avoid the waste of resources by ensuring that the information thus obtained can be used in the arbitration. As discussed below, the Committee believes arbitrators in international cases should *not* request state courts to issue commissions for depositions.

Guidelines for Arbitrators Concerning Exchanges of Information states in its Article 6(b): "Depositions . . . as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration."[128]

Finally, the Committee believes that, in international arbitrations, the issuance of orders for documents or testimony from non-parties should always be subject, in the first instance, to the control of the arbitrators. There are some state statutes which permit attorneys for the parties to arbitrations to issue subpoenas.[129] (As discussed above, the RUAA confers such authority only upon the arbitrators.) In cases subject to the FAA, federal courts have held that only the arbitrators may issue subpoenas for production of documents or testimony.[130] The question whether subpoenas issued by attorneys under state law should be enforced is likely to arise only in state courts.[131] The Committee believes that courts asked to enforce attorney-issued subpoenas for non-party testimony or document production for international arbitrations should exercise their discretion not to do so.

July, 2010

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[128] INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION, GUIDELINES FOR ARBITRATORS CONCERNING EXCHANGES OF INFORMATION, art. 6(b) (2008), http://www.adr.org/si.asp?id=5288.

[129] For example, N.Y. C.P.L.R. § 7505 provides: "An arbitrator and any attorney of record in the arbitration proceeding has the power to issue subpoenas."

[130] A number of federal courts have held that, under Section 7, the parties to an arbitration may not issue subpoenas. *See* NBC v. Bear Stearns & Co., 165 F.3d 184, 187 (2d Cir. 1999) ("§ 7 explicitly confers authority only upon *arbitrators*; by necessary implication, the *parties* to an arbitration may not employ this provision to subpoena documents or witnesses,"); St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co., 969 F.2d 585, 591 (7th Cir. 1992); Burton v. Bush, 614 F.2d 389, 390 (4th Cir. 1980) ("While an arbitration panel may subpoena documents or witnesses, the litigating parties have no comparable privilege.") (citations omitted).

[131] Under *ImClone*, a New York court is likely to hold that the Section 7 of the FAA preempts CPLR §7505.

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Reflections on the Use of Dispositive Motions in Arbitration

By Edna Sussman and Solomon Ebere

Responding to the perception that arbitration is not sufficiently time and cost-effective, the use of all of the tools at the arbitrator's disposal to streamline the process is being urged. Summary disposition is increasingly being suggested by arbitration practitioners as such a tool.[1] Corporate arbitration users too are urging the greater use of early resolution of issues, noting that "early resolution of...issues could streamline the proceedings and eliminate the necessity for much evidence, briefing and pleading of factual detail and therefore reduce the cost of arbitration. At the very least, early resolution of such issues could conceivably push the parties to an early settlement."[2] While allowing the kind of motion practice in arbitration that prevails in court would lead to the delays and costs incurred in court and is to be assiduously avoided, an examination of the desirability of the greater use of summary adjudication in appropriate cases is warranted.

For purposes of this article, dispositive motions are motions that resemble the type of motions filed in U.S. civil litigation and that a court would consider dispositive of a case or of parts of a case, such as motions for summary judgment or motions to dismiss or strike claims or defenses. In U.S. civil litigation, these mechanisms are frequently used to set aside unmeritorious claims or defenses, and promote a faster resolution of disputes. Proponents of the greater use of dispositive motions in arbitration argue that, for similar reasons, arbitrators ought to use similar procedural tools to resolve disputes at an early stage of the arbitration proceeding where appropriate.

In practice, however, it is generally believed that arbitrators have been reluctant to hear and grant dispositive motions.[3] This hesitation can be caused by several concerns: many major arbitration rules lack explicit rules authorizing arbitrators to entertain dispositive motions; summary disposition of a case may render the resulting award vulnerable to challenges before courts; the absence of the right of appeal in arbitration creates a hesitation to abbreviate the process and raises concerns about the appearance of justice, or lack thereof, in a truncated proceeding. While the latter concerns cannot be ignored, users are resoundingly asking for a more muscular process. Since arbitration is a creature of party choice, the users' stated preferences should be given serious consideration.

This article reviews the arbitrator's authority to decide dispositive motions and the cases in the U.S. which have dealt with petitions to vacate an arbitrator's award on a dispositive motion. In brief, U.S. courts accord a summary adjudication the same deference as an adjudication after a full blown hearing, as long as the parties have been afforded a fundamentally fair proceeding.

The Arbitrator's Authority

Neither the Federal Arbitration Act ("FAA"), nor the Uniform Arbitration Act ("UAA") expressly provide for dispositive motions. However, based on the flexibility and discretion granted to arbitrators,[4] courts have found that arbitrators have the authority to grant such motions even when the arbitral rules governing the arbitration, such as the American Arbitration Association's ("AAA") Commercial Arbitration Rules, do not expressly grant such authority.[5] As the Third Circuit said in *Sherrock Brothers, Inc. v. Daimler Chrysler Motors Company, LLC:*

> Granting summary judgment surely falls within this standard [of broad discretion to the arbitrator] and fundamental fairness is not implicated by an arbitration panel's decision to forego an evidentiary hearing because of its conclusion that there were no genuine issues of material fact in dispute. An evidentiary hearing will not be required just to find out whether real issues surface in a case.[6]

Moreover, many institutional arbitration rules do provide arbitrators with express authority to entertain dispositive motions. These include Rule 32(c) of the AAA's Construction Industry Rules, Rule 27 of the AAA's Employment Arbitration Rules, and Rule 18 of the JAMS Comprehensive Arbitration Rules.[7] The utility of enabling the arbitrator to decide dispositive motions was recognized and arbitral authority to decide such motions was expressly incorporated into Section 15(b) of the 2000 Revised Uniform Arbitration Act ("RUAA") which provides: "[a]n arbitrator may decide a request for summary disposition of a claim or particular issue."[8]

In international arbitration, as in domestic arbitration, the general grant of discretion to the arbitrator under institutional rules supports the authority of the arbitrator to make summary adjudications. See, ICDR Rules Article 16:3, ICC Rules Article 20: LCIA Rules Article 14:2: UNCITRAL Rules Article 15.2. In 2006 ICSID revised its Arbitration Rules and included Article 41(5), which expressly provided arbitrators with the power to summarily dispose of a case.[9]

The view of the international arbitration bar as to the arbitrator's authority is also reflected in the International Bar Association Rules on the Taking of Evidence in Inter-

national Arbitration, Article 2, which states, in relevant part: "3. The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues (...) for which a preliminary determination may be appropriate." The Commentary on the Rules further states: "While the Working Party did not want to encourage litigation-style motion practice, the Working Party recognized that in some cases certain issues may resolve all or part of a case. In such circumstances, the IBA Rules of Evidence make clear that the arbitral tribunal has the authority to address such matters first, so as to avoid potentially unnecessary work."[10]

Judicial Review of Summary Adjudications

Summary dispositions by arbitrators have been sanctioned by the courts. Generally, parties challenging an arbitration panel's decision to grant a dispositive motion have contended either that the arbitrators had "exceeded their power," and/or that they engaged in "misconduct in...refusing to hear evidence pertinent and material to the controversy," two of the grounds for vacatur stated in Section 10(a) of the Federal Arbitration Act.[11] In addition to these statutory grounds, parties have raised challenges based on manifest disregard of the law and violation of public policy.

A court's review of challenges to summary adjudications is grounded in the same premise as that applicable to all other arbitral awards. The court's "scope of... review is narrow" and the analysis is not an "occasion for a de novo review of an award." Arbitration awards, including summary adjudications, are to be "be enforced despite a court's disagreement with the merits, if there is a barely colorable justification for the outcome reached."[12] But the courts do review arbitration awards, including summary adjudications, to ensure that parties to arbitration are not deprived of a "fundamentally fair proceeding" which requires that a party receive "notice, opportunity to be heard and to present relevant and material evidence and argument before the decision makers."[13]

In *Global Int'l Reinsurance Co. Ltd. v. TIG Ins. Co.*, Judge Rakoff of the Federal Court in the Southern District of New York was not persuaded to vacate an award based on claims that the arbitrator had resolved factual disputes without discovery or an evidentiary hearing. The court stated that "arbitrators have great latitude to determine the procedures governing their proceedings and to restrict or control evidentiary proceedings" and "need not compromise the speed and efficiency goals of arbitration by allowing the parties to present every piece of relevant evidence."[14] The court concluded that the arbitrator was well within his discretion when he determined that the contracts were clear on their face and that further evidence or testimony was not necessary to resolve the issue of contract interpretation before him. The court found that by permitting the losing party to fully brief the issue and submit all evidence it believed to be relevant, conducting a four-hour oral argument and reviewing all of the relevant contracts, the arbitrator had afforded the losing party an adequate opportunity to present its evidence and argument.

Other courts have similarly stated that a refusal to hear all evidence is not enough to vacate an award. "The law only requires that the parties be given *an* opportunity to present their evidence, not that they be given every opportunity" (emphasis in original).[15] Those seeking to vacate an award must show that the excluded evidence was material to the panel's determination and that the refusal to hear the evidence was so prejudicial that the party was denied fundamental fairness.[16] If complaining about a denial of discovery, in order to prevail on a vacatur, a party must show that the evidence that would have been obtained in discovery would overcome the panel's decisions.[17] Parties are not entitled to full discovery that would not change the outcome when the matter can be decided on a pre-hearing motion.

Parties are not entitled in every case to a full-blown evidentiary hearing. In *Schlessinger v. Rosenfeld, Meyer & Susman*, the court (applying California law) stated that a party is entitled to cross-examine if a witness appears at a hearing, but the law does not give a party an absolute right to present oral testimony in every case. The court recognized that a legal issue or defense could possibly be resolved on undisputed facts, and the purpose of arbitration to deliver a speedy and inexpensive means of dispute resolution would be defeated by precluding summary adjudications and requiring a full scale evidentiary hearing in all cases.[18] At least one court has even said that self-serving conclusory statements rejected by the arbitrator as insufficient to create a genuine issue of material fact to defeat the summary judgment motion need not block the granting of a motion.[19]

There are many fact patterns in which a summary adjudication of all or part of the claims and defenses asserted in an arbitration may be appropriate.[20] To illustrate, summary adjudications by arbitrators were granted and confirmed by the courts on the following grounds: res judicata and collateral estoppel,[21] plain meaning of the contract,[22] statute of limitations,[23] standing and preemption,[24] waiver and estoppel,[25] employment at will,[26] failure to comply with a contractual claims or notice procedure,[27] evidence insufficient to permit a rational inference by a trier of fact,[28] and failure to state a claim because no duty was owing.[29] The availability of summary adjudication and its enforcement for international arbitrations under the New York Convention has also been confirmed.[30] While there have been cases in which a summary adjudication has been vacated,[31] those cases are few, and they present facts in which the arbitrator failed to allow for the presentation of material non-cumulative evidence.

A Cautionary Note

As the cases instruct us, while arbitrators have the authority to consider motions for summary disposition and courts have generally affirmed summary adjudications, arbitrators must take great care in exercising this power.

First, the avoidance of increasing the costs of the proceedings and/or delaying its conclusion must be paramount. How sound is the motion and what is its likelihood of success? Are there issues of fact that would preclude ruling in favor of the motion? Will the motion, if granted, really reduce costs and expedite the arbitration, or will it lead to just the opposite result?

In many cases, striking a few unmeritorious claims or defenses of several asserted would not serve to abbreviate the proceedings. Consideration of a motion not likely to succeed will waste time and money. The cost and dilatory impact of court-style motion practice, where the making of dispositive motions is the norm, is precisely what arbitration should avoid. In order to deflect inappropriate motions, arbitrators often discuss the issue of motions in the first preliminary conference to determine the parties' plans in this regard and consider with the parties whether there are appropriate motions to be made. Arbitrators also often require that a letter application for leave to file motions (other than discovery motions) be submitted before a motion is made and afford the opposing party an opportunity to respond to the application.

Second, arbitrators must ensure that they apply the appropriate standard for summary disposition, *i.e.*, that the facts upon which the dispositive motion is made are not in dispute. If there are genuine issues of fact material to the decision, granting a dispositive motion would likely be viewed as depriving the party of a fair proceeding. Arbitrators must also ensure that they have carefully considered any discovery requests by the opposing party. If a party is denied requested discovery that is material to the motion and could alter the result, there would likely be a finding that the party was denied its right to a fundamentally fair proceeding. Issuing an award that is vacated for failure to provide a fundamentally fair proceeding thus requiring the parties to relitigate the matter is the worst result an arbitrator can deliver.

Accordingly, arbitrators must carefully balance the possible benefits to be derived from allowing a dispositive motion to be made against the costs and potential delays occasioned by the motion before allowing the motion to be made. Arbitrators should be confident that the movant is entitled to the relief sought based on undisputed facts and the opponent has had the benefit of any relevant and material discovery sought before granting a dispositive motion.

If a summary adjudication is granted, the arbitrator would serve the parties well and diminish the likelihood of vacatur by writing a reasoned award explaining the basis for the decision and why any evidence that was not considered or discovery not permitted was not material and would not have changed the result.

Conclusion

As in so many aspects of the arbitrator's role, the exercise of good judgment is crucial. Each case must be reviewed in light of its particular facts. An ill-advised consideration of a dispositive motion or a grant of a dispositive motion later vacated by a court will occasion even more cost and delay and deny the parties the benefits arbitration is intended to provide. But dispositive motions are a powerful tool available to streamline proceedings, and arbitrators should not shy away from meritorious dispositive motions that will reduce time and cost. If arbitration is to deliver on its promise of offering a faster and cheaper dispute resolution mechanism, arbitrators should be proactive in considering with the parties the possible advantages of addressing claims or defenses that are legally insufficient at the earliest opportunity.

The College of Commercial Arbitrators protocol for arbitrators with respect to dispositive motions strikes just the right balance in urging arbitrators to "discourage the filing of unproductive motions; limit motions for summary judgment to those that hold reasonable promise for streamlining or focusing the arbitration process, but act aggressively on those."[32]

Endnotes

1. *See* Catherine M. Amirfar, Claudia D. Salas, *How Summary Adjudication Can Promote Fairness and Efficiency in International Arbitration*, International Bar Association, Arbitration Newsletter (2010), *see also* Alfred G. Ferris and Biddle W. Lee, *The Use of Dispositive Motions in Arbitration*, 62 Disp. Resol. J. 17, 24 (2007), Mark Friedman and Steven Michaels, *Is It Summary Judgment Time?*, Global Arbitration Review, Vol. 1 Issue 2 (2008), *available at* http://www.globalarbitrationreview com/journal/issues/issue/173/volume-1-issue-2/
2. *See* Lisa Davis George, *The Case for User Feedback in Arbitrator Selection*, 65 Disp. Resol J. 18 (2011).
3. *See* D. Brian King and Jeffery P. Commission, *Summary Judgment in International Arbitration: The "Nay" Case*, ABA International Law Spring 2010 Meeting, at 1 (Spring 2010), *available at* http://apps.americanbar.org/intlaw/spring2010/materials/Common%20Law%20Summary%20Judgment%20in%20International%20Arbitration/King%20-%20Commission pdf (observing that "there is little empirical evidence of use of such a mechanism in the practice of arbitral tribunals ").
4. *See e.g.*, American Arbitration Association, Commercial Arbitration Rules, Rule R-30(b).
5. Of course, if summary adjudication is precluded in the contract's arbitration clause, it is not available
6. *Sherrock Brothers, Inc v. DaimlerChrysler Motors Co., LLC*, 260 Fed. Appx. 497, 502 (3rd Cir 2008).

7. *But see* Rule 12504 of the Financial Industry Regulatory Authoity's Code of Arbitration Procedure for Customer Disputes, which allows dispositive motions but only with respect to very limited specified issues.

8. 2000 Revised Uniform Arbitration Act ("RUAA"), Section 15(b), *available at* http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm. As of 2007, it has been enacted in 12 states.

9 For a discussion of these rules, *see* Judith Gill, *Applications for Early Disposition of Claims in Arbitration Proceedings*, ICCA Congress Series No. 14, Proceedings of June 2008 Dublin Conference (2009)

10. International Bar Association Rules on the Taking of Evidence in International Arbitration, *available at* http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx.

11. Federal Arbitration Act, 9 U.S.C. 10(a).

12. *Global Int'l Reinsurance Co. Ltd. v. TIG Ins. Co.*, No. 08 civ. 7338, 2009 U.S. Dist. LEXIS 7697, *3 (S.D N Y. January 20, 2009).

13. *Dave Sheldon v. Jay Vermonty*, 269 F.3d 1202, 1207 (10th Cir. 2001).

14. *Global Int'l Reinsurance Co. Ltd. v. TIG Ins. Co.*, *supra* note 12, at *4.

15. *See Max Marx Color & Chem. Co. Employees' Profit Sharing Plan v. Barnes*, 37 F. Supp. 2d 248, 252 n 23 (S.D.N.Y 1999)

16. *See Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, No. 01 C 5226, 2004 U.S. Dist. LEXIS 3494 (N.D. Ill. March 8, 2004); *Warren v. Thacher*, 114 F. Supp. 2d 600 (W.D. Ky. 2000).

17. *See The Louisiana Brown 1992 Irrevocable Trust v. Peabody Coal Co.*, No. 99-3322, 2000 U.S. App. LEXIS 1909 (6th Cir. 2000); *Warren v. Thacher, supra* note 16.

18. *See Schlessinger v. Rosenfeld, Meyer & Susman*, 40 Cal. App. 4th 1096 (Cal. Ct. App. 1995); *accord, Warren v. Thacher, supra* note 16.

19. *See LaPine v. Kyocera Corp.*, No. 07-06132, 2008 U.S. LEXIS 41172 (N.D Cal., May 22, 2008).

20. For a discussion of additional cases *see* David Raim and Nancy Monarch, *Summary Disposition in Arbitration Proceedings*, 11 Arias-US Quarterly, 12 (2004); David E. Robbins, *Calling All Arbitrators. Reclaim Control of the Arbitration Process—The Courts Let You*, 60 Disp Res J. Vol. 9 (2005).

21 *See Sherrock Brothers, Inc v DaimlerChrysler Motors Co., LLC, supra* note 6.

22. *See Global Int'l Reinsurance Co Ltd. v. TIG Ins. Co , supra* note 12; *Intercarbon Bermuda Ltd, v. Caltex Trading and Transp Corp.*, 146 F.R.D. 64 (S.D.N.Y. 1993).

23. *See Ozormoor v. T- Mobile USA Inc.*, 2010 U.S. Dist LEXIS 85248 (E D.Mich. August 19, 2010); *see also Stifler v Weiner*, 488 A.2d 192 (Ct Spec. App. Md. 1985).

24. *See Max Marx Color & Chem Co. Employees' Profit Sharing Plan v. Barnes, supra* note 15

25. *See LaPine v. Kyocera Corp., supra* note 19.

26. *See Goldman Sachs & Co. v. Patel QDS:224S164*, 222 N.Y.L.J. 35 (S. Ct., N.Y. Cty. 1999).

27. *See Pegasus Constr Corp. v. Turner Constr. Co.*, 929 P.2d 1200 (Ct App Wash. 1997); *The Louisiana Brown 1992 Irrevocable Trust v. Peabody Coal Co., supra* note 17.

28. *See Hamilton v. Sirius Radio*, 375 F. Supp. 2d 269 (S.D.N Y 2005).

29. *See Warren v. Thacher, supra* note 16.

30. *See LaPine v. Kyocera Corp., supra* note 19.

31. *See e.g. Int'l Union, United Mine Workers v. Marrowbone*, 232 F.3d 383 (4th Cir. 2000) (arbitrator in a labor dispute where the parties had acknowledged that there were factual disputes refused evidence which he had not determined was cumulative, irrelevant or immaterial); *Prudential Secs. v. Dalton*, 929 F Supp. 1411, 1417 (N.D. Okla. 1996) (arbitrators dismissed facially sufficient claim and failed to allow claimant to present evidence pertinent and material to the controversy); *Thomas Neary v. The Prudential Ins. Co. of Am.*, 63 F. Supp. 2d 208 (D. Conn. 1999) (arbitrators manifestly disregarded standard for summary judgment); *Andrew v. CUNA Brokerage Serv. Inc.*, 976 A. 2d 496 (Sup. Ct Pa. 2009) (arbitrators granted summary judgment on statute of limitations ground on a fraud claim where the losing party claimed he did not know and could not have reasonably been expected to know about his investment losses until a later date and that accordingly an evidentiary hearing was required to determine the validity of the limitations defense).

32 College of Commercial Arbitrators, *Protocols for Expeditious, Cost Effective Commercial Arbitration*, at 73 (2010), *available at* http://www.thecca.net/CCA_Protocols.pdf.

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Arbitration Rules

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Arbitration Rules and Mediation Procedures

Including Procedures for Large, Complex Commercial Disputes

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Commercial Arbitration Rules and Mediation Procedures

(Including Procedures for Large, Complex Commercial Disputes)

Important Notice

These rules and any amendment of them shall apply in the form in effect at the time the administrative filing requirements are met for a demand for arbitration or submission agreement received by the AAA®. To ensure that you have the most current information, see our web site at **www.adr.org.**

Introduction

Each year, many millions of business transactions take place. Occasionally, disagreements develop over these business transactions. Many of these disputes are resolved by arbitration, the voluntary submission of a dispute to an impartial person or persons for final and binding determination. Arbitration has proven to be an effective way to resolve these disputes privately, promptly, and economically.

The American Arbitration Association® (AAA), a not-for-profit, public service organization, offers a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, families, communities, and all levels of government. Services are available through AAA headquarters in New York and through offices located in major cities throughout the United States. Hearings may be held at locations convenient for the parties and are not limited to cities with AAA offices. In addition, the AAA serves as a center for education and training, issues specialized publications, and conducts research on various forms of alternative dispute resolution.

Standard Arbitration Clause

The parties can provide for arbitration of future disputes by inserting the following clause into their contracts:

> *Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.*

Arbitration of existing disputes may be accomplished by use of the following:

> *We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules the following Controversy: (describe briefly). We further agree that the above controversy be submitted to (one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrator(s), and that a judgment of any court having jurisdiction may be entered on the award.*

The services of the AAA are generally concluded with the transmittal of the award. Although there is voluntary compliance with the majority of awards, judgment on the award can be entered in a court having appropriate jurisdiction if necessary.

Administrative Fees

The AAA charges a filing fee based on the amount of the claim or counterclaim. This fee information, which is included with these rules, allows the parties to exercise control over their administrative fees. The fees cover AAA administrative services; they do not cover arbitrator compensation or expenses, if any, reporting services, or any post-award charges incurred by the parties in enforcing the award.

Mediation

Subject to the right of any party to opt out, in cases where a claim or counterclaim exceeds $75,000, the rules provide that the parties shall mediate their dispute upon the administration of the arbitration or at any time when the arbitration is pending. In mediation, the neutral mediator assists the parties in

reaching a settlement but does not have the authority to make a binding decision or award. Mediation is administered by the AAA in accordance with its Commercial Mediation Procedures. There is no additional filing fee where parties to a pending arbitration attempt to mediate their dispute under the AAA's auspices.

Although these rules include a mediation procedure that will apply to many cases, parties may still want to incorporate mediation into their contractual dispute settlement process. Parties can do so by inserting the following mediation clause into their contract in conjunction with a standard arbitration provision:

> *If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.*

If the parties want to use a mediator to resolve an existing dispute, they can enter into the following submission agreement:

> *The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Commercial Mediation Procedures. (The clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, and any other item of concern to the parties.)*

Large, Complex Cases

Unless the parties agree otherwise, the procedures for Large, Complex Commercial Disputes, which appear in this pamphlet, will be applied to all cases administered by the AAA under the Commercial Arbitration Rules in which the disclosed claim or counterclaim of any party is at least $500,000 exclusive of claimed interest, arbitration fees and costs. The key features of these procedures include:

- A highly qualified, trained Roster of Neutrals;
- A mandatory preliminary hearing with the arbitrators, which may be conducted by teleconference;
- Broad arbitrator authority to order and control the exchange of information, including depositions;
- A presumption that hearings will proceed on a consecutive or block basis.

Commercial Arbitration Rules

R-1. Agreement of Parties*

(a) The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules. These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a Demand for Arbitration or Submission Agreement received by the AAA. Any disputes regarding which AAA rules shall apply shall be decided by the AAA. The parties, by written agreement, may vary the procedures set forth in these rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator.

(b) Unless the parties or the AAA determines otherwise, the Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds $75,000, exclusive of interest, attorneys' fees, and arbitration fees and costs.

Parties may also agree to use these procedures in larger cases. Unless the parties agree otherwise, these procedures will not apply in cases involving more than two parties. The Expedited Procedures shall be applied as described in Sections E-1 through E-10 of these rules, in addition to any other portion of these rules that is not in conflict with the Expedited Procedures.

(c) Unless the parties agree otherwise, the Procedures for Large, Complex Commercial Disputes shall apply to all cases in which the disclosed claim or counterclaim of any party is at least $500,000 or more, exclusive of claimed interest, attorneys' fees, arbitration fees and costs. Parties may also agree to use the procedures in cases involving claims or counterclaims under $500,000, or in nonmonetary cases. The Procedures for Large, Complex Commercial Disputes shall be applied as described in Sections L-1 through L-3 of these rules, in addition to any other portion of these rules that is not in conflict with the Procedures for Large, Complex Commercial Disputes.

(d) Parties may, by agreement, apply the Expedited Procedures, the Procedures for Large, Complex Commercial Disputes, or the Procedures for the Resolution of Disputes through Document Submission (Rule E-6) to any dispute.

(e) All other cases shall be administered in accordance with Sections R-1 through R-58 of these rules.

* *A dispute arising out of an employer-promulgated plan will be administered under the AAA's Employment Arbitration Rules and Mediation Procedures. A dispute arising out of a consumer arbitration agreement will be administered under the AAA's Consumer Arbitration Rules.*

R-2. AAA and Delegation of Duties

When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices. Arbitrations administered under these rules shall only be administered by the AAA or by an individual or organization authorized by the AAA to do so.

R-3. National Roster of Arbitrators

The AAA shall establish and maintain a National Roster of Arbitrators ("National Roster") and shall appoint arbitrators as provided in these rules. The term "arbitrator" in these rules refers to the arbitration panel, constituted for a particular case, whether composed of one or more arbitrators, or to an individual arbitrator, as the context requires.

R-4. Filing Requirements

(a) Arbitration under an arbitration provision in a contract shall be initiated by the initiating party ("claimant") filing with the AAA a Demand for Arbitration, the administrative filing fee, and a copy of the applicable arbitration agreement from the parties' contract which provides for arbitration.

(b) Arbitration pursuant to a court order shall be initiated by the initiating party filing with the AAA a Demand for Arbitration, the administrative filing fee, and a copy of any applicable arbitration agreement from the parties' contract which provides for arbitration.

- **i.** The filing party shall include a copy of the court order.
- **ii.** The filing fee must be paid before a matter is considered properly filed. If the court order directs that a specific party is responsible for the filing fee, it is the responsibility of the filing party to either make such payment to the AAA and seek reimbursement as directed in the court order or to make other such arrangements so that the filing fee is submitted to the AAA with the Demand.
- **iii.** The party filing the Demand with the AAA is the claimant and the opposing party is the respondent regardless of which party initiated the court action. Parties may request that the arbitrator alter the order of proceedings if necessary pursuant to R-32.

(c) It is the responsibility of the filing party to ensure that any conditions precedent to the filing of a case are met prior to filing for an arbitration, as well as any time requirements associated with the filing. Any dispute regarding whether a condition precedent has been met may be raised to the arbitrator for determination.

(d) Parties to any existing dispute who have not previously agreed to use these rules may commence an arbitration under these rules by filing a written submission agreement and the administrative filing fee. To the extent that the parties' submission agreement contains any variances from these rules, such variances should be clearly stated in the Submission Agreement.

(e) Information to be included with any arbitration filing includes:

- **i.** the name of each party;
- **ii.** the address for each party, including telephone and fax numbers and e-mail addresses;
- **iii.** if applicable, the names, addresses, telephone and fax numbers, and e-mail addresses of any known representative for each party;
- **iv.** a statement setting forth the nature of the claim including the relief sought and the amount involved; and
- **v.** the locale requested if the arbitration agreement does not specify one.

(f) The initiating party may file or submit a dispute to the AAA in the following manner:

- **i.** through AAA WebFile, located at **www.adr.org;** or
- **ii.** by filing the complete Demand or Submission with any AAA office, regardless of the intended locale of hearing.

(g) The filing party shall simultaneously provide a copy of the Demand and any supporting documents to the opposing party.

(h) The AAA shall provide notice to the parties (or their representatives if so named) of the receipt of a Demand or Submission when the administrative filing requirements have been satisfied. The date on which the filing requirements are satisfied shall establish the date of filing the dispute for administration. However, all disputes in connection with the AAA's determination of the date of filing may be decided by the arbitrator.

(i) If the filing does not satisfy the filing requirements set forth above, the AAA shall acknowledge to all named parties receipt of the incomplete filing and inform the parties of the filing deficiencies. If the deficiencies are not cured by the date specified by the AAA, the filing may be returned to the initiating party.

R-5. Answers and Counterclaims

(a) A respondent may file an answering statement with the AAA within 14 calendar days after notice of the filing of the Demand is sent by the AAA. The respondent shall, at the time of any such filing, send a copy of any answering statement to the claimant and to all other parties to the arbitration. If no answering statement is filed within the stated time, the respondent will be deemed to deny the claim. Failure to file an answering statement shall not operate to delay the arbitration.

(b) A respondent may file a counterclaim at any time after notice of the filing of the Demand is sent by the AAA, subject to the limitations set forth in Rule R-6. The respondent shall send a copy of the counterclaim to the claimant and all other parties to the arbitration. If a counterclaim is asserted, it shall include a statement setting forth the nature of the counterclaim including the relief sought and the amount involved. The filing fee as specified in the applicable AAA Fee Schedule must be paid at the time of the filing of any counterclaim.

(c) If the respondent alleges that a different arbitration provision is controlling, the matter will be administered in accordance with the arbitration provision submitted by the initiating party subject to a final determination by the arbitrator.

(d) If the counterclaim does not meet the requirements for filing a claim and the deficiency is not cured by the date specified by the AAA, it may be returned to the filing party.

R-6. Changes of Claim

(a) A party may at any time prior to the close of the hearing or by the date established by the arbitrator increase or decrease the amount of its claim or counterclaim. Written notice of the change of claim amount must be provided to the AAA and all parties. If the change of claim amount results in an increase in administrative fee, the balance of the fee is due before the change of claim amount may be accepted by the arbitrator.

(b) Any new or different claim or counterclaim, as opposed to an increase or decrease in the amount of a pending claim or counterclaim, shall be made in writing and filed with the AAA, and a copy shall be provided to the other party, who shall have a period of 14 calendar days from the date of such transmittal within which to file an answer to the proposed change of claim or counterclaim with the AAA. After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator's consent.

R-7. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

R-8. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

R-9. Mediation

In all cases where a claim or counterclaim exceeds $75,000, upon the AAA's administration of the arbitration or at any time while the arbitration is pending, the parties shall mediate their dispute pursuant to the applicable provisions of the AAA's Commercial Mediation Procedures, or as otherwise agreed by the parties. Absent an agreement of the parties to the contrary, the mediation shall take place concurrently with the arbitration and shall not serve to delay the arbitration proceedings. However, any party to an arbitration may unilaterally opt out of this rule upon notification to the AAA and the other parties to the arbitration. The parties shall confirm the completion of any mediation or any decision to opt out of this rule to the AAA. Unless agreed to by all parties and the mediator, the mediator shall not be appointed as an arbitrator to the case.

R-10. Administrative Conference

At the request of any party or upon the AAA's own initiative, the AAA may conduct an administrative conference, in person or by telephone, with the parties and/or their representatives. The conference may address such issues as arbitrator selection, mediation of the dispute, potential exchange of information, a timetable for hearings, and any other administrative matters.

R-11. Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. Any disputes regarding the locale that are to be decided by the AAA must be submitted to the AAA and all other parties within 14 calendar days from the date of the AAA's initiation of the case or the date established by the AAA. Disputes regarding locale shall be determined in the following manner:

(a) When the parties' arbitration agreement is silent with respect to locale, and if the parties disagree as to the locale, the AAA may initially determine the place of

arbitration, subject to the power of the arbitrator after appointment, to make a final determination on the locale.

(b) When the parties' arbitration agreement requires a specific locale, absent the parties' agreement to change it, or a determination by the arbitrator upon appointment that applicable law requires a different locale, the locale shall be that specified in the arbitration agreement.

(c) If the reference to a locale in the arbitration agreement is ambiguous, and the parties are unable to agree to a specific locale, the AAA shall determine the locale, subject to the power of the arbitrator to finally determine the locale.

The arbitrator, at the arbitrator's sole discretion, shall have the authority to conduct special hearings for document production purposes or otherwise at other locations if reasonably necessary and beneficial to the process.

R-12. Appointment from National Roster

If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner:

(a) The AAA shall send simultaneously to each party to the dispute an identical list of 10 (unless the AAA decides that a different number is appropriate) names of persons chosen from the National Roster. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.

(b) If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 14 calendar days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. The parties are not required to exchange selection lists. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable to that party. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the National Roster without the submission of additional lists.

(c) Unless the parties agree otherwise, when there are two or more claimants or two or more respondents, the AAA may appoint all the arbitrators.

R-13. Direct Appointment by a Party

(a) If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. The notice of appointment, with the name and address of the arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any appointing party, the AAA shall submit a list of members of the National Roster from which the party may, if it so desires, make the appointment.

(b) Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Section R-18 with respect to impartiality and independence unless the parties have specifically agreed pursuant to Section R-18(b) that the party-appointed arbitrators are to be non-neutral and need not meet those standards.

(c) If the agreement specifies a period of time within which an arbitrator shall be appointed and any party fails to make the appointment within that period, the AAA shall make the appointment.

(d) If no period of time is specified in the agreement, the AAA shall notify the party to make the appointment. If within 14 calendar days after such notice has been sent, an arbitrator has not been appointed by a party, the AAA shall make the appointment.

R-14. Appointment of Chairperson by Party-Appointed Arbitrators or Parties

(a) If, pursuant to Section R-13, either the parties have directly appointed arbitrators, or the arbitrators have been appointed by the AAA, and the parties have authorized them to appoint a chairperson within a specified time and no appointment is made within that time or any agreed extension, the AAA may appoint the chairperson.

(b) If no period of time is specified for appointment of the chairperson, and the party-appointed arbitrators or the parties do not make the appointment within 14 calendar days from the date of the appointment of the last party-appointed arbitrator, the AAA may appoint the chairperson.

(c) If the parties have agreed that their party-appointed arbitrators shall appoint the chairperson from the National Roster, the AAA shall furnish to the party-appointed arbitrators, in the manner provided in Section R-12, a list selected from the National Roster, and the appointment of the chairperson shall be made as provided in that Section.

R-15. Nationality of Arbitrator

Where the parties are nationals of different countries, the AAA, at the request of any party or on its own initiative, may appoint as arbitrator a national of a country other than that of any of the parties. The request must be made before the time set for the appointment of the arbitrator as agreed by the parties or set by these rules.

R-16. Number of Arbitrators

(a) If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed. A party may request three arbitrators in the Demand or Answer, which request the AAA will consider in exercising its discretion regarding the number of arbitrators appointed to the dispute.

(b) Any request for a change in the number of arbitrators as a result of an increase or decrease in the amount of a claim or a new or different claim must be made to the AAA and other parties to the arbitration no later than seven calendar days after receipt of the R-6 required notice of change of claim amount. If the parties are unable to agree with respect to the request for a change in the number of arbitrators, the AAA shall make that determination.

R-17. Disclosure

(a) Any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration. Failure on the part of a party or a representative to comply with the requirements of this rule may result in the waiver of the right to object to an arbitrator in accordance with Rule R-41.

(b) Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.

(c) Disclosure of information pursuant to this Section R-17 is not an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.

R-18. Disqualification of Arbitrator

(a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for:

- **i.** partiality or lack of independence,
- **ii.** inability or refusal to perform his or her duties with diligence and in good faith, and
- **iii.** any grounds for disqualification provided by applicable law.

(b) The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-13 shall be non-neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.

(c) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

R-19. Communication with Arbitrator

(a) No party and no one acting on behalf of any party shall communicate *ex parte* with an arbitrator or a candidate for arbitrator concerning the arbitration, except that a party, or someone acting on behalf of a party, may communicate *ex parte* with a candidate for direct appointment pursuant to R-13 in order to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or independence in relation to the parties or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party-designated arbitrators are to participate in that selection.

(b) Section R-19(a) does not apply to arbitrators directly appointed by the parties who, pursuant to Section R-18(b), the parties have agreed in writing are non-neutral. Where the parties have so agreed under Section R-18(b), the AAA shall as an administrative practice suggest to the parties that they agree further that Section R-19(a) should nonetheless apply prospectively.

(c) In the course of administering an arbitration, the AAA may initiate communications with each party or anyone acting on behalf of the parties either jointly or individually.

(d) As set forth in R-43, unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

R-20. Vacancies

(a) If for any reason an arbitrator is unable or unwilling to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these rules.

(b) In the event of a vacancy in a panel of neutral arbitrators after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.

(c) In the event of the appointment of a substitute arbitrator, the panel of arbitrators shall determine in its sole discretion whether it is necessary to repeat all or part of any prior hearings.

R-21. Preliminary Hearing

(a) At the discretion of the arbitrator, and depending on the size and complexity of the arbitration, a preliminary hearing should be scheduled as soon as practicable after the arbitrator has been appointed. The parties should be invited to attend the preliminary hearing along with their representatives. The preliminary hearing may be conducted in person or by telephone.

(b) At the preliminary hearing, the parties and the arbitrator should be prepared to discuss and establish a procedure for the conduct of the arbitration that is appropriate to achieve a fair, efficient, and economical resolution of the dispute. Sections P-1 and P-2 of these rules address the issues to be considered at the preliminary hearing.

R-22. Pre-Hearing Exchange and Production of Information

(a) *Authority of arbitrator.* The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses.

(b) *Documents.* The arbitrator may, on application of a party or on the arbitrator's own initiative:

i. require the parties to exchange documents in their possession or custody on which they intend to rely;

ii. require the parties to update their exchanges of the documents on which they intend to rely as such documents become known to them;

iii. require the parties, in response to reasonable document requests, to make available to the other party documents, in the responding party's possession or custody, not otherwise readily available to the party seeking the documents, reasonably believed by the party seeking the documents to exist and to be relevant and material to the outcome of disputed issues; and

iv. require the parties, when documents to be exchanged or produced are maintained in electronic form, to make such documents available in the form most convenient and economical for the party in possession of such documents, unless the arbitrator determines that there is good cause for requiring the documents to be produced in a different form. The parties should attempt to agree in advance upon, and the arbitrator may determine, reasonable search parameters to balance the need for production of electronically stored documents relevant and material to the outcome of disputed issues against the cost of locating and producing them.

R-23. Enforcement Powers of the Arbitrator

The arbitrator shall have the authority to issue any orders necessary to enforce the provisions of rules R-21 and R-22 and to otherwise achieve a fair, efficient and economical resolution of the case, including, without limitation:

(a) conditioning any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing, on appropriate orders to preserve such confidentiality;

(b) imposing reasonable search parameters for electronic and other documents if the parties are unable to agree;

(c) allocating costs of producing documentation, including electronically stored documentation;

(d) in the case of willful non-compliance with any order issued by the arbitrator, drawing adverse inferences, excluding evidence and other submissions, and/or making special allocations of costs or an interim award of costs arising from such non-compliance; and

(e) issuing any other enforcement orders which the arbitrator is empowered to issue under applicable law.

R-24. Date, Time, and Place of Hearing

The arbitrator shall set the date, time, and place for each hearing. The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule. The AAA shall send a notice of hearing to the parties at least 10 calendar days in advance of the hearing date, unless otherwise agreed by the parties.

R-25. Attendance at Hearings

The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person.

R-26. Representation

Any party may participate without representation (*pro se*), or by counsel or any other representative of the party's choosing, unless such choice is prohibited by applicable law. A party intending to be so represented shall notify the other party and the AAA of the name, telephone number and address, and email address if available, of the representative at least seven calendar days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

R-27. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

R-28. Stenographic Record

(a) Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three calendar days in advance of the hearing. The requesting party or parties shall pay the cost of the record.

(b) No other means of recording the proceedings will be permitted absent the agreement of the parties or per the direction of the arbitrator.

(c) If the transcript or any other recording is agreed by the parties or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator.

(d) The arbitrator may resolve any disputes with regard to apportionment of the costs of the stenographic record or other recording.

R-29. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

R-30. Postponements

The arbitrator may postpone any hearing upon agreement of the parties, upon request of a party for good cause shown, or upon the arbitrator's own initiative.

R-31. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

R-32. Conduct of Proceedings

(a) The claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

(b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

(c) When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provide an opportunity for cross-examination.

(d) The parties may agree to waive oral hearings in any case and may also agree to utilize the Procedures for Resolution of Disputes Through Document Submission, found in Rule E-6.

R-33. Dispositive Motions

The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.

R-34. Evidence

(a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default, or has waived the right to be present.

(b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.

(c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

(d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

R-35. Evidence by Written Statements and Post-Hearing Filing of Documents or Other Evidence

(a) At a date agreed upon by the parties or ordered by the arbitrator, the parties shall give written notice for any witness or expert witness who has provided a written witness statement to appear in person at the arbitration hearing for examination. If such notice is given, and the witness fails to appear, the arbitrator may disregard the written witness statement and/or expert report of the witness or make such other order as the arbitrator may consider to be just and reasonable.

(b) If a witness whose testimony is represented by a party to be essential is unable or unwilling to testify at the hearing, either in person or through electronic or other means, either party may request that the arbitrator order the witness to appear in person for examination before the arbitrator at a time and location where the witness is willing and able to appear voluntarily or can legally be compelled to do so. Any such order may be conditioned upon payment by the requesting party of all reasonable costs associated with such examination.

(c) If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine and respond to such documents or other evidence.

R-36. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the date and time and the AAA shall notify the parties. Any party who so desires may be present at such an inspection or investigation. In the event that one or all parties are not present at the inspection or investigation, the arbitrator shall make an oral or written report to the parties and afford them an opportunity to comment.

R-37. Interim Measures

(a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.

(b) Such interim measures may take the form of an interim award, and the arbitrator may require security for the costs of such measures.

(c) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

R-38. Emergency Measures of Protection

(a) Unless the parties agree otherwise, the provisions of this rule shall apply to arbitrations conducted under arbitration clauses or agreements entered on or after October 1, 2013.

(b) A party in need of emergency relief prior to the constitution of the panel shall notify the AAA and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by facsimile or e-mail or other reliable means, but must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties.

(c) Within one business day of receipt of notice as provided in section (b), the AAA shall appoint a single emergency arbitrator designated to rule on emergency applications. The emergency arbitrator shall immediately disclose any circumstance likely, on the basis of the facts disclosed on the application, to affect such arbitrator's impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the AAA to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.

(d) The emergency arbitrator shall as soon as possible, but in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such a schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceeding by telephone or video conference or on written submissions as alternatives to a formal hearing. The emergency arbitrator shall have the authority vested in the tribunal under Rule 7, including the authority to rule on her/his own jurisdiction, and shall resolve any disputes over the applicability of this Rule 38.

(e) If after consideration the emergency arbitrator is satisfied that the party seeking the emergency relief has shown that immediate and irreparable loss or damage shall result in the absence of emergency relief, and that such party is entitled to such relief, the emergency arbitrator may enter an interim order or award granting the relief and stating the reason therefore.

(f) Any application to modify an interim award of emergency relief must be based on changed circumstances and may be made to the emergency arbitrator until the panel is constituted; thereafter such a request shall be addressed to the panel. The emergency arbitrator shall have no further power to act after the panel is constituted unless the parties agree that the emergency arbitrator is named as a member of the panel.

(g) Any interim award of emergency relief may be conditioned on provision by the party seeking such relief for appropriate security.

(h) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this rule, the agreement to arbitrate or a waiver of the right to arbitrate. If the AAA is directed by a judicial authority to nominate a special master to consider and report on an application for emergency relief, the AAA shall proceed as provided in this rule and the references to the emergency arbitrator shall be read to mean the special master, except that the special master shall issue a report rather than an interim award.

(i) The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator or special master, subject to the power of the tribunal to determine finally the apportionment of such costs.

R-39. Closing of Hearing

(a) The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed.

(b) If documents or responses are to be filed as provided in Rule R-35, or if briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If no documents, responses, or briefs are to be filed, the arbitrator shall declare the hearings closed as of the date of the last hearing (including telephonic hearings). If the case was heard without any oral hearings, the arbitrator shall close the hearings upon the due date established for receipt of the final submission.

(c) The time limit within which the arbitrator is required to make the award shall commence, in the absence of other agreements by the parties, upon the closing of the hearing. The AAA may extend the time limit for rendering of the award only in unusual and extreme circumstances.

R-40. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or by the direction of the arbitrator upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed to by the parties in the arbitration agreement, the matter may not be reopened unless the parties agree to an extension of time. When no specific date is fixed by agreement of the parties , the arbitrator shall have 30 calendar days from the closing of the reopened hearing within which to make an award (14 calendar days if the case is governed by the Expedited Procedures).

R-41. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

R-42. Extensions of Time

The parties may modify any period of time by mutual agreement. The AAA or the arbitrator may for good cause extend any period of time established by these rules, except the time for making the award. The AAA shall notify the parties of any extension.

R-43. Serving of Notice and Communications

(a) Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules, for any court action in connection therewith, or for the entry of judgment on any award made under these rules may be served on a party by mail addressed to the party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard to the dispute is or has been granted to the party.

(b) The AAA, the arbitrator and the parties may also use overnight delivery or electronic facsimile transmission (fax), or electronic (e-mail) to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be transmitted by e-mail or other methods of communication.

(c) Unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

(d) Unless otherwise instructed by the AAA or by the arbitrator, all written communications made by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

(e) Failure to provide the other party with copies of communications made to the AAA or to the arbitrator may prevent the AAA or the arbitrator from acting on any requests or objections contained therein.

(f) The AAA may direct that any oral or written communications that are sent by a party or their representative shall be sent in a particular manner. The failure of a party or their representative to do so may result in the AAA's refusal to consider the issue raised in the communication.

R-44. Majority Decision

(a) When the panel consists of more than one arbitrator, unless required by law or by the arbitration agreement or section (b) of this rule, a majority of the arbitrators must make all decisions.

(b) Where there is a panel of three arbitrators, absent an objection of a party or another member of the panel, the chairperson of the panel is authorized to resolve any disputes related to the exchange of information or procedural matters without the need to consult the full panel.

R-45. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 calendar days from the date of closing the hearing, or, if oral hearings have been waived, from the due date set for receipt of the parties' final statements and proofs.

R-46. Form of Award

(a) Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the form and manner required by law.

(b) The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.

R-47. Scope of Award

(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.

(b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.

(c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-53, R-54, and R-55. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

(d) The award of the arbitrator(s) may include:

- **i.** interest at such rate and from such date as the arbitrator(s) may deem appropriate; and
- **ii.** an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

R-48. Award Upon Settlement—Consent Award

(a) If the parties settle their dispute during the course of the arbitration and if the parties so request, the arbitrator may set forth the terms of the settlement in a "consent award." A consent award must include an allocation of arbitration costs, including administrative fees and expenses as well as arbitrator fees and expenses.

(b) The consent award shall not be released to the parties until all administrative fees and all arbitrator compensation have been paid in full.

R-49. Delivery of Award to Parties

Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at their last known addresses, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

R-50. Modification of Award

Within 20 calendar days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other

parties shall be given 10 calendar days to respond to the request. The arbitrator shall dispose of the request within 20 calendar days after transmittal by the AAA to the arbitrator of the request and any response thereto.

R-51. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party to the arbitration, furnish to the party, at its expense, copies or certified copies of any papers in the AAA's possession that are not determined by the AAA to be privileged or confidential.

R-52. Applications to Court and Exclusion of Liability

(a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary or proper party in judicial proceedings relating to the arbitration.

(c) Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

(d) Parties to an arbitration under these rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.

(e) Parties to an arbitration under these rules may not call the arbitrator, the AAA, or AAA employees as a witness in litigation or any other proceeding relating to the arbitration. The arbitrator, the AAA and AAA employees are not competent to testify as witnesses in any such proceeding.

R-53. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe administrative fees to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable. The filing fee shall be advanced by the party or parties making a claim or counterclaim, subject to final apportionment by the arbitrator in the award. The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.

R-54. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and

the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

R-55. Neutral Arbitrator's Compensation

(a) Arbitrators shall be compensated at a rate consistent with the arbitrator's stated rate of compensation.

(b) If there is disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the AAA and confirmed to the parties.

(c) Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.

R-56. Deposits

(a) The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.

(b) Other than in cases where the arbitrator serves for a flat fee, deposit amounts requested will be based on estimates provided by the arbitrator. The arbitrator will determine the estimated amount of deposits using the information provided by the parties with respect to the complexity of each case.

(c) Upon the request of any party, the AAA shall request from the arbitrator an itemization or explanation for the arbitrator's request for deposits.

R-57. Remedies for Nonpayment

If arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that one of them may advance the required payment.

(a) Upon receipt of information from the AAA that payment for administrative charges or deposits for arbitrator compensation have not been paid in full, to the extent the law allows, a party may request that the arbitrator take specific measures relating to a party's non-payment.

(b) Such measures may include, but are not limited to, limiting a party's ability to assert or pursue their claim. In no event, however, shall a party be precluded from defending a claim or counterclaim.

(c) The arbitrator must provide the party opposing a request for such measures with the opportunity to respond prior to making any ruling regarding the same.

(d) In the event that the arbitrator grants any request for relief which limits any party's participation in the arbitration, the arbitrator shall require the party who is making a claim and who has made appropriate payments to submit such evidence as the arbitrator may require for the making of an award.

(e) Upon receipt of information from the AAA that full payments have not been received, the arbitrator, on the arbitrator's own initiative or at the request of the AAA or a party, may order the suspension of the arbitration. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.

(f) If the arbitration has been suspended by either the AAA or the arbitrator and the parties have failed to make the full deposits requested within the time provided after the suspension, the arbitrator, or the AAA if an arbitrator has not been appointed, may terminate the proceedings.

R-58. Sanctions

(a) The arbitrator may, upon a party's request, order appropriate sanctions where a party fails to comply with its obligations under these rules or with an order of the arbitrator. In the event that the arbitrator enters a sanction that limits any party's participation in the arbitration or results in an adverse determination of an issue or issues, the arbitrator shall explain that order in writing and shall require the submission of evidence and legal argument prior to making of an award. The arbitrator may not enter a default award as a sanction.

(b) The arbitrator must provide a party that is subject to a sanction request with the opportunity to respond prior to making any determination regarding the sanctions application.

Preliminary Hearing Procedures

P-1. General

(a) In all but the simplest cases, holding a preliminary hearing as early in the process as possible will help the parties and the arbitrator organize the proceeding in a manner that will maximize efficiency and economy, and will provide each party a fair opportunity to present its case.

(b) Care must be taken to avoid importing procedures from court systems, as such procedures may not be appropriate to the conduct of arbitrations as an alternative form of dispute resolution that is designed to be simpler, less expensive and more expeditious.

P-2. Checklist

(a) The following checklist suggests subjects that the parties and the arbitrator should address at the preliminary hearing, in addition to any others that the parties or the arbitrator believe to be appropriate to the particular case. The items to be addressed in a particular case will depend on the size, subject matter, and complexity of the dispute, and are subject to the discretion of the arbitrator:

- **(i)** the possibility of other non-adjudicative methods of dispute resolution, including mediation pursuant to R-9;
- **(ii)** whether all necessary or appropriate parties are included in the arbitration;
- **(iii)** whether a party will seek a more detailed statement of claims, counterclaims or defenses;
- **(iv)** whether there are any anticipated amendments to the parties' claims, counterclaims, or defenses;
- **(v)** which
  - **(a)** arbitration rules;
  - **(b)** procedural law; and
  - **(c)** substantive law govern the arbitration;
- **(vi)** whether there are any threshold or dispositive issues that can efficiently be decided without considering the entire case, including without limitation,
  - **(a)** any preconditions that must be satisfied before proceeding with the arbitration;
  - **(b)** whether any claim or counterclaim falls outside the arbitrator's jurisdiction or is otherwise not arbitrable;
  - **(c)** consolidation of the claims or counterclaims with another arbitration; or
  - **(d)** bifurcation of the proceeding.

(vii) whether the parties will exchange documents, including electronically stored documents, on which they intend to rely in the arbitration, and/or make written requests for production of documents within defined parameters;

(viii) whether to establish any additional procedures to obtain information that is relevant and material to the outcome of disputed issues;

(ix) how costs of any searches for requested information or documents that would result in substantial costs should be borne;

(x) whether any measures are required to protect confidential information;

(xi) whether the parties intend to present evidence from expert witnesses, and if so, whether to establish a schedule for the parties to identify their experts and exchange expert reports;

(xii) whether, according to a schedule set by the arbitrator, the parties will

(a) identify all witnesses, the subject matter of their anticipated testimonies, exchange written witness statements, and determine whether written witness statements will replace direct testimony at the hearing;

(b) exchange and pre-mark documents that each party intends to submit; and

(c) exchange pre-hearing submissions, including exhibits;

(xiii) the date, time and place of the arbitration hearing;

(xiv) whether, at the arbitration hearing,

(a) testimony may be presented in person, in writing, by videoconference, via the internet, telephonically, or by other reasonable means;

(b) there will be a stenographic transcript or other record of the proceeding and, if so, who will make arrangements to provide it;

(xv) whether any procedure needs to be established for the issuance of subpoenas;

(xvi) the identification of any ongoing, related litigation or arbitration;

(xvii) whether post-hearing submissions will be filed;

(xviii) the form of the arbitration award; and

(xix) any other matter the arbitrator considers appropriate or a party wishes to raise.

(b) The arbitrator shall issue a written order memorializing decisions made and agreements reached during or following the preliminary hearing.

Expedited Procedures

E-1. Limitation on Extensions

Except in extraordinary circumstances, the AAA or the arbitrator may grant a party no more than one seven-day extension of time to respond to the Demand for Arbitration or counterclaim as provided in Section R-5.

E-2. Changes of Claim or Counterclaim

A claim or counterclaim may be increased in amount, or a new or different claim or counterclaim added, upon the agreement of the other party, or the consent of the arbitrator. After the arbitrator is appointed, however, no new or different claim or counterclaim may be submitted except with the arbitrator's consent. If an increased claim or counterclaim exceeds $75,000, the case will be administered under the regular procedures unless all parties and the arbitrator agree that the case may continue to be processed under the Expedited Procedures.

E-3. Serving of Notices

In addition to notice provided by Section R-43, the parties shall also accept notice by telephone. Telephonic notices by the AAA shall subsequently be confirmed in writing to the parties. Should there be a failure to confirm in writing any such oral notice, the proceeding shall nevertheless be valid if notice has, in fact, been given by telephone.

E-4. Appointment and Qualifications of Arbitrator

(a) The AAA shall simultaneously submit to each party an identical list of five proposed arbitrators drawn from its National Roster from which one arbitrator shall be appointed.

(b) The parties are encouraged to agree to an arbitrator from this list and to advise the AAA of their agreement. If the parties are unable to agree upon an arbitrator, each party may strike two names from the list and return it to the AAA within seven days from the date of the AAA's mailing to the parties. If for any reason the appointment of an arbitrator cannot be made from the list, the AAA may make the appointment from other members of the panel without the submission of additional lists.

(c) The parties will be given notice by the AAA of the appointment of the arbitrator, who shall be subject to disqualification for the reasons specified in Section R-18. The parties shall notify the AAA within seven calendar days of any objection to the arbitrator appointed. Any such objection shall be for cause and shall be confirmed in writing to the AAA with a copy to the other party or parties.

E-5. Exchange of Exhibits

At least two business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing. The arbitrator shall resolve disputes concerning the exchange of exhibits.

E-6. Proceedings on Documents and Procedures for the Resolution of Disputes Through Document Submission

Where no party's claim exceeds $25,000, exclusive of interest, attorneys' fees and arbitration costs, and other cases in which the parties agree, the dispute shall be resolved by submission of documents, unless any party requests an oral hearing, or the arbitrator determines that an oral hearing is necessary. Where cases are resolved by submission of documents, the following procedures may be utilized at the agreement of the parties or the discretion of the arbitrator:

(a) Within 14 calendar days of confirmation of the arbitrator's appointment, the arbitrator may convene a preliminary management hearing, via conference call, video conference, or internet, to establish a fair and equitable procedure for the submission of documents, and, if the arbitrator deems appropriate, a schedule for one or more telephonic or electronic conferences.

(b) The arbitrator has the discretion to remove the case from the documents-only process if the arbitrator determines that an in-person hearing is necessary.

(c) If the parties agree to in-person hearings after a previous agreement to proceed under this rule, the arbitrator shall conduct such hearings. If a party seeks to have in-person hearings after agreeing to this rule, but there is not agreement among the parties to proceed with in-person hearings, the arbitrator shall resolve the issue after the parties have been given the opportunity to provide their respective positions on the issue.

(d) The arbitrator shall establish the date for either written submissions or a final telephonic or electronic conference. Such date shall operate to close the hearing and the time for the rendering of the award shall commence.

(e) Unless the parties have agreed to a form of award other than that set forth in rule R-46, when the parties have agreed to resolve their dispute by this rule, the arbitrator shall render the award within 14 calendar days from the date the hearing is closed.

(f) If the parties agree to a form of award other than that described in rule R-46, the arbitrator shall have 30 calendar days from the date the hearing is declared closed in which to render the award.

(g) The award is subject to all other provisions of the Regular Track of these rules which pertain to awards.

E-7. Date, Time, and Place of Hearing

In cases in which a hearing is to be held, the arbitrator shall set the date, time, and place of the hearing, to be scheduled to take place within 30 calendar days of confirmation of the arbitrator's appointment. The AAA will notify the parties in advance of the hearing date.

E-8. The Hearing

(a) Generally, the hearing shall not exceed one day. Each party shall have equal opportunity to submit its proofs and complete its case. The arbitrator shall determine the order of the hearing, and may require further submission of documents within two business days after the hearing. For good cause shown, the arbitrator may schedule additional hearings within seven business days after the initial day of hearings.

(b) Generally, there will be no stenographic record. Any party desiring a stenographic record may arrange for one pursuant to the provisions of Section R-28.

E-9. Time of Award

Unless otherwise agreed by the parties, the award shall be rendered not later than 14 calendar days from the date of the closing of the hearing or, if oral hearings have been waived, from the due date established for the receipt of the parties' final statements and proofs.

E-10. Arbitrator's Compensation

Arbitrators will receive compensation at a rate to be suggested by the AAA regional office.

Procedures for Large, Complex Commercial Disputes

L-1. Administrative Conference

Prior to the dissemination of a list of potential arbitrators, the AAA shall, unless the parties agree otherwise, conduct an administrative conference with the parties and/or their attorneys or other representatives by conference call. The conference will take place within 14 calendar days after the commencement of the arbitration. In the event the parties are unable to agree on a mutually acceptable time for the conference, the AAA may contact the parties individually to discuss the issues contemplated herein. Such administrative conference shall be conducted for the following purposes and for such additional purposes as the parties or the AAA may deem appropriate:

(a) to obtain additional information about the nature and magnitude of the dispute and the anticipated length of hearing and scheduling;

(b) to discuss the views of the parties about the technical and other qualifications of the arbitrators;

(c) to obtain conflicts statements from the parties; and

(d) to consider, with the parties, whether mediation or other non-adjudicative methods of dispute resolution might be appropriate.

L-2. Arbitrators

(a) Large, complex commercial cases shall be heard and determined by either one or three arbitrators, as may be agreed upon by the parties. With the exception in paragraph (b) below, if the parties are unable to agree upon the number of arbitrators and a claim or counterclaim involves at least $1,000,000, then three arbitrator(s) shall hear and determine the case. If the parties are unable to agree on the number of arbitrators and each claim and counterclaim is less than $1,000,000, then one arbitrator shall hear and determine the case.

(b) In cases involving the financial hardship of a party or other circumstance, the AAA at its discretion may require that only one arbitrator hear and determine the case, irrespective of the size of the claim involved in the dispute.

(c) The AAA shall appoint arbitrator(s) as agreed by the parties. If they are unable to agree on a method of appointment, the AAA shall appoint arbitrators from the Large, Complex Commercial Case Panel, in the manner provided in the regular Commercial Arbitration Rules. Absent agreement of the parties, the arbitrator(s) shall not have served as the mediator in the mediation phase of the instant proceeding.

L-3. Management of Proceedings

(a) The arbitrator shall take such steps as deemed necessary or desirable to avoid delay and to achieve a fair, speedy and cost-effective resolution of a Large, Complex Commercial Dispute.

(b) As promptly as practicable after the selection of the arbitrator(s), a preliminary hearing shall be scheduled in accordance with sections P-1 and P-2 of these rules.

(c) The parties shall exchange copies of all exhibits they intend to submit at the hearing at least 10 calendar days prior to the hearing unless the arbitrator(s) determines otherwise.

(d) The parties and the arbitrator(s) shall address issues pertaining to the pre-hearing exchange and production of information in accordance with rule R-22 of the AAA Commercial Rules, and the arbitrator's determinations on such issues shall be included within the Scheduling and Procedure Order.

(e) The arbitrator, or any single member of the arbitration tribunal, shall be authorized to resolve any disputes concerning the pre-hearing exchange and production of documents and information by any reasonable means within his discretion, including, without limitation, the issuance of orders set forth in rules R-22 and R-23 of the AAA Commercial Rules.

(f) In exceptional cases, at the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator may order depositions to obtain the testimony of a person who may possess information determined by the arbitrator to be relevant and material to the outcome of the case. The arbitrator may allocate the cost of taking such a deposition.

(g) Generally, hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.

Administrative Fee Schedules (Standard and Flexible Fees)

FOR THE CURRENT ADMINISTRATIVE FEE SCHEDULE, PLEASE VISIT ***www.adr.org/feeschedule.***

Commercial Mediation Procedures

M-1. Agreement of Parties

Whenever, by stipulation or in their contract, the parties have provided for mediation or conciliation of existing or future disputes under the auspices of the American Arbitration Association or under these procedures, the parties and their representatives, unless agreed otherwise in writing, shall be deemed to have made these procedural guidelines, as amended and in effect as of the date of filing of a request for mediation, a part of their agreement and designate the AAA as the administrator of their mediation.

The parties by mutual agreement may vary any part of these procedures including, but not limited to, agreeing to conduct the mediation via telephone or other electronic or technical means.

M-2. Initiation of Mediation

Any party or parties to a dispute may initiate mediation under the AAA's auspices by making a request for mediation to any of the AAA's regional offices or case management centers via telephone, email, regular mail or fax. Requests for mediation may also be filed online via WebFile at **www.adr.org.**

The party initiating the mediation shall simultaneously notify the other party or parties of the request. The initiating party shall provide the following information to the AAA and the other party or parties as applicable:

(i) A copy of the mediation provision of the parties' contract or the parties' stipulation to mediate.

(ii) The names, regular mail addresses, email addresses, and telephone numbers of all parties to the dispute and representatives, if any, in the mediation.

(iii) A brief statement of the nature of the dispute and the relief requested.

(iv) Any specific qualifications the mediator should possess.

M-3. Representation

Subject to any applicable law, any party may be represented by persons of the party's choice. The names and addresses of such persons shall be communicated in writing to all parties and to the AAA.

M-4. Appointment of the Mediator

If the parties have not agreed to the appointment of a mediator and have not provided any other method of appointment, the mediator shall be appointed in the following manner:

(i) Upon receipt of a request for mediation, the AAA will send to each party a list of mediators from the AAA's Panel of Mediators. The parties are encouraged to agree to a mediator from the submitted list and to advise the AAA of their agreement.

(ii) If the parties are unable to agree upon a mediator, each party shall strike unacceptable names from the list, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all mediators on the list shall be deemed acceptable. From among the mediators who have been mutually approved by the parties, and in accordance with the designated order of mutual preference, the AAA shall invite a mediator to serve.

(iii) If the parties fail to agree on any of the mediators listed, or if acceptable mediators are unable to serve, or if for any other reason the appointment cannot be made from the submitted list, the AAA shall have the authority to make the appointment from among other members of the Panel of Mediators without the submission of additional lists.

M-5. Mediator's Impartiality and Duty to Disclose

AAA mediators are required to abide by the *Model Standards of Conduct for Mediators* in effect at the time a mediator is appointed to a case. Where there is a conflict between the *Model Standards* and any provision of these Mediation Procedures, these Mediation Procedures shall govern. The Standards require mediators to (i) decline a mediation if the mediator cannot conduct it in an impartial manner, and (ii) disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality.

Prior to accepting an appointment, AAA mediators are required to make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for the mediator. AAA mediators are required to disclose any circumstance likely to create a presumption of bias or prevent a resolution of the parties' dispute within the time-frame desired by the parties. Upon receipt of such disclosures, the AAA shall immediately communicate the disclosures to the parties for their comments.

The parties may, upon receiving disclosure of actual or potential conflicts of interest of the mediator, waive such conflicts and proceed with the mediation. In the event that a party disagrees as to whether the mediator shall serve, or in the event that the mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, the mediator shall be replaced.

M-6. Vacancies

If any mediator shall become unwilling or unable to serve, the AAA will appoint another mediator, unless the parties agree otherwise, in accordance with section M-4.

M-7. Duties and Responsibilities of the Mediator

(i) The mediator shall conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.

(ii) The mediator is authorized to conduct separate or *ex parte* meetings and other communications with the parties and/or their representatives, before, during, and after any scheduled mediation conference. Such communications may be conducted via telephone, in writing, via email, online, in person or otherwise.

(iii) The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator may request the exchange of memoranda on issues, including the underlying interests and the history of the parties' negotiations. Information that a party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.

(iv) The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.

(v) In the event a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation session(s), the mediator may continue to communicate with the parties, for a period of time, in an ongoing effort to facilitate a complete settlement.

(vi) The mediator is not a legal representative of any party and has no fiduciary duty to any party.

M-8. Responsibilities of the Parties

The parties shall ensure that appropriate representatives of each party, having authority to consummate a settlement, attend the mediation conference.

Prior to and during the scheduled mediation conference session(s) the parties and their representatives shall, as appropriate to each party's circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive mediation.

M-9. Privacy

Mediation sessions and related mediation communications are private proceedings. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.

M-10. Confidentiality

Subject to applicable law or the parties' agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports, or other documents received by a mediator while serving in that capacity shall be confidential.

The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding the following, unless agreed to by the parties or required by applicable law:

(i) Views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute;

(ii) Admissions made by a party or other participant in the course of the mediation proceedings;

(iii) Proposals made or views expressed by the mediator; or

(iv) The fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

M-11. No Stenographic Record

There shall be no stenographic record of the mediation process.

M-12. Termination of Mediation

The mediation shall be terminated:

(i) By the execution of a settlement agreement by the parties; or

(ii) By a written or verbal declaration of the mediator to the effect that further efforts at mediation would not contribute to a resolution of the parties' dispute; or

(iii) By a written or verbal declaration of all parties to the effect that the mediation proceedings are terminated; or

(iv) When there has been no communication between the mediator and any party or party's representative for 21 days following the conclusion of the mediation conference.

M-13. Exclusion of Liability

Neither the AAA nor any mediator is a necessary party in judicial proceedings relating to the mediation. Neither the AAA nor any mediator shall be liable to any party for any error, act or omission in connection with any mediation conducted under these procedures.

M-14. Interpretation and Application of Procedures

The mediator shall interpret and apply these procedures insofar as they relate to the mediator's duties and responsibilities. All other procedures shall be interpreted and applied by the AAA.

M-15. Deposits

Unless otherwise directed by the mediator, the AAA will require the parties to deposit in advance of the mediation conference such sums of money as it, in consultation with the mediator, deems necessary to cover the costs and expenses of the mediation and shall render an accounting to the parties and return any unexpended balance at the conclusion of the mediation.

M-16. Expenses

All expenses of the mediation, including required traveling and other expenses or charges of the mediator, shall be borne equally by the parties unless they agree otherwise. The expenses of participants for either side shall be paid by the party requesting the attendance of such participants.

M-17. Cost of the Mediation

FOR THE CURRENT ADMINISTRATIVE FEE SCHEDULE, PLEASE VISIT ***www.adr.org/feeschedule.***

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International Institute for
Conflict Prevention & Resolution

CPR PROCEDURES & CLAUSES

Administered Arbitration Rules

Effective July 1, 2013

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Changing the Way the World Resolves Conflict

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.

Dispute Resolution Services:

- With litigation costing billions of dollars each year, effective conflict management is essential to reduce costs, increase privacy, lower litigation risks and improve business relationships.
- Mediation, arbitration and other consensual dispute resolution methods offer a low-cost, high-return option for parties.
- CPR's Panels of Distinguished Neutrals, comprised of former judges, prominent attorneys and academics, are uniquely qualified to resolve worldwide complex business disputes in more than 20 specialized practice areas.

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- Fully administered arbitration.

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Administered Arbitration Rules

Effective July 1, 2013

CPR'S FULL RANGE OF ARBITRATION OPTIONS

The International Institute for Conflict Prevention and Resolution ("CPR") has long championed its Rules for Non-Administered Arbitration (Rev. 2007) as a means of providing for a fair, expeditious, and economical arbitration process. Hallmark features of non-administered or *ad hoc* rules include management of the process by the Tribunal and counsel, without the need for the involvement of a separate administering entity. To aid participants in a non-administered process when necessary, CPR offers customized services, such as arbitrator selection and a challenge procedure. For a full menu of such services, please refer to CPR's website, www.cpradr.org.

CPR maintains its commitment to non-administered processes. However, mindful of the benefits that an arbitral institution can provide in appropriate cases, CPR has promulgated a set of administered arbitration rules to increase parties' range of options. The CPR Rules for Administered Arbitration (July 1, 2013) provide parties with the same well-designed procedures and high quality arbitrators as CPR's non-administered option, while also allowing the parties to avail themselves of CPR's quality staff and resources when an administered process is desired.

Mediation and Other ADR Procedures. The following Rules are intended to govern administered arbitration proceedings. However, parties also may wish to incorporate pre-arbitral negotiation or mediation phases in their contract provisions. Parties desiring to use such procedures should consult the *CPR Mediation Procedure* and CPR's *Dispute Resolution Clauses* (available on CPR's website at www.cpradr.org).

To obtain a copy of any of our rules and procedures, or to find out more about our Dispute Resolution Services and fees, visit our website at www.cpradr.org or call CPR's office at +1.212.949.6490.

CPR MODEL CLAUSES FOR ADMINISTERED ARBITRATION

Standard Contractual Provisions

The CPR Rules for Administered Arbitration (the "Administered Rules" or "Rules") are intended in particular for use in complex commercial arbitrations where parties desire an administered process. They are designed to assure the expeditious and economical conduct of proceedings. The Administered Rules may be adopted by parties wishing to do so by using one of the following standard provisions:

A. Pre-Dispute Clause for Administered Arbitration

"Any dispute arising out of or relating to this contract, including the breach, termination or validity thereof, shall be finally resolved by arbitration in accordance with the International Institute for Conflict Prevention and Resolution ("CPR") Rules for Administered Arbitration (the "Administered Rules" or "Rules") by (a sole arbitrator) (three arbitrators, of whom each party shall designate one, with the third arbitrator to be appointed by CPR) (three arbitrators, of whom each party shall designate one, with the third arbitrator to be designated by the two party-appointed arbitrators) (three arbitrators, of whom each party shall designate one in accordance with the screened appointment procedure provided in Rule 5.4) (three arbitrators, none of whom shall be designated by either party). The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of the arbitration shall be (city, state)."

B. Existing Dispute Submission Agreement for Administered Arbitration

"We, the undersigned parties, hereby agree to submit to arbitration in accordance with the International Institute for Conflict Prevention and Resolution ("CPR") Rules for Administered Arbitration (the "Administered Rules" or "Rules") the following dispute:

[Describe briefly]

We further agree that the above dispute shall be submitted to (a sole arbitrator) (three arbitrators, of whom each party shall designate one, with the third arbitrator to be appointed by CPR) (three arbitrators, of whom each party shall designate one, with the third arbitrator to be designated by the two party-appointed arbitrators) (three arbitrators, of whom each party shall designate one in accordance with the screened appointment procedure provided in Rule 5.4) (three arbitrators, none of whom shall be designated by either party). [We further agree that we shall faithfully observe this agreement and the Administered Rules and that we shall abide by and perform any award rendered by the arbitrator(s).] The arbitration shall be governed by the Federal Arbitration Act, 9 U S.C. §§ 1 *et seq* , and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of arbitration shall be (city, state)."

A. GENERAL AND INTRODUCTORY ADMINISTERED RULES

Rule 1: Scope of Application

1.1 Where the parties to a contract have provided for arbitration under the International Institute for Conflict Prevention and Resolution ("CPR") Rules for Administered Arbitration (the "Administered Rules" or "Rules"), they shall be deemed to have made these Administered Rules a part of their arbitration agreement, except to the extent that they have agreed in writing, or on the record during the course of the arbitral proceeding, to modify these Administered Rules. Unless the parties otherwise agree, these Administered Rules, and any amendment thereof adopted by CPR, shall apply in the form in effect at the time the arbitration is commenced. If the parties have provided for CPR arbitration without specifying either the Non-Administered or Administered Rules, the CPR Administered Rules shall apply to any arbitration agreement dated July 1, 2013 or later.

1.2 These Administered Rules shall govern the arbitration except that where any of these Administered Rules is in conflict with a mandatory provision of applicable arbitration law, that provision of law shall prevail.

Rule 2: Notices

2.1 Notices or other communications required under these Administered Rules shall be in writing and delivered to the address specified in writing by the recipient or, if no address has been specified, to the last known business or residence address of the recipient. Notices and communications may be given by registered mail, courier, telex, facsimile transmission, email or any other means of telecommunication that provides a record thereof. Notices and communications shall be deemed to be effective as of the date of receipt. Proof of transmission shall be deemed *prima facie* proof of receipt of any notice or communication given under these Rules.

2.2 Time periods specified by these Administered Rules or established by the Arbitral Tribunal (the "Tribunal") shall start to run on the day following the day when a notice or communication is received, unless these Rules or the Tribunal shall specifically provide otherwise. If the last day of such period is an official holiday or a non-business day at the place where the notice or communication is received, the

period is extended until the first business day which follows. Official holidays and non-business days occurring during the running of the period of time are included in calculating the period.

Rule 3: Commencement of Arbitration

3.1 The party commencing arbitration (the "Claimant") shall deliver to the other party (the "Respondent") a notice of arbitration with an electronic copy to CPR at the same time in accordance with Rule 3.3.

3.2 The notice of arbitration shall include in the text or in attachments thereto

a. The full names, addresses, telephone numbers and email addresses for the parties and their counsel;

b. A demand that the dispute be referred to arbitration pursuant to these Rules,

c. The text of the arbitration clause or the separate arbitration agreement that is involved;

d. A statement of the general nature of the Claimant's claim;

e. The relief or remedy sought; and

f. The name, address, telephone number and email address of the arbitrator designated for appointment by the Claimant, unless the parties have agreed that neither shall designate an arbitrator or that the party-designated arbitrators shall be appointed as provided in Rule 5.4.

3.3 Delivery of the notice of arbitration to CPR required under this Rule 3.1 shall be as specified on the CPR website. Simultaneous with delivery of the notice of arbitration to CPR, the Claimant shall make payment to CPR of the appropriate Filing Fee as provided in the Schedule of Administered Arbitration Costs on the CPR website. In the event the Claimant fails to comply with this requirement, CPR may fix a time limit within which the Claimant must make payment, failing which the file shall be closed without prejudice to the Claimant's right to submit the same claim(s) at a later date in another notice of arbitration if permissible.

3.4 The date on which CPR is in receipt of both the notice of arbitration and Filing Fee shall, for all purposes, be deemed to be the date of the commencement of the arbitration ("Commencement Date"). CPR will determine the Commencement Date and so notify the parties.

3.5 CPR shall notify the Respondent of its time to deliver a notice of defense, which shall be 20 days after the Commencement Date.

3.6 The Respondent shall deliver to the Claimant a notice of defense by the date provided by CPR under Rule 3.5 with an electronic copy to CPR at the same time. Failure to deliver a notice of defense shall not delay the arbitration; in the event of such failure, all claims set forth in the notice of arbitration shall be deemed denied. Failure to deliver a notice of defense shall not excuse the Respondent from notifying the Claimant and CPR in writing, by the date provided by CPR under Rule 3.5, of the arbitrator designated for appointment by the Respondent, unless the parties have agreed that neither shall designate an arbitrator or that the party-designated arbitrators shall be appointed as provided in Rule 5.4.

3.7 The notice of defense shall include:

a. The full names, addresses, telephone numbers and email addresses for the parties and their counsel;

b. Any comment on the notice of arbitration that the Respondent may deem appropriate;

c. A statement of the general nature of the Respondent's defense, and

d. The name, address, telephone number and email address of the arbitrator designated for appointment by the Respondent, unless the parties have agreed that neither shall designate an arbitrator or that the party-designated arbitrators shall be appointed as provided in Rule 5.4.

3.8 The Respondent may include in its notice of defense any counterclaim within the scope of the arbitration clause. If it does so, the counterclaim in the notice of defense shall include items (a), (b), (c), (d) and (e) of Rule 3.2.

3.9 If a counterclaim is asserted in accordance with Rule 3.8, CPR shall notify the Claimant of its time to deliver a response, which shall be 20 days after CPR's receipt of the notice of defense and counterclaim. Such response shall have the same elements as provided in Rule 3.7(b) and (c) for the notice of defense. Failure to deliver a reply to a counterclaim shall not delay the arbitration; in the event of such failure, all counterclaims set forth in the notice of defense shall be deemed denied.

3.10 Claims or counterclaims within the scope of the arbitration clause may be freely added, amended or withdrawn prior to the appointment of the Tribunal and thereafter with the consent of the Tribunal. Notices of defense or replies to added or amended claims or counterclaims shall be delivered by the date CPR provides, which shall be within 20 days after CPR's receipt of the addition or amendment or such other date as specified by CPR, or, if the Tribunal has been appointed, by the date specified by the Tribunal.

3.11 If a dispute is submitted to arbitration pursuant to a submission agreement, this Rule 3 shall apply to the extent that it is not inconsistent with the submission agreement.

Rule 4: Representation

4.1 The parties may be represented or assisted by persons of their choice.

4.2 Each party shall communicate the name, address, telephone number and email address, and function of such persons in writing to the other party, to the Tribunal and to CPR.

B. RULES WITH RESPECT TO THE TRIBUNAL

Rule 5: Selection of Arbitrator(s) by the Parties

5.1 a. Unless the parties have agreed otherwise in writing, the Tribunal shall consist of three arbitrators, one designated for appointment by each of the parties as provided in Rules 3.2 and 3.7 respectively, and a third who shall chair the Tribunal, selected as provided in Rule 5.2.

b. Unless otherwise agreed, any arbitrator not designated for appointment by a party shall be a member of the CPR Panels of Distinguished Neutrals ("CPR Panels"). Upon request, CPR will provide a list of candidates from the CPR Panels in accordance with the Rules.

c. Where a party has designated an arbitrator for appointment, CPR will query such candidate for their availability and request that the candidate disclose in writing any circumstances that might give rise to justifiable doubt regarding the candidate's independence or impartiality as provided in Rule 7 Upon receipt, CPR shall circulate any disclosures made to the parties, and, within 10 days after receipt of that candidate's disclosures, a party may object to the appointment of any candidate on grounds of

[redacted]

lack of independence or impartiality by written and reasoned notice to CPR, with a copy to the other party. CPR shall decide the objection after providing the non-objecting party with an opportunity to comment on the objection. If there is no objection to the candidate, or if the objection is overruled by CPR, CPR shall appoint the candidate as a party-appointed arbitrator, and any subsequent challenges of that arbitrator, based on circumstances subsequently learned, shall be made and decided in accordance with the procedures set forth in Rules 7.6 - 7.8. At its discretion, CPR may decide an objection made under this Rule 5.1(c) by referring it to a Challenge Review Committee pursuant to the CPR Challenge Protocol (excluding its fee requirement).

5.2 a. Unless the parties agree that the third arbitrator who shall chair the Tribunal be selected jointly by the party-appointed arbitrators, CPR shall select the third arbitrator as provided in Rule 6.

b. If the party-appointed arbitrators shall designate for appointment the third arbitrator who shall chair the Tribunal, such designation cannot occur until after appointment by CPR of both of the party-designated arbitrators. The party-appointed arbitrators shall inform CPR of the candidate designated by them to be the third arbitrator, whereupon CPR will query such candidate for availability and request such candidate to disclose in writing any circumstances that might give rise to justifiable doubt regarding the candidate's independence or impartiality as provided in Rule 7. Upon receipt, CPR shall circulate any disclosures made to the parties, and, within 10 days after receipt of that candidate's disclosures, a party may object to the appointment of such candidate on grounds of lack of independence or impartiality by written and reasoned notice to CPR, with a copy to the other party. CPR shall decide the objection after providing the non-objecting party with an opportunity to comment. If there is no objection to the candidate, or if the objection is overruled by CPR, CPR shall appoint the candidate as the third arbitrator, and any subsequent challenges of that arbitrator, based on circumstances subsequently learned, shall be made and decided in accordance with the procedures set forth in Rules 7.6 - 7.8. At its discretion, CPR may decide an objection under this Rule 5.2 (b) by referring

it to a Challenge Review Committee pursuant to the CPR Challenge Protocol (excluding its fee requirement).

In the event that the party-appointed arbitrators are unable to agree on a third arbitrator within 20 days of CPR's appointment of the second arbitrator, the third arbitrator shall be selected by CPR as provided in Rule 6.2.

5.3 If the parties have agreed on a Tribunal consisting of a sole arbitrator or of three arbitrators none of whom shall be designated for appointment by either party, the parties shall attempt jointly to designate such arbitrator(s) within 20 days after the notice of defense provided for in Rule 3.6 is due. CPR will query such jointly designated candidate(s) in accordance with the procedure provided for in Rule 5.1(c). The parties may extend their selection process until one or both of them have concluded that a deadlock has been reached, but in no event for more than 30 days after the notice of defense provided for in Rule 3.6 is due. In the event the parties are unable to designate the arbitrator(s) within the extended selection period, the arbitrator(s) shall be selected as provided in Rule 6.2.

5.4 If the parties have agreed on a Tribunal consisting of three arbitrators, two of whom are to be designated by the parties without knowing which party designated each of them, as provided for in this Rule 5.4, CPR shall conduct a "screened" selection of party-designated arbitrators as follows:

a. CPR will provide each party with a copy of a list of candidates from the CPR Panels together with confirmation of their availability to serve as arbitrators and disclosure of any circumstances that might give rise to justifiable doubt regarding their independence or impartiality, as provided in Rule 7. Within 10 days after the receipt of the CPR list, each party shall designate from the list three candidates, in order of preference, for its party-designated arbitrator, and so notify CPR and the other party in writing.

b. Within the same 10-day period after receipt of the CPR list, a party may also object to the appointment of any candidate on the list on grounds of lack of independence or impartiality by written and reasoned notice to CPR, with a copy to the other party. CPR shall decide the objection after providing the non-objecting party with an opportunity to comment. If there is no

objection to the first candidate designated by a party, or if the objection is overruled by CPR, CPR shall appoint the candidate as the arbitrator, and any subsequent challenges of that arbitrator, based on circumstances subsequently learned, shall be made and decided in accordance with the procedures set forth in Rules 7 6 - 7.8. At its discretion, CPR may decide an objection under this Rule 5.4 (b) by referring it to a Challenge Review Committee pursuant to the CPR Challenge Protocol (excluding its fee requirement).

c. If the independence or impartiality of the first candidate designated by a party is successfully challenged, CPR will appoint the subsequent candidate designated by that party, in order of the party's indicated preference, provided CPR does not sustain any objection made to the appointment of that candidate.

d. Neither CPR nor the parties shall advise or otherwise provide any information or indication to any arbitrator candidate or appointed arbitrator as to which party selected either of the party-designated arbitrators. No party or anyone acting on its behalf shall have any *ex parte* communications relating to the case with any arbitrator candidate or appointed arbitrator pursuant to this Rule 5.4.

e. The chair of the Tribunal will be appointed by CPR in accordance with the procedure set forth in Rule 6.2, which shall proceed concurrently with the procedure for appointing the party-designated arbitrators provided in subsections (a)-(d) above.

5.5 Where the arbitration agreement entitles each party to designate an arbitrator but there is more than one Claimant or Respondent to the dispute, and either the multiple Claimants or the multiple Respondents do not jointly designate an arbitrator, CPR shall appoint all of the arbitrators as provided in Rule 6.2.

Rule 6: Selection of Arbitrator(s) by CPR

6.1 Whenever (i) a party has failed to designate its arbitrator to be appointed by CPR; (ii) the parties, acting jointly, have failed to designate the arbitrator(s) for appointment by CPR; (iii) the parties have agreed that the party-designated arbitrators who have been appointed by CPR shall designate the third arbitrator and such arbitrators have failed to designate the third arbitrator, (iv) the parties have provided that one or more arbitrator(s) shall be

appointed by CPR; or (v) the multi-party nature of the dispute calls for CPR to appoint all members of a three-member Tribunal pursuant to Rule 5.5, the arbitrator(s) required to complete the Tribunal shall be selected as provided in this Rule 6.

6.2 Except where a party has failed to designate the arbitrator to be appointed by it, CPR shall proceed as follows:

a. CPR shall jointly convene the parties by telephone to discuss the selection of the arbitrator(s).

b. Thereafter, CPR shall provide to the parties a list of candidates, from the CPR Panels, of not less than five candidates if one arbitrator is to be selected, and of not less than seven candidates if two or three arbitrators are to be selected. Such list shall include a brief statement of each candidate's qualifications, availability and disclosures in writing of any circumstances that might give rise to justifiable doubt regarding the candidate's independence or impartiality as provided in Rule 7. Each party shall number the candidates in order of preference, shall note any objection it may have to any candidate, and shall deliver the list so marked to CPR, which, on agreement of the parties, shall circulate the delivered lists to the parties. Any party failing without good cause to return the candidate list so marked within 10 days after receipt shall be deemed to have assented to all candidates listed thereon. CPR shall appoint as arbitrator(s) the nominee(s) willing to serve for whom the parties collectively have indicated the highest preference and who appear to meet the standards set forth in Rule 7. If a tie should result between two candidates, CPR may designate either candidate. If this procedure for any reason should fail to result in designation of the required number of arbitrators or if a party fails to participate in this procedure, CPR shall appoint a person or persons whom it deems qualified to fill any remaining vacancy.

6.3 Where a party has failed to designate the arbitrator to be appointed by it, CPR shall appoint a person whom it deems qualified to serve as such arbitrator.

Rule 7: Qualifications, Challenges and Replacement of Arbitrator(s)

7.1 Each arbitrator shall be independent and impartial.

7.2 By accepting appointment, each arbitrator shall be deemed to be bound by these Administered Rules and any modification thereof agreed to by the parties, and to have represented that he or she has the time available to devote to the expeditious process contemplated by these Administered Rules.

7.3 Each arbitrator shall disclose in writing to CPR and the parties prior to appointment in accordance with the Rules, and also promptly upon there arising during the course of the arbitration, any circumstances that might give rise to justifiable doubt regarding the arbitrator's independence or impartiality. Such circumstances include bias, interest in the result of the arbitration, and past or present relations with a party or its counsel.

7.4 No party or anyone acting on its behalf shall have any *ex parte* communications concerning any matter relating to the proceeding with any arbitrator or arbitrator candidate, except that a party may advise an arbitrator candidate being considered for designation as its appointed arbitrator of the general nature of the case and discuss the candidate's qualifications, availability, and independence and impartiality with respect to the parties, and a party also may confer with its designated arbitrator after the arbitrator's appointment by CPR regarding the selection of the chair of the Tribunal. As provided in Rule 5.4(d), no party or anyone acting on its behalf shall have any *ex parte* communications relating to the case with any arbitrator candidate designated or appointed pursuant to Rule 5 4.

7.5 Any arbitrator may be challenged if circumstances exist or arise that give rise to justifiable doubt regarding that arbitrator's independence or impartiality, provided that a party may challenge an arbitrator whom it has designated only for reasons of which it becomes aware after the designation has been made.

7.6 A party may challenge an appointed arbitrator only by a notice in writing to CPR, with a copy to the Tribunal and the other party, in accordance with the CPR Challenge Protocol (excluding its fee requirement) given no later than 15 days after the challenging party (i) receives notification of the appointment of that arbitrator, or (ii) becomes aware of the circumstances specified in Rule 7.5, whichever shall last occur. The notice shall state the reasons for the challenge with specificity. The notice shall not be sent to the Tribunal when the challenged arbitrator is a party-designated arbitrator selected as provided in Rule 5.4; in that event, CPR may provide

each member of the Tribunal with an opportunity to comment on the substance of the challenge without disclosing the identity of the challenging party.

7.7 When an arbitrator has been challenged by a party, the other party may agree to the challenge or the arbitrator may voluntarily withdraw. Neither of these actions implies acceptance of the validity of the challenge.

7.8 If neither agreed disqualification nor voluntary withdrawal occurs, the challenge shall be decided by CPR in accordance with the CPR Challenge Protocol (excluding its fee requirement) after providing the non-challenging party and each member of the Tribunal with an opportunity to comment on the challenge in accordance with these Rules.

7.9 In the event of death, resignation or successful challenge of an arbitrator not designated by a party, a substitute arbitrator shall be appointed pursuant to the procedure by which the arbitrator being replaced was selected. In the event of the death, resignation or successful challenge of an arbitrator designated by a party, that party may designate a substitute arbitrator, provided, however, that should that party fail to notify CPR and the other party of the substitute designation within 20 days from the date on which it becomes aware that the opening arose, that party's right of designation shall lapse, and CPR shall appoint a substitute arbitrator forthwith in accordance with these Rules.

7.10 In the event that an arbitrator fails to act or is *de jure* or *de facto* prevented from duly performing the functions of an arbitrator, the procedures provided in Rule 7.9 shall apply to the selection of a replacement. If the parties do not agree on whether the arbitrator has failed to act or is prevented from performing the functions of an arbitrator, either party may request CPR to make that determination forthwith.

7.11 If the sole arbitrator or the chair of the Tribunal is replaced, the successor shall decide the extent to which any hearings held previously shall be repeated. If any other arbitrator is replaced, the Tribunal in its discretion may require that some or all prior hearings be repeated.

7.12 If an arbitrator on a three-person Tribunal fails to participate in the arbitration, the two other arbitrators shall have the power in their sole discretion to continue the arbitration and to make any decision,

ruling or award, notwithstanding the failure of the third arbitrator to participate, unless the parties agree otherwise. In determining whether to continue the arbitration or to render any decision, ruling or award without the participation of an arbitrator, the two other arbitrators shall take into account the stage of the arbitration, the reason, if any, expressed by the third arbitrator for such nonparticipation, and such other matters as they consider appropriate in the circumstances of the case. In the event that the two other arbitrators determine not to continue the arbitration without the participation of a third arbitrator, the procedures provided in Rule 7.9 shall apply to the selection of a replacement.

Rule 8: Challenges to the Jurisdiction of the Tribunal

8.1 The Tribunal shall have the power to hear and determine challenges to its jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

8.2 The Tribunal shall have the power to determine the existence, scope or validity of the contract of which an arbitration clause forms a part. For the purpose of challenges to the jurisdiction of the Tribunal, the arbitration clause shall be considered as separable from any contract of which it forms a part.

8.3 Any challenges to the jurisdiction of the Tribunal, except challenges based on the award itself, shall be made no later than the notice of defense or, with respect to a counterclaim, the reply to the counterclaim; provided, however, that if a claim or counterclaim is later added or amended, a challenge to jurisdiction over such claim or counterclaim must be made not later than the response to such claim or counterclaim as provided under these Rules.

C. RULES WITH RESPECT TO THE CONDUCT OF THE ARBITRAL PROCEEDINGS

Rule 9: General Provisions

9.1 Subject to these Rules, the Tribunal may conduct the arbitration in such manner as it shall deem appropriate. The chair shall be responsible for the organization of arbitral conferences and hearings and arrangements with respect to the functioning of the Tribunal, and shall keep CPR informed of such arrangements throughout the proceedings.

9.2 The proceedings shall be conducted in an expeditious manner. The Tribunal is empowered to impose time limits it considers reasonable on each

phase of the proceeding, including without limitation, the time allotted to each party for presentation of its case and for rebuttal. In setting time limits, the Tribunal should bear in mind its obligation to manage the proceeding firmly in order to complete proceedings as economically and expeditiously as possible.

9.3 The Tribunal shall hold an initial pre-hearing conference for the planning and scheduling of the proceeding. Such conference shall be held promptly after the constitution of the Tribunal, unless the Tribunal is of the view that further submissions from the parties are appropriate prior to such conference. The objective of this conference shall be to discuss all elements of the arbitration with a view to planning for its future conduct. Following the initial pre-hearing conference, a schedule for the conduct of the arbitration should be issued as soon thereafter as appropriate. Matters to be considered in the initial pre-hearing conference may include, *inter alia*, the following

a. Procedural matters (such as setting specific time limits for, and manner of, any required discovery, the desirability of bifurcation or other separation of the issues in the arbitration; the desirability and practicability of consolidating the arbitration with any other proceeding; the scheduling of conferences and hearings; the scheduling of pre-hearing memoranda; the need for and type of record of conferences and hearings, including the need for transcripts; the amount of time allotted to each party for presentation of its case and for rebuttal; the mode, manner and order for presenting proof; the need for expert witnesses and how expert testimony should be presented, and the necessity for any on-site inspection by the Tribunal);

b. The early identification and narrowing of the issues in the arbitration;

c. The possibility of stipulations of fact and admissions by the parties solely for purposes of the arbitration, as well as simplification of document authentication;

d. The possibility of appointment of a neutral expert by the Tribunal, and

e. The possibility of the parties engaging in settlement negotiations, with or without the assistance of a mediator.

After the initial conference, further pre-hearing or other conferences may be held as the Tribunal deems appropriate.

9.4 In order to define the issues to be heard and determined, the Tribunal may, *inter alia*, make pre-hearing orders and instruct the parties to file more detailed statements of claim and of defense and pre-hearing memoranda.

9.5 Unless the parties have agreed upon the place of arbitration, the Tribunal shall fix the place of arbitration based upon the contentions of the parties and the circumstances of the arbitration. The award shall be deemed made at such place. The Tribunal may schedule meetings and hold hearings wherever it deems appropriate.

9.6 Except as otherwise provided in these Administered Rules, only electronic copies of filings, communications and other documents shall be sent to CPR; hard copies of filings or other documents sent to the Tribunal and/or the other party should not be sent to CPR in the ordinary course.

Rule 10: Applicable Law(s) and Remedies

10.1 The Tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to the dispute. Failing such a designation by the parties, the Tribunal shall apply such law(s) or rules of law as it determines to be appropriate.

10.2 Subject to Rule 10.1, in arbitrations involving the application of contracts, the Tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract.

10.3 The Tribunal may grant any remedy or relief, including but not limited to specific performance of a contract, which is within the scope of the agreement of the parties and permissible under the law(s) or rules of law applicable to the dispute.

10.4 The Tribunal may award such pre-award and post-award interest, simple or compound, as it considers appropriate, taking into consideration the contract and applicable law.

Rule 11: Discovery

The Tribunal may require and facilitate such discovery as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective. The

Tribunal may issue orders to protect the confidentiality of proprietary information, trade secrets and other sensitive information disclosed in discovery.

Rule 12: Evidence and Hearings

12.1 The Tribunal shall determine the manner in which the parties shall present their cases. Unless otherwise determined by the Tribunal or agreed by the parties, the presentation of a party's case shall include the submission of a pre-hearing memorandum including the following elements

a. A statement of facts;

b. A statement of each claim being asserted;

c. A statement of the applicable law and authorities upon which the party relies;

d. A statement of the relief requested, including the basis for any damages claimed; and

e. A statement of the nature and manner of presentation of the evidence, including the name, capacity and subject of testimony of any witnesses to be called and an estimate of the amount of time required for each witness's direct testimony.

12.2 If either party so requests or the Tribunal so directs, a hearing shall be held for the presentation of evidence and oral argument. Testimony may be presented in written and/or oral form as the Tribunal may determine is appropriate. The Tribunal is not required to apply any rules of evidence used in judicial proceedings, provided, however, that the Tribunal shall apply any lawyer-client privilege and work product immunity it deems applicable. The Tribunal shall determine the applicability of any privilege or immunity and the admissibility, relevance, materiality and weight of the evidence offered.

12.3 The Tribunal, in its discretion, may require the parties to produce evidence in addition to that initially offered. It may also appoint neutral experts whose testimony shall be subject to cross-examination and rebuttal.

12.4 The Tribunal shall determine the manner in which witnesses are to be examined. The Tribunal shall have the right to exclude witnesses from hearings during the testimony of other witnesses.

Rule 13: Interim Measures of Protection

13.1 At the request of a party, the Tribunal may take such interim measures as it deems necessary, including measures for the preservation of assets, the conservation of goods or the sale of perishable goods. The Tribunal may require appropriate security as a condition of ordering such measures.

13.2 A request for interim measures by a party to a court shall not be deemed incompatible with the agreement to arbitrate or as a waiver of that agreement.

Rule 14: Interim Measures of Protection by a Special Arbitrator

14.1 Unless otherwise agreed by the parties, this Rule 14 shall be deemed part of any arbitration clause or agreement that provides for arbitration under these Administered Rules.

14.2 Prior to the constitution of the Tribunal, any party may request that interim measures be granted under this Administered Rule against any other party by a special arbitrator appointed for that purpose.

14.3 Interim measures under this Administered Rule are requested by written application to CPR, entitled "Request for Interim Measures of Protection by a Special Arbitrator," describing in reasonable detail the relief sought, the party against whom the relief is sought, the grounds for the relief, and, if practicable, the evidence and law supporting the request. The request shall be delivered in accordance with Administered Rule 2 1, and shall certify that all other parties affected have been notified of the request or explain the steps taken to notify such parties.

14.4 The request for interim measures by a special arbitrator shall be accompanied by an initial deposit payable to CPR as provided in the Schedule of Administered Arbitration Costs on the CPR website. CPR shall promptly determine whether any further deposit is due to cover the fee of CPR and the remuneration of the special arbitrator, which amount shall be paid within the time period determined by CPR.

14.5 If the parties agree upon a special arbitrator within one business day of the request, that arbitrator shall be appointed by CPR subject to Rule 14.6. If there is no such timely agreement, CPR shall appoint a special arbitrator from a list of arbitrators maintained by CPR for that purpose. To the extent practicable, CPR shall appoint the special arbitrator within one business day of CPR's receipt of the application for interim measures under this Administered Rule. The

special arbitrator's fee shall be determined by CPR in consultation with the special arbitrator. The special arbitrator's fee and reasonable out-of-pocket expenses shall be paid from the deposit made with CPR.

14.6 Prior to appointment, a special arbitrator candidate shall disclose to CPR any circumstances that might give rise to justifiable doubt regarding his or her independence or impartiality within the meaning of Administered Rule 7. Any challenge to the appointment of a special arbitrator must be made within one business day of the challenging party's receipt of CPR's notification of the appointment of the arbitrator and the circumstances disclosed. A special arbitrator may be challenged on any ground for challenging arbitrators generally under Administered Rule 7. To the extent practicable, CPR shall rule on the challenge within one business day after CPR's receipt of the challenge. CPR's ruling on the challenge shall be final.

14.7 In the event of death, resignation or successful challenge of a special arbitrator, CPR shall appoint a replacement forthwith in accordance with the procedures set forth in Administered Rules 14.5 and 14.6.

14.8 The special arbitrator shall determine the procedure to be followed, which shall include, whenever possible, reasonable notice to, and an opportunity for hearing (either in person, by teleconference or other appropriate means) for all affected parties. The special arbitrator shall conduct the proceedings as expeditiously as possible, and shall have the powers vested in the Tribunal under Administered Rule 8, including the power to rule on his or her own jurisdiction and the applicability of this Administered Rule 14.

14.9 The special arbitrator may grant such interim measures as he or she deems necessary, including but not limited to measures for the preservation of assets, the conservation of goods or the sale of perishable goods.

14.10 The ruling on the request for interim measures shall be made by award or order, and the special arbitrator may state in such award or order whether or not the special arbitrator views the award or order as final for purposes of any judicial proceedings in connection therewith. The award or order may be made conditional upon the provision of security or any act or cessation of any act specified in the award or order. The award or order may provide for the payment of a specified amount in case of noncompliance with its terms.

14.11 The award or order shall specify the relief awarded or denied, shall determine the cost of the proceedings, which includes CPR's administrative fees and expenses, the special arbitrator's fee and expenses as determined by CPR, and apportion such costs among the parties as the special arbitrator deems appropriate. The special arbitrator may also apportion the parties' reasonable attorneys' fees and expenses in the award or order or in a supplementary award or order. Unless the parties agree otherwise, the award or order shall state the reasoning on which the award or order rests as the special arbitrator deems appropriate.

14.12 Prior to the execution of any special arbitrator's award, the special arbitrator shall send a copy of the award in draft form to CPR for a limited review for format, clerical, typographical or computational errors, or any errors of a similar nature in the award. CPR shall promptly review such award, suggest any corrections to the special arbitrator and the special arbitrator shall as soon as possible thereafter deliver executed copies of the award to CPR, which shall promptly deliver the award to the parties, provided no fees, expenses and other charges incurred in accordance with the Schedule of Administered Arbitration Costs are outstanding.

14.13 A request for interim measures by a party to a court shall not be deemed incompatible with the agreement to arbitrate, including the agreement to this Administered Rule 14, or as a waiver of that agreement.

14.14 The special arbitrator's award or order shall remain in effect until modified or vacated by the special arbitrator or the Tribunal. The special arbitrator may modify or vacate the award or order for good cause. If the Tribunal is constituted before the special arbitrator has rendered an award or order, the special arbitrator shall retain jurisdiction to render such award or order unless and until the Tribunal directs otherwise. Once the Tribunal has been constituted, the Tribunal may modify or vacate the award or order rendered by the special arbitrator.

14.15 The special arbitrator shall not serve as a member of the Tribunal unless the parties agree otherwise.

Rule 15: The Award

15.1 The Tribunal may make final, interim, interlocutory and partial awards. With respect to any interim,

interlocutory or partial award, the Tribunal may state in its award whether or not it views the award as final for purposes of any judicial proceedings in connection therewith.

15.2 All awards shall be in writing and shall state the reasoning on which the award rests unless the parties agree otherwise. The award shall be deemed to be made at the seat of arbitration and shall contain the date on which the award was made. When there are three arbitrators, the award shall be made and signed by at least a majority of the arbitrators.

15.3 A member of the Tribunal who does not join in an award may issue a dissenting opinion. Such opinion shall not constitute part of the award.

15.4 Prior to execution of any award, the Tribunal shall send a copy of the award in draft form to CPR for a limited review for format, clerical, typographical or computational errors, or any errors of a similar nature in the award. CPR shall promptly review such award, and suggest any corrections to the Tribunal.

15.5 Thereafter as soon as possible, but in no event more than 3 days, the Tribunal shall deliver executed copies of the award and of any dissenting opinion to CPR, which shall promptly deliver the award and any dissenting opinion to the parties provided no fees, expenses and other charges incurred in accordance with the Schedule of Administered Arbitration Costs are outstanding.

15.6 Within 15 days after receipt of the award, either party, with notice to the other party and CPR, may request the Tribunal to clarify the award; to correct any clerical, typographical or computational errors, or any errors of a similar nature in the award; or to make an additional award as to claims or counterclaims presented in the arbitration but not determined in the award. The Tribunal shall make any clarification, correction or additional award requested by either party that it deems justified within 30 days after receipt of such request. Within 15 days after delivery of the award to the parties or, if a party requests a clarification, correction or additional award, within 30 days after receipt of such request, the Tribunal may make such corrections and additional awards on its own initiative as it deems appropriate. All clarifications, corrections, and additional awards shall be in writing, shall be submitted directly to CPR by the Tribunal for delivery by CPR to the parties, and the provisions of this Administered Rule 15 shall apply to them.

15.7 The award shall be final and binding on the parties, and the parties will undertake to carry out the award without delay. If an interpretation, correction or additional award is requested by a party, or a correction or additional award is made by the Tribunal on its own initiative as provided in Administered Rule 15.6, the award shall be final and binding on the parties when such clarification, correction or additional award is issued by CPR or upon the expiration of the time periods provided in Administered Rule 15.6 for such clarification, correction or additional award to be made, whichever is earlier.

15.8 a. The dispute should in most circumstances be submitted to the Tribunal for decision within six months after the initial pre-hearing conference required by Administered Rule 9.3. The final award should in most circumstances be submitted by the Tribunal to CPR within 30 days after the close of the hearing and thereafter CPR should render the award to the parties promptly. The Tribunal and CPR shall use their best efforts to comply with this schedule.

b. CPR must approve any scheduling orders or extensions that would result in a final award being rendered more than 12 months after the initial pre-hearing conference required by Administered Rule 9.3. When such approval is required, CPR in its discretion may convene a call with the parties and arbitrators to discuss factors relevent to such request.

Rule 16. Failure to Comply with Administered Rules

Whenever a party fails to comply with these Administered Rules, or any order of the Tribunal pursuant to these Administered Rules, in a manner deemed material by the Tribunal, the Tribunal, if appropriate, shall fix a reasonable period of time for compliance and, if the party does not comply within said period, the Tribunal may impose a remedy it deems just, including an award on default. Prior to entering an award on default, the Tribunal shall require the non-defaulting party to produce evidence and legal argument in support of its contentions as the Tribunal may deem appropriate. The Tribunal may receive such evidence and argument without the defaulting party's presence or participation.

D. RULES WITH RESPECT TO COSTS AND FEES

Rule 17. Arbitrator Fees, Expenses and Deposits

17.1 Each arbitrator shall be compensated on a reasonable basis determined at the time of appointment for serving as an arbitrator and shall be reimbursed for any reasonable travel and other expenses. The compensation for each arbitrator should be fully disclosed to all Tribunal members and parties. If there is a disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by CPR and confirmed in writing to the parties. The parties shall be jointly and severally liable for such fees and expenses.

17.2 The Tribunal shall determine the necessary advances on the arbitrator(s) fees and expenses and advise CPR which, unless otherwise agreed by the parties, shall invoice the parties in equal shares. The amount of any advances to cover arbitrator fees and expenses may be subject to readjustment at any time during the arbitration. Such funds shall be held and disbursed in a manner CPR deems appropriate. An accounting will be rendered to the parties and any unexpended balance returned at the conclusion of the arbitration as may be appropriate.

17.3 If the requested advances are not paid in full within 10 days after receipt of the request, CPR shall so inform the parties and the proceeding may be suspended or terminated unless the other party pays the non-paying party's share subject to any award on costs.

Rule 18. CPR Administrative Fees and Expenses

18.1 In addition to the CPR Filing Fee, CPR shall charge a Case Administrative Fee ("Administrative Fee") as set forth in the Schedule of Administered Arbitration Costs on the CPR website. CPR reserves the right to adjust the Administrative Fee based on developments in the proceeding

18.2 Unless otherwise agreed by the parties, CPR shall invoice the parties in equal shares for the Administrative Fees. Payment shall be due on receipt unless other arrangements are authorized by CPR. The parties shall be jointly and severally liable to CPR for the Administrative Fee. In the event a party fails to pay as provided in the invoice, the proceeding shall be suspended or terminated unless the other party pays the non-paying party's share subject to any award on costs.

[redacted]

Rule 19. Fixing and Apportionment of Costs

19.1 The Tribunal shall fix the costs of arbitration in its award. The costs of arbitration include:

a. The fees and expenses of members of the Tribunal;

b. The costs of expert advice and other assistance engaged by the Tribunal;

c. The travel and other expenses of witnesses to such extent as the Tribunal may deem appropriate;

d. The costs for legal representation and assistance and experts incurred by a party to such extent as the Tribunal may deem appropriate;

e. The CPR Administrative Fee with respect to the arbitration;

f. The costs of a transcript; and

g. The costs of meeting and hearing facilities.

19.2 Subject to any agreement between the parties to the contrary, the Tribunal may apportion the costs of arbitration between or among the parties in such manner as it deems reasonable, taking into account the circumstances of the case, the conduct of the parties during the proceeding, and the result of the arbitration.

E. MISCELLANEOUS ADMINISTERED RULES

Rule 20: Confidentiality

Unless the parties agree otherwise, the parties, the arbitrators and CPR shall treat the proceedings, any related discovery and the decisions of the Tribunal, as confidential, except in connection with judicial proceedings ancillary to the arbitration, such as a judicial challenge to, or enforcement of, an award, and unless otherwise required by law or to protect a legal right of a party. To the extent possible, any specific issues of confidentiality should be raised with and resolved by the Tribunal.

Rule 21: Settlement and Mediation

21.1 Either party may propose settlement negotiations to the other party at any time. The Tribunal may suggest that the parties explore settlement at such times as the Tribunal may deem appropriate.

21.2 With the consent of the parties, the Tribunal at any stage of the proceeding may request CPR to arrange for mediation of the claims asserted in the

arbitration by a mediator acceptable to the parties. The mediator shall be a person other than a member of the Tribunal. Unless the parties agree otherwise, any such mediation shall be conducted under the CPR Mediation Procedure.

21.3 The Tribunal will not be informed of any settlement offers or other statements made during settlement negotiations or a mediation between the parties, unless both parties consent.

21.4 If the parties settle the dispute before an award is made, the Tribunal shall terminate the arbitration and so inform CPR. If requested by all parties and accepted by the Tribunal, the Tribunal may record the settlement in the form of an award made by consent of the parties. The Tribunal is not obliged to give reasons for such an award. CPR shall issue the award

Rule 22: Actions Against CPR or Arbitrator(s)

Neither CPR nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these Administered Rules.

Rule 23: Waiver

A party knowing of a failure to comply with any provision of these Administered Rules, or any requirement of the arbitration agreement or any direction of the Tribunal, and neglecting to state its objections promptly, waives any objection thereto.

Rule 24: Interpretation and Application of Administered Rules

The Tribunal shall interpret and apply these Administered Rules insofar as they relate to the Tribunal's powers and duties When there is more than one member on the Tribunal and a difference arises among them concerning the meaning or application of these Administered Rules, that difference shall be decided by a majority vote. All other Rules shall be interpreted and applied by CPR.

Sample Arbitrator Materials

FORM OF RETAINER LETTER FOR AD HOC CASES
(TO BE ADAPTED TO THE PARTICULAR CASE)

Charles J. Moxley, Jr.
MoxleyADR LLC
850 Third Avenue, 14th Floor
New York, NY 10022
Tel: (212) 329-8553
Cell: (917) 699-8801
E-mail: cmoxley@moxleyadr.com

DATE

VIA E-MAIL and MAIL

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RE: XXXXXXXXXXXXXXX
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XXXXXXXXXXXXXXX

Dear Counsel:

The purpose of this letter is to set forth the basis upon which I will serve as arbitrator ("Arbitrator") in the above arbitration (the "Arbitration").

The Parties hereby appoint me as Arbitrator pursuant to the terms hereof. The Parties will compensate me at the rate of $___ per hour for my services as Arbitrator, including for hearing, study, and administrative time, and will reimburse my reasonable and necessary expenses incurred in connection with the Arbitration, with each side being responsible for one-half of my charges, subject to a possible subsequent reallocation of charges in the course of this arbitration. My statements will be sent to you as counsel. You agree to promptly forward the statements to the Parties, but the payment obligation is solely that of the Parties.

The Parties will make an initial deposit of $_____, *i.e.*, $_____ from each side, due upon delivery of an executed copy of this Retainer Agreement. That deposit will be supplemented, following the Preliminary Hearing/Scheduling Conference in the Arbitration, based upon my estimate at that time as to the amount of time that will likely be needed for the Arbitration. I

the work in question. I may suspend my participation in the Arbitration at any time if the Parties have not timely deposited the funds I have requested.

The deposits will be maintained in a non-interest-bearing escrow account of MoxleyADR LLC. Any deposits remaining at the end of the Arbitration not needed to satisfy my statements will be returned to the Parties.

I will submit my statements to you periodically, depending upon the level of activity, drawing down on the deposits at such times. The statements will necessarily be of a general nature so as not to disclose my thinking concerning the case.

The Parties will not require me to be a party or witness in any judicial or other proceeding arising out of or relating to the Arbitration and will pay me my hourly rate set forth above for time spent in connection with any proceeding in which I might become involved arising out of or relating to the Arbitration.

If the above is acceptable, would you kindly have the enclosed copy of this Retainer Agreement executed by the Parties and returned to me, along with the initial deposits payable to MoxleyADR LLC. I will execute the Arbitrator's Oath annexed hereto upon receipt of an executed copy of the Retainer Agreement.

I look forward to working with you on this matter.

Very truly yours,

Charles J. Moxley, Jr.

CJM:sm

AGREED TO:

XXXXXXXXXXXXXX

By:_____ _____
Date

XXXXXXXXXXXXXXX
XXXXXXXXXXXXXXX
DATE
Page 3

XXXXXXXXXXXXXXX

By:_____ _____
Date

ARBITRATOR'S OATH

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

I attest that I have diligently conducted a conflicts check, based upon review of the information provided to me regarding this matter, and have performed my obligations and duties to disclose in accordance with the Code of Ethics for Arbitrators in Commercial Disputes, effective March 1, 2004, issued by the American Arbitration Association and the American Bar Association (the "Code of Ethics").

I understand that my obligation to check for conflicts and make disclosures is ongoing for the length of my service as an arbitrator in this matter.

I, being duly sworn, hereby accept this appointment in accordance with the Moxley Retainer Agreement to which this Arbitrator's Oath is attached. I hereby further undertake, to faithfully and fairly hear and decide the matters in controversy between the Parties in accordance with the Parties' arbitration agreement and the Code of Ethics and to render an Award according to the best of my understanding.

Dated: _____

_____
Charles J. Moxley, Jr.

Sworn to before me
this ____ day of March, 2013.

_____
Notary Public

FORM OF DISCLOSURE STATEMENT, INCLUDING BLOCK DISCLOSURE COVERING BAR ACTIVITIES, PUBLICATIONS, ETC. (TO BE ADAPTED TO THE PARTICULAR CASE)

Charles J. Moxley, Jr.
MoxleyADR LLC
850 Third Avenue, 14th Floor
New York, NY 10022
Tel· (212) 329-8553
Cell: (917) 699-8801
E-mail: cmoxley@moxleyadr.com

DATE

VIA E-MAIL and MAIL

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RE: XXXXXXXXXXXXXXX
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Dear xxxxxx:

Enclosed please find the Notice of Appointment, Arbitrator's Oath, and Notice of Compensation Arrangements in the above matter, signed by me.

Based upon my recollection and conflicts search, I have had the following contacts with Parties, witnesses, attorneys and law firms identified as involved in this case: _____

_____

_____

_____

My conflicts search is conducted based upon my recollection and conflicts system. My conflicts system, which goes back approximately ten years, captures information as to parties and attorneys with whom I have had cases, but not as to witnesses.

I am active in numerous bar associations and other professional organizations and regularly teach, write and participate on panels and other programs in connection with ADR activities, including as follows:

- Bar Association Activities: I am Chair of the Committee on Arbitration and ADR of the Commercial and Federal Litigation Section of the NYSBA and a member of that Section's Executive Committee, and a member of the ADR Committee of the New York City Bar Association. I am a past member of the NYSBA's House of Delegates, a member of the Executive Committee and past Chair of the Dispute Resolution Section of the NYSBA, and was previously a member of the Arbitration Committee of the New York City Bar Association. I am also a member of the Dispute Resolution and International Sections of the American Bar Association and of the Arbitration and Mediation Committees of the Dispute Resolution Section and have in the past been active in the New York County Lawyers' Association.

- Professional Activities: I am a Fellow of the College of Commercial Arbitrators and of the Chartered Institute of Arbitrators and an ARIAS-U.S. Certified Arbitrator and IMI Certified Mediator. I am also on the Executive Committee of the New York Branch of the Chartered Institute of Arbitrators.

- Publications: I regularly write in the ADR area and have published numerous articles, some of which have been reprinted in books.

- Teaching: I am an Adjunct Professor at Fordham Law School, teaching international and arbitration law, and the Distinguished ADR Practitioner in Residence at the Benjamin N. Cardozo School of Law. In the past, I have taught at St. John's University School of Law and New York Law School.

- Participation on Panels: I have participated on numerous panels in CLE and other programs presented by the American Arbitration Association, the NYSBA, the American Bar Association, the New York City Bar Association, the New York County Lawyers' Association, ARIAS-US, the Fordham and Cardozo Law Schools, and other organizations and regularly engage in such activities. I also regularly provide training to arbitrators in the commercial arbitration field.

I have contact, actual or constructive, with so many attorneys and others in connection with the foregoing activities that there is no practical way for me to conduct an effective conflicts search to ascertain whether I have had any contact with or exposure to participants in this case in connection with such activities, and, accordingly, I have not conducted such a search and make no disclosure as to such matters other than based on knowledge I have as a result of my present recollection without inquiry. Nor have I checked whether any persons associated with this case may have published in the same issue of a journal or in the same books as those in which I have

been published or may have participated in any trainings or other programs in which I have been involved or may be on listservs on which I am included. I am no longer affiliated with any law firm and have not conducted any conflicts check with any of the prior firms with which I have been affiliated.

I make the above disclosures out of completeness. None of the above would in any way affect my impartiality or independence or interfere with my ability to serve fairly as an arbitrator in this case.

If any of the parties, counsel or others associated with this case are aware of any contacts I may have had with any of the case participants, I would appreciate their calling such information to the attention of the AAA and of counsel and the parties involved in this case.

Thank you.

Very truly yours,

Charles J. Moxley, Jr.

CJM:sm
Enclosures

DRAFT: 05/16/13 3:15 PM

FORM OF MEMORANDUM TO BE SENT TO COUNSEL IN ADVANCE OF PRELIMINARY HEARING

[INDIVIDUAL ENTRIES TO BE ADAPTED/ADJUSTED/DELETED/SUPPLEMENTED BASED ON THE NEEDS OF THE PARTICULAR CASE]

Charles J. Moxley, Jr.

XXXXXXXXXXXXXXXXXXXXXXXXX

XXXXXXXXXXXXXXX,	)	
	)	XXXXXXXXXXXXXXX
Claimant,	)	
- and -	)	
	)	
	)	
XXXXXXXXXXXXXXX,	)	
	)	
Respondent.	)	
	)	

DISCUSSION MEMORANDUM FOR PRELIMINARY HEARING

Dear Counsel:

The Panel has conferred and compiled the following list of matters to be covered at our preliminary hearing scheduled for _____ at _____ _.m. at the offices of _____. Party representatives are welcome to attend with counsel.

Purpose of Preliminary Hearing

As you know, the preliminary hearing is the organizational meeting for an arbitration, at which the schedule is established, to the extent possible, for all phases of the case.

The Parties' Acceptance of the Panel

We will confirm the Parties' acceptance of the Panel, as constituted.

Neutrality of Party-Appointed Arbitrators

We will confirm our understanding that the party-appointed Arbitrators are neutral.

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XXXXXXXXXXXXXXXXXXXXXXXXXXXX

***Ex Parte* Communications**

We will confirm that, while there may have been *ex parte* communications between the Parties and their party-appointed Arbitrator to date, going forward there will be no *ex parte* communications between any Arbitrator and any Party.

Applicable Rules

We will confirm that this arbitration will be conducted pursuant to the _____ of the _____.

Applicable Law

We note that the _____ (the "Agreement") provides in Section ____ that the Agreement shall be governed by _____ law. We further note that Section _____ of the Agreement provides that the arbitration procedures shall be governed by the _____ and applicable provisions of _____ law. We will discuss the meaning of these provisions.

Schedule

We note that Section _____ of the Agreement provides that the Panel shall conduct this arbitration in such a way as to issue its award "as soon as practicable, but in no event later than _____ (___) days after appointment of the independent arbitrator pursuant to this Section ____ nor later than _____ (__) days following completion of the arbitration."

We note that the _____ e-mail of _____, to the Parties set an objections date of _____ for the appointment of the Chair, and, accordingy, subject to hearing from you on the matter if you have a different view, understand that _____ is the "appointment date" from which the arbitration clause's _____ is calculated, meaning that, under this schedule, the Panel's award is due on _____.

We will also want to discuss how the _____ days provision of Section _____ of the Agreement should be interpreted, including whether the ____ days should run from the later of the completion of the evidentiary hearing or the Parties' submission of any post-hearing briefs or other papers.

Arbitrability

We will want to confirm with the Parties that all issues in this case are arbitrable and subject to the jurisdiction of the Arbitrators in the case and that all conditions precedent to arbitration have been satisfied.

XXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXXX

Description of the Case

We will invite each side to set forth its views as to what this case is about, what the main factual and legal issues are, and how the case should be best administered to achieve the arbitration benefits of expedition and economy, along with full and fair opportunity for each side to develop and present its claims or defenses.

Our focus will be particularly on encouraging the Parties to identify the real issues in contention and the ones that may be dealt with in a more summary way, whether through stipulation, agreed chronologies, or the like.

Amendments, if Any, to the Pleadings

We will discuss whether any amendments to the pleadings would be helpful to the expeditious preparation of this case for hearing. We note in this regard that Paragraph __ of the Demand refers to other claims that may be asserted and that Respondent has not responded paragraph by paragraph to the Demand.

Substantive Motions

The Parties will be asked if there are any substantive motions contemplated and, if there are, for a description of them and a statement as to why it is believed that any such motion would foster the efficient and fair administration of the case.

Discovery Master

The Parties will be asked whether they wish to have the entire Panel hear discovery and routine procedural matters or to delegate such matters to the Chair as Discovery Master, subject to involving the entire Panel if the Chair or any Party so desires in any particular instance. It is contemplated that, if the Chair is appointed Discovery Master, either of the other Arbitrators may serve as Discovery Master if a discovery or similar issue arises at a time when the Chair is unavailable.

Reliance Documents

We will discuss whether, separately from the ordinary document production procedures, it might be helpful in this case for the Parties to produce early on the documents of which they are presently aware upon which they anticipate relying at the hearing.

Document Production

XXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXX

We will establish a schedule for document disclosure, including possibly for such matters as the following: document requests, objections, production, Counsels' meeting and conferring on objections, privilege logs, and the resolution of any remaining discovery disputes by the Panel or Discovery Master.

We request that you inform yourselves in advance of the preliminary hearing as to how your clients' files are maintained and consider how you think we can most efficiently manage discovery, including electronic discovery, in this matter.

Electronic Discovery

This will involve a discussion of how electronic discovery can be most effectively managed in this case, including through the early addressing of such issues as search terms, custodians, hit counts, format, metadata, and the like.

Stipulation of Confidentiality

This will address the process for establishing a stipulation of confidentiality as to sensitive documents, if the Parties so desire.

We will also discuss whether the Parties will be requesting a confidentiality order in this arbitration, with respect to the confidentiality of the arbitration proceedings.

Depositions

We note that the arbitration clause in this matter contemplates depositions of parties and third-parties, as well as document production. We will discuss what particular depositions the Parties believe are needed in this case and how long such depositions should be.

As a general matter, we will encourage the Parties to limit depositions to those that are really necessary, so as to enable this process to achieve the arbitral goals of expedition and economy, to the extent consistent with the Parties' ability to do what they need to do to prepare and present their claims or defenses.

Completion of Discovery

We will want to establish a completion date for discovery.

Cut-off Date for Further Pleadings and Motions

We will address the subject of appropriate cut-off dates for further pleadings and motions.

XXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

Non-Party Subpoenas

This will involve a discussion of what, if any, non-parties may need to be subpoenaed and of the schedule and process to be followed with respect to subpoenas.

We will encourage the Parties to get working on non-party subpoenas as promptly as possible and will request that the Parties cooperate with each other in trying to make witnesses available informally.

Experts' Reports

This will involve a discussion of whether the Parties anticipate presenting expert witnesses in the case, and, if so, the schedule for experts' reports, which it is contemplated will serve as the direct testimony of the expert witnesses, subject to an agreed warm-up period.

Status Conferences

We will want to schedule periodic status conferences, either with the entire Panel or with the Discovery Master, as you prefer.

Possible Stipulated Facts

This will involve a discussion of whether it will potentially be productive for the Parties to attempt to agree to stipulated facts in this matter.

Summaries, Chronologies and *Dramatis Personae*

We will encourage the Parties to prepare, either jointy or separately, whatever summaries, chronologies and *dramatis personae* they think might be helpful to the Arbitrators.

It particularly struck us that the facts of record as to the sales of _____ that are a focus of this dispute may efficiently be set forth in summary form, in one way or another, accompanied by the applicable documents, thereby potentially saving the substantial time that might have otherwise been necessary to present such matters. Obviously, the disputed facts as to such sales would be the subject of more detailed evidentiary presentations at the hearing, to the extent necessary.

Identification of Witnesses and of Mode of Testimony

This will involve a discussion of the timing of the Parties' identification of the witnesses they expect to call at the hearing in this matter and also discussion of a schedule for the Parties' discussing whether some witnesses may appear at the hearing by video-conference, conference call, or the like.

XXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

We will also discuss whether the Witness Lists should include descriptions of the areas of testimony of the anticipated witnesses or a summary of such testimony.

Sworn Witness Statements

This will involve a discussion of whether you think it would be helpful to proceed by sworn witness statements for some or all witnesses, with such statements serving as the direct testimony of any such witnesses, subject to an agreed "warm-up period."

Hearing Exhibits

This will involve a discussion of the process and schedule for your identifying and organizing hearing exhibits, including joint exhibits, key exhibits, and disputed exhibits (if any).

Demonstrative Exhibits

This will involve a discussion of the deadlines for your exchanging demonstrative exhibits, including PowerPoints, if any.

Pre-Hearing Memoranda

This will involve a discussion of the pre-hearing memoranda, if any, to be submitted by the Parties.

We will encourage you, to the extent practicable, to do as much of your briefing in advance of the hearing as possible so that we may move to decision quickly after the completion of the hearing.

The Hearing

This will involve a discussion of the length of the hearing, when and where the hearing will be conducted and of how the hearing will be conducted procedurally and as to evidentiary issues. Please have your schedules available as to possible hearing dates, including the schedules of your witnesses.

The Parties will be encouraged to consider agreeing on a maximum amount of time for each side to present its case.

We will also discuss whether a chess clock approach makes sense in this case.

XXXXXXXXXXXXXX
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Evidentiary Nature of Designated Hearing Exhibits

This will involve a discussion of how and when designated exhibits will come into evidence.

Copies of Cases and Other Authorities Relied Upon

The Parties will be requested to provide the Arbitrators with hard copies of cases and other authorities relied upon in any memoranda submitted.

Accelerated Exchange Program

We will ask whether the Parties wish to adopt the AAA's Accelerated Exchange Program, whereby submissions are sent directly to the Arbitrators, with a copy to opposing counsel and the AAA, rather than sending them to the AAA for transmittal to the Arbitrators.

Form of the Parties' Submissions to the Arbitrators

The Panel will request that the Parties submit shorter documents electronically and longer documents both electronically and by express mail or other overnight delivery provider.

Electronic Hearing

We will discuss the extent to which the Parties want to conduct the hearing through hard or electronic copies of documents.

Post-Hearing Submissions

We will discuss whether the Parties will want to make closing statements, whether at the end of or some time subsequent to the end of the hearing, and whether they will want to submit post-hearing memoranda, although final decision on this will be left for later in the case.

As mentioned above, we will encourage the Parties to do as much of the briefing as practicable on a pre-hearing basis to optimize getting the case to the Arbitrators as quickly after the hearing as possible.

Form of Award

This will involve a discussion of whether the Parties will want a "standard" or reasoned award in this matter or detailed findings of fact and conclusions of law.

XXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXX

Court Reporter

The Arbitrators will ask the Parties to advise as to whether they anticipate arranging a court reporter for the hearing.

Costs and Attorneys' fees

We note that the Agreement provides for an allocation of costs and attorneys' fees based on the extent to which the Parties prevail in the arbitration. We will discuss the timing and form of the Parties' submissions in this regard.

Disclosures as to Conflicts

This will involve reference to the fact that the Arbitrators are obligated on a continuing basis to disclose any additional matters that come to their attention that are subject to disclosure under the applicable ethical rules. The Parties will be asked to agree to bring to the attention of each other and the AAA any information that comes to their attention that may require disclosure.

Mediation Window

We will discuss whether the Parties would like to have a "mediation window," built into the schedule. This would be a time when, independently of and without the participation of the Arbitrators, the Parties consider pursuing a mediation process while the arbitration process proceeds.

Other

The Parties will be invited to raise any other questions, issues or concerns they would like to discuss at the preliminary hearing and are invited to propose any such matters in advance as agenda items.

* * * *

We look forward to working with you on this matter.

Thank you.

Charles J. Moxley, Jr., Chair
For the Panel

To Be Adapted to the Particular Case
(Each order is customized; the following sets forth some possible draft language to be considered)

Charles J. Moxley, Jr.

_____
_____

_____,	:	Case No. _____
Claimant,	:	
- and -	:	
_____,	:	
Respondents.	:	

REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

Pursuant to the _____ Rules of the _____ (the "____"), a preliminary hearing was held in the above matter by telephonic conference call on _____, before Arbitrators _____, _____, and _____ (the "Arbitrators"). Appearing at the hearing were _____, of _____, attorneys for Claimant _____ ("Claimant"), and _____ of _____, attorneys for Respondent _____ and _____ ("Respondents") (collectively, the "Parties").

Following are the matters agreed to by the Parties and/or directed by the Arbitrators.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

Acceptance of Panel

1. All Arbitrators have made disclosures. The Parties acknowledge receipt of same and consent to proceed with the Panel as presently constituted.

***Ex Parte* Communications**

2. There will be no *ex parte* communications between the appointing parties and the party-nominated arbitrators going forward, with the following exception: The party-nominated Arbitrators may submit their statements for arbitration services to their appointing parties, as previously agreed; provided, however, that such statements will be general in nature so as not to disclose the thinking or decision-making processes of the Arbitrators.

Applicable Rules

3. This arbitration will be conducted pursuant to the _____ of the ____, as amended and in effect _____, for individually negotiated contracts (the "_____").

Schedule

4. The Parties confirm that they waive the provisions of Section __ of the _____ relating to the time period within which the Arbitrators must render their award in this proceeding.

Number of Arbitrators

5. The arbitration provision of the Parties' License Agreement (the "Agreement") applicable to this dispute provides for 3 arbitrators. The Parties confirmed that they have agreed to have this dispute heard by one arbitrator, the Arbitrator.

_____
_____and _____
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Contract Provision Requiring Hearing to Commence
Within Days of Selection of the Third Arbitrator

6. The arbitration clause in this matter provides for the hearing to commence within __ days of the appointment of the third arbitrator, unless the Parties agree otherwise. The Parties have agreed as follows in this regard: _____.

Possible Status Quo Order

7. The Parties will promptly meet and confer in an effort to agree to a status quo order with respect to this matter. In advance of such discussions, Claimant will provide Respondent will a proposed form of such order. Any status quo order agreed to by the Parties will be submitted to the Arbitrator to be "so ordered."

8. A follow-up conference call with the Arbitrator with respect to a possible status quo order will be held at ____ _.m. on _____, in a conference call to be arranged by the ___, provided, however, that, if the Parties resolve the matter, they will so advise the ___ and the call will be cancelled.

Respondent's Motion to Stay or Limit the Scope of this Arbitration

9. The Parties will meet and confer concerning Respondent's request for a stay of this arbitration or a limitation on its scope.

10. If the Parties are unable to agree on the matter, Respondent may, by _____, serve and file its motion seeking to stay this arbitration or limit its scope. Absent good cause shown or agreement by the Parties, such motion papers, not counting exhibits, will be limited to ten (10) pages.

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_____and _____
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11. By _____, Claimant will respond to Respondent's said motion. Absent good cause shown or agreement by the Parties, such response, not counting exhibits, will be limited to ten (10) pages.

12. Oral argument on the motion will be held with the Arbitrators on _____ at ____ _.m., in a conference call to be arranged by the ____.

Acceptance of Arbitrator

13. The Parties agreed that they have accepted Arbitrator _____ as the Arbitrator in this arbitration, notwithstanding that Mr. _____ is not an active or retired official of an insurance or reinsurance company.

Respondent's Motion as to Arbitrability

14. Respondent asserts that, with respect to this matter, Claimant, by _____, waived its right to have this dispute arbitrated and hence that this arbitration should be dismissed. Claimant disputes that any such waiver took place. Respondent intends to make a motion to dismiss on the ground that the Parties' instant dispute is not arbitrable as a result of the alleged waiver.

15. The following schedule will apply with respect to said motion:

- Respondent will interpose its motion and supporting papers by _____;
- Claimant will interpose its opposing papers by _____;
- Respondent will interpose its reply papers, if any, by _____; and
- Oral argument will be heard on the motion on _____ at ____ _.m. New York time, in a conference call to be arranged by the _____.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

Conditional Scheduling Order for the Case Going Forward

16. The contemplated motion as to arbitrability raises the question as to whether this arbitration will proceed.

17. Accordingly, the following schedule is set forth provisionally, subject to the Arbitrator's ruling on said motion.

Arbitrability

18. The Parties agree that all claims presently asserted in this arbitration are arbitrable.

Further Pleadings

19. Claimant will serve and file its Amended Demand for Arbitration by _____, setting forth in detail the factual and legal bases of Claimant's claims in this arbitration and attaching the documents upon which Claimant relies for said claims.

20. Respondents will serve and file their Answer to Claimant's Amended Demand for Arbitration by _____, setting forth in detail the factual and legal bases of Respondents' defenses in this arbitration and attaching the documents upon which Respondents rely for said defenses.

Respondents' Answer

21. By _____, Respondents will serve and file their Answer in this arbitration. The Answer will respond with specificity to the particularized allegations of Claimant's Notice of Arbitration and Statement of Claim (the "Statement of Claim"), as well as setting forth Respondents' own allegations as to the matters at issue in this arbitration.

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_____and _____
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22. he Answer, when interposed, will be deemed confidential, for use in this arbitration only; provided, however, that within __ days of the discovery master's so ordering a confidentiality order in this matter (discussed below), Respondents will specifically designate the portions of their Answer they deem confidential pursuant to said order.

Amended Pleadings

23. By _____, Claimants will serve and file their Demand for Arbitration and Second Amended Statement of Claim ("Second Amended Statement of Claim"), setting forth their claims with particularity, including their claims as to _____ _____, attaching to said amended pleading the documents upon which Claimants rely for the allegations set forth therein. Except as otherwise provided, the compliance time as to all deadlines set forth herein is _____ on the specified date.

24. By _____, Respondent will serve and file its Written Statement of Defense ("Answer to Claims"), including its counterclaims, if any, setting forth with particularity its response to the allegations set forth in Claimants' Second Amended Statement of Claim and the factual and legal bases for its counterclaims, if any, attaching to said pleading the documents upon which Claimants rely for the allegations set forth therein.

25. By _____, Claimants will serve and file their Written Statement of Defense to any counterclaims asserted by Respondent in this matter, setting forth with particularity their response to the allegations set forth in Respondent's Answer to Claims, attaching to said pleading the documents upon which Respondent relies for the allegations set forth therein.

_____
_____and _____
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Pleadings

26. The Parties agreed that the pleadings are closed in this matter. No amendments or further pleadings are contemplated.

Potential Dispositive Motions

27. In the event a Party wishes to make a possible dispositive motion, that Party will, by _____, serve and file a letter of no more than three pages summarizing the contemplated bases for such a motion and explaining why, in that Party's view, the making of the motion would foster the efficient administration and resolution of this case.

28. The other side will thereafter have until _____ to respond to the foregoing letter with its own letter of no more than three pages.

29. Counsel for the Parties will thereafter confer by _____ as to whether, in their respective views, the contemplated motion would contribute to the efficient administration and resolution of the case.

30. If, after the Parties so confer, either side still wants to make such a motion, the side seeking to make the motion will so advise the Arbitrator and a conference call will be held with the Arbitrator on _____ at ____ _.m. to discuss the proposed motion.

31. No dispositive motion may be made after _____.

Substantive Motions

32. No substantive motions are contemplated in this arbitration.

_____
_____and _____
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Respondent's Motion for a Stay

33. With respect to Respondent's motion to stay this arbitration based on developments in parallel litigation between the Parties and others in Supreme Court, New York County, the Arbitrators denied said motion, subject to leave to renew, should the applicable facts and circumstances change.

Claimant's Motion for Summary Disposition

34. With respect to Claimant's motion for summary disposition dated _____, Respondents will, by _____, interpose their papers in opposition to said motion.

35. Because of the Arbitrators' familiarity with the case and the issues raised, Respondents' opposing memorandum may consist largely of bullet points without extensive elaboration. Respondents advise that they expect to be able to limit the memorandum to __ pages, double-spaced.

36. By _____, Claimant will submit its reply papers, if any, with such papers being limited to __ pages, double-spaced.

37. Oral argument on this motion will be held before the Arbitrators on _____ at ____ p.m., in a conference call to be arranged by the ____.

Motion to Strike

38. Respondents assert that certain allegations contained in Claimant's Statement of Claim should be stricken. Claimant opposes the striking of any portion of his Statement of Claim.

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_____and _____
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39. By _____, Respondents will serve and file their papers in support of their motion to strike in this regard, with such papers being limited to __ pages, double-spaced.

40. By _____, Claimant will serve and file his opposing papers on this motion, with such papers to be limited to __ pages, double-spaced.

41. By _____, Respondents will interpose their reply papers, if any, on this motion, with such papers to be limited to __ pages, single-spaced.

42. This motion will be heard by the Arbitrators in a conference call on _____ at ____ _.m., with __ minutes being allotted to the call. The call will be arranged by the ____.

Respondents' Possible Motion to Disqualify Claimant's Counsel

43. Respondents advised that they are considering a motion to disqualify Claimant's counsel in this arbitration. The Arbitrators reminded Counsel that there is case authority in New York to the effect that a motion to disqualify adversary counsel in an arbitration is for the courts, not arbitrators, to decide.

44. By April _____, Respondents will advise the Arbitrators what, if anything, they intend to do with respect to this possible motion.

45. The Arbitrators have determined that, if the Parties, based on conformed consent, agree to have the Arbitrators hear such a motion, the Arbitrators will hear it.

Confidentiality

46. The Parties have been working on a draft order as to confidentiality. The Parties will continue this effort and will, by _____, submit to the discovery master (discussed below) either a stipulated order or their respective arguments as to their disagreement as to same.

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_____and _____
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47. Any dispute between the Parties as to the form of a confidentiality order in the case will be addressed in a conference call with the discovery master, to be scheduled as necessary.

Confidentiality

48. The Parties will consult with each other with respect to entering into a stipulation of confidentiality as to documents in the case and as to this proceeding as a whole.

49. Assuming the Parties decide to enter into such a stipulation, they will, by _____, submit said stipulation to the Tribunal to be so ordered; provided, however, that, if the Parties want to enter into a stipulation along these lines but are unable to agree to the language thereof, they may present the matter to the Arbitrator for conferencing.

Interview of Claimant's Chief Actuary

50. Claimant has advised that Claimant's chief actuary has knowledge as to the calculation of the amount of Claimant's claims in this arbitration. To expedite this arbitration and hopefully lessen the scope of discovery, Claimant has agreed to make its chief actuary available for interview by Respondents in a conference call to be arranged and participated in by Counsel for the Parties in this arbitration.

51. Claimant may, if it chooses, have a consultant or expert participate in the foregoing conference call with Claimant's chief actuary; provided, however, that the identify of any such consultant or expert should be disclosed to Claimant at least 24 hours in advance of the call.

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_____and _____
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52. This conference call with Claimant's chief actuary will take place on _____, or such other date as the Parties may agree.

Charts or Diagrams Identifying Relevant Entities and Other Relationships and Events

53. By _____, the parties, either jointly or severally, depending on their ability to agree on the matter, will present charts or diagrams to the arbitrators setting forth the various ownership interests, contractual relationships, transfers, assignments, changes of name or identity, and the like as between the entities and other persons relevant to this matter.

Discovery Master

54. Issues as to discovery and routine administrative and scheduling matters will be heard by the chair, Arbitrator _____, as discovery master; provided, however, that, if any party or the discovery master wants the entire panel to hear any such matter, the entire panel will hear it. In the event of the chair's unavailability to hear any matter intended for the discovery master, the chair may designate either of the other Arbitrators to serve as discovery master. All Arbitrators and the ____ will be copied on communications between the Parties and the discovery master.

Discovery Master

55. By _____, the Parties will advise the Arbitrators whether they want issues as to discovery and routine administrative and scheduling matters to be heard by the chair as discovery master or by the entire Panel; provided, however, that, if the Parties desire generally to have such matters heard by the chair, they may, nonetheless, with respect to any particular matter

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or issue, thereafter request that said matter or issue be heard by the entire Panel, in which case the entire Panel will hear it.

Reliance Documents

56. By _____, each side will produce the documents upon which it relies in this arbitration for its claims, counterclaims or defenses, except that a side is not required to re-produce any such documents that it has previously produced in this arbitration.

57. It is not contemplated at this time that a separate schedule will be established for production of reliance documents. Rather, we will go through the normal processes of documents requests, objections, and the like, and of the pre-hearing designation of exhibits.

Document Production as to Documents other than Reliance Documents

58. The Parties will exchange document requests as to documents other than reliance documents by _____.

59. The Parties will exchange their responses and objections, if any, to such document requests by _____.

60. The Parties will meet and confer by _____with respect to objections to document requests. In the interest of avoiding undue expense and delay in this arbitration, the Parties are encouraged to work out any discovery disputes they may have.

61. By _____, the Parties will submit letter briefs to the Arbitrator concerning any unresolved disputes as to document production.

62. Oral argument will be held with the Arbitrator on any open discovery issues on _____at ____ _.m., in a conference call to be arranged by the ____.

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_____and _____
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63. The Parties will produce all unobjected to documents by _____.

Document Production

64. The parties will exchange document requests by _____.

65. Document requests should generally comply with the following:

- They should be limited to documents that are directly relevant to significant issues in the case or to the case's outcome;
- They should be restricted in terms of time frame, subject matter and persons or entities to which the requests pertain; and
- They ordinarily should not include broad phraseology such as "all documents directly or indirectly related to."

66. The Parties will serve and file their responses and objections, if any, to document requests by _____.

67. The parties will meet and confer by _____ with respect to any then-existing objections to document requests.

68. By _____, the Parties will submit letter briefs to the discovery master concerning any remaining disputes as to document production.

69. Oral argument will be held with the discovery master on any open discovery issues on _____ at ____ _.m., in a conference call to be arranged by the ____.

70. The Parties will make their document productions on a rolling basis, starting on _____, with document production to be completed by _____, it being expected that the Parties will produce significant blocks of documents as they become available during the period of rolling production.

71. By _____, the Parties will serve and file their privilege logs in this matter. It is anticipated that counsel will meet and confer by _____ as to the approach to be taken

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with respect to privilege logs in the case, including the use of categorical objections, in an effort to work out an agreed approach; provided, however, that, if the Parties are unable to agree in this respect, they may schedule a conference with the discovery master as to any such disagreement.

Electronic Discovery

72. E-discovery should generally be consistent with the following:

- There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, electronic documents are not required to be produced from back-up servers, tapes or other media.
- Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format which is usable by the party receiving the e-documents and convenient and economical for the producing party. Absent a showing of compelling need, the parties need not produce metadata, with the exception of header fields for email correspondence.
- Where the costs and burdens of e-discovery are disproportionate to the nature and/or gravity of the dispute or to the relevance of the materials requested, the Arbitrators will consider either denying such request or ordering disclosure on the condition that the requesting party advance the reasonable costs of production to the other side, subject to further allocation of costs in the final award.

73. By _____, the Parties will meet and confer as to the parameters of electronic discovery in this matter, addressing such issues as search terms and the possible testing thereof, time periods, custodians, hit counts, format in which documents will be produced, the possible use of predictive coding, metadata and other points relating to electronic discovery that may arise.

74. By _____, the Parties will submit letter briefs to the discovery master with respect to any disputes as to e-discovery.

_____
_____and _____
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75. Oral argument will be heard on any such discovery disputes as to e-discovery with the discovery master on _____ at ____ p.m., in a conference call to be arranged by the ____. To the extent technical issues are expected to be raised, each side should have its technical experts available for this call.

76. The Parties will make their document productions as to electronic materials on a rolling basis, starting on _____, with document production of such materials to be completed by _____.

Witness Statements

77. It is not contemplated that the Parties will submit witness statements in this arbitration.

Witness Statements and Experts' Reports

78. The Parties agree that it would make sense in this case to have witnesses present their direct testimony by sworn witness statements, so as to provide disclosure by each side of the direct testimony it expects to present at the hearing.

79. The Parties further agree that expert witnesses in the case will present sworn experts' reports and that such reports will serve as the direct testimony of the experts.

80. Except as otherwise agreed by the Parties, the witness statements and experts' reports will have attached to them the documents to which the witnesses make reference in their witness statements or reports.

81. No witness statement or expert's report will be taken into consideration by the Arbitrators unless the witness is presented for cross-examination at the hearing.

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82. Each side will be permitted a warm-up period of approximately __ minutes for the witnesses it presents.

83. Respondents advise that they contemplate presenting expert testimony by an expert in the auditing of legal bills ("Respondents' Auditing Expert").

84. By _____, Claimant will serve and file a witness statement setting forth, with respect to the different phases of the case in the Underlying Litigation, Claimant's testimony as to what it contends to be the need for and reasonableness of the legal services for which it billed Respondents for such phases of the Underlying Litigation.

85. By _____, Respondents will serve and file the report of Respondents' Auditing Expert.

86. By _____, Respondents will also serve and file the witness statement of any other expert witness they intend to offer on the subject of Claimant's bills to Respondents in the Underlying Litigation.

87. By _____, Respondents will also serve and file the witness statement of _____ ("_____").

88. By _____, Claimant will interpose its opposing witness statements or experts' reports, if any.

89. It is contemplated that the above-referenced witness statements and experts' reports will be no more than __ pages, single-spaced, although the Parties may exceed that length if they regard it as necessary to present their claims or defenses.

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_____and _____
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Expert Witnesses

90. The Parties have not yet decided whether they will want to present expert testimony in the case. To the extent that either side decides that it wants to do so, the following procedures will apply.

91. By _____, each side will serve and file a letter identifying any expert witnesses it expects to call at the hearing in this matter.

92. By _____, each side will serve and file its experts' reports, if any.

93. By _____, each side will serve and file its opposing experts' reports, if any.

94. The reports of the expert witnesses will serve as the direct testimony of the witnesses; provided, however, that the Parties may present their expert witnesses for a "warm up" period of direct testimony lasting approximately __ minutes.

95. The Arbitrators reserve the option of "hot-tubbing" expert witnesses from both sides on particular topics, so the Arbitrators may pose questions to such witnesses at the same time, to the extent it seems helpful. The Parties will arrange the timing of the testimony of their respective expert witnesses accordingly.

96. It is not contemplated that there will be depositions of expert witnesses in the case.

Proceeding on Documents

97. Based on the request of Claimant, this case will proceed based on the submission of documents; provided, however, that, should Respondents request a hearing, whether in person

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or by telephone, or a preliminary hearing (by telephone), that request will be taken into consideration by the Arbitrators.

98. Specifically, notwithstanding Respondents' failure to appear in this matter to date, Respondents are invited to appear and defend this arbitration going forward, as the Arbitrators would prefer to hear this matter based on hearing both sides' contentions and proofs.

99. So that this matter may proceed expeditiously, Respondents are directed to advise the ____ within five days of the date of this order if they intend to appear and defend the case. If Respondents advise that they intend to appear and defend the case, a further preliminary hearing will be held promptly to discuss how the case will be administered. If Respondents do not appear and defend the case, the case, as set forth herein, will be heard based on documents and a follow-up conference call of the Arbitrators with the Parties.

100. Regardless of whether they appear and defend the case, Respondents are to be served with copies of all papers filed with the ____ in the case simultaneously with such filing.

Documentary Submissions

101. Subject to the above, the following schedule shall apply to this case:

- Claimant shall have until _____, to interpose its documentary case;
- Respondents shall have until _____, to interpose their documentary case;
- Claimant shall have until _____, to interpose its reply documentary case, if any; and
- A conference call will be held with the Parties and the Arbitrators on _____at ____ _.m. for the Parties to submit any final arguments or proof to the Arbitrators with respect to their claims or defenses in the case before the record is closed and the Arbitrators decide it.

102. This schedule is established pursuant to the timeframe dictated by the Parties' arbitration agreement.

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_____and _____
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Unproduced Documents

103. Any exhibit offered at the hearing that was responsive to a discovery request served upon the offering party, but which was not produced in response thereto on or before the date set for such production, will not be received in evidence at the hearing, absent good cause shown.

Privilege Issue as to_____

104. At their meet and confer with respect to discovery issues on _____, the Parties will discuss the practical criteria for defining what documents associated with _____ will be treated as privileged for purposes of this arbitration.

105. If the Parties are unable to agree on the parameters of such privilege insofar as concerns documents associated with _____, the matter may be raised in the conference call with the discovery master scheduled for _____ at ____ _.m.

Proportionality

106. The Arbitrators are concerned that the amount of time and expense that go into this matter be reasonably proportionate to what is at issue in the case, so the Parties may receive the arbitral advantages of expedition and economy.

107. The Parties are expected to maintain such proportionality in the discovery and other phases of this case.

108. To the extent a party demands discovery beyond that which is proportionate the Arbitrators will, upon request, consider cost-shifting.

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_____and _____
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Depositions

109. Claimant wants to conduct five or more depositions in this arbitration. Respondents argue that this is too many depositions and that their number and duration should be limited.

110. It is anticipated that the Parties may have a better idea of what depositions are necessary and their appropriate scope after document production has been conducted.

111. The Arbitrators have provisionally ruled that each side may take __ hours of depositions, limited to __ witnesses per side; provided, however, that these parameters are subject to revisiting as document production proceeds in the case.

112. The depositions in the case will be conducted in _____ and are to be completed by _____.

Depositions

113. The Parties will be limited to _____ depositions each, with the total depositions to be taken by each side not to exceed ____ hours.

Fact Discovery Cut-Off

114. All fact discovery in the case will be completed by _____.

Discovery or Testimony from Associated Non-Parties

115. The Arbitrators expect the Parties to cooperate in making reasonably necessary discovery or testimony available from entities or persons whose cooperation they are able to secure, based upon their relationship or influence with such entities or persons; provided, however, that the provision of such discovery or testimony by such entities or persons is

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understood to be subject to whatever objections such entities or persons might have to individual items of discovery that are sought in the case.

116. The Parties agreed, in this regard, to attempt to make former employees and associated persons available for discovery and testimony.

Related Entities

117. Claimant advised that it will make its affiliates available for testimony or disclosure in this arbitration, to the extent said affiliates may have documents or other information relevant to matters at issue in the arbitration.

Appearance of Messrs. _____ and _____ at the Hearing

118. By _____, Respondent will attempt to ascertain and report back to the arbitrators and to Claimant whether Messrs. _____ and _____ will agree to come to the hearing without the necessity of a subpoena and, assuming they will so appear, whether they will do so in person or by video conference or in some other way.

Discovery from the Entities and

119. The Arbitrator advised that the Tribunal expects the Parties to cooperate in making discovery available from entities or persons whose cooperation they are able to secure based upon their relationship or influence with such entities or persons; provided, however, that the provision of such discovery by such entities or persons is understood to be subject to whatever objections such Parties might have to individual aspects of such production and to the rulings of the Tribunal thereon.

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120. In this connection, Respondent has agreed to make discovery available from the _____ entities, including _____, _____, and _____.

121. Both sides will request of _____ ("_____") that it cooperate in making discovery available to the Parties in this arbitration and will report back to each other and to this Tribunal by _____ as to whether such cooperation from _____will be forthcoming.

Subpoena, If Necessary, to _____

122. If neither side is able to arrange agreement by _____ to provide discovery in this arbitration without the necessity of a subpoena, either side may submit a subpoena to the Arbitrator seeking production of documents by _____, with such subpoena to be submitted to this Tribunal, on notice to the other side, on _____, when the Parties exchange their document requests.

123. The other side will thereafter have three (3) business days, following the submission of such a subpoena to the Arbitrator, to object thereto.

124. Any such subpoena will be submitted to the Arbitrator in Word format and will contain a provision to the effect that any issue or objection the recipient has as to the documents requested may be raised with the Arbitrator in this arbitration, in a conference call with the Arbitrator and counsel for the Parties.

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_____and _____
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Other Subpoenas

125. If either side wants to subpoena any other entity or person, it will submit its proposed subpoena(s) to the Arbitrator by _____, if the subpoena is for discovery purposes, and by _____, if the subpoena is for the hearing.

126. The other side will thereafter have three (3) business days, following the submission of such a subpoena, to object thereto.

127. Any such subpoena will be submitted to the Arbitrator in Word format and will contain a provision to the effect that any issue or objection the recipient has as to the documents requested may be raised with the Arbitrator in this arbitration, in a conference call with the Arbitrator and counsel for the Parties.

Subpoenas

128. By _____, the Parties will meet and confer as to any non-party witnesses from whom documents or testimony is sought and will submit subpoenas to the discovery master with respect to any such documents or testimony that is not otherwise available.

129. Any requests for documents submitted by subpoena directed to non-parties should be narrowly drawn and should not request documents already in the possession, custody or control of the party seeking such production.

Status Conferences

130. Status conferences will be held with the discovery master on _____ at ____ _.m. and on _____ at ____ _.m., in conference calls to be arranged by the ____.

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_____and _____

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Stipulated Facts

131. It is not contemplated that the Parties will agree to stipulated facts in this arbitration.

Possible Stipulated Facts

132. The Parties will confer by _____, as to whether they regard it as worthwhile to attempt to agree to stipulated facts, and, if so, will establish a schedule for working out such stipulated facts and will advise the Arbitrators as to said schedule by _____.

Witness Lists

133. By _____, the Parties will exchange lists of witnesses they expect to call at the hearing. As to any such witnesses who are not known to the other side, the side identifying such witness will set forth on the witness list the witnesses' names and current business affiliations and will describe the general areas of the witnesses' expected testimony.

Final Pre-Hearing Status Conference

134. A final pre-hearing status conference will be held with the Arbitrators on _____ at ____ _.m., in a conference call to be arranged by the ____.

Hearing Exhibits

135. By _____, the Parties will identify to one another the exhibits they expect to use at the hearing.

136. By _____, the Parties will meet and confer in an attempt to agree on joint exhibits to be submitted at the hearing. The Parties' stipulation to the inclusion of documents as joint exhibits does not signify agreement with the documents, but rather only that the admission

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of such documents into evidence at the hearing is not disputed. Such exhibits will be organized in binders with tabs.

137. By _____, the Parties will finally establish the binders of joint exhibits and provide to one another binders of any additional exhibits they intend to offer into evidence at the hearing. Subject to the Parties' agreeing on some other approach, as expedient, individual exhibits marked by Claimant will start with the number ___ and those marked by Respondents will start with the number __.

138. The Parties are requested to organize the various exhibits in the tabbed binders in the way that seems most helpful, whether in chronological order or by issue or the like.

139. Except for good cause shown, documents that have not been identified as exhibits will not be admitted into evidence at the hearing. This applies to all documents except those to be used solely for impeachment.

Key Exhibits

140. By _____, each side will serve and file the five to ten exhibits that it believes to be most important in the case. The Parties are encouraged to highlight such exhibits, identifying the portions thereof believed to be of particular importance.

Demonstrative Exhibits

141. The Parties will serve and file their demonstrative exhibits, if any, including all schedules, summaries, diagrams, charts, PowerPoint presentations and the like that they propose to offer at the hearing at least three days in advance of such use, provided, however, that demonstrative exhibits that are prepared on a reactive basis during the hearing will be produced

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_____and _____
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as much in advance as reasonably practicable. Notwithstanding the foregoing, the Parties are encouraged to serve and file such materials as much in advance of the hearing as possible to facilitate the Arbitrators' understanding of the matters displayed.

Memorials

142. By _____, Claimant will serve and file its pre-hearing memorial.

143. By _____, Respondent will serve and file its pre-hearing memorial.

144. Each of these memorials will be limited to __ pages, double-spaced, with 1" margins on each side.

Pre-Hearing Memoranda

145. By _____, the Parties will serve and file their pre-hearing memoranda, with such memoranda being limited to __ pages each, double-spaced.

146. By _____, each side may submit a reply pre-hearing memorandum limited to responding to legal issues raised by the other side in its earlier memorandum, with such reply memoranda to be limited to __ pages each, double-spaced.

Motions *In Limine* With Respect to Contested Exhibits or Testimony

147. By _____, the Parties will serve and file their letter briefs addressing any issues with respect to disputed exhibits or testimony.

148. Each side will thereafter have until _____ to serve and file its response to any such motion.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

Pre-Hearing Objections to Exhibits or Testimony

149. By _____, the Parties will serve and file their letter briefs addressing any issues with respect to disputed exhibits or testimony or the like. It is contemplated that such motions will generally be limited to issues such as privilege, authenticity, extreme prejudice or the like. Absent good cause, such motions should be no longer than two pages.

150. Each side will thereafter have until _____ to serve and file its response to any such motion made by the other side.

The Hearing

151. The hearing will be held on _____ at _____. Subject to the Parties' preferences, the hearing day will generally run from ____ _.m. to ____ _.m., subject to extending the day as necessary to complete witnesses or keep to schedule. It is anticipated that we will take a mid-morning and a mid-afternoon break of approximately __ minutes each and a midday luncheon break of approximately __ hour.

152. Each side will make opening statements of approximately __ minutes.

153. The Parties are requested to advise the Arbitrators promptly if their estimates as to the amount of time needed for the hearing in this matter change.

154. The Parties will make arrangements to schedule witnesses so that the hearing may proceed expeditiously.

155. The Party presenting evidence will, to the extent practicable, give notice of at least three days to the other Party with respect to the identities of upcoming witnesses and the anticipated order of testimony.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

Opening Statements

156. It is contemplated that each side will make opening statements of approximately __ minutes.

Firmness of Hearing Dates

157. The hearing dates set forth herein are firm dates, which will not be rescheduled, absent agreement of the Parties or extraordinary circumstances unrelated to preparedness.

Evidentiary Status of Designated Hearing Exhibits

158. All previously designated hearing exhibits will be deemed admitted into evidence as of the opening of the hearing, except as to contested exhibits that are specifically so designated by the Parties by the opening of the hearing. The Arbitrators will hear argument as to such exhibits in the course of the hearing.

Closing Statements

159. Subject to discussion at the hearing, it is anticipated that the Parties will make closing statements to the Arbitrators on _____ at ____ _.m., at a place to be agreed by the Parties, it being contemplated that the closing statements will run approximately __ hours, with each side to have approximately __ hours.

Closing Statements

160. In lieu of post-hearing memoranda, it is anticipated that the Parties will make closing statements to the Arbitrator at a session to be held on _____ at ____ _.m., at a place to be agreed by the Parties, provided, however, that, if the Parties determine that they want

_____
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to submit post-hearing memoranda or if the Arbitrator requests that issues be briefed, post-hearing memoranda may be submitted.

Summations

161. It is anticipated that, in lieu of post-hearing memorials, the Parties will make summations in a hearing to be held on _____ at ____ _.m., at a location to be agreed by the Parties.

Post-Hearing Memoranda

162. The Parties will decide at the close of the hearing, in consultation with the Arbitrators, what post-hearing briefing, if any, will be submitted.

Post-Hearing Memoranda

163. It is anticipated that the Parties will submit post-hearing memoranda on a simultaneous basis ____ weeks following the completion of the hearing.

Provision of Pre-Hearing Papers to the Arbitrators

164. The Parties will provide copies of motions papers, witness lists, experts' reports, pre-hearing memoranda, and key exhibits to the Arbitrators when served upon the other side. The other exhibits binders may be provided to the Arbitrators at the opening of the hearing.

165. Copies of all legal memoranda will be provided to the Arbitrators in Word as well as PDF format; provided, however, that the Parties need only exchange such materials in PDF format among themselves.

166. The Parties will provide the Arbitrators will copies of all cases and other authorities relied upon in their submissions to the Arbitrators.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

Materials to be Provided to the Arbitrators in Electronic Form Following the Hearing

167. Following the hearing, each side will transmit to the Arbitrators on a DVD, thumb drive, or the like, the following documents that it has previously interposed, submitting them in Word format to the extent convenient:

- pleadings;
- pre-hearing memoranda;
- post-hearing memoranda, if any;
- other significant memoranda;
- experts' reports;
- cases and other authorities referred to in the side's pre-hearing and post-hearing memoranda, assuming the party has made electronic copies of same; and
- exhibits referred to by the party in its post-hearing papers, to the extent the party has made electronic copies of such exhibits.

168. The Parties will also make arrangements, as among themselves, to submit the following materials to the Arbitrators electronically on such DVDs or the like:

- hearing transcripts in searchable format;
- a chart that shows, by witness, the hearing volume and pages at which each witness' testimony appears; and
- exhibits, to the extent the Parties have made electronic copies of them.

Language of Proceeding

169. The language of this proceeding is _____.

170. By _____, the Parties will confer in an effort to agree as to how the case will be administered with respect to documents, if any, which, in the original, are in a language other than _____, including with respect to questions as to responsibility for arranging translations, the identify of appropriate translators, the timing of making and providing translations, and the responsibility for the costs of such matters.

_____
_____and _____

REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

171. The Parties will confer by _____ with respect to questions relating to any necessary arrangements for one or more interpreters of the testimony of witnesses, if any, unable to testify in _____.

172. The Parties will memorialize their agreement with respect to such matters by _____. Should the Parties be unable to reach agreement, in any respect, with respect to such matters, they will so advise the Arbitrator by said date, submitting letter briefs to the Arbitrator setting forth their respective positions and the reasons and the reasons therefor.

Form of Award

173. The Arbitrators will issue a reasoned award.

Court Reporter

174. It is understood that the Parties, at their election, intend to arrange for a court reporter to transcribe the hearing.

Accelerated Exchange Program

175. The Parties have agreed to use the Accelerated Exchange Program of the ____. Pursuant to the Accelerated Exchange Program, the Parties may transmit written materials directly to the Arbitrators, simultaneously providing copies of same to the other side. Direct written communications to the Arbitrators will be directed as follows:

_____
_____
_____
_____
_____
_____

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

_____
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_____

_____
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_____
_____

176. The Parties are to submit such materials to the Arbitrators by e-mail and hard copy; provided, however, that there is no need to provide electronic copies of exhibits and other bulky materials to the Arbitrators or to provide the Arbitrators with hard copies of briefs or other memoranda shorter than ten pages.

177. The Parties will copy the ____ on all e-mails to the Arbitrators and will also send to the ____ copies of cover letters transmitting non-electronic materials to the Arbitrators, but do not need to send the ____ copies of such non-electronic materials.

178. Under no circumstances are oral communications, by telephone or otherwise, to be initiated with the Arbitrators, except as scheduled by the ____ or the Arbitrators on notice to both sides.

Mediation

179. By _____, the Parties will meet and confer as to whether they would like to attempt to resolve this matter through mediation.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

180. If the Parties would like to engage in such an effort, the ____ is available to provide the Parties with lists of potential mediators.

181. If there is any part of the case that the Parties would like the Arbitrators to address sooner rather than later to facilitate settlement, the Parties may request the Arbitrators to do so.

Control Date for the Parties' Deciding Whether to Mediate

182. By _____, the Parties will meet and confer as to whether they would like to attempt to resolve this matter through mediation.

183. If the Parties would like to engage in such an effort, the ____ will be glad to provide them with a list of potential mediators. If the Parties would like to have any issue decided sooner rather than later in the case to facilitate settlement, they may so advise the Arbitrator and the matter will be conferenced.

Disclosures as to Conflicts

184. The Parties are reminded to update their respective conflicts checklists as further information becomes available.

185. The duty to update such checklists continues through the duration of this arbitration.

186. The Parties have agreed that, if there is anything that becomes known to a party that is relevant in the context of arbitrator disclosure, the party will advise the case administrator as soon as it becomes known.

Attorneys' Fees

187. Claimant is seeking attorneys' fees under his Employment Agreements.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

188. The Parties have agreed on the following procedure with respect to Claimant's claim for attorneys' fees: Thirty days after the Arbitrators have issued their award as to the merits of the case, Claimant may submit a statement of costs and attorneys' fees and a supporting memorandum of law with respect to attorneys' fees. Respondents will then have ten days to respond to such papers submitted by Claimant. Claimant will thereafter have five days to reply, following which the matter will be submitted to the Arbitrators for decision.

189. It is contemplated that the Arbitrators will decide any issues as to attorneys' fees on the papers.

Attorneys' Fees

190. The Parties agreed that they are not seeking attorneys' fees in this arbitration and that any requests for attorneys' fees in their respective papers previously submitted in this arbitration are withdrawn.

191. The Arbitrators note that both sides seek to recover attorneys' fees. It will be addressed later in this proceeding how the Parties' applications for attorneys' fees will be administered.

Arranging Conference Calls with the Discovery Master or Arbitrators

192. Should disputes arise between the Parties as to discovery or other preliminary matters in the course of this arbitration, the Parties are urged to arrange a conference call with the discovery master or the Arbitrators promptly, so the matter may be addressed promptly, rather than have it remain unresolved and risk affecting the schedule.

_____
_____and _____
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Adjustment of Individual Dates by the Parties

193. The Parties may by stipulation adjust individual dates between themselves that do not affect the Arbitrators or the hearing, providing notice of such changes to the Arbitrators, but otherwise schedule changes are to be submitted to the Arbitrators.

Attachment A

194. Attached hereto as Attachment A is a chronology of the deadlines set forth in this scheduling order.

Revisions or Additions to this Order

195. If either side believes at this time that any of the deadlines or other matters set forth above need to be changed in any way or that anything needs to be added, it will advise the other side and the Arbitrators within seven days of the date of this Order.

Dated: New York, New York
_____

_____
_____, Arbitrator

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

ATTACHMENT A
CHRONOLOGY OF DATES SET FORTH IN REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER ("THE ORDER")

- _____: Respondents to serve and file their answer, pursuant to paragraph __ of the Order;
- _____: The Parties to submit a proposed order as to confidentiality or any dispute on the subject to the discovery master, pursuant to paragraph __ of the Order;
- _____:
  - Respondents to serve and file their papers in support of their motion to strike, pursuant to paragraph __ of the Order; and
  - The Parties to serve and file document requests, pursuant to paragraph __ of the Order;
- _____: The Parties to exchange their responses and objections to document requests, pursuant to paragraph __ of the Order;
- _____: Claimant to serve and file his papers in opposition to Respondents' motion to strike, pursuant to paragraph __ of the Order;
- _____: Respondents to advise the Arbitrators what, if anything, they intend to do with respect to their possible motion to disqualify Claimant's counsel, pursuant to paragraph __ of the Order;
- _____: Respondents to serve and file their reply papers on their motion to strike, pursuant to paragraph __ of the Order;
- _____at_____.m.: Oral argument before the Arbitrators on Respondents' motion to strike, pursuant to paragraph __ of the Order;
- _____at_____.m.:
  - The Parties to meet and confer with respect to objections to document requests, pursuant to paragraph __ of the Order;
  - The Parties to meet and confer as to the parameters of electronic discovery, pursuant to paragraph __ of the Order; and
  - The Parties to discuss the practical criteria for defining what documents associated with _____ will be treated as privileged for purposes of this arbitration, pursuant to paragraph __ of the Order.
- _____:
  - The Parties to submit letter briefs to the discovery master concerning any disputes as to document production, pursuant to paragraph __ of the Order; and
  - The Parties to submit letter briefs to the discovery master concerning any disputes as to e-discovery, pursuant to paragraph __ of the Order;

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

- _____at_____.m.:
  - Oral argument with the discovery master as to any open discovery issues, pursuant to paragraph __ of the Order;
  - Oral argument with the discovery master as to any disputes as to e-discovery, pursuant to paragraph __ of the Order;
  - Oral argument with the discovery master with respect to any issues the Parties have identified as to the applicability of privilege to documents associated with _____, pursuant to paragraph __ of the Order;
  - The Parties to commence their document production on a rolling basis, pursuant to paragraph __ of the Order; and
  - The Parties to commence their production of electronic materials, pursuant to paragraph __ of the Order;
- _____: The Parties to meet and confer as to the approach to be taken with respect to privilege logs in the case, pursuant to paragraph __ of the Order;
- _____: The Parties to serve and file their privilege logs, pursuant to paragraph __ of the Order;
- _____at_____.m.: Status conference with the discovery master, pursuant to paragraph __ of the Order;
- _____:
  - Completion of document production, pursuant to paragraph __ of the Order; and
  - Completion of production of electronic materials, pursuant to paragraph __ of the Order;
- _____: The Parties to conduct the depositions in the case within this time period, pursuant to paragraph __ of the Order;
- _____at_____.m.: Status conference with the discovery master, pursuant to paragraph __ of the Order;
- _____: Each side to serve and file a letter identifying any expert witnesses it expects to call at the hearing in the matter, pursuant to paragraph __ of the Order;
- _____:
  - The Parties to complete all depositions in the case, pursuant to paragraph __ of the Order; and
  - The Parties to complete all fact discovery in the case, pursuant to paragraph __ of the Order;
- _____: The Parties to meet and confer with respect to non-party discovery and testimony, if any, and to submit subpoenas with respect to any such discovery or testimony that is not otherwise available, pursuant to paragraph __ of the Order;
- _____: Each side to serve and file its experts' reports, if any, pursuant to paragraph __ of the Order;
- _____:
  - The Parties to identify the exhibits they expect to use at the hearing, pursuant to paragraph __ of the Order;

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

- _____:
  - The Parties to exchange lists of witnesses they expect to call at the hearing, pursuant to paragraph __ of the Order; and
  - The Parties to meet and confer in an effort to agree on joint exhibits to be submitted at the hearing, pursuant to paragraph __ of the Order;
- _____: The Parties to serve and file their opposing experts' reports, if any, pursuant to paragraph __ of the Order;
- _____:
  - The Parties to finally establish the binder of joint exhibits and provide to one another binders of any additional exhibits they intend to offer into evidence at the hearing, pursuant to paragraph __ of the Order;
  - Each side to serve and file the five to ten exhibits it believes to be most important in the case, pursuant to paragraph __ of the Order; and
  - The Parties to serve and file their pre-hearing memoranda, pursuant to paragraph __ of the Order;
- _____at_____.m.: Final pre-hearing status conference, pursuant to paragraph __ of the Order;
- _____: The Parties to serve and file their letter briefs on any issues with respect to disputed exhibits or testimony or the like, pursuant to paragraph __ of the Order;
- _____: Each side to submit a reply pre-hearing memoranda, pursuant to paragraph __ of the Order;
- _____: Each side to serve and file its response to any motion *in limine* made by the other side, pursuant to paragraph __ of the Order;
- _____: The hearing, pursuant to paragraph __ of the Order; and
- _____at_____.m.: Closing statements, pursuant to paragraph __ of the Order.

CJM DRAFT 5/15/2015 11:01 AM

MISCELLAENOUS SCHEDULING ORDER LANGUAGE OF LESS GENERAL APPLICABILITY

POINTS TO BE COVERED IN PRELIMINARY HEARING

Charles J. Moxley, Jr.
Draft to be Adapted to the Individual Case

Following are some general topics/points to be covered in preliminary hearings, subject to the needs of the particular case:

- **Purpose:**
  - Purpose of preliminary hearing – _____
- **Arbitration speech:**
  - Discussion with counsel about how arbitration is supposed to be different – _____
    - Discovery – _____
    - Motion practice – _____
    - Pre-hearing disputes – _____
- **Proportionality:** – _____
  - Amount at issue in this case – _____
    - Claims – _____
    - Counterclaims – _____
  - Specific discussion of the appropriate limits of this case in light of proportionality – _____
    - Discovery – _____
    - Motion practice – _____
    - Pre-hearing disputes – _____
- **Applicable arbitration rules:**
  - Commercial rules – _____
  - Employment rules – _____
  - ICDR rules – _____
  - Large and complex case rules
- **Applicable law**:
  - Substantive law – _____
  - Arbitration law – _____
- **Issues raised by the arbitration clause:** – _____
  - Special requirements:
    - Step clause
    - ????
  - Any issues as to arbitrability – _____
    - Objecting party's motion as to same – _____
    - Responding party's papers as to same – _____
- **The Parties' descriptions of their respective views of the world with respect to the case and how it should be administered** – _____

- **Amendments tf Pleadings:**
  - Whether amendments of pleadings are indicated, and, if so, whether reliance documents should be attached to them – _____
    - Date for amended pleadings (complaint/answer) – _____
    - Date for opposing papers – _____
    - Date for reply papers – _____
    - Documents to be attached to each – _____
- **Particularizations:**
  - Whether particularizations of alleged claims and/or damages are indicated – _____
  - And, if so:
    - Opening particularization by (Claimant/Respondent) – _____
    - Corresponding particularization by (Claimant/Respondent) – _____
    - Response to particularizations by (Claimant/Respondent) – _____
    - Response to particularization by (Claimant/Respondent) – _____
  - Date for particularizations of claims – _____
  - Date for particularization of damages – _____
  - Whether documents are to be attached– _____
- **Possible substantive motions**: – _____
  - Procedure to be followed:
    - generally, exchanges of letter briefs of 3-5 pages as to why hearing the proposed motion would foster the expeditious, economical, and fair administration of the case
    - generally, with the case proceeding in the ordinary course in the meantime, subject to what makes sense on the facts of the particular case
    - schedule as to same
      - date for initial letter of proponent – _____
      - opposing papers – _____
      - reply papers – _____
      - oral argument as to same – _____
    - cut-off date for substantive motions – _____
- **Confidentiality:**
  - As to documents – _____
  - As to the entire proceeding as a whole – _____
  - Date for submission of proposed stipulation of confidentiality to be so ordered or to submit any dispute concerning same to the Tribunal – _____
  - **Things to avoid in the stip:**
    - Binding the arbitrator – arbitrator is bound under the AAA rules and ethical rules – _____
    - Binding the AAA -- same – _____
- **Discovery Master:**
  - Whether the Chair will serve as Discovery Master or the entire Panel will hear discovery and routine administrative matters – _____
  - Chair to do it – _____

- Entire Panel to do it – _____

- **Reliance Documents:**
  - Whether the production of reliance documents makes sense in place of, in advance of, or along with normal document production – _____
  - Date for submitting reliance documents – _____
  - Date for any responses to reliance documents – _____
- **Witness Statements:**
  - Whether sworn witness statements, with reliance documents attached, will be used in the case, in whole or in part, in lieu of direct testimony – _____
  - Date for the parties' deciding whether they wish to use witness statements – _____
  - Date for submitting witness statements – _____
  - Date for submitting responsive witness statements – _____
- **Document Production:** Schedule for document production, if any, including for the following:
  - Document requests – _____
  - Responses and objections – _____
  - Counsels' meeting and conferring on objections – _____
  - Privilege logs, if any – _____
  - Production of uncontested documents – _____
    - Possibility of use of generic descriptions in the logs – _____
  - Letter briefs to the Discovery Master or the Panel concerning any discovery disputes – _____ and
  - Schedule for argument of any discovery disputes before the Discovery Master or Panel – _____
- **Client Files:** The expectation that Counsel will familiarize themselves as to how their clients' files are maintained and as to how discovery can best be managed, including electronic discovery – _____
- **Discussion of how electronic discovery can be most effectively managed in the case, including with respect to such matters as:**
  - Date for counsel to meet and confer on the subject – _____
  - Date for conference call with the Discovery Master or Panel if it would be helpful – _____
  - Search terms – _____
  - The possible testing of search terms – _____
  - Hit counts – _____
  - Time periods – _____
  - Custodians – _____
  - Format in which documents will be produced – _____
  - The possible use of predictive coding – _____
  - Possible communications among each side's electronic search experts – _____
  - Other points relating to electronic discovery that are of concern on the facts of the particular case – _____

- **General approach as to submissions to the Tribunal**: General procedure to be followed before submitting a detailed letter brief to the other side:
  - Meet and confer first– _____
  - Confirm in any communication to the Tribunal that such meeting and conferring has taken place – _____
- **Timetable for communications among counsel and to the Tribunal:** Turnaround time concerning communications from either side
  - Response by the other side – within 24 hours – _____
  - Response by the Arbitrator – within 24 hours thereafter – _____
  - Subject to faster turnaround, if needed– _____
- **Extensive written application to be avoided as possible:** General point as that many matters may be handled by conference call with the Arbitrator without substantial written submissions
- **Other discovery**, if any – _____
  - **Interrogatories** – _____
  - **Requests to admit** – _____
  - **Offers of Proof** – _____
- **Non-party subpoenas: –** _____
  - Dates for submitting discovery subpoenas to the Tribunal– _____
  - Date for submitting hearing subpoenas to the Tribunal – _____
  - General rule – 3 business days for the other side to respond before the Tribunal will sign – _____
- **Cooperation of parties as to non-party witnesses:** Expectation that parties will exert best efforts to make non-parties over whom they have influence available for discovery or testimony in the case, where such non-parties have relevant and material documents or information – _____
- **Cut-off date for fact discovery** – _____
- **Experts: –** _____
  - Identification of areas of expert testimony on issues as to which a party has the burden of proof – _____
  - Identification of each side's anticipated expert witnesses on issues on which a party has the burden of proof – _____
  - Identification of rebuttal expert testimony – _____
  - Identification of each side's anticipated expert witnesses on other issues – _____
  - Date for experts' reports on issues as to which a party has a burden of proof – _____
  - Date, where applicable, for reply experts' reports – _____
- **Status conferences: –** _____
  - _____
  - _____
  - _____
  - _____
- **Possible Stipulated Facts: –** _____

- **Summaries, Chronologies and *Dramatis Personae*:** – _____
- **Witness lists**: Identification of witnesses, including as follows:
  - Their present business affiliations – _____
  - Their anticipated areas of testimony – _____
  - Mode of testimony – _____
    - In person – _____
    - By videoconference – _____
    - By telephone – _____
    - By deposition testimony, whether videotaped or not – _____
- **Hearing exhibits**, including as follows: – _____
  - Date for the Parties' exchanges of exhibits to be offered – _____
  - Date for counsels' meeting and conferring to agree on joint exhibits and avoid duplication – _____
  - Finalization of joint exhibits and of each side's identification of its other exhibits and – _____
  - Organization of exhibits binders by category or chronology or the like, as makes sense in the case – _____
- **Key Exhibits** – _____
- **Demonstrative exhibits** – _____
- **Pre-hearing memoranda** – _____
- **Motions *in limine*** – _____
- **The hearing:**
  - When – _____
  - Where – _____
  - Hours – _____
  - Particular focus on length of hearing day – _____
  - Panel's approach to evidentiary, administrative, timing, and other matters – _____
- **Evidentiary nature of designated hearing exhibits**, including as follows:
  - The most typical approach: exhibits to be received into evidence as of the opening of hearing, unless objected to in advance thereto or – _____
  - The more restrictive approach, whereby only documents actually used at the hearing are deemed in evidence – _____
  - Clarification that foundations for the admission of documents need not ordinarily be laid and – _____
  - Decision as to whether pre-marking applies to documents used for impeachment only – _____
- **Provision to arbitrators of copies of cases and other authorities relied upon:** – _____
  - Hard copies – _____
  - Electronic copies – _____
- **Accelerated Exchange Program** – _____
- **Form of the Parties' submissions** to the Arbitrators, whether by electronic and/or hard copies – _____
- **Word copies of submissions**, including briefs and experts' reports

- **Use of electronics at hearings** – _____
- **Post-hearing submissions**, including:
  - Post-hearing memoranda and – _____
  - Closing statements and possibly schedule as to same – _____
- **Form of award:** – _____
  - Standard – _____
  - Reasoned – _____
  - Reasoned lite and – _____
  - Findings of fact and conclusions of law – _____
- **Court reporter** – _____
- **Cyber security** – _____
  - Discuss – _____
  - Areas of focus – _____
    - Means of exchanging documents and other materials – _____
      - Paper only – _____
      - Email – _____
      - What requirements as to type of programs – _____
      - What requirements as to whether emails are to be encrypted – _____
  - Means of storing it – _____
  - Means of using it – _____
  - Means of disposing of it – _____
  - What to do with the passwords – _____
    - Need to constantly change the password – _____
- **Level of cyber securities sensitivity and whether special measure should be taken** – _____
  - Communications with the Panel
  - Submissions to the Panel
  - Exhibits
  - Transcripts
  - Anything else
- **Length of time by which I may destroy the case files**
  - Hard copies other than pleadings
  - Exhibits and transcripts from the hearing
  - Electronic copies of same
- **Costs and attorneys' fees, including**: – _____
  - Whether to be handled through post-hearing declarations and computer sheets as to attorney time – _____
  - Or in a separate process after the merits of the case are decided by interim award or the like – _____
- **Parties' ongoing duty of disclosure as to conflicts** – _____
- **Mediation window** – _____
- **Document retention** – _____
- **Parties' expectations** – _____

- **Anything else either side or any panel member wants to raise** – _____

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

Particularizations by Claimant as to the Trade Secrets and Other Proprietary Information of Claimant that Claimant Contends Respondent Wrongfully Disclosed or Used or the Like

1. By _____, Claimant will serve and file a Particularization, setting forth in reasonable detail the trade secrets or other proprietary information of Claimant that Claimant contends Respondent wrongfully disclosed or used or the like and will produce the documents upon which Claimant relies for such contentions.

2. It is suggested that this Particularization include a chart with numbered boxes, wherein each particular assertion is particularized and the related documents identified, to facilitate Respondent's response to said Particularization.

3. By _____, Respondent will serve and file its Response to Claimant's foregoing Particularization and will produce the documents upon which it relies for such Response.

4. It is requested that Respondent's Response to Claimant's said Particularization include a column that Respondent adds to Claimant's Particularization, setting forth Respondent's response to each individual assertion, box by box, set forth therein and identifying the documents upon which Respondent relies for such Response.

5. It is understood that Respondent will provide its Response to Claimant's said Particularization based on documents then available to Respondent and witnesses who are still employed by Respondent; provided, however, that to the extent Respondent is able, within the foregoing time frame, to also include information from outside sources, including former

employees, and information as to what is available in the public domain, it will do so, but without prejudice to further elaboration on such matters later.

6. A major purpose of this process of Particularization is to enable each side, on an efficient basis, to gain reasonable discovery as to the other side's contentions. It is expected that this process should, to a considerable extent, obviate a more elaborate course of discovery.

Additional Contract Documents

7. By _____, Respondent will provide to the arbitrators copies of the additional contract documents referenced in the pleadings that have not previously been provided to the Arbitrators.

Particularizations as to Respondent's Counterclaim for $_____

8. By _____, Respondent will serve and file a Particularization of its claim for $_____ plus additional monthly accruals and interest, setting forth the bases for that claim with specificity.

9. Said Particularization will list each individual item or similar group of items of work making up said alleged damages with particularity, including as to the following: the identity of the work in question, the dates thereof, and Respondent's bases for contending that Claimant is liable to Respondent for such work.[1]

[1] This Particularization addresses the factual and contractual bases for Respondent's counterclaim for $_____; provided, however, that issues as to the scope of the work under the _____ will be addressed by Respondent in a separate Particularization and need not be addressed in this Particularization, except by general reference to Respondent's position as to the scope of that agreement.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

10. It is expected that this Particularization will include a detailed chart wherein the particular items at issue will be numbered and placed in individual blocks or the like to facilitate Claimant's responsive Particularization on an item by item basis.

11. By _____, Claimant will serve and file its responsive Particularization, setting forth with specificity its response to each item or group of items set forth by Respondent in its Particularization

12. Each side's said Particularization will include as attachments the documents upon which the side relies in support of its Particularization and will identify the particular documents, or parts thereof, upon which the side relies in connection with its description of its position as to each item or group of items of work set forth therein.

Particularizations as to Funding Available in a _____

13. To the extent that items included within Respondent's $_____ counterclaim are for amounts beyond the agreed monthly payments under the _____ (the "_____"), Respondent will, by _____ serve and file a Particularization of its bases for contending that such items are payable under the _____, including the provisions thereof concerning payments through funding available in a _____.

14. By _____, Claimant will serve and file its responsive Particularization, responding to Respondent's said Particularization with specificity.

15. Each side's said Particularization will include as attachments the documents upon which it relies in its Particularization and will identify the particular documents, or parts thereof,

upon which the side relies in connection with its description of its position as to the matters in question.

16. These Particularizations will be organized similarly to Respondent's Particularization of its counterclaim for $_____, setting forth the parties' respective contentions in a format whereby such contentions are numbered and placed in individual blocks or the like to facilitate the narrowing of the issues as to the matters in contention.

Particularizations as to the Scope of the _____

17. By _____, Respondent will serve and file a Particularization of its position as to the scope of the _____, identifying with specificity Respondent's bases for contending that the scope of the _____ changed over time and what it contends the final applicable scope is.

18. By _____, Claimant will serve and file its responsive Particularization of its position as to the scope of the _____.

19. Each side's said Particularization will include as attachments the documents upon which it relies in its Particularization and will identify the particular documents, or parts thereof, upon which the side relies in connection with its description of its position as to the matters in contention.

20. These Particularizations will be organized similarly to Respondent's Particularization of its counterclaim for $_____, setting forth the parties' respective contentions in a format whereby such contentions are numbered and placed in individual blocks or the like to facilitate the narrowing of the issues as to the matters in contention.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

Particularizations as to Claimant's Claim for $_____

21. By _____, Claimant will serve and file a Particularization of its claim for $_____, setting forth the bases for that claim with specificity.

22. Said Particularization will list each individual payment and related billing and payment documents with particularity.

23. It is expected that this Particularization will include a detailed chart wherein the particular items at issue will be numbered and placed in individual blocks or the like to facilitate Respondent's responsive Particularization on an item by item basis.

24. By _____, Respondent will serve and file its responsive Particularization, setting forth with specificity its response as to each payment identified by Claimant in its Particularization and identifying and attached the documents upon which it relies in response.

Respondent's Counterclaim as to Claimant's Alleged Breach of the Implied Covenant of Good Faith and Fair Dealing____

25. Respondent has represented that its counterclaim alleging Claimant's breach of the implied covenant of good faith and fair dealing is a claim in the alternative that does not seek additional relief beyond that demanded in connection with Respondent's other counterclaims, except that Respondent reserves the right to seek its costs and attorneys' fees in this arbitration if, in its view, discovery discloses that Claimant's positions in this arbitration as to its obligations to Respondent under the _____ are asserted in bad faith.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

Respondent's Particularization as to Any Compensation it Received Based on Information Provided or Work Done by Claimant

26. By _____, Respondent will serve and file its Particularization, setting forth in reasonable detail the amounts of money, by markup or otherwise, if any, that Respondent received based on information provided or work done by Claimant, along with the documents upon which Respondent relies in support of said Particularization.

27. Respondent is providing this information based on Claimant's request for discovery as to such matters, but is doing so without prejudice to Respondent's position that such information is not relevant or material to Claimant's damages, if any, even assuming, for discovery purposes only, that Claimant is able to establish liability.

28. The Parties agreed that, reasonably in advance of this _____ date, Claimant may elaborate on its damages theory and identify for Respondent different parameters for this Particularization by Respondent, subject to agreement between the Parties as to what those parameters would be for purposes of discovery. In such eventuality, the Parties will work together on the definition of such parameters, failing which the Parties may schedule a conference call with the Discovery Master to discuss the matter.

29. Respondent will further produce representative documents showing how the time of its engineers who worked with Claimant was reported and billed internally within Respondent and used for compensation purposes with the applicable customer(s).

30. A major purpose of this process of particularization is to enable each side, on an efficient basis, to gain reasonable discovery as to the other side's contentions. It is expected that this process should, to a considerable extent, obviate a more elaborate course of discovery.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

Project Files

31. The parties have agreed, in the interests of expedition and economy, that each side will make available to the other its respective "project files," meaning the work files maintained by each side with respect to the work that is the subject of the claims and counterclaims in this arbitration.

32. By _____, each side will have identified to the other the project files that it has available to it and will have made arrangements to make such files available for review by the other side, subject to reasonable protocols to be worked out between the parties as to such document production.

33. The foregoing includes electronically stored documents, to the extent the project files are maintained electronically.

34. The objective of this approach is that each side will have available to it the project files available to the other side and will be able to search them and access whatever it wants from them upon reasonable notice to the other side and under reasonable conditions.

Respondent's Particularization of Its Counterclaim for Damages

35. By _____, Respondent will serve and file a Particularization of its alleged damages on the counterclaims it has asserted in this arbitration, providing reasonable detail as to such alleged damages and producing documents, beyond those already produced, upon which it relies for said damages.

EDNA SUSSMAN'S FOR AD HOC ARBITRATION SAMPLE

TERMS OF APPOINTMENT

Arbitration Concerning _____

_____
Claimants

v.

_____
Respondent

I. Appointment of the Arbitral Tribunal

1. The Parties confirm their acceptance that the Arbitral Tribunal comprising _____ (appointed by Claimants), _____(appointed by Respondent), and _____(appointed as Presiding Arbitrator on the nomination of the co-arbitrators), has been validly established in accordance with the terms of the relevant Arbitration Agreements.

2. Each Arbitrator confirms that he or she is and shall remain impartial and independent of the Parties.

3. The Parties waive any objection to the appointment of the Arbitrators on the ground of any conflict of interest, lack of independence or impartiality in respect of matters known to them at the date of signature of these Terms of Appointment.

4. There shall be no ex parte communication between any Party and any Arbitrator regarding any matter in these proceedings. All written communications by any Party to the Arbitral Tribunal shall be copied simultaneously to the other Parties.

II. Remuneration and Expenses of the Arbitrators

5. Each Arbitrator's remuneration for time spent on the arbitration, including study of submissions, correspondence, hearings, deliberations, travel (at 50% rate) and drafting the award shall be calculated on the basis of US$_____per hour for arbitrator ___, ____ per hour for arbitrator _____ and ____ per hour for arbitrator _____.

6. If the Parties cancel or postpone all or part of any hearing dates with less than 20 days notice the Arbitral Tribunal is entitled to payment at fifty per cent (50 %) of the Arbitrators' hourly rate for the time reserved but not used.

7. The Arbitrators shall be reimbursed in respect of all disbursements and charges incurred in connection with the arbitration, including but not limited to travel, hotel, courier delivery, telephone, facsimile and copying.

III. Advance on Costs

8. The Parties shall establish an initial deposit of $_____from each side, for a total of $_____covering both of the above-captioned cases. Each Arbitrator may draw against such deposit on a monthly basis for fees and expenses. The Presiding Arbitrator may from time to time require the Parties to replenish such deposit in order to maintain an appropriate balance.

9. [Interest shall accrue on the account for the benefit of the Parties.]

10. [Funds should be deposited as follows: :

Account Name:
_____

IV. Confidentiality

11. The arbitral proceedings and any rulings or award shall be kept confidential by the Parties and members of the Arbitral Tribunal except (i) as necessary for enforcement or recognition of the award, (ii) with the consent of all Parties and (iii) as required by law or as necessary to protect legitimate interests of a Party or Arbitrator. For the avoidance of any doubt, it is agreed that in preparing and presenting its case no Party shall be precluded from communicating with prospective witnesses, experts or other sources of information or materials.

V. Immunity from Suit

12. No Arbitrator shall be required by either Party to be a party or witness in any judicial or other proceedings arising out of this arbitration; and

13. No Arbitrator shall be liable to any Party in respect of any act or omission in connections with any matter related to this arbitration, save where that Arbitrator is shown to have been guilty of conscious and deliberate wrongdoing.

VI. Notices

14. All written communications shall be sent to the following addresses.

(1) Claimants

(2) Respondent

(3) Arbitrators

For the Parties:

_____ _____

Claimants Respondent

For the Arbitral Tribunal:

_____ _____ _____

Dated:

Sample Disclosure

Via E-mail

Date:

Addressees

Case name

Dear :

I am returning the Notice of Appointment and Notice of Compensation Arrangements for this matter.

I served as a co-arbitrator in a matter in which ___ represented a party about one year ago in which I was appointed [by agreement of the parties from an AAA list] [by the opposing party] .....I mediated a case in which the respondent ___ appeared as a party five years ago. I serve on a bar association committee which meets once a month of which counsel for plaintiff is also a member and we occasionally attend the same meeting. Etc. _____

I have the following additional disclosures: I am active with various bar associations, have spoken and published extensively and edit a legal publication and so have occasion to interact with many members of the bar. Regarding counsel associated with the firms or parties in this matter, I may be serving or have served on bar association committees with them, I may have been listed as an editor in a publication which published an article by them or had an article or chapter I wrote appear in the same publication as their contribution appeared in, I may have cited them in one of my articles or been cited by them in one of their articles, I may have presented at an educational program at which they also presented, I may be director of an organization of which they are also a director, I may have met them at bar association functions or professional conferences or they may subscribe to an ADR related list serve that I subscribe to or be members of one of my www.Linkedin.com groups or be one of my over 700 "connections" on Linkedin, an on-line network in which I accept all invitations to connect sent to me by anyone in the litigation or alternative dispute resolution field whether I know them or not and which is strictly professional in nature. Fordham Law School has a great many adjunct professors and I have no contact with them arising from our respective responsibilities at Fordham. My practice is not to make inquiries with respect to these various professional activities as there are so many that it is not possible for me to identify all possible points of overlap in such affiliations and they do not constitute a "relationship which might reasonably affect impartiality or independence in the eyes of any of the parties." I therefore make no disclosures with respect to such affiliations

other than with respect to persons directly involved in this matter as to which I have such knowledge based on present recollection without inquiry.

A more comprehensive listing of my activities is found on my website at _____. You are invited to promptly conduct such further review and research online or otherwise and seek responses from me to any further inquiry as you deem appropriate.

My husband is _____ at _____. I have not conducted a conflict check at that firm or at the firms of _____ or _____with which I was previously associated. I am not made aware of the matters handled at any of those firms. I am not receiving and will not receive any payments from the firms with which I was associated.

I believe I can render a fair and unbiased decision and act independently in this matter and make these additional statements in the interest of full disclosure. If there is anything known to a party that is relevant in this context, please advise the case administrator as soon as it becomes known.

Sincerely yours,

Edna Sussman

Caution from Edna Sussman: This is only a SAMPLE preliminary hearing order that is to revised and tailored to suit the specifics of the case

AMERICAN ARBITRATION ASSOCIATION

Claimants	)	
- and -	)	Case No.
Respondents.	)	

PRE-HEARING ORDER NO. 1

A Preliminary Hearing was held [by telephone conference] on _____in connection with the above-entitled proceeding. The hearing was attended by _____on behalf of Claimants and _____on behalf of Respondents and the Arbitrators.

By agreement of the parties and order of the Arbitrators, the parties are directed to comply with the following:

1. The parties stipulated that the arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association.

2. The parties stipulated that the arbitration shall be governed by the Federal Arbitration Act.

3. The parties accepted the arbitration panel as constituted.

If applicable -{4. As certain operative documents in this case do not contain an arbitration clause and certain persons and entities are named as parties in this proceeding that are not party to an arbitration agreement, the parties will prepare a stipulation, to be executed by all parties, identifying the agreements/issues that they are submitting to arbitration in these proceedings and confirming that all parties named are submitting themselves to the jurisdiction of this arbitration with respect to those issues.} **or can be incorporated into the order without a stipulation.**

If applicable - [The parties further confirm that the reference to mediation in _____of the _____ does not constitute a condition precedent to these arbitration proceedings [or has been satisfied].

5. **[List any amendments to pleadings being requested and permitted. Ensure that the nature of the claims is set forth in sufficient particularity that intelligent progress can be made] e.g.** Respondents may amend the counterclaim on or before February 5, 2010.] Leave shall be requested from the Arbitrators for any subsequent amendments to the pleadings on a good-cause-shown basis.

6. No motions, other than discovery motions, shall be filed by any party without first submitting a letter to the Arbitrators setting forth the nature of the motion that the party proposes to file and a brief statement of the factual and legal bases for such motion and obtaining approval from the Arbitrators for such filing.

7. **ADD specific issues to be addressed in particular case. E.g.** On or before _____, the parties will confer as to the desirability of bifurcating the proceedings and/or retaining a joint neutral expert. Any issues in this regard that require the Arbitrators' attention shall be brought to the Arbitrators' attention by letter on or before_____. Responding letters may be submitted on or before _____.

8. On or before _____the parties shall serve written requests for the production of any document or narrow and specific categories of documents which are relevant to the case and material to its outcome.

9. On or before _____ each party shall serve upon the other party written responses to the document requests directed to it.

10. The parties will meet and confer in an effort to resolve any discovery disputes arising out of objections to the requests made. If the parties are unable to resolve any such discovery issues, such disputes shall be presented by the submission of letters setting forth the respective views of the parties on or before_____. Responding letters may be submitted on or before _____At the discretion of the Arbitrators, such dispute(s) shall be resolved on the basis of the exchange of letters or a telephone conference to be held on_____. With respect to subsequent discovery

disputes, if any, the parties shall meet and confer in an effort to resolve any such disputes and shall present any areas of disagreement to the Arbitrators by letter setting forth their positions. The parties are encouraged to consolidate the disputes into as few separate submissions as possible. **(or can request a Redfern schedule]**

11. On or before_____, each party shall produce:
    a. those documents responsive to the requests directed to it as to which no objection was made;
    b. those disputed documents which it has been determined must be disclosed;
    c. those documents on which it relies in support of its case in the arbitration; and
    [d. a privilege log itemizing any withheld privileged documents.]

[Documents shall be produced on a rolling basis in advance of the final date for production]

12. **[If agreed]** With the consent of the parties, the Chair of the Panel of Arbitrators, or at the Chair's designation either of the other Arbitrators (the "Discovery Master"), shall resolve discovery disputes; provided, however, that at the request of either party or the Discovery Master, the other Arbitrators shall participate in the resolution of such discovery disputes.

13. If any party proposes to offer testimony by an expert at the hearing, such expert shall be identified on or before_____. The parties shall confer and advise the panel as to the date upon which parties shall serve a written report with respect to testimony to be offered by any expert at the hearing **[or better to specify date here].** The report shall include a statement of all opinions to be expressed and the basis and reasons therefor, the data which the expert considered in forming the opinions, any exhibits to be used as a summary of or in support of the opinions and the expert's qualifications. **[can add dates for expert rebuttals].**

14. A Preliminary Hearing will be held via telephone conference on _____at _____PM Eastern time to review any outstanding issues. **[may also schedule interim calls here if appropriate]**

15. On or before 14 days prior to the hearings the parties shall exchange the exhibits that they propose to offer at the hearing. The parties may agree to reserve documents which they will only use for cross-examination, rebuttal or impeachment and shall advise the Arbitrators of their agreement in this regard on September 23, 2011 at the scheduled call. Any exhibit offered which was responsive to a discovery request served upon a party but which was not produced to the other parties on or before the time set for the completion of discovery will not be received except for good cause shown.

16. On or before 14 days prior to the hearings the parties shall exchange a list of the persons they anticipate calling as lay witnesses to testify on their behalf. Such list shall reflect the name and address of each witness and a brief description of the subject matter of the testimony to be elicited from each such witness.

[If witness statements are used in lieu of direct testimony:
If any party proposes to adduce testimonial evidence of factual witnesses at the hearing, it shall serve written witness statements on or before _____by way of simultaneous exchange.

Written witness statements shall:

1. be in sufficient detail to stand as the evidence in chief of the witness at the hearing.
2. state the basis of that evidence (own perception or, if on information received, from whom such information was received, when and how);
3. identify in the witness statement and include as exhibits all documents to which the witness refers;
4. contain a statement by the witness confirming the truth of the contents of the witness statement; and
5. be signed by the witness.

No person shall be heard as a witness at the hearing for whom no written witness statement has been served.

Can include a time for rebuttal statements also.

All witnesses whose evidence is relied upon should be available for cross-examination at the hearing, if required by the other party or by the Arbitrators. If a witness who has submitted a witness statement or Expert Report does not appear at the hearing without a valid reason, the Arbitrators shall disregard that evidence unless, in exceptional circumstances, the Arbitrators determine otherwise. Each party shall be responsible to ensure the attendance of the witnesses on whose evidence they rely and, subject always to the Arbitrators power to deal with costs in its Award, for the costs of those witnesses attending the hearing.]

17. The parties shall cooperate in an effort to prepare a statement of stipulated facts to the extent that would be cost effective and will submit that to the Arbitrators on or before 14 days prior to the hearings.

18. On or before 14 days prior to the hearings each party shall provide the Arbitrators and the other parties with its pre-hearing memorandum which will include a discussion of the facts and the applicable law and a copy of any expert reports. The memoranda shall be accompanied by copies of the cases and other authorities upon which the parties rely. Exhibits necessary to understanding the pre-hearing memoranda and not already submitted to the arbitrators may be submitted. [or submit 20 document the parties viewed as most important to their case.]

19. The parties shall cooperate in preparing a joint exhibit book, indexed and pre-numbered, to avoid duplicative documents and an unnecessary number of exhibit books. To the extent necessary, the parties shall prepare a separate exhibit volume, indexed and pre-numbered, consisting of that party's prospective additional hearing exhibits. At the commencement of the

evidentiary hearing, the parties shall provide the Arbitrators with the exhibit volumes, indexed and pre-numbered, shall provide the separate exhibit binder to the other parties and shall have an exhibit set available for use by witnesses.

20. All submissions to the Arbitrators shall be accompanied by copies of any cases and other authorities upon which the parties rely.

21. **[If utilized]**The AAA's Accelerated Exchange Program shall be utilized for transmitting documents to the Arbitrators. Documents shall be delivered to the Arbitrators by e-mail and, if longer than 5 pages, followed by hard copy by overnight service or mail. For purposes of transmitting documents to the Arbitrators, the parties shall utilize the following contact information:

_____

Copies of all documents transmitted to the Arbitrators shall be sent simultaneously to the other parties, and a copy of the transmittal correspondence shall be sent simultaneously to _____, the AAA Case Manager. The Case Manager shall communicate with counsel concerning documents, if any, that may need to be executed to further document this stipulation.

22. The parties will confer as to the requested form of the award to be issued in this case and will advise the panel on or before____. [or the parties have requested a _____award]

23. The evidentiary hearings will commence at 9:30 a.m. on _____with _____to be held in reserve should an additional day prove to be necessary. The parties will confer and advise the panel of the location for the hearing. If the parties choose to use the offices of the American Arbitration Association, they will make the necessary arrangements directly with the case manager. The parties will make arrangements to schedule the attendance of witnesses such that the proceeding can proceed expeditiously and without any unnecessary delay.

24. The party presenting evidence shall give notice to the other party one day before of the names of the witnesses who will be called to testify the next day and the order in which the witnesses will be called.

25. If a court reporter is to be employed to transcribe the evidentiary hearing, the parties will make the necessary arrangements.

[The language of the arbitration will be English.]

[If a translator is to be employed, the parties will make the necessary arrangements.]

26. All deadlines set forth in this order shall be adhered to strictly unless and until amended by the panel. Late submissions may be subject to consequences which may include a refusal by the panel to accept the submission.

27. The evidentiary hearing dates set forth in this Pre-Hearing Order No. 1 will not be rescheduled absent extraordinary circumstances unrelated to preparedness. This Pre-Hearing Order No. 1 shall continue in effect unless and until amended by subsequent order of the Arbitrators. Any request for a modification of the schedule set forth in this Pre-Hearing Order No. 1 will include a statement as to whether the other party consents to the proposed modification and will confirm that the proposed modification will not require a change in the evidentiary hearing dates.

27. The parties are reminded to update their respective conflict checklists as further information becomes available. The duty to update such checklists will continue up to and including the date that the hearings are declared closed by the Arbitrators. If there is anything known to a party that is relevant in the context of arbitrator disclosure or impartiality, please advise the case administrator as soon as it becomes known.

Dated: _____

_____

_____

_____, chair

Arbitrators

Master for procedural call just before the hearing

By Edna Sussman- to be tailored as needed for the case

The panel would like to review procedural matters for the hearing to assure an efficient and fair process.

1. Confirm date, location and time of the hearing. We have June _____commencing at 9:30 and are holding _____if necessary. Please confirm the dates and confirm where the hearing is taking place.

2. We did not set a page limit for the pre-hearing memoranda which shall contain a discussion of the facts and the law. Do counsel want to agree on a page limit? We suggest a page limit of _____ pages. Please be sure to send hard copies of all authorities relied on, cases, statutes, horn books pages, etc. to the arbitrators. (if not set in first order)

3. Will any fact witnesses' direct testimony be presented by affidavit? If there will be affidavits for any direct testimony, the affidavits should be delivered to the tribunal with the pre-hearing memoranda. All witnesses must of course be available for cross examination. {This is likely already established in the first order] If affidavits are to be used for the direct, it should be understood that counsel will be permitted a limited "warm up" direct examination of that witness before cross examination. Any to be presented by deposition? Will cross be limited to the direct or anything relevant to the case?

4. Will all witnesses be available for live testimony; if not, is an agreement and arrangements for video conferencing or telephone testimony necessary for any witnesses? If so, are arrangements to be made to have documents available at the witness' location for the examination? Is there agreement as to the presence of an attorney with the witness?

5. Are any expert witnesses to be presented? How will the experts' testimony be presented? Is consideration being given to having the experts there at the same time so that the panel can pose questions to both in the sequence deemed most useful to the panel?

6. Time allocation: should a "chess clock" approach be used to divide the number of hours evenly between the parties? Is there a concern that without such a mechanism one side will be denied an equal opportunity to present its case within the time frame we have allocated for the hearing in this matter?

7.. Will there be opening statements? How long? Power points to be used?

8. Who will attend the hearing for each party understanding that each party is entitled to one party representative (and any expert witness) but the parties may agree to have others present? Witnesses sequestered?

9. Review exhibit and admission of evidence process. Demonstratives? Rules of evidence- objections – hearing behavior on objections.

10. Stipulated facts?

11. Will there be a court reporter? If so, have arrangements been made for their presence?

12. Is there a need for a translator? Coordination on slelection?

13. Technology needs for the hearing

14. Please advise as to the nature of the award requested by the parties. (If not already established)

15. Review schedule -Daily list of witnesses schedule for next two days

16. Attorney's fees, costs, sanctions [if appropriate to discuss]

17. Ways to shorten the hearing:

a. witness books containing the exhibits to be used with each witness to shorten the time otherwise spent pulling out the relevant exhibit,
b. no opening statements,
c. resolution of any objections to the admission of broad categories documents before the hearing if there is an issue like that
d. delivery to the Tribunal before the hearing of key exhibits as to which there are no objections to admissibility to avoid time spent reading documents into the record with witnesses
e. preparing witnesses to just respond to the questions posed to avoid long non-responsive answers, avoiding duplicative testimony
f. CV of witnesses
g. timeline
h. Witness statements
i. shortening the "warm up periods,"
j. streamlining the experts' testimony through various tools such as no oral direct, having the experts meet alone without counsel and report back to the Tribunal as to the open issues,
k. stipulated facts if cost effective- or limited for facts that Panel asks for as to which there is no dispute but would be helpful, e.g. corporate chart, time line, when transactions took place and in what amount, etc.- tailored to case
l. length of hearing days, weekends