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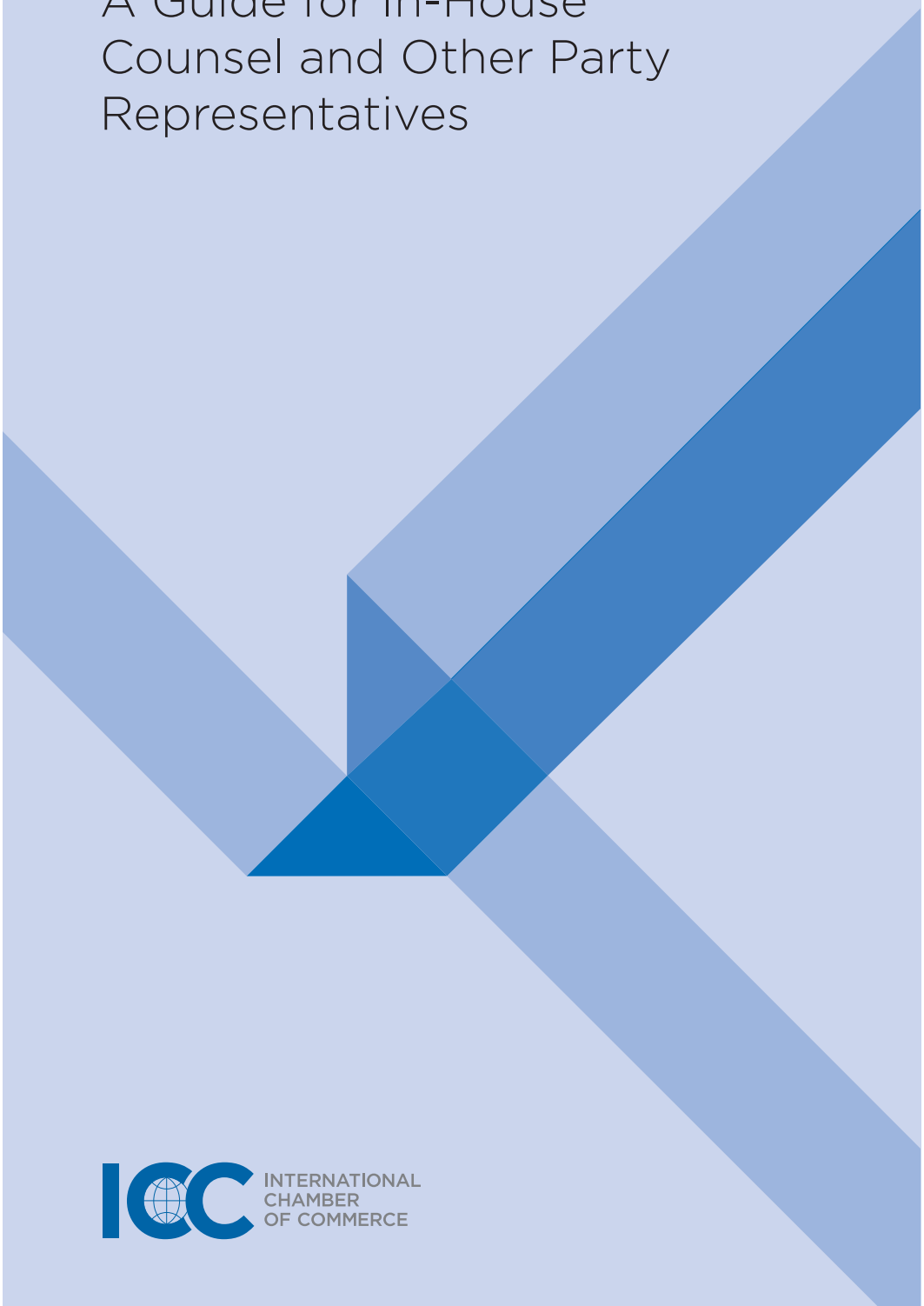
Table of Contents

International Arbitration

COMMISSION ON ARBITRATION AND ADR | LEADING DISPUTE RESOLUTION WORLDWIDE

EFFECTIVE MANAGEMENT OF ARBITRATION

A Guide for In-House Counsel and Other Party Representatives



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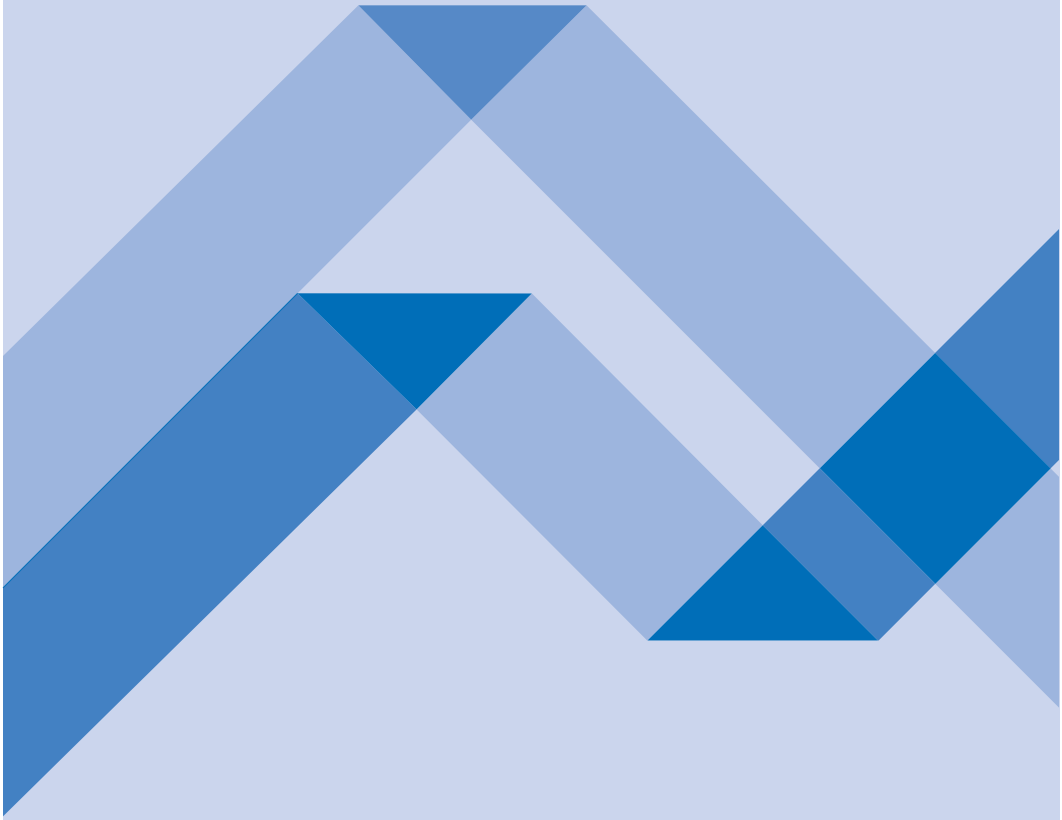

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The views and suggestions contained in this guide originate from the ICC Commission on Arbitration and ADR and the widespread consultations conducted during the drafting of the guide. They should not be thought to represent views and suggestions of the ICC International Court of Arbitration or the ICC International Centre for ADR, nor are they in any way binding on either body.

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EFFECTIVE MANAGEMENT OF ARBITRATION

A Guide for In-House Counsel and Other Party Representatives

The purpose of this guide is to provide in-house counsel and other party representatives, such as managers and government officials, with a practical toolkit for making decisions on how to conduct an arbitration in a time- and cost-effective manner, having regard to the complexity and value of the dispute. The guide can also assist outside counsel in working with party representatives to that effect.

Reflecting the ICC's continuing efforts to provide arbitration users with means to ensure that arbitral proceedings are conducted effectively, the guide focuses on time and cost issues in the management of arbitration. While strategic considerations are of great importance in any arbitration and will have a significant impact on its management, they tend to be case-specific and are beyond the scope of this guide.

While the guide was conceived with the ICC Rules of Arbitration in mind, most of its contents, as well as the dynamic generated by it, can be used in any arbitration. The guide can be useful for both large and small cases.

INTRODUCTION

Arbitration is a dispute resolution mechanism that provides diverse users worldwide with a neutral forum, a uniform system of enforcement and the procedural flexibility that allows parties to tailor-make a procedure to suit their needs in each case. With a joint commitment to efficient management by parties, outside counsel and arbitral tribunals, it can achieve a time- and cost-effective resolution of a dispute. Without that commitment, the opposite can be true: the very flexibility of arbitration can lead to increased time and cost.

As arbitration has become more complex and the scrutiny of dispute resolution mechanisms has intensified, users have expressed the concern that arbitration is often too long and too expensive. One user has queried why a bridge can be built in one or two years but an arbitration to determine responsibility for delays and defects can take as long as three to four years. In light of the concerns of users, the ICC decided to address time- and cost-efficiency in arbitration head-on.

As a first step, in 2007, the ICC Commission on Arbitration (as it was then known) published its report on controlling time and costs in arbitration. Prior research covering a wide range of ICC cases had showed that on average:

- 82% of the costs of an arbitration were party costs, including lawyers' fees and expenses, expenses related to witness and expert evidence, and other costs incurred by the parties for the arbitration;
- 16% of the costs covered arbitrators' fees and expenses; and
- 2% of the costs covered ICC administrative expenses.

It followed that, to minimize costs, special emphasis needed to be placed on reducing the costs connected with the parties' presentation of their cases. The report developed a series of suggested concrete measures for each phase of the arbitration that can be used to reduce time and cost.

Then, in 2009, the Commission began its revision of the ICC Rules of Arbitration. The revised Rules came into force on 1 January 2012.* One of the guiding principles for the revision was to improve the time- and cost-efficiency of arbitration. Among the provisions directed to that end is the requirement of an early case management conference during which the parties and the tribunal can establish an appropriate, time- and cost-effective procedure for the arbitration. The suggestions in the 2007 report, many of which are now included as an appendix to the Rules, may be used for that purpose.

The present guide is a continuation of that effort and is designed to help party representatives implement the new provisions and make appropriate decisions for effective case management. The guide will also assist outside counsel in working with party representatives to ensure well-planned and well-managed proceedings.

As noted above, arbitration rules permit flexibility and do not specify precisely how an arbitration is to be conducted. For example, there is nothing in the ICC Rules of Arbitration about the number of rounds of briefs, document production, the examination of witnesses, oral argument, post-hearing memoranda or bifurcation. The open-ended nature of the Rules enables the parties and the arbitral tribunal to tailor-make an effective procedure that suits the needs and particularities of each case. However, when studying the matter, the Commission came to the conclusion that too often the parties and tribunals do not tailor-make the procedure at an early stage, but rather apply boilerplate solutions or simply decide procedural matters piecemeal as the case progresses. This was found to increase time and cost in many arbitrations. Under the new case management provisions in Articles 22–24 of the Rules, which are specifically designed to address that problem, the process of tailor-making the procedure has now become a formal requirement.

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* Those Rules have since been further revised to include, among other things, an expedited procedure for lower-value cases. Effective as of 1 March 2017, the newly revised Rules can be downloaded from the ICC website (www.iccwbo.org). In this guide, references to the Rules have been updated, where necessary.

Tailor-making the procedure so that the arbitration will be faster and cheaper is not inherently difficult to accomplish. The parties can agree upon faster and cheaper procedures and, failing their agreement, the arbitral tribunal has the power to determine such procedures after consultation with the parties. This will normally be done at the first case management conference. What is more challenging is determining the appropriate level of process and resources to match the value and complexity of the case. It is faster and cheaper to have one round of briefs rather than three, or to hold a three-day rather than a three-week hearing, but an extended opportunity to be heard will necessarily be given up. It is less expensive and less burdensome to present a witness by videoconference, but perhaps also less persuasive. The goal of each party is to present its case in a manner that is most likely to persuade the arbitral tribunal to find in its favour. The time and cost that a party should be willing to devote to that end will vary according to the importance, complexity and value of the dispute. For each phase of the arbitration, cost/risk/benefit decisions have to be made.

Appropriate time and cost decisions can be made when party representatives have a collaborative relationship with outside counsel and actively participate in the making of those decisions. Each party best knows its own internal processes, the value of the underlying transaction and what is ultimately at stake. It is the party's case, the party's risk and the party's money, so the party itself is in the best position to decide what level of risk to accept and what strategic decisions to make. Outside counsel can assist in reaching such decisions on the basis of an informed evaluation of the pros and cons of the available alternatives. In addition, arbitral tribunals play an important role by bringing their experience to bear in devising cost-effective procedures and encouraging all of the parties to assist in conducting the arbitration in an expeditious and cost-effective manner, as contemplated by Article 22(1) of the Rules.

CASE MANAGEMENT CONSIDERATIONS

As a general matter, party representatives should consider the following when managing an arbitration:

Early case assessment. Much time and cost can be saved by not litigating matters with low chances of success, or that are not worth the cost/time/distraction to its personnel. This should be analysed before an arbitration has begun; however, case assessment should also continue during the arbitration.

Maintaining realistic schedules. Setting up of a realistic schedule for the entire arbitration as early as possible and sticking to that schedule, unless there are serious reasons for not doing so, are essential to controlled and predictable proceedings. Parties will be able more accurately to foresee the date of the award and make appropriate financial plans. The arbitral tribunal also has an important role in establishing and maintaining a realistic schedule.

Establishing a tailor-made and cost-effective procedure. Using this guide, party representatives along with outside counsel can determine optimum procedures from the party's perspective. The question then is how to implement those procedures. First, one party may consult with the other party with a view to reaching agreement on the applicable procedures. Any such agreement must be applied pursuant to Article 19 of the Rules. If the parties cannot agree on one or more of the procedures, each can present its position to the arbitral tribunal prior to or during the case management conference. The arbitral tribunal will decide after hearing the parties.

Awareness of settlement procedures. Settlement procedures such as mediation, neutral evaluation and direct settlement discussions can occur at any time before or during an arbitration. As an arbitration progresses, views on the case and parties' needs may change, affecting the desirability and nature of a potential settlement. New facts may come to light, a partial award may be rendered, management changes may occur, and new perspectives in relations between the parties may emerge. The parties should continually reassess their case and determine whether, at any given point in time, there is an opportunity for a meaningful settlement.

STRUCTURE OF THE GUIDE

This guide is composed of three main parts, each of which is designed to assist in making effective time and cost decisions for an arbitration: first, a discussion of settlement considerations; second, a discussion of the case management conference; and third, a series of eleven topic sheets.

Each topic sheet deals independently with a specific step in the arbitration process where cost/risk/benefit decisions need to be made. The topic sheets are not intended to cover every aspect of an arbitration; rather, they are designed to provide a methodology for decision-making. They may also serve as a tool to assist in making appropriate decisions on each topic. The following topics are covered:

- Request for arbitration
- Answer and counterclaims
- Multiparty arbitration
- Early determination of issues
- Rounds of written submissions
- Document production
- Need for fact witnesses
- Fact witness statements
- Expert witnesses
- Hearing on the merits
- Post-hearing briefs

Each topic sheet is designed to serve as an executive summary and follows a standard format consisting of a series of separate sections. The first section presents the topic and identifies the issue(s); the second section sets out the options available to the parties for that topic; the third section discusses the pros and cons of the different options; the fourth section analyses the different choices from a cost/risk/benefit perspective; and the fifth section lists useful questions that will help to focus on the key decisions that need to be made. The list of questions could, for example, serve as a basis for discussion between party representatives and outside counsel regarding the choices that need to be made for that particular phase of the arbitration. Where useful, a final section contains other general points to consider.

The topic sheets are not prescriptive and do not provide any definitive answers but rather contain suggestions that can be used to stimulate discussion and decision-making. It is the hope of the Commission that these topic sheets will help in taking the appropriate cost/risk/benefit decisions that need to be made in order to conduct an expeditious and cost-effective arbitration, having regard to the complexity and value of the dispute.

SETTLEMENT CONSIDERATIONS

A negotiated settlement of the dispute can save a great deal of time and cost, and parties would be well advised to maintain focus on the availability of settlement opportunities before and throughout an arbitration. The case management techniques listed in Appendix IV (h) to the ICC Rules of Arbitration indicate that the arbitral tribunal may inform the parties that they are free to settle all or part of the dispute at any time and, where agreed with the parties, may take steps to facilitate a settlement, subject to enforceability considerations under applicable law.

WHETHER OR NOT TO SETTLE

This is a complex question that will depend on each individual case. It is necessary to weigh the chances of success in an arbitration against a series of factors including the costs, burden and distraction caused by the proceedings and the time required to obtain the result. The choice may be affected by matters of principle or the need to eliminate financial or other uncertainties. Additional considerations include:

Preservation of relationships. Parties to an arbitration may have an ongoing relationship which they wish to preserve. Settlement may support that relationship better than litigating the dispute.

Difficulties of enforcement. If a claimant anticipates difficulties in enforcing an arbitral award against a particular respondent, it should factor that difficulty into its assessment of the strength of its case. When enforcement is uncertain, a settlement for a lower amount may be appropriate.

Reasons not to settle. Various factors may militate against settlement. For example, a claimant may wish to obtain a precedent or guidance from a tribunal for use in future cases or may consider that a given settlement offer does not match the chances of success in an arbitration. A respondent may prefer not to settle in order to discourage other potential claimants from seeking a settlement or because it is concerned that a settlement may be interpreted as an admission of liability.

Importance of confidentiality. A settlement may be preferable to an arbitration that is not confidential. ICC arbitration proceedings will not be confidential unless the parties have so agreed, the tribunal has so ordered or applicable law so requires.

METHODS OF SETTLEMENT

If the parties have decided to explore settlement, various methods are available to them. They may seek a settlement on their own, with the assistance of counsel or with the assistance of a mediator pursuant to the ICC Mediation Rules. Recourse to the Mediation Rules may be based on an agreement between the parties or a unilateral request by one party subsequently accepted by the other. While providing for mediation, the ICC Mediation Rules also allow the parties to choose any other settlement method that may be better suited to their dispute. Settlement methods that can be used under the ICC Mediation Rules include:

Mediation. The neutral acts as a facilitator to help the parties arrive at a negotiated settlement of their dispute. The neutral is not requested to provide any opinion on the merits of the dispute.

Neutral evaluation. The neutral provides a non-binding opinion or evaluation on any of a wide variety of matters including issues of fact or law, technical questions or the interpretation of a contract.

Mini-trial. A panel consisting of the neutral and an authorized executive of each party hears presentations by the parties, after which either the panel or the neutral can mediate the dispute or express an opinion on the merits.

A combination of methods, such as mediation with a neutral evaluation on a particular issue.

The report of an expert, selected pursuant to the ICC Rules for the Administration of Expert Proceedings to make findings on a disputed matter, may help to facilitate settlement. However, unlike a neutral evaluation and unless the parties agree otherwise, the expert's report will be admissible in judicial or arbitral proceedings if no settlement is reached.

CASE MANAGEMENT TECHNIQUES

The parties and their counsel should keep in mind that even where settlement is not feasible before or at the outset of an arbitration, the arbitration can be managed in such a way as to facilitate settlement throughout the proceedings. Appendix IV to the ICC Rules of Arbitration highlights several case management techniques that can be used to that end:

Bifurcation. In appropriate cases, a partial award on jurisdiction or liability may facilitate settlement. For example, if the arbitral tribunal decides that it has jurisdiction, the parties will know that the arbitration will go forward. This could prompt them to discuss settlement. Similarly, if the tribunal finds a party to be liable, the parties may prefer to settle the issue of damages rather than incur the time and expense of completing the arbitration.

Early consideration of controlling issues. In some cases there are issues of law, fact or a mixture of fact and law, which necessarily affect the determination of the claims in the arbitration, yet can be resolved independently at relatively little expense. Examples include the determination of the applicable law, statute of limitations, the interpretation of a particular contractual provision, the determination of a key fact or technical issue or the measure of damages. The parties may find it easier to arrive at a settlement after such issues have been resolved by the tribunal.

Engagement of the arbitral tribunal. Where the parties agree and the applicable law permits, the arbitral tribunal can actively facilitate settlement either by encouraging the parties to pursue one of the settlement methods described above, or through discussions with the parties.

CREATIVITY AND OPEN-MINDEDNESS

Arbitrations often take on a life of their own once the parties have developed their positions and incurred costs. Parties and their counsel should keep in mind that a settlement can occur at any time during an arbitration and that the ICC Rules of Arbitration encourage the parties to explore this possibility. When exercising their will and their creativity in seeking a settlement, parties often arrive at solutions that are unavailable through arbitration.

CASE MANAGEMENT CONFERENCE

The case management conference provides the mechanism for determining the manner in which the arbitration will be conducted. If it is not possible to determine the entire procedure at the first case management conference, the remaining issues may be decided at a subsequent conference. The decisions made at the case management conference can be modified during the course of the arbitration by agreement of all of the parties or, failing such agreement, by a decision of the arbitral tribunal.

Article 24(1) of the ICC Rules of Arbitration requires the arbitral tribunal to convene an early case management conference to consult the parties on the conduct of the arbitration. Thereafter, pursuant to Article 22(2) of the Rules, the arbitral tribunal may adopt procedural measures for the conduct of the arbitration, provided that they are not contrary to any agreement of the parties. Article 22(1) requires the arbitral tribunal and the parties to make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.

Issues to be decided include: the number of rounds of briefs; the extent of document production, if any; the early determination of issues; fact and expert witnesses; and the conduct of the hearing, if any. The topic sheets contained in this guide are designed to assist the parties, along with their counsel and the arbitral tribunal, in making appropriate choices for the conduct of the arbitration.

In practice, after receiving the case file, the arbitral tribunal may invite the parties to make case management proposals. If it does not do so, the parties can seek to agree between themselves upon the conduct of the proceedings. If they arrive at an agreement, it must be followed, subject to any proposals of the arbitral tribunal that are accepted by all of the parties. If the parties do not reach an agreement, the arbitral tribunal, after listening to the parties, will adopt procedural measures that it deems to be appropriate for the case at hand.

While Article 22(1) of the Rules refers to expeditious and cost-effective proceedings, it also makes clear that speed and low cost are not ends in themselves. The complexity and value of the dispute must be taken into account. A cost-effective and expeditious arbitration will be one in which the time and cost devoted to resolving the dispute is appropriate in light of what is at stake. In each case, it is necessary to make a cost/benefit analysis in order to see whether a particular procedural measure is cost-justified.

The objectives of the parties will play a crucial role in making such choices. Some examples of how parties' goals may translate into case management strategy are set forth below:

- When an important matter of principle is at stake, it may be worth the time and expense needed for a thorough examination of the facts and a full articulation of all legal arguments. A party with this objective may be willing to incur the expense of more extensive document production, multiple rounds of written submissions, a larger number of fact and expert witnesses, and the like.
- When neither an important principle nor great sums are at stake, parties may wish the arbitration to be as inexpensive and rapid as possible. Here, in contrast, parties may seek to limit document production, limit the number of witnesses, shorten hearings or minimize submissions.
- When parties wish to settle the case, for example in order to maintain their relationship or mitigate the risk of loss, they may use the case management conference to seek bifurcation of the proceedings or an early determination of controlling issues, the resolution of which might facilitate settlement. The parties may also agree to undertake settlement procedures either before or during the remaining phases of the arbitration.

TOPIC SHEETS

1. Request for Arbitration
2. Answer and Counterclaims
3. Multiparty Arbitration
4. Early Determination of Issues
5. Rounds of Written Submissions
6. Document Production
7. Need for Fact Witnesses
8. Fact Witness Statements
9. Expert Witnesses (pre-hearing issues)
10. Hearing on the Merits (including witness issues)
11. Post-Hearing Briefs

1. REQUEST FOR ARBITRATION

PRESENTATION

An ICC arbitration is commenced by the filing of a Request for Arbitration with the Secretariat of the ICC International Court of Arbitration (Article 4 of the ICC Rules of Arbitration). In all cases, the Request must contain the information required by Article 4(3) of the Rules. That provision is intended to elicit sufficient information to enable the respondent to respond to the claimant's claims, as required by Article 5(1) of the Rules, and for the International Court of Arbitration to fulfil its functions under the Rules with respect to the constitution of the arbitral tribunal and the setting in motion of the arbitration.

Issue: Should the Request contain only the minimum requirements of the Rules or provide a more elaborate statement of the case?

OPTIONS

A. File a short Request that satisfies the Rules without providing any more content or evidence than is strictly required by the Rules.

B. File a comprehensive Request that constitutes a full statement of the case, including exhibits.

The above options represent two ends of a spectrum. However, there is also the option of filing a Request that provides a level of content and evidence anywhere between those two ends.

PROS AND CONS

A shorter and less comprehensive Request can be prepared more economically and more quickly than a more comprehensive document.

On the other hand, a more comprehensive Request may avoid the need for multiple rounds of subsequent submissions and thereby help to expedite the arbitration. In addition, providing more information may increase the impact of the Request on the respondent. Additional detail may also enable the parties and the

arbitral tribunal to focus on the key issues in the case as early as possible and thereby facilitate the drawing up of the Terms of Reference and the conduct of the case management conference.

COST/BENEFIT ANALYSIS

In all circumstances, the claimant should seriously consider conducting an early assessment of the nature, strengths and weaknesses of its case before filing a Request. This will allow it to determine, in the first instance, whether the claims are sufficiently strong to warrant bringing the arbitration or whether it would be better to seek a settlement of the dispute. If it decides to proceed with the arbitration, the early case assessment will help to ensure that the Request does not contain errors and that the claimant's claims are correctly described and set forth in the most effective manner. While this assessment requires some time and expenditure, it typically results in a saving of both over the arbitration as a whole.

If the claimant decides to proceed with the arbitration, it must determine whether to file a shorter or longer Request. The decision on how comprehensive the Request should be will be heavily influenced by the circumstances of the case and strategic considerations. Some time and cost may be saved by drafting a shorter Request although this may be a temporary saving if the claimant is ultimately required to supplement such a Request with additional detailed information. When the Request and the Answer respectively constitute a full statement of the case and a full statement of defence, time and cost can be saved by avoiding one or more further rounds of submissions. However, in complex cases this may not be possible, and the Request and Answer may be ultimately superseded by subsequent written submissions.

If a primary purpose for filing a Request is to elicit settlement discussions, consideration should be given to whether this is best accomplished with a shorter or a longer Request. A shorter Request may be preferable if the respondent is unlikely to discuss settlement unless an arbitration has been commenced and the substantive aspects of the claim would be best dealt with in the

settlement discussions. A longer Request may be preferable if the goal is to show the respondent in writing the strengths of the claimant's case before commencing settlement discussions.

QUESTIONS TO ASK

1. What is the desired result of filing the Request (e.g. triggering settlement discussions or having the dispute resolved by arbitration)?

2. Are there any valid reasons for not conducting an early case assessment?

3. Are there any real cost savings in filing a shorter Request? Would they be outweighed by the benefits of filing a longer Request for any of the reasons described above?

4. Are there any other strategic or legal considerations that may affect the timing of the filing of the Request and consequently whether it should be shorter or longer?

OTHER POINTS TO CONSIDER

In certain cases, questions of timing may militate in favour of a shorter Request. For example, a Request may need to be filed quickly to avoid being barred by a statute of limitations. A Request may also have to be filed within ten days of receipt by the Secretariat of an application for emergency measures pursuant to Article 1 of the Emergency Arbitrator Rules (Appendix V to the Rules).

Pursuant to Article 23(4) of the Rules, after the Terms of Reference have been established, no new claims may be made without the authorization of the arbitral tribunal. It is therefore prudent for the claimant to make all of its claims prior to the signing of the Terms of Reference.

Article 5(6) of the Rules provides that the claimant shall submit a reply to any counterclaim raised by the respondent pursuant to Article 5(5) of the Rules. The topic sheet relating to the Answer and counterclaims offers guidance on this matter.

2. ANSWER AND COUNTERCLAIMS

PRESENTATION

The respondent is required to file an Answer to the Request for Arbitration with the Secretariat (Article 5 of the ICC Rules of Arbitration). In all cases, the Answer must contain the information required by Article 5(1) of the Rules. The Answer may contain a counterclaim pursuant to Article 5(5) of the Rules.

Issue: How detailed or extensive should the Answer and any counterclaim be, above and beyond what is required by the Rules?

OPTIONS

A. File a short Answer that satisfies the Rules without providing any more content or evidence than is strictly required by the Rules.

B. File a comprehensive Answer that constitutes a full statement of defence, including evidentiary exhibits.

The above options represent two ends of a spectrum. However, there is also the option of filing an Answer that provides a level of content and evidence anywhere between those two ends.

In deciding on the appropriate length of the Answer, the respondent should consider whether or not to match the length and level of detail chosen by the claimant. Specifically, the respondent may choose between the following options:

a) File an Answer that reflects the approach taken by the claimant (e.g. a shorter or a longer document).

b) File an Answer in a form that is different from the form of the Request filed by the claimant.

C. Assert a counterclaim, irrespective of the length and content of the Answer. The raising of a counterclaim is subject to considerations similar to those described in the topic sheet on the Request for Arbitration.

PROS AND CONS

The pros and cons of filing a shorter or a longer Answer may vary depending on the form of the Request filed by the claimant. If the claimant has filed a shorter Request and the respondent reciprocates with an equally short Answer, the arbitration should be able to proceed more expeditiously to the Terms of Reference and the case management conference, in part because the respondent is less likely to need an extension of time for filing the Answer pursuant to Article 5(2) of the Rules. On the other hand, if the claimant files a longer and more detailed Request, then the respondent may be required to seek an extension of time in order to respond with a detailed Answer.

A shorter and less comprehensive Answer can be prepared more economically and more quickly than a more comprehensive document.

If the claimant has filed a comprehensive Request and the respondent decides to file a comprehensive Answer, this may avoid the need for multiple rounds of subsequent submissions and thereby expedite the arbitration.

In addition, providing more information may increase the impact of the Answer. Additional detail may also increase the ability of the parties and the arbitral tribunal to focus on the key issues in the case as early as possible and thereby facilitate the drawing up of the Terms of Reference and the conduct of the case management conference.

COST/BENEFIT ANALYSIS

To the extent possible in the time available, the respondent should conduct an early assessment of the nature, strengths and weaknesses of its case before filing an Answer. This will allow it to determine, in the first instance, whether the case should be defended or whether settlement should be pursued. If the respondent decides to defend the arbitration, and possibly assert counterclaims, the early case assessment will help to ensure that the Answer does not contain errors and that the respondent's defence and/or counterclaims are correctly described and set forth in the most effective manner. While this assessment

requires some time and expenditure, it typically results in a saving of both over the arbitration as a whole.

An additional consideration for the respondent is the limited amount of time available under the Rules for making an early case assessment and filing its Answer. If the respondent has prior knowledge of the dispute, then it may be able to undertake an early case assessment before receiving the Request for Arbitration. If, on the other hand, the receipt of the Request for Arbitration is the respondent's first real opportunity to assess the claimant's claims, the time available to it under the Rules for this purpose will be limited.

Depending on the circumstances described above, the respondent must decide whether to file a shorter or a longer Answer. The decision on how comprehensive the Answer should be will be heavily influenced by the circumstances of the case, strategic considerations and the limited time available for submitting the Answer under the Rules. Some time and cost may be saved by drafting a shorter Answer although this may be a temporary saving if the respondent is ultimately required to supplement such an Answer with additional detailed information.

If the claimant has filed a full statement of the case in its Request and if in the time available it is possible to file a full statement of defence in the Answer, time and cost can be saved by avoiding one or more rounds of further submissions. However, this may not be possible in complex cases.

Consideration should be given to whether filing a shorter or a longer Answer might facilitate settlement discussions. A shorter Answer may be preferable if the substantive aspects of the settlement would best be dealt with in negotiations and there is a reasonable prospect of a settlement. A longer Answer may be preferable if the goal is to show the claimant in writing the strengths of the respondent's defence and any counterclaims for purposes of settlement discussions.

QUESTIONS TO ASK

1. Are there any real cost savings or any other advantages in filing a shorter Answer? Would they be outweighed by the benefits of filing a longer Answer for any of the reasons described above?

2. Is there sufficient time to conduct an early assessment of the defence and file the Answer within the 30 days specified in the Rules, or is it necessary to request an extension of time for filing the Answer pursuant to Article 5(2)?

3. Are there any serious counterclaims that can and should be raised in the arbitration? Should they comply with only the minimum requirements set out in the Rules or be more detailed and accompanied by evidentiary exhibits?

OTHER POINTS TO CONSIDER

Pursuant to Article 23(4) of the Rules, after the Terms of Reference have been established, no new claims may be made, without the authorization of the arbitral tribunal. It is therefore prudent for any counterclaims to be made by the respondent prior to the signing of the Terms of Reference.

If the respondent wishes to join an additional party pursuant to Article 7(1) of the Rules, it must be careful to do so within the time limits specified in that Article.

If there are serious objections to jurisdiction, the respondent may consider keeping the Answer short with respect to the merits.

3. MULTIPARTY ARBITRATION

PRESENTATION

Under the ICC Rules of Arbitration, an arbitration having more than two parties may occur when all of the parties have so agreed. Multiparty arbitrations may result from various procedural choices:

- A claimant may commence an arbitration pursuant to Article 4 of the Rules against two or more respondents.
- Two or more claimants may commence an arbitration pursuant to Article 4 of the Rules against one or more respondents.
- Before the confirmation or appointment of any arbitrator, any party may join another party to the arbitration pursuant to Article 7 of the Rules.
- Upon any party's request, two or more pending arbitrations may be consolidated into a single arbitration by the Court, subject to the requirements of Article 10 of the Rules.

Issue: When is it beneficial to choose a multiparty arbitration?

OPTIONS

A. A single arbitration that includes all relevant parties when they have all so agreed.

B. Two or more separate arbitrations.

PROS AND CONS

A single multiparty arbitration, when possible, results in more comprehensive proceedings and avoids duplication. It also avoids the risk of conflicting decisions in separate arbitrations.

On the other hand, a single multiparty arbitration may result in more complex proceedings, which could increase the length and cost of the arbitration. For example, a party with a small role in the dispute may not wish to participate in a multiparty arbitration and could

refuse to do so in the absence of a binding arbitration agreement. Further, in an arbitration where there is to be a three-member arbitral tribunal, choosing to have more than two parties in the arbitration may deprive the parties of their ability to choose a co-arbitrator, because the ICC International Court of Arbitration may decide to appoint the entire tribunal pursuant to Article 12(8) of the Rules.

COST/BENEFIT ANALYSIS

Consideration should be given to whether a single multiparty arbitration, as opposed to two or more separate arbitrations, would save time and money. While a single arbitration will usually be more cost-efficient, there could be situations in which separate arbitrations may still be the more efficient option for one or more parties.

If a single multiparty arbitration is the more time- and cost-efficient option, the parties should consider whether the time and cost benefits outweigh any of the potential disadvantages, such as the risk of losing the opportunity to choose a co-arbitrator because the International Court of Arbitration may find it necessary to appoint the arbitral tribunal pursuant to Article 12(8) of the Rules.

Another important factor to consider in deciding whether a single multiparty arbitration would be beneficial is the contractual role of each party and the specific interests flowing from that role. Arbitration of your dispute with one party may weaken your position with respect to another party. Where, for example, parties share potential liability with respect to their contractual counterparty, it may be tactically imprudent for them to have their internal disputes heard in the arbitration with the contractual counterparty, since their allegations against each other may support the counterparty's case against them.

4. EARLY DETERMINATION OF ISSUES

PRESENTATION

Issue: In what circumstances would it be beneficial to break out certain issues for early determination by the arbitral tribunal in a partial award?

Various kinds of issues lend themselves to such treatment:

First, there may be threshold issues that could be dispositive of the entire arbitration. Such issues might include:

- whether the tribunal has jurisdiction over the dispute;
- whether the dispute is barred by an applicable statute of limitations;
- whether there is liability;
- whether the dispute is arbitrable;
- whether the parties have capacity to sue or be sued.

For example, were a tribunal to decide that it lacks jurisdiction over the entire dispute, that would result in a final award dismissing all claims made in the arbitration. If the tribunal decides that it has jurisdiction, that decision would result in a partial award and the arbitration would continue, unless the tribunal's decision leads to a settlement. The same pattern would apply, *mutatis mutandis*, to the other examples given above.

Second, there may be discrete issues which could be usefully broken out and decided in a partial award, even though their resolution would not be dispositive of the entire arbitration. The early resolution of a particular issue may narrow or simplify the issues to be decided in the remainder of the arbitration or may facilitate settlement. Such issues may include:

- a decision on the meaning of a contractual provision;
- a decision on the applicable law;
- a decision on certain key facts in dispute;

- a decision on an issue that may significantly affect a party's exposure to one or more claims, such as determination of the types of recoverable damages.

For example, a decision on applicable law may save the parties from having to incur time and cost pleading their case on the basis of alternative applicable laws. The same analysis applies to the other examples above.

OPTIONS

A. Do not break out any issues for early determination.

B. Break out one or more issues for early determination by means of an award.

PROS AND CONS

The early determination of one or more issues in a partial award may resolve the entire dispute, simplify the remainder of the arbitration or facilitate settlement. However, if the award does not achieve one of those objectives, the early determination procedure may result in added time and cost. In addition, breaking out a discrete issue rather than having it decided along with the other issues may affect the way the tribunal decides one or more of the issues.

COST/BENEFIT ANALYSIS

Breaking out issues that could be dispositive of the entire arbitration

A cost/benefit analysis of this question is complicated by the fact that the decision has to be made in the face of important unknowns. When deciding whether or not to break out an issue, the parties cannot know what the arbitral tribunal's decision will be. For example, in a case involving issues of liability and damages, if the issue of liability is broken out and the tribunal decides that there is no liability, a great deal of time and cost will be saved since there will be no need to exchange briefs and hold hearings on damages. On the other hand, if the tribunal finds that there is liability, unless such finding encourages the parties to settle the case, there will have to be a damages phase, and the breaking out of the issue of liability may then actually add to the overall time and cost of the proceedings.

Given these unknowns, the cost/benefit analysis must turn on an appreciation of probabilities and an estimate of potential cost. In deciding whether to break out an issue, it may be useful to estimate likely outcomes as well as time and cost in answer to certain specific questions:

- What is the likelihood that the tribunal's decision will be dispositive of the entire arbitration?
- If the tribunal's decision will not be dispositive of the entire arbitration, what is the likelihood that the tribunal's early determination of the issue may result in a settlement of the case?
- What is the added time and cost likely to result from early determination of the issue in comparison with the likely overall cost, i.e. how much more time and cost would there be if the arbitration were conducted in two parts rather than one?

The answers to these questions can help in deciding whether or not to break out an issue for early determination. The following factors would tend to favour the breaking out of an issue for early determination:

- the likelihood of a dispositive determination is high;
- the likelihood of a settlement, even if there is no dispositive determination, is high;
- the remaining phases are likely to be long and expensive;
- the additional cost caused by early determination is low.

A decision on whether to break out an issue can be made by weighing these factors in relation to each other.

Breaking out issues in a partial award not dispositive of the entire arbitration

A similar type of cost/benefit analysis would apply here, although the relevant questions are slightly different:

- What is the likelihood that the tribunal's early determination of a particular issue will significantly narrow or simplify the other issues to be decided in the remainder of the arbitration?

- What is the likelihood that early determination of a particular issue may result in a settlement of the case?
- What is the additional time and cost likely to result from early determination of a particular issue?

Once again, weighing the answers to those questions against each other can help in deciding whether it is beneficial to break out a particular issue for early determination.

QUESTIONS TO ASK

1. Does the case contain any threshold or discrete issues that could be determined in a separate award?

2. Would the early determination of those issues by the arbitral tribunal be beneficial, in light of the cost/benefit analysis discussed above?

3. Would early determination (a) potentially resolve the entire dispute, (b) facilitate settlement or (c) simplify the rest of the arbitration?

OTHER POINTS TO CONSIDER

Article 38(5) of the Rules permits the arbitral tribunal, when allocating the costs of the arbitration, to take into account the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner. The arbitral tribunal might allocate some amount of costs against a party that loses in the early determination of a potentially dispositive issue if that party is considered to have acted in bad faith or otherwise not to have acted in an expeditious and cost-effective manner.

There may be logistical reasons for breaking out one or more issues for early determination, such as the availability of witnesses, hearing facilities, counsel or arbitrators. In addition, it may allow a complex case to be conducted in a more orderly manner.

There may be compelling reasons for deciding certain issues early in an arbitration, e.g. whether claims made under different arbitration agreements may be heard together in a single arbitration. The breaking out of an issue for decision in a partial award could be agreed upon by the parties or determined by the arbitral tribunal in the absence of an agreement by the parties.

5. ROUNDS OF WRITTEN SUBMISSIONS

PRESENTATION

An ICC arbitration is commenced by the filing of a Request for Arbitration (Article 4 of the ICC Rules of Arbitration). Thereafter, the respondent files an Answer (Article 5). If the Answer contains a counterclaim, the claimant files a reply (Article 5). The Terms of Reference for the arbitration are then established (Article 23).

Issue: How many subsequent rounds of written submissions are appropriate in a particular arbitration?

OPTIONS

A. No further written submissions are necessary, since the Request and the Answer sufficiently state the case.

B. One subsequent round of written submissions.

C. Two or more subsequent rounds of written submissions.

D. Post-hearing briefs (assuming there is a hearing).

PROS AND CONS

Additional rounds of written submissions enable the parties to articulate their positions more extensively and respond to the developing arguments on each side.

However, additional rounds of briefs may lead to unnecessary repetition, excessive detail or dilatory tactics.

COST/BENEFIT ANALYSIS

Each round of written submissions increases the length and cost of the arbitration. It is therefore essential to determine whether, in a particular case, the benefits of an additional round are worth the extra time and cost.

Additional submissions may be particularly useful in certain cases, e.g. where there are complicated issues of fact or law or issues of strategic importance for a party. In such cases, it is very common to have two rounds of pre-hearing written submissions after the initial submissions.

QUESTIONS TO ASK

1. Does the case justify the extra time and cost caused by additional written submissions?

And, in particular,

2. Are additional rounds of submissions genuinely useful or necessary for a party to make its case to the arbitral tribunal, and if so, why?

3. What is the estimated cost of such additional rounds?

4. Is the benefit worth the cost, and if so, why?

OTHER POINTS TO CONSIDER

Consider limiting the number of pages of written submissions.

Consider limiting the scope of such submissions, e.g. to issues raised by the other side in its immediately preceding submission.

Consider having the arbitral tribunal indicate issues on which it wishes the parties to focus in any further round of submissions.

Consider whether any subsequent rounds of submissions should be simultaneous or sequential. For example, it may be efficient for post-hearing briefs to be filed simultaneously.

Consider whether post-hearing briefs are genuinely useful or necessary, or whether one round of pre-hearing briefs and one round of post-hearing briefs are sufficient.

The foregoing suggestions could be put into effect either through an agreement between the parties or in an order from the arbitral tribunal upon a party's request.

6. DOCUMENT PRODUCTION

PRESENTATION

Document production can involve substantial time and cost. Obviously, every party may unilaterally submit documents to support its case. Document production refers to the extent to which one party may demand that another party produce documents.

The ICC Rules of Arbitration contain no specific provisions governing document production. Article 19 of the Rules allows the parties to agree upon the procedures to be applied and empowers the tribunal to decide in the absence of an agreement of the parties. Article 22(4) requires the arbitral tribunal to ensure that each party has a reasonable opportunity to present its case. Article 25(1) provides that the arbitral tribunal shall establish the facts of the case by all appropriate means and Article 25(5) allows it to summon any party to provide additional evidence.

In short, the Rules leave the question of whether and how much document production will occur to the parties and the arbitrators, provided that the parties are treated fairly and impartially and that each party has a reasonable opportunity to present its case. When document production is to occur, the manner in which the process is executed and the degree of production can have a significant impact on time and cost.

In-house counsel or other party representatives, working with outside counsel, should consider whether and to what extent document production is genuinely useful and cost-beneficial. When document production is to occur, time and cost can be significantly reduced by establishing an efficient document production procedure.

Issue: Is document production desirable and, if so, how much document production should there be?

OPTIONS

Options range from no document production at all to full document production.

A. No document production.

- The parties may decide to seek no documents from each other and to rely solely on the documents each of them possesses.
- The parties are always free to submit their own documents.
- The parties are also free to request the arbitral tribunal to order the production of specific documents.

B. Production limited to specific documents or narrow categories of documents, which are relevant and material to deciding an issue in the arbitration.

Consider using:

- the IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules") as a standard;
- the suggestions in the report of the ICC Commission on Arbitration and ADR entitled "Controlling Time and Costs in Arbitration";
- the report of the ICC Commission on Arbitration and ADR entitled "Managing E-Document Production".

C. Broad document production as used in some common law jurisdictions.

- The parties may agree upon broad requests for documents.
- In rare cases, the parties may agree to common law style "discovery" including depositions and/or interrogatories.

When document production is to occur, the parties may agree upon the ground rules for requesting documents from and producing documents to each other.

If the parties cannot agree on whether to have document production or on the extent of document production or the ground rules for such production, the tribunal will decide.

PROS AND CONS

Document production can be very expensive and time-consuming and the broader the document production the more expensive and time-consuming it

tends to be. It requires time and expenditure from the party that searches for and produces documents as well as from the party that must study and analyse the documents that are produced.

On the other hand, if one of the parties has sole possession of documents needed by the other party, document production may be essential. Moreover, document production can provide the parties and the tribunal with a more complete understanding of the case. Given that parties are unlikely to submit documents spontaneously when they are detrimental to their own case, document production puts them under an obligation to do so.

COST/BENEFIT ANALYSIS

In view of the time and cost required for document production, a cost/benefit analysis is necessary in order to decide whether to seek document production at all and, if so, to determine the desired extent of such production. The parties should explore whether they can effectively meet their burden of proof with the documents that are already in their possession and whether the other side is likely to have documents that are genuinely useful for the first party to make its case.

Each party should then estimate the extra time and cost caused by document production and weigh this against the likelihood that document production will genuinely assist it in making its case. For example, if document production is estimated to cost USD 500,000 and it is considered that there is at best a 10% chance that it will yield valuable results, the question arises as to whether that 10% chance is worth the expense of USD 500,000. This is a decision that can best be made jointly by the party, typically represented by in-house counsel, and outside counsel. Many factors may come into play, such as the amount in dispute, whether there are policy issues, whether there is concern about precedent and whether the benefit of obtaining documents from the other side may be outweighed by the detriment of being required to produce documents oneself.

QUESTIONS TO ASK

1. Are any requests for document production genuinely useful or necessary for a party to make its case or can the party rely effectively on the documents in its possession?

2. What extent of document production is genuinely useful and necessary?

3. When should document production occur?

4. What is the estimated cost of searching for and producing documents, as well as the cost of reviewing and analysing documents that have been produced?

5. Is the benefit of document production worth the cost, and if so, why?

OTHER POINTS TO CONSIDER

Consider whether it is appropriate to deal with document production in the arbitration clause, for example by agreeing that there will be no document production (e.g. in contracts where it is relatively certain that document production will not assist in resolving potential disputes); by agreeing to limited document production in accordance with the IBA Rules; or by agreeing to broad document production or "discovery".

Consider whether document production should occur once or more than once. Consider whether it should occur prior to or after written submissions.

Consider whether it is appropriate to limit documents transmitted to the arbitral tribunal to a manageable quantity.

Take into account any costs of translation when estimating the cost of document production.

Consider the ground rules to be adopted for implementing document production, including the use of a Redfern Schedule and the setting of the shortest reasonable time frames for production.

Special considerations may be needed if the parties agree upon or the tribunal orders the production of electronic documents. In such cases, the report of the ICC Commission on Arbitration and ADR entitled "Managing E-Document Production" can be used to assist in choosing the most efficient methods of e-document production.

7. NEED FOR FACT WITNESSES

PRESENTATION

Article 25(1) of the ICC Rules of Arbitration requires the arbitral tribunal to establish the facts of the case by all appropriate means. This can include the hearing of fact witnesses. Article 25(3) of the Rules specifically allows the arbitral tribunal to decide to hear witnesses. However, Article 25(6) allows the arbitral tribunal to decide the case solely on documents, unless a party requests a hearing. This would permit an arbitration with no hearing and no fact witnesses.

Issue: Is there a genuine need for fact witnesses?

OPTIONS

A. No fact witnesses at all.

B. One or more fact witnesses.

- Identify the issues on which fact witness testimony is necessary.
- Identify the appropriate fact witnesses for the issues.

PROS AND CONS

Fact witnesses can be essential to proving a case. However, they significantly increase the length and cost of an arbitration, since there will typically be one or more written witness statements for each witness and the oral testimony of each witness may be required at a hearing.

COST/BENEFIT ANALYSIS

Fact witnesses may be genuinely necessary in order to prove disputed facts or to present a broader picture of the circumstances surrounding the dispute. In determining whether fact witnesses are needed, the following issues can be considered:

- Are there any disputed facts? It may appear from the pleadings that there are disputed facts, but it may turn out after discussion between the parties that those facts are not really disputed. In addition, a party may agree not to contest certain disputed facts in order to save time and cost when the dispute over those facts is not sufficiently important.
- If there are disputed facts, are they relevant and material for deciding an issue in the dispute? There is no need to incur the extra time and cost involved in having a fact witness testify on disputed facts that will not affect the determination of an issue in the dispute.
- If there are disputed facts that are relevant and material, can they be proved by documents alone or do they genuinely need to be proved through fact witnesses?
- Is it useful to call fact witnesses to make a general presentation on the circumstances of the dispute?

When a party has decided to use fact witnesses, time and cost can be reduced by avoiding having many witnesses testify as to the same facts and by carefully focusing the scope of the testimony of each witness.

QUESTIONS TO ASK

1. Is there a genuine need for fact witnesses at all?

2. If so, who should they be? What should be the scope of their testimony? How many fact witnesses are genuinely necessary to establish a particular fact or present the circumstances of the case?

OTHER POINTS TO CONSIDER

Consider using videoconferencing for oral witness testimony to save time and cost.

Consider what is the most effective way of examining the fact witnesses at a hearing: e.g. direct examination and cross-examination; opening presentation by the witness followed by cross-examination; use of the witness's written statement as a substitute for direct examination and proceeding straightaway with cross-examination; questioning of fact witnesses by the tribunal only or by the tribunal followed by questions from counsel.

Determine whether it is preferable for a given witness to testify in the language of the arbitration or in his or her native language. When a witness is testifying in a language other than the language of the arbitration, appropriate translation will often need to be arranged, which will increase time and cost.

8. FACT WITNESS STATEMENTS

PRESENTATION

Issues arising when a party has decided to present fact witness evidence: Should witness statements be submitted? What should their scope be? When should they be submitted?

OPTIONS

Form

A. No written witness statements.

B. Brief summary of the scope of witness evidence (witness summary).

C. Full witness statements.

Scope of full witness statements

A. Lengthy and comprehensive statement.

B. Short statement limited to key factual issues in dispute.

Number and timing

A. One or more rounds of witness statements.

B. Witness statements submitted with written submissions.

C. Witness statements submitted following the exchange of written submissions.

D. Witness statements submitted simultaneously or sequentially.

PROS AND CONS

Form

Written witness statements increase the length and cost of the pre-hearing phase, but can reduce the length and cost of the hearing by replacing direct examination and allowing for a more focused cross-examination. The absence of witness statements, or the submission of witness summaries only, will reduce pre-hearing costs but can increase the length and cost of the hearing.

Scope

Comprehensive witness statements can be a valuable part of case presentation, allowing witnesses to tell the story of the dispute and place documentary evidence in its context. However, lengthy witness statements will increase time and cost as well as the scope of cross-examination.

Number and timing

More than one round of witness statements provides witnesses with the opportunity to rebut the evidence of other witnesses, but will increase time and cost prior to the hearing.

Submitting witness statements with the written submissions provides direct proof of the facts at the time they are alleged. It also allows the parties to identify and progressively narrow down the factual issues, which may make for shorter, more targeted submissions later.

Submitting witness statements only after the exchange of written submissions may allow the parties to narrow down the factual issues in dispute before preparing and submitting witness statements, which may consequently be more focused on the disputed issues.

COST/BENEFIT ANALYSIS

While witness statements can provide valuable evidence in support of a party's position, they can add significantly to time and cost. The importance of the evidence to be presented must therefore be weighed against the time and expense required to present it. For example, if alternative sources of evidence are available (e.g. contemporaneous documentary evidence), there may be no cost justification for providing a witness statement on those facts. Similarly, if a witness is submitting a statement on a given fact, the submission of another witness statement evidencing the same fact may not be cost-justified, particularly if the fact is of little importance.

Full witness statements require more work and are therefore more expensive to prepare than witness summaries. However, they may subsequently save time and cost during a hearing by obviating the need for lengthy direct examination of the witness at the hearing.

The case management techniques set out in Appendix IV to the Rules include limiting the length and scope of written witness evidence so as to avoid repetition and focus on key issues. In line with Appendix IV, parties may wish to consider how to structure their fact witness evidence as efficiently as possible.

QUESTIONS TO ASK

1. In light of the other sources of evidence available, is the preparation of a given witness statement justified in terms of time and cost?

2. Is a witness statement required to prove a disputed question of fact or provide necessary background information? Is more than one witness statement necessary to accomplish this? Is there a good reason not to limit the witness statement to the key factual issues in dispute?

3. Should the witness evidence be presented in the form of full witness statements or witness summaries?

4. Is it necessary to have more than one round of witness statements?

5. Should the witness statements be filed concurrently with, or only after, the parties' written submissions?

9. EXPERT WITNESSES (PRE-HEARING ISSUES)

PRESENTATION

Article 25(3) of the ICC Rules of Arbitration contemplates the possibility of experts appointed by the parties, while Article 25(4) provides that, after consulting the parties, the arbitral tribunal may appoint one or more experts, define their terms of reference, and receive their reports.

Issues: Is there a genuine need to appoint experts? Should they be appointed by the parties, the tribunal, or both? How should they be selected? How should the written expert reports be produced?

OPTIONS

Whether and how to appoint experts

A. No experts at all.

B. Party-appointed expert(s) only.

C. Tribunal-appointed expert(s) only.

D. Both party-appointed and tribunal-appointed experts.

How to select party-appointed experts

A. Selection of an expert by the parties or their counsel.

B. Selection of an expert proposed by the ICC International Centre for ADR at a party's request.

How to select tribunal-appointed experts

A. Selection by the tribunal alone after obtaining the parties' comments on the expert to be appointed, including with respect to the expert's independence and impartiality. This option includes the tribunal's selection of an expert proposed by the ICC International Centre for ADR at the tribunal's request.

B. Selection by the tribunal of an expert agreed by the parties or from a list of experts jointly submitted by the parties.

Production of written reports

A. Separate reports by each party-appointed expert.

- These reports can be produced with the parties' briefs or after the parties have produced their fact witness statements.
- These reports can be produced either simultaneously or sequentially.

B. Instead of, or subsequent to, the production of separate reports, the party-appointed experts meet to determine points of agreement and disagreement and produce reports laying out their respective positions on the points of disagreement.

C. Preparation by the tribunal of terms of reference for tribunal-appointed experts after submitting a draft to the parties for comment. Thereafter, the expert produces a written report based upon the terms of reference.

PROS AND CONS

Certain technical issues may need to be presented through expert opinions. In some cases, expert opinions can be decisive for a case. However, expert witnesses significantly increase the length and cost of an arbitration.

If there are to be experts, the pros and cons of party-appointed experts and/or tribunal-appointed experts must be considered. In particular cases, a tribunal-appointed expert may be the most persuasive expert for arbitrators from certain legal cultures, but reliance on a tribunal-appointed expert deprives the parties of some degree of control. Whether a tribunal-appointed expert should be requested is an important matter of strategy to be considered on a case-by-case basis.

Recourse to a tribunal-appointed expert alone, with no party-appointed experts, will no doubt be the least expensive option. However, there may be cases where a tribunal-appointed expert's views cannot be adequately questioned or tested by the parties without the assistance of party-appointed experts. Recourse to both will increase time and cost.

COST/BENEFIT ANALYSIS

Whether and how to appoint experts

Whether or not to appoint experts can be a complex question requiring consideration of a number of factors, including the nature of the issues, the legal and cultural background of the tribunal, the availability of experts, case strategy and the impact on time and cost. A key consideration will be whether the cost and time associated with expert witnesses is justified by a genuine need in the case at hand.

How to select party-appointed experts

A. Selection of an expert by the parties or their counsel

In order to present evidence on issues requiring expertise, the parties or their counsel may select an outside expert to produce an expert report. Alternatively, evidence on such issues can be presented by the parties' in-house technical experts. The in-house experts may be very knowledgeable in their field and have hands-on knowledge of the specific technical matters at issue. Yet, there is a risk that the tribunal could perceive them as being partial. Outside experts are more expensive and more time-consuming but, depending on their qualifications and professional demeanour, could be viewed as more impartial.

B. Selection of an expert proposed by the ICC International Centre for ADR at a party's request.

The ICC International Centre for ADR offers parties and tribunals a service of finding experts from a wide range of sectors and countries. This may speed up the process of identifying experts and minimize the cost. In addition, the fact that a party-appointed expert has been identified by the ICC International Centre for ADR can reflect well upon the expert's qualifications, independence and impartiality.

How to select tribunal-appointed experts

A. Selection by the tribunal alone after obtaining the parties' comments on the expert to be appointed, including with respect to the expert's independence and impartiality. This option includes the selection by the tribunal of an expert proposed by the ICC International Centre for ADR at the tribunal's request.

The selection of an expert by the arbitral tribunal alone may be more expeditious and may avoid disputes between the parties over the suitability of their respective proposals. Moreover, the appointment of one expert will reduce time and cost. However, this method excludes the parties from the selection process and creates a risk that the chosen expert may fall short of the parties' expectations. From the parties' perspective, a further disadvantage is that the content of the expert's opinion may remain unknown to them until produced before the arbitral tribunal.

B. Selection by the tribunal of an expert agreed by the parties or from a list of experts jointly submitted by the parties.

This is a more time-consuming process than the appointment of an expert by the tribunal alone, but has the advantage of restricting selection to an expert acceptable to the parties and the tribunal. Moreover, the appointment of a single expert will reduce time and cost. However, a potential disadvantage from the parties' perspective will again be that the content of the expert's opinion remains unknown to the parties until produced before the arbitral tribunal.

Production of written reports

A. Separate reports by each party-appointed expert.

- These reports can be produced with the parties' briefs or after the parties have produced their fact witness statements.

  The submission of expert evidence with a party's briefs has the advantage of enabling a more comprehensive understanding of that party's case. It may help to focus the content of any subsequent briefs on the actual rather than the assumed areas in which expert evidence may be submitted. The disadvantage is that the expert evidence may not take account of any evidence introduced by the other party in subsequent witness statements, expert reports or subsequent briefs and may either be incomplete or create a need for supplemental expert evidence.

- These reports can be produced either simultaneously or sequentially.

In cases where the points of disagreement are sufficiently clear, simultaneous filings will generally be faster than sequential filings because there will be fewer rounds. However, when the points of disagreement are not sufficiently clear, simultaneous filings may result in expert reports that do not correspond or respond to each other, which could actually increase time and cost.

The ultimate choice will also depend upon tactical or strategic considerations that go beyond issues of time and cost.

B. Instead of, or subsequent to, the production of separate reports, the party-appointed experts meet to determine points of agreement and disagreement and produce reports laying out their respective positions on the points of disagreement.

The production of written expert reports can be time-consuming and expensive. Reducing the scope of those reports will reduce time and cost. If the party-appointed experts are given the opportunity to meet and clearly identify the points over which they disagree, their reports can be shortened and focus on the points of disagreement.

C. Preparation by the tribunal of terms of reference for tribunal-appointed experts after submitting a draft to the parties for comment. Thereafter, the expert produces a written report based on the terms of reference.

It is important to ensure that the tribunal-appointed expert focuses and provides an opinion on the specific issues in dispute within the relevant area of expertise. The terms of reference are designed to serve this purpose. By being allowed to comment on and provide input into the terms of reference, the parties will have a degree of control over the process.

QUESTIONS TO ASK

1. Is there a genuine need to appoint experts or can the case be effectively made without expert evidence?

2. Should there be party-appointed experts, tribunal-appointed experts or both?

3. What is the appropriate method for selecting party-appointed experts or tribunal-appointed experts, as the case may be?

4. If there are to be party-appointed experts, how many experts are genuinely necessary?

5. When and in what form should expert reports be produced?

6. Should reports be submitted simultaneously or sequentially?

7. Should party-appointed experts be required to meet in order to determine points of agreement and disagreement?

8. If such a meeting is held, should counsel be present at the meeting?

OTHER POINTS TO CONSIDER

Consider avoiding more than one party-appointed expert per topic on each side.

Consider whether it is genuinely necessary to have an expert witness on issues of law. A great deal of time and cost can be saved if legal issues are argued by outside counsel in their briefs and at the hearing.

10. HEARING ON THE MERITS (INCLUDING WITNESS ISSUES)

PRESENTATION

Pursuant to Article 25(2) of the ICC Rules of Arbitration, a hearing must be held if requested by any party. In addition, pursuant to Articles 25(2) and 25(3), the arbitral tribunal may hear the parties, witnesses, experts or any other person, if it so decides of its own motion.

Hearings are expensive to hold and the longer they are, the more costly they become.

Issues: Is it genuinely necessary to hold a hearing at all? If so, is there a need for more than one hearing? What is the appropriate length for the hearing and how should it be organized?

OPTIONS

A. Hold no hearing and have the case decided solely on the documents submitted by the parties.

B. Hold one or more hearings, as appropriate.

When a hearing is to be held, a certain number of choices need to be made, including:

- appropriate location;
- dates;
- attendees;
- appropriate duration;
- allocation of time between the parties;
- whether there are to be opening and/or closing statements and their duration;
- whether there should be direct examination, cross-examination and/or witness conferencing for fact and expert witnesses;
- whether the hearing should be transcribed and if so, whether daily transcripts and/or live transcripts (i.e. real-time transcripts available electronically to participants during the hearing) should be made;

- when interpreting is needed, whether it should be consecutive or simultaneous;
- whether to use videoconferencing for all or part of the hearing.

PROS AND CONS

Oral hearings are often considered as a key opportunity for the parties to present their case and for the arbitrators to understand it and assess the evidence.

On the other hand, oral hearings are typically one of the most expensive and time-consuming phases of the arbitral process. Costs are generated by a number of factors, including the extensive preparation that is usually necessary and the number of people attending the hearing. In addition, the arbitration is often delayed by the difficulty of finding a mutually convenient time in the calendars of all relevant participants.

Cost and time can nevertheless be reduced by making appropriate choices with respect to the organization of the hearing.

COST/BENEFIT ANALYSIS

In deciding whether to request or agree upon a hearing, the parties should take various factors into consideration. Hearings tend to be most useful when there are disputed issues of fact to be addressed by fact and expert witnesses. Parties may consider proceeding without a hearing, for example, when:

- the case turns exclusively on questions of contract interpretation that do not require witness testimony;
- the case turns exclusively on a question of law;
- no respondent is participating;
- the value of the dispute is low;
- there is a need for a quick decision.

It should be determined whether the potential benefits of a hearing justify the associated time and cost. The choices made with respect to the organization of the hearing may reduce time and cost and may affect the decision on whether or not to hold a hearing at all.

Appropriate location

Pursuant to Article 18(2) of the Rules, hearings may be conducted at any location and not necessarily at the place of the arbitration. The cost of the hearing can be reduced if a location likely to be advantageous in terms of cost is chosen.

Dates

To avoid delay, the dates for the hearing should be set at the earliest reasonable opportunity and recorded in everyone's calendars. Ideally, the hearing dates should be fixed during the first case management conference.

Attendees

Attendees should be limited to those genuinely necessary for the conduct of the hearing.

Time and cost can be reduced if an informed and knowledgeable party representative with decision-making authority participates in the preparation of and attends the hearing. Such a person will be in a position to make cost/benefit decisions in consultation with outside counsel. For companies, the party representative is often an in-house counsel. For states or state entities, an individual with decision-making authority can be appointed.

Appropriate duration

Under the Rules, there is no prescribed length for hearings. In practice, parties often request hearings that are longer than necessary. However, the longer the hearing, the greater the cost. The length of the hearing should be carefully chosen so as to allow no more time than is necessary for adequately presenting the case.

Use and duration of opening/closing statements

An opening statement is an opportunity to make a summary and synthesis of the case and can help focus the arbitral tribunal's attention on the key issues. The longer the statement, the greater the cost. When the case has already been fully developed in briefs with supporting documents and witness statements, it may not be necessary to repeat these matters in an opening statement.

A closing statement is an opportunity to make a summary and a synthesis of what happened at the hearing. However, if the parties are not given sufficient time to prepare a closing statement, it may be of little use. Furthermore, it may not be necessary to have both a closing statement and a post-hearing brief, as they are likely to repeat each other and unnecessarily increase time and cost.

Direct examination, cross-examination, witness conferencing

In some legal systems, the questioning of witnesses is largely conducted by the arbitral tribunal, with counsel for each side being invited to ask follow-up questions. Under this approach there is no direct examination or cross-examination.

In other legal systems, and increasingly in international arbitration, the questioning of witnesses is largely conducted by counsel through direct examination and cross-examination, with the arbitral tribunal having the right to interject questions or ask questions at the end of the witness's testimony.

The first approach will often result in a shorter and less expensive hearing. The second approach will often allow a more comprehensive examination of the witnesses. Since the first approach leaves the arbitral tribunal largely in control, there is little scope for the parties to make cost/benefit decisions. While the overall duration and cost of the second approach will often be greater, a number of choices can be made to reduce the time and cost, as follows:

Direct examination

Direct examination is the questioning of a witness by the party presenting that witness. In international arbitration, witnesses often submit written witness statements setting forth their evidence. When such statements have been submitted, direct examination may be dispensed with entirely or kept short (e.g. 10 or 15 minutes). This will reduce the length and cost of the hearing.

Cross-examination

Cross-examination is the questioning of a witness presented by the opposing party. If each side is given an

overall allocation of time at the hearing, a party is free to determine how much time to use for each witness so long as the total time is not exceeded. Alternatively, time and cost can be reduced by setting time limits on the cross-examination of witnesses.

Consideration should also be given to the appropriate scope of cross-examination. Limiting its scope to matters covered in a witness's statement or in direct examination, if any, may reduce the length and cost of the hearing.

If it is not necessary to cross-examine certain witnesses who have provided statements for the other side, time and cost can be saved by not doing so. However, in that case, it may be necessary to obtain agreement from the other side or an order from the tribunal stipulating that the decision not to cross-examine a witness does not constitute an admission of the truth of that witness's written statement.

Witness conferencing

Witness conferencing can function as an alternative or an addition to cross-examination. In witness conferencing, two or more witnesses dealing with the same area of evidence are questioned together either by the arbitral tribunal first and then by counsel, or vice versa. The witnesses are also given the opportunity to debate with each other.

Witness conferencing (in particular of expert witnesses) can save time and cost insofar as it helps to focus on, clarify and resolve areas of evidential disagreement.

If the witness conferencing is directed by the arbitral tribunal, the arbitrators will need to prepare carefully beforehand in order to be able to fulfil their inquisitorial role effectively. It may deprive the parties of some control over the presentation of the case.

If the witness conferencing is directed by counsel, they retain greater control over the process and debate can still occur between the witnesses. In addition, the tribunal will have the opportunity to ask its own questions. However, some of the benefits of witness conferencing may be lost as the process is likely to be longer, more expensive and less focused.

Nature of transcripts, if needed

Transcripts are expensive, especially daily transcripts and live transcripts (i.e. real-time transcripts available electronically to participants during the hearing). A cost/benefit decision should be made on what is genuinely necessary. A transcript enables the parties and the tribunal to have a complete and accurate record of the evidence adduced at the hearing. It can be very helpful to the parties when preparing post-hearing briefs, if any, and to the tribunal when preparing the award. In very low value or simple cases, it may be possible to save the expense of a transcript at no great loss. In complex cases with many witnesses, the additional cost of daily transcripts and live transcripts may well be justified. They will facilitate effective cross-examination and be useful when preparing further witness questioning.

Consecutive or simultaneous interpreting, if needed

A choice must be made between simultaneous and consecutive interpreting.

Consecutive interpreting requires fewer interpreters and equipment, but is more than twice as long as simultaneous interpreting, which makes it more costly due notably to the extra time lawyers and experts will have to spend at the hearing. While it may be easier to control the accuracy of consecutive interpreting, that benefit must be weighed against the considerable time and cost it may add to the hearing.

Use of videoconferencing for all or part of the hearing

While it is generally preferable to hold hearings in the physical presence of the arbitrators, the parties and the witnesses, the significant time commitment and travel expenditure this may require from certain witnesses can be avoided by using videoconferencing.

QUESTIONS TO ASK

1. Is an oral hearing necessary for the fair determination of the issues in dispute so as to justify the extra time and cost it involves?

2. Is it necessary to test a written witness statement by cross-examining the witnesses at a hearing?

3. Is there a more convenient location for the hearing than the place of arbitration?

4. What is the earliest time at which dates for the hearing can be set?

5. Who genuinely needs to attend the hearing?

6. Should fact witnesses and/or expert witnesses be allowed to attend the hearing while other witnesses are giving testimony?

7. Taking into account the nature of the issues in dispute, the value of the dispute and the number of witnesses, what is the total number of days genuinely necessary for the hearing? Is the proposed length of the hearing justified in terms of cost?

8. How should the total time of the hearing be allocated between the parties?

9. Should there be an opening statement and if so, how long should it be? Is it genuinely necessary to have both a closing statement and a post-hearing brief? If there is to be a closing statement, how long should it be and how much time should be allocated for its preparation?

10. Does every witness need to be cross-examined?

11. Which areas of evidence require examination and what is the most efficient method of examination (cross-examination or witness conferencing)?

12. Should the hearing be transcribed and if so, should there be daily transcripts and/or live transcripts?

13. If interpreting is needed, should it be consecutive or simultaneous?

14. Should videoconferencing be used for all or part of the hearing?

11. POST-HEARING BRIEFS

PRESENTATION

Parties in an arbitration have the opportunity to present their legal arguments and the relevant facts in pre-hearing submissions and during the hearing itself. The issue here is whether it is necessary or useful for the parties to submit post-hearing briefs.

Post-hearing briefs may be used to draw the arbitral tribunal's attention to relevant facts that have emerged at the hearing and place them in the context of the parties' claims and defences. They may be drafted in a manner that assists the arbitral tribunal with drafting the arbitral award. In some cases, the arbitral tribunal may identify key issues to be addressed by the parties in their post-hearing briefs.

If closing statements are made at the end of a hearing, post-hearing briefs may be unnecessary. Conversely, if there are post-hearing briefs, closing statements may be unnecessary.

Issue: Should there be post-hearing briefs and/or closing statements?

OPTIONS

A. Proceed directly from the hearing to an award with no closing statements or post-hearing briefs.

B. Provide for closing statements immediately after the hearing or at some agreed time thereafter, but no post-hearing briefs.

C. Provide for post-hearing briefs but no closing statements.

D. Provide for both closing statements and post-hearing briefs.

E. Post-hearing briefs, if any, can be submitted simultaneously or sequentially, and there can be more than one round of post-hearing briefs.

PROS AND CONS

The submission of post-hearing briefs can serve a number of useful purposes, as mentioned above. In a

long and complex hearing, it may be useful for each party to sum up what they consider to have been demonstrated at the hearing. Post-hearing briefs can include valuable references to the hearing transcript and present a short final synthesis of the evidence and facts of the case, which can be of great value to the arbitral tribunal when drafting the award.

On the other hand, post-hearing briefs add to the cost of the arbitration and may delay the rendering of the award. In addition, they may be of little use if they merely repeat facts and arguments already well understood by the arbitral tribunal.

COST/BENEFIT ANALYSIS

The additional time and expense required for post-hearing briefs need to be balanced against the likelihood that they will genuinely serve one of the purposes indicated above. For example, post-hearing briefs will be especially useful where there are numerous witnesses, complicated or disputed facts, or extensive cross-examination. In all cases, the time and cost associated with post-hearing briefs should be weighed against their likely impact on the arbitral tribunal's decision.

The time and expense required for post-hearing briefs can often be reduced if measures are agreed to keep them relatively short and concise, e.g. limiting the number of pages.

QUESTIONS TO ASK

1. Does the case justify the extra time and expense required for post-hearing briefs, closing statements, or both?

And, in particular,

2. Are post-hearing briefs genuinely useful or necessary for a party to make its case to the arbitral tribunal, and if so, why?

3. What is the estimated cost of preparing the post-hearing briefs?

4. Is the benefit worth the cost, and if so, why?

OTHER POINTS TO CONSIDER

Consider limiting the scope, length and timing of any post-hearing briefs.

Consider having post-hearing briefs filed simultaneously to save time.

In some cases, it may be genuinely necessary to allow each party a short period of time in which to reply briefly to the other party's post-hearing brief.

In some cases, simultaneous post-hearing briefs may have the undesirable consequence of creating a need for further rounds of submissions. Care should therefore be taken to define properly the parameters of post-hearing briefs.

Post-hearing briefs may include submissions on costs, which are normally not discussed at the hearing. This can also save time.

ICC COMMISSION ON ARBITRATION AND ADR

The ICC Commission on Arbitration and ADR is the ICC's rule-making and research body for dispute resolution services and constitutes a unique think tank on international dispute resolution. The Commission drafts and revises the various ICC rules for dispute resolution, including arbitration, mediation, dispute boards, and the proposal and appointment of experts and neutrals and administration of expert proceedings. It also produces reports and guidelines on legal, procedural and practical aspects of dispute resolution. In its research capacity, it proposes new policies aimed at ensuring efficient and cost-effective dispute resolution, and provides useful resources for the conduct of dispute resolution. The Commission's products are published regularly in print and online.

The Commission brings together experts in the field of international dispute resolution from all over the globe and from numerous jurisdictions. It currently has over 850 members from some 100 countries. The Commission holds two plenary sessions each year, at which proposed rules and other products are discussed, debated and voted upon. Between these sessions, the Commission's work is often carried out in smaller task forces.

The Commission aims to:

- *Promote on a worldwide scale the settlement of international disputes by means of arbitration, mediation, expertise, dispute boards and other forms of dispute resolution.*
- *Provide guidance on a range of topics of current relevance to the world of international dispute resolution, with a view to improving dispute resolution services.*
- *Create a link among arbitrators, counsel and users to enable ICC dispute resolution to respond effectively to users' needs.*

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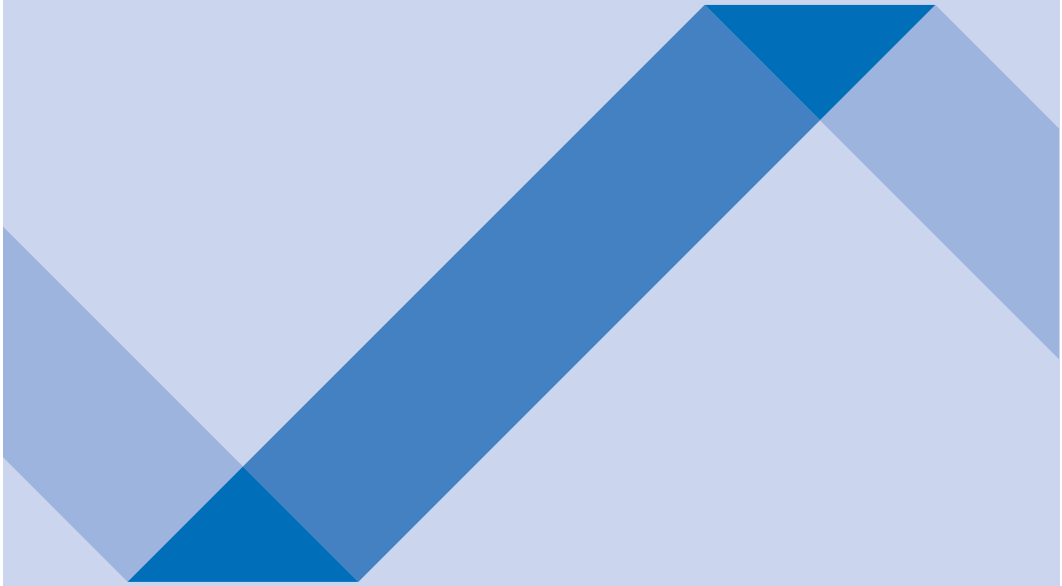

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IBA Rules on the Taking of Evidence in International Arbitration

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the global voice of
the legal profession

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About the Arbitration Committee

Established as the Committee in the International Bar Association's Legal Practice Division which focuses on the laws, practice and procedures relating to the arbitration of transnational disputes, the Arbitration Committee currently has over 2,300 members from over 90 countries, and membership is increasing steadily.

Through its publications and conferences, the Committee seeks to share information about international arbitration, promote its use and improve its effectiveness. The Committee maintains standing subcommittees and, as appropriate, establishes Task Forces to address specific issues. At the time of issuance of these revised Rules, the Committee has four subcommittees, namely the Rules of Evidence Subcommittee, the Investment Treaty Arbitration Subcommittee, the Conflicts of Interest Subcommittee, and the Recognition and Enforcement of Arbitral Awards Subcommittee; and two task forces: the Task Force on Attorney Ethics in Arbitration and the Task Force on Arbitration Agreements.

Foreword

These IBA Rules on the Taking of Evidence in International Arbitration ('IBA Rules of Evidence') are a revised version of the IBA Rules on the Taking of Evidence in International Commercial Arbitration, prepared by a Working Party of the Arbitration Committee whose members are listed on pages i and ii.

The IBA issued these Rules as a resource to parties and to arbitrators to provide an efficient, economical and fair process for the taking of evidence in international arbitration. The Rules provide mechanisms for the presentation of documents, witnesses of fact and expert witnesses, inspections, as well as the conduct of evidentiary hearings. The Rules are designed to be used in conjunction with, and adopted together with, institutional, ad hoc or other rules or procedures governing international arbitrations. The IBA Rules of Evidence reflect procedures in use in many different legal systems, and they may be particularly useful when the parties come from different legal cultures.

Since their issuance in 1999, the IBA Rules on the Taking of Evidence in International Commercial Arbitration have gained wide acceptance within the international arbitral community. In 2008, a review process was initiated at the instance of Sally Harpole and Pierre Bienvenu, the then Co-Chairs of the Arbitration Committee. The revised version of the IBA Rules of Evidence was developed by the members of the IBA Rules of Evidence Review Subcommittee, assisted by members of the 1999 Working Party. These revised Rules replace the IBA Rules on the Taking of Evidence in International Commercial Arbitration, which themselves replaced the IBA Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration, issued in 1983.

If parties wish to adopt the IBA Rules of Evidence in their arbitration clause, it is recommended that they add the following language to the clause, selecting one of the alternatives therein provided:

'[In addition to the institutional, ad hoc or other rules chosen by the parties,] [t]he parties agree that the arbitration shall be conducted according to the IBA Rules of Evidence as current on the date of [this agreement/the commencement of the arbitration].'

In addition, parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, at the commencement of the arbitration, or at any time thereafter. They may also vary them or use them as guidelines in developing their own procedures.

The IBA Rules of Evidence were adopted by resolution of the IBA Council on 29 May 2010. The IBA Rules of Evidence are available in English, and translations in other languages are planned. Copies of the IBA Rules of Evidence may be ordered from the IBA, and the Rules are available to download at **http://tinyurl.com/iba-Arbitration-Guidelines.**

Guido S Tawil
Judith Gill, QC
Co-Chairs, Arbitration Committee
29 May 2010

The Rules

Preamble

1. These IBA Rules on the Taking of Evidence in International Arbitration are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions. They are designed to supplement the legal provisions and the institutional, ad hoc or other rules that apply to the conduct of the arbitration.
2. Parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, to govern arbitration proceedings, or they may vary them or use them as guidelines in developing their own procedures. The Rules are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration, and Parties and Arbitral Tribunals are free to adapt them to the particular circumstances of each arbitration.
3. The taking of evidence shall be conducted on the principles that each Party shall act in good faith and be entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Parties rely.

Definitions

In the IBA Rules of Evidence:

'Arbitral Tribunal' means a sole arbitrator or a panel of arbitrators;

'Claimant' means the Party or Parties who commenced the arbitration and any Party who, through joinder or otherwise, becomes aligned with such Party or Parties;

'Document' means a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means;

'Evidentiary Hearing' means any hearing, whether or not held on consecutive days, at which the Arbitral Tribunal, whether in person, by teleconference, videoconference or other method, receives oral or other evidence;

'Expert Report' means a written statement by a Tribunal-Appointed Expert or a Party-Appointed Expert;

'General Rules' mean the institutional, ad hoc or other rules that apply to the conduct of the arbitration;

'IBA Rules of Evidence' or *'Rules'* means these IBA Rules on the Taking of Evidence in International Arbitration, as they may be revised or amended from time to time;

'Party' means a party to the arbitration;

'Party-Appointed Expert' means a person or organisation appointed by a Party in order to report on specific issues determined by the Party;

'Request to Produce' means a written request by a Party that another Party produce Documents;

'Respondent' means the Party or Parties against whom the Claimant made its claim, and any Party who, through joinder or otherwise, becomes aligned with such Party or Parties, and includes a Respondent making a counter-claim,

'Tribunal-Appointed Expert' means a person or organisation appointed by the Arbitral Tribunal in order to report to it on specific issues determined by the Arbitral Tribunal; and

'Witness Statement' means a written statement of testimony by a witness of fact.

Article 1 Scope of Application

1. Whenever the Parties have agreed or the Arbitral Tribunal has determined to apply the IBA Rules of Evidence, the Rules shall govern the taking of evidence, except to the extent that any specific provision of them may be found to be in conflict with any mandatory provision of law determined to be applicable to the case by the Parties or by the Arbitral Tribunal.
2. Where the Parties have agreed to apply the IBA Rules of Evidence, they shall be deemed to have agreed, in the absence of a contrary indication, to the version as current on the date of such agreement.
3. In case of conflict between any provisions of the IBA Rules of Evidence and the General Rules, the Arbitral Tribunal shall apply the IBA Rules of

Evidence in the manner that it determines best in order to accomplish the purposes of both the General Rules and the IBA Rules of Evidence, unless the Parties agree to the contrary.

4. In the event of any dispute regarding the meaning of the IBA Rules of Evidence, the Arbitral Tribunal shall interpret them according to their purpose and in the manner most appropriate for the particular arbitration.
5. Insofar as the IBA Rules of Evidence and the General Rules are silent on any matter concerning the taking of evidence and the Parties have not agreed otherwise, the Arbitral Tribunal shall conduct the taking of evidence as it deems appropriate, in accordance with the general principles of the IBA Rules of Evidence.

Article 2 Consultation on Evidentiary Issues

1. The Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence.
2. The consultation on evidentiary issues may address the scope, timing and manner of the taking of evidence, including:
   (a) the preparation and submission of Witness Statements and Expert Reports;
   (b) the taking of oral testimony at any Evidentiary Hearing;
   (c) the requirements, procedure and format applicable to the production of Documents;
   (d) the level of confidentiality protection to be afforded to evidence in the arbitration; and
   (e) the promotion of efficiency, economy and conservation of resources in connection with the taking of evidence.
3. The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues:
   (a) that the Arbitral Tribunal may regard as relevant to the case and material to its outcome; and/or
   (b) for which a preliminary determination may be appropriate.

Article 3 Documents

1. Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal and to the other Parties all Documents available to it on which it relies, including public Documents and those in the public domain, except for any Documents that have already been submitted by another Party.
2. Within the time ordered by the Arbitral Tribunal, any Party may submit to the Arbitral Tribunal and to the other Parties a Request to Produce.
3. A Request to Produce shall contain:
   (a) *(i)* a description of each 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; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;
   (b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and
   (c) *(i)* a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and
   (ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.
4. Within the time ordered by the Arbitral Tribunal, the Party to whom the Request to Produce is addressed shall produce to the other Parties and, if the Arbitral Tribunal so orders, to it, all the Documents requested in its possession, custody or control as to which it makes no objection.
5. If the Party to whom the Request to Produce is addressed has an objection to some or all of the

Documents requested, it shall state the objection in writing to the Arbitral Tribunal and the other Parties within the time ordered by the Arbitral Tribunal. The reasons for such objection shall be any of those set forth in Article 9.2 or a failure to satisfy any of the requirements of Article 3.3.

6. Upon receipt of any such objection, the Arbitral Tribunal may invite the relevant Parties to consult with each other with a view to resolving the objection.
7. Either Party may, within the time ordered by the Arbitral Tribunal, request the Arbitral Tribunal to rule on the objection. The Arbitral Tribunal shall then, in consultation with the Parties and in timely fashion, consider the Request to Produce and the objection. The Arbitral Tribunal may order the Party to whom such Request is addressed to produce any requested Document in its possession, custody or control as to which the Arbitral Tribunal determines that *(i)* the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome; *(ii)* none of the reasons for objection set forth in Article 9.2 applies; and *(iii)* the requirements of Article 3.3 have been satisfied. Any such Document shall be produced to the other Parties and, if the Arbitral Tribunal so orders, to it.
8. In exceptional circumstances, if the propriety of an objection can be determined only by review of the Document, the Arbitral Tribunal may determine that it should not review the Document. In that event, the Arbitral Tribunal may, after consultation with the Parties, appoint an independent and impartial expert, bound to confidentiality, to review any such Document and to report on the objection. To the extent that the objection is upheld by the Arbitral Tribunal, the expert shall not disclose to the Arbitral Tribunal and to the other Parties the contents of the Document reviewed.
9. 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, 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.

10. At any time before the arbitration is concluded, the Arbitral Tribunal may *(i)* request any Party to produce Documents, *(ii)* request any Party to use its best efforts to take or *(iii)* itself take, any step that it considers appropriate to obtain Documents from any person or organisation. A Party to whom such a request for Documents is addressed may object to the request for any of the reasons set forth in Article 9.2. In such cases, Article 3.4 to Article 3.8 shall apply correspondingly.
11. Within the time ordered by the Arbitral Tribunal, the Parties may submit to the Arbitral Tribunal and to the other Parties any additional Documents on which they intend to rely or which they believe have become relevant to the case and material to its outcome as a consequence of the issues raised in Documents, Witness Statements or Expert Reports submitted or produced, or in other submissions of the Parties.
12. With respect to the form of submission or production of Documents:
    (a) copies of Documents shall conform to the originals and, at the request of the Arbitral Tribunal, any original shall be presented for inspection;
    (b) Documents that a Party maintains in electronic form shall be submitted or produced in the form most convenient or economical to it that is reasonably usable by the recipients, unless the Parties agree otherwise or, in the absence of such agreement, the Arbitral Tribunal decides otherwise;

(c) a Party is not obligated to produce multiple copies of Documents which are essentially identical unless the Arbitral Tribunal decides otherwise; and

(d) translations of Documents shall be submitted together with the originals and marked as translations with the original language identified.

13. Any Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration. This requirement shall apply except and to the extent that disclosure may be required of a Party to fulfil a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. The Arbitral Tribunal may issue orders to set forth the terms of this confidentiality. This requirement shall be without prejudice to all other obligations of confidentiality in the arbitration.

14. If the arbitration is organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability or damages), the Arbitral Tribunal may, after consultation with the Parties, schedule the submission of Documents and Requests to Produce separately for each issue or phase.

Article 4 Witnesses of Fact

1. Within the time ordered by the Arbitral Tribunal, each Party shall identify the witnesses on whose testimony it intends to rely and the subject matter of that testimony.

2. Any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative.

3. It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them.

4. The Arbitral Tribunal may order each Party to submit within a specified time to the Arbitral Tribunal and to the other Parties Witness Statements by each witness on whose testimony it intends to rely, except for

those witnesses whose testimony is sought pursuant to Articles 4.9 or 4.10. If Evidentiary Hearings are organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability or damages), the Arbitral Tribunal or the Parties by agreement may schedule the submission of Witness Statements separately for each issue or phase.

5 Each Witness Statement shall contain:

(a) the full name and address of the witness, a statement regarding his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience, if such a description may be
relevant to the dispute or to the contents of the statement;

(b) a full and detailed description of the facts, and the source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in dispute. Documents on which the witness relies that have not already been submitted shall be provided;

(c) a statement as to the language in which the Witness Statement was originally prepared and the language in which the witness anticipates giving testimony at the Evidentiary Hearing;

(d) an affirmation of the truth of the Witness Statement; and

(e) the signature of the witness and its date and place.

6. If Witness Statements are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Witness Statements, including statements from persons not previously named as witnesses, so long as any such revisions or additions respond only to matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration.

7. If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by

that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.

8. If the appearance of a witness has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Witness Statement.
9. 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.
10. At any time before the arbitration is concluded, the Arbitral Tribunal may order any Party to provide for, or to use its best efforts to provide for, the appearance for testimony at an Evidentiary Hearing of any person, including one whose testimony has not yet been offered. A Party to whom such a request is addressed may object for any of the reasons set forth in Article 9.2.

Article 5 Party-Appointed Experts

1. A Party may rely on a Party-Appointed Expert as a means of evidence on specific issues. Within the time ordered by the Arbitral Tribunal, (i) each Party shall identify any Party-Appointed Expert on whose testimony it intends to rely and the subject-matter of such testimony; and (ii) the Party-Appointed Expert shall submit an Expert Report.
2. The Expert Report shall contain:
   (a) the full name and address of the Party-Appointed Expert, a statement regarding his or her present and past relationship (if any) with

any of the Parties, their legal advisors and the Arbitral Tribunal, and a description of his or her background, qualifications, training and experience;

(b) a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions;

(c) a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal;

(d) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;

(e) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided;

(f) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Party-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;

(g) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report;

(h) the signature of the Party-Appointed Expert and its date and place; and

(i) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author.

3. If Expert Reports are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Expert Reports, including reports or statements from persons not previously identified as Party-Appointed Experts, so long as any such revisions or additions respond only to matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration.

4. The Arbitral Tribunal in its discretion may order that any Party-Appointed Experts who will submit or who have submitted Expert Reports on the same or

related issues meet and confer on such issues. At such meeting, the Party-Appointed Experts shall attempt to reach agreement on the issues within the scope of their Expert Reports, and they shall record in writing any such issues on which they reach agreement, any remaining areas of disagreement and the reasons therefore.

5. If a Party-Appointed Expert whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Expert Report by that Party-Appointed Expert related to that Evidentiary Hearing unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.
6. If the appearance of a Party-Appointed Expert has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Expert Report.

Article 6 Tribunal-Appointed Experts

1. The Arbitral Tribunal, after consulting with the Parties, may appoint one or more independent Tribunal-Appointed Experts to report to it on specific issues designated by the Arbitral Tribunal. The Arbitral Tribunal shall establish the terms of reference for any Tribunal-Appointed Expert Report after consulting with the Parties. A copy of the final terms of reference shall be sent by the Arbitral Tribunal to the Parties.
2. The Tribunal-Appointed Expert shall, before accepting appointment, submit to the Arbitral Tribunal and to the Parties a description of his or her qualifications and a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal. Within the time ordered by the Arbitral Tribunal, the Parties shall inform the Arbitral Tribunal whether they have any objections as to the Tribunal-Appointed Expert's qualifications and independence. The Arbitral Tribunal shall decide promptly whether to accept any such objection. After the appointment of a Tribunal-Appointed Expert, a Party may object to the expert's qualifications or independence only if the objection is for reasons of which the Party becomes aware

after the appointment has been made. The Arbitral Tribunal shall decide promptly what, if any, action to take.

3. Subject to the provisions of Article 9.2, the Tribunal-Appointed Expert may request a Party to provide any information or to provide access to any Documents, goods, samples, property, machinery, systems, processes or site for inspection, to the extent relevant to the case and material to its outcome The authority of a Tribunal-Appointed Expert to request such information or access shall be the same as the authority of the Arbitral Tribunal. The Parties and their representatives shall have the right to receive any such information and to attend any such inspection. Any disagreement between a Tribunal-Appointed Expert and a Party as to the relevance, materiality or appropriateness of such a request shall be decided by the Arbitral Tribunal, in the manner provided in Articles 3.5 through 3.8. The Tribunal-Appointed Expert shall record in the Expert Report any non-compliance by a Party with an appropriate request or decision by the Arbitral Tribunal and shall describe its effects on the determination of the specific issue.
4. The Tribunal-Appointed Expert shall report in writing to the Arbitral Tribunal in an Expert Report. The Expert Report shall contain:
   (a) the full name and address of the Tribunal-Appointed Expert, and a description of his or her background, qualifications, training and experience;
   (b) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;
   (c) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions Documents on which the Tribunal-Appointed Expert relies that have not already been submitted shall be provided,
   (d) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Tribunal-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;

(e) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report;
(f) the signature of the Tribunal-Appointed Expert and its date and place; and
(g) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author.

5. The Arbitral Tribunal shall send a copy of such Expert Report to the Parties. The Parties may examine any information, Documents, goods, samples, property, machinery, systems, processes or site for inspection that the Tribunal-Appointed Expert has examined and any correspondence between the Arbitral Tribunal and the Tribunal-Appointed Expert. Within the time ordered by the Arbitral Tribunal, any Party shall have the opportunity to respond to the Expert Report in a submission by the Party or through a Witness Statement or an Expert Report by a Party-Appointed Expert. The Arbitral Tribunal shall send the submission, Witness Statement or Expert Report to the Tribunal-Appointed Expert and to the other Parties.
6. At the request of a Party or of the Arbitral Tribunal, the Tribunal-Appointed Expert shall be present at an Evidentiary Hearing. The Arbitral Tribunal may question the Tribunal-Appointed Expert, and he or she may be questioned by the Parties or by any Party-Appointed Expert on issues raised in his or her Expert Report, the Parties' submissions or Witness Statement or the Expert Reports made by the Party-Appointed Experts pursuant to Article 6 5.
7. Any Expert Report made by a Tribunal-Appointed Expert and its conclusions shall be assessed by the Arbitral Tribunal with due regard to all circumstances of the case.
8. The fees and expenses of a Tribunal-Appointed Expert, to be funded in a manner determined by the Arbitral Tribunal, shall form part of the costs of the arbitration.

Article 7 Inspection

Subject to the provisions of Article 9.2, the Arbitral Tribunal may, at the request of a Party or on its own motion, inspect or require the inspection by a Tribunal-

Appointed Expert or a Party-Appointed Expert of any site, property, machinery or any other goods, samples, systems, processes or Documents, as it deems appropriate. The Arbitral Tribunal shall, in consultation with the Parties, determine the timing and arrangement for the inspection. The Parties and their representatives shall have the right to attend any such inspection.

Article 8 Evidentiary Hearing

1. Within the time ordered by the Arbitral Tribunal, each Party shall inform the Arbitral Tribunal and the other Parties of the witnesses whose appearance it requests. Each witness (which term includes, for the purposes of this Article, witnesses of fact and any experts) shall, subject to Article 8.2, appear for testimony at the Evidentiary Hearing if such person's appearance has been requested by any Party or by the Arbitral Tribunal. Each witness shall appear in person unless the Arbitral Tribunal allows the use of videoconference or similar technology with respect to a particular witness.
2. The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing. The Arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness, if it considers such question, answer or appearance to be irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise covered by a reason for objection set forth in Article 9.2. Questions to a witness during direct and re-direct testimony may not be unreasonably leading.
3. With respect to oral testimony at an Evidentiary Hearing:
   (a) the Claimant shall ordinarily first present the testimony of its witnesses, followed by the Respondent presenting the testimony of its witnesses;
   (b) following direct testimony, any other Party may question such witness, in an order to be determined by the Arbitral Tribunal. The Party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning;
   (c) thereafter, the Claimant shall ordinarily first

present the testimony of its Party-Appointed Experts, followed by the Respondent presenting the testimony of its Party-Appointed Experts. The Party who initially presented the Party-Appointed Expert shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning;

(d) the Arbitral Tribunal may question a Tribunal-Appointed Expert, and he or she may be questioned by the Parties or by any Party-Appointed Expert, on issues raised in the Tribunal-Appointed Expert Report, in the Parties' submissions or in the Expert Reports made by the Party-Appointed Experts;

(e) if the arbitration is organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability and damages), the Parties may agree or the Arbitral Tribunal may order the scheduling of testimony separately for each issue or phase;

(f) the Arbitral Tribunal, upon request of a Party or on its own motion, may vary this order of proceeding, including the arrangement of testimony by particular issues or in such a manner that witnesses be questioned at the same time and in confrontation with each other (witness conferencing);

(g) the Arbitral Tribunal may ask questions to a witness at any time.

4. A witness of fact providing testimony shall first affirm, in a manner determined appropriate by the Arbitral Tribunal, that he or she commits to tell the truth or, in the case of an expert witness, his or her genuine belief in the opinions to be expressed at the Evidentiary Hearing. If the witness has submitted a Witness Statement or an Expert Report, the witness shall confirm it. The Parties may agree or the Arbitral Tribunal may order that the Witness Statement or Expert Report shall serve as that witness's direct testimony.

5. Subject to the provisions of Article 9.2, the Arbitral Tribunal may request any person to give oral or written evidence on any issue that the Arbitral Tribunal considers to be relevant to the case and material to its outcome. Any witness called and

questioned by the Arbitral Tribunal may also be questioned by the Parties.

Article 9 Admissibility and Assessment of Evidence

1. The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.
2. The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:
   (a) lack of sufficient relevance to the case or materiality to its outcome;
   (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;
   (c) unreasonable burden to produce the requested evidence;
   (d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;
   (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;
   (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
   (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.
3. In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:
   (a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;
   (b) any need to protect the confidentiality of a Document created or statement or oral

communication made in connection with and for the purpose of settlement negotiations;

(c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen;

(d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and

(e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.

4. The Arbitral Tribunal may, where appropriate, make necessary arrangements to permit evidence to be presented or considered subject to suitable confidentiality protection.

5. If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.

6. If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party.

7. If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence.

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

INTERNATIONAL DISPUTE RESOLUTION PROCEDURES

(Including Mediation and Arbitration Rules)

Rules Amended and Effective June 1, 2014

Fee Schedule Amended and Effective June 1, 2014

available online at icdr.org

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Table of Contents

International Dispute Resolution Procedures

(Including Mediation and Arbitration Rules)

Introduction

These Procedures are designed to provide a complete dispute resolution framework for disputing parties, their counsel, arbitrators, and mediators They provide a balance between the autonomy of the parties to agree to the dispute resolution process they want and the need for process management by mediators and arbitrators

The International Centre for Dispute Resolution® ("ICDR®") is the international division of the American Arbitration Association® ("AAA®"). The ICDR provides dispute resolution services around the world in locations chosen by the parties. ICDR arbitrations and mediations may be conducted in any language chosen by the parties The ICDR Procedures reflect best international practices that are designed to deliver efficient, economic, and fair proceedings

International Mediation

The parties may seek to settle their dispute through mediation Mediation may be scheduled independently of arbitration or concurrently with the scheduling of the arbitration In mediation, an impartial and independent mediator assists the parties in reaching a settlement but does not have the authority to make a binding decision or award The Mediation Rules that follow provide a framework for the mediation.

The following pre-dispute mediation clause may be included in contracts:

In the event of any controversy or claim arising out of or relating to this contract, or a breach thereof, the parties hereto agree first to try and settle the dispute by mediation, administered by the International Centre for Dispute Resolution under its Mediation Rules, before resorting to arbitration, litigation, or some other dispute resolution procedure

The parties should consider adding:

a. *The place of mediation shall be (city, [province or state], country), and*

b. *The language(s) of the mediation shall be _____.*

If the parties want to use a mediator to resolve an existing dispute, they may enter into the following submission agreement.

The parties hereby submit the following dispute to mediation administered by the International Centre for Dispute Resolution in accordance with its International Mediation Rules. (The clause may also provide for the qualifications of the mediator(s), the place of mediation, and any other item of concern to the parties)

International Arbitration

A dispute can be submitted to an arbitral tribunal for a final and binding decision. In ICDR arbitration, each party is given the opportunity to make a case presentation following the process provided by these Rules and the tribunal.

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 determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules.

The parties should consider adding:

a. *The number of arbitrators shall be (one or three),*

b. *The place of arbitration shall be (city, [province or state], country); and*

c. *The language(s) of the arbitration shall be _____.*

For more complete clause-drafting guidance, please refer to the *ICDR Guide to Drafting International Dispute Resolution Clauses* on the Clause Drafting page at **www.icdr.org.** When writing a clause or agreement for dispute resolution, the parties may choose to confer with the ICDR on useful options. Please see the contact information provided in *How to File a Case with the ICDR.*

International Expedited Procedures

The Expedited Procedures provide parties with an expedited and simplified arbitration procedure designed to reduce the time and cost of an arbitration.

The Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds USD $250,000 exclusive of interest and the costs of arbitration. The parties may agree to the application of these Expedited Procedures on matters of any claim size.

Where parties intend that the Expedited Procedures shall apply regardless of the amount in dispute, they may consider the following clause:

> *Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Expedited Procedures.*

The parties should consider adding:

a. *The place of arbitration shall be (city, [province or state], country); and*

b. *The language(s) of the arbitration shall be* _____.

Features of the International Expedited Procedures:

- Parties may choose to apply the Expedited Procedures to cases of any size;
- Comprehensive filing requirements;
- Expedited arbitrator appointment process with party input;
- Appointment from an experienced pool of arbitrators ready to serve on an expedited basis;
- Early preparatory conference call with the arbitrator requiring participation of parties and their representatives;
- Presumption that cases up to $100,000 will be decided on documents only;
- Expedited schedule and limited hearing days, if any; and
- An award within 30 calendar days of the close of the hearing or the date established for the receipt of the parties' final statements and proofs.

Whenever a singular term is used in the International Mediation or International Arbitration Rules, such as "party," "claimant," or "arbitrator," that term shall include the plural if there is more than one such entity.

The English-language version of these Rules is the official text for questions of interpretation.

How to File a Case with the ICDR

Parties initiating a case with the International Centre for Dispute Resolution or the American Arbitration Association may file online via AAAWebFile® (File & Manage a Case) at **www.icdr.org,** by mail, or facsimile (fax). For filing assistance, parties may contact the ICDR directly at any ICDR or AAA office.

Mail:
International Centre for Dispute Resolution Case Filing Services
1101 Laurel Oak Road, Suite 100
Voorhees, NJ, 08043
United States

AAAWebFile: www.icdr.org
Email: casefiling@adr.org
Phone: +1.856.435.6401
Fax: +1.212.484.4178
Toll-free phone in the U.S. and Canada: +1.877.495.4185
Toll-free fax in the U.S. and Canada: +1.877.304.8457

For further information about these Rules, visit the ICDR website at **www.icdr.org** or call +1.212.484.4181.

International Mediation Rules

1. Agreement of Parties

Whenever parties have agreed in writing to mediate disputes under these International Mediation Rules or have provided for mediation or conciliation of existing or future international disputes under the auspices of the International Centre for Dispute Resolution (ICDR), the international division of the American Arbitration Association (AAA), or the AAA without designating particular Rules, they shall be deemed to have made these Rules, as amended and in effect as of the date of the submission of the dispute, a part of their agreement. The parties by mutual agreement may vary any part of these Rules including, but not limited to, agreeing to conduct the mediation via telephone or other electronic or technical means.

2. Initiation of Mediation

1. Any party or parties to a dispute may initiate mediation under the ICDR's auspices by making a request for mediation to any ICDR or AAA office or case management center via telephone, email, regular mail, or fax. Requests for mediation may also be filed online via AAA WebFile at **www.icdr.org.**
2. 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 ICDR and the other party or parties as applicable:
   - **a.** a copy of the mediation provision of the parties' contract or the parties' stipulation to mediate;
   - **b.** the names, regular mail addresses, email addresses, and telephone numbers of all parties to the dispute and representatives, if any, in the mediation;
   - **c.** a brief statement of the nature of the dispute and the relief requested,
   - **d.** any specific qualifications the mediator should possess.
3. Where there is no preexisting stipulation or contract by which the parties have provided for mediation of existing or future disputes under the auspices of the ICDR, a party may request the ICDR to invite another party to participate in "mediation by voluntary submission." Upon receipt of such a request, the ICDR will contact the other party or parties involved in the dispute and attempt to obtain a submission to mediation.

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 ICDR.

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:

a. Upon receipt of a request for mediation, the ICDR will send to each party a list of mediators from the ICDR's Panel of Mediators. The parties are encouraged to agree to a mediator from the submitted list and to advise the ICDR of their agreement.

b. 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 ICDR. 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 ICDR shall invite a mediator to serve

c. 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 ICDR shall have the authority to make the appointment from among other members of the Panel of Mediators without the submission of additional lists.

5. Mediator's Impartiality and Duty to Disclose

1. ICDR 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 Rules, these Mediation Rules 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

2. Prior to accepting an appointment, ICDR 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. ICDR 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 ICDR shall immediately communicate the disclosures to the parties for their comments

3. 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.

6. Vacancies

If any mediator shall become unwilling or unable to serve, the ICDR will appoint another mediator, unless the parties agree otherwise, in accordance with Rule 4.

7. Duties and Responsibilities of the Mediator

1. 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.
2. 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
3. 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.
4. 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.
5. In the event that a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation conference(s), the mediator may continue to communicate with the parties for a period of time in an ongoing effort to facilitate a complete settlement.
6. The mediator is not a legal representative of any party and has no fiduciary duty to any party

8. Responsibilities of the Parties

1. The parties shall ensure that appropriate representatives of each party having authority to consummate a settlement attend the mediation conference.
2. Prior to and during the scheduled mediation conference(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

9. Privacy

Mediation conferences and related mediation communications are private proceedings. The parties and their representatives may attend mediation conferences. Other persons may attend only with the permission of the parties and with the consent of the mediator.

10. Confidentiality

1. 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.
2. 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
3. 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:
   a. views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute;
   b. admissions made by a party or other participant in the course of the mediation proceedings;
   c. proposals made or views expressed by the mediator; or
   d. the fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

11. No Stenographic Record

There shall be no stenographic record of the mediation process.

12. Termination of Mediation

The mediation shall be terminated:

- **a.** by the execution of a settlement agreement by the parties; or
- **b.** 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
- **c.** by a written or verbal declaration of all parties to the effect that the mediation proceedings are terminated, or
- **d.** 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.

13. Exclusion of Liability

Neither the ICDR nor any mediator is a necessary party in judicial proceedings relating to the mediation. Neither the ICDR nor any mediator shall be liable to any party for any error, act, or omission in connection with any mediation conducted under these Rules.

14. Interpretation and Application of Rules

The mediator shall interpret and apply these Rules insofar as they relate to the mediator's duties and responsibilities. All other Rules shall be interpreted and applied by the ICDR.

15. Deposits

Unless otherwise directed by the mediator, the ICDR 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.

16. Expenses

All expenses of the mediation, including required travel 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.

17. Cost of Mediation

1. There is no filing fee to initiate a mediation or a fee to request the ICDR to invite parties to mediate.
2. The cost of mediation is based on the hourly mediation rate published on the mediator's ICDR profile. This rate covers both mediator compensation and an allocated portion for the ICDR's services There is a four-hour minimum charge for a mediation conference. Expenses referenced in Rule 16 may also apply.
3. If a matter submitted for mediation is withdrawn or cancelled or results in a settlement after the agreement to mediate is filed but prior to the mediation conference, the cost is $250 plus any mediator time and charges incurred.
4. The parties will be billed equally for all costs unless they agree otherwise.

If you have questions about mediation costs or services, please visit our website at **www.icdr.org** or contact us at + 1.212.484.4181.

18. Language of Mediation

If the parties have not agreed otherwise, the language(s) of the mediation shall be that of the documents containing the mediation agreement.

Conference Room Rental

The costs described above do not include the use of ICDR conference rooms. Conference rooms are available on a rental basis. Please contact your local ICDR office for availability and rates.

International Arbitration Rules

Article 1: Scope of These Rules

1. Where parties have agreed to arbitrate disputes under these International Arbitration Rules ("Rules"), or have provided for arbitration of an international dispute by the International Centre for Dispute Resolution (ICDR) or the American Arbitration Association (AAA) without designating particular rules, the arbitration shall take place in accordance with these Rules as in effect at the date of commencement of the arbitration, subject to modifications that the parties may adopt in writing. The ICDR is the Administrator of these Rules.
2. These Rules govern the arbitration, except that, where any such rule is in conflict with any provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.
3. When parties agree to arbitrate under these Rules, or when they provide for arbitration of an international dispute by the ICDR or the AAA without designating particular rules, they thereby authorize the ICDR to administer the arbitration. These Rules specify the duties and responsibilities of the ICDR, a division of the AAA, as the Administrator. The Administrator may provide services through any of the ICDR's case management offices or through the facilities of the AAA or arbitral institutions with which the ICDR or the AAA has agreements of cooperation. Arbitrations administered under these Rules shall be administered only by the ICDR or by an individual or organization authorized by the ICDR to do so.
4. Unless the parties agree or the Administrator determines otherwise, the International Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds USD $250,000 exclusive of interest and the costs of arbitration. The parties may also agree to use the International Expedited Procedures in other cases The International Expedited Procedures shall be applied as described in Articles 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. Where no party's claim or counterclaim exceeds USD $100,000 exclusive of interest, attorneys' fees, and other arbitration costs, the dispute shall be resolved by written submissions only unless the arbitrator determines that an oral hearing is necessary.

Commencing the Arbitration

Article 2 Notice of Arbitration

1. The party initiating arbitration ("Claimant") shall, in compliance with Article 10, give written Notice of Arbitration to the Administrator and at the same time to the party against whom a claim is being made ("Respondent"). The Claimant may also initiate the arbitration through the Administrator's online filing system located at **www.icdr.org.**

2. The arbitration shall be deemed to commence on the date on which the Administrator receives the Notice of Arbitration.

3. The Notice of Arbitration shall contain the following information:

   a. a demand that the dispute be referred to arbitration;

   b. the names, addresses, telephone numbers, fax numbers, and email addresses of the parties and, if known, of their representatives,

   c. a copy of the entire arbitration clause or agreement being invoked, and, where claims are made under more than one arbitration agreement, a copy of the arbitration agreement under which each claim is made;

   d. a reference to any contract out of or in relation to which the dispute arises;

   e. a description of the claim and of the facts supporting it,

   f. the relief or remedy sought and any amount claimed; and

   g. optionally, proposals, consistent with any prior agreement between or among the parties, as to the means of designating the arbitrators, the number of arbitrators, the place of arbitration, the language(s) of the arbitration, and any interest in mediating the dispute.

4. The Notice of Arbitration shall be accompanied by the appropriate filing fee

5. Upon receipt of the Notice of Arbitration, the Administrator shall communicate with all parties with respect to the arbitration and shall acknowledge the commencement of the arbitration

Article 3: Answer and Counterclaim

1. Within 30 days after the commencement of the arbitration, Respondent shall submit to Claimant, to any other parties, and to the Administrator a written Answer to the Notice of Arbitration.

2. At the time Respondent submits its Answer, Respondent may make any counterclaims covered by the agreement to arbitrate or assert any setoffs and Claimant shall within 30 days submit to Respondent, to any other parties, and to the Administrator a written Answer to the counterclaim or setoffs

3. A counterclaim or setoff shall contain the same information required of a Notice of Arbitration under Article 2(3) and shall be accompanied by the appropriate filing fee.

4. Respondent shall within 30 days after the commencement of the arbitration submit to Claimant, to any other parties, and to the Administrator a response to any proposals by Claimant not previously agreed upon, or submit its own proposals, consistent with any prior agreement between or among the parties, as to the means of designating the arbitrators, the number of arbitrators, the place of the arbitration, the language(s) of the arbitration, and any interest in mediating the dispute.

5. The arbitral tribunal, or the Administrator if the tribunal has not yet been constituted, may extend any of the time limits established in this Article if it considers such an extension justified.
6. Failure of Respondent to submit an Answer shall not preclude the arbitration from proceeding.
7. In arbitrations with multiple parties, Respondent may make claims or assert setoffs against another Respondent and Claimant may make claims or assert setoffs against another Claimant in accordance with the provisions of this Article 3.

Article 4: Administrative Conference

The Administrator may conduct an administrative conference before the arbitral tribunal is constituted to facilitate party discussion and agreement on issues such as arbitrator selection, mediating the dispute, process efficiencies, and any other administrative matters.

Article 5· Mediation

Following the time for submission of an Answer, the Administrator may invite the parties to mediate in accordance with the ICDR's International Mediation Rules. At any stage of the proceedings, the parties may agree to mediate in accordance with the ICDR's International Mediation Rules. Unless the parties agree otherwise, the mediation shall proceed concurrently with arbitration and the mediator shall not be an arbitrator appointed to the case.

Article 6· Emergency Measures of Protection

1. A party may apply for emergency relief before the constitution of the arbitral tribunal by submitting a written notice to the Administrator and to all other parties setting forth the nature of the relief sought, the reasons why such relief is required on an emergency basis, and the reasons why the party is entitled to such relief The notice shall be submitted concurrent with or following the submission of a Notice of Arbitration. Such notice may be given by email, or as otherwise permitted by Article 10, and must include a statement certifying that all parties have been notified or an explanation of the steps taken in good faith to notify all parties
2. Within one business day of receipt of the notice as provided in Article 6(1), the Administrator shall appoint a single emergency arbitrator. Prior to accepting appointment, a prospective emergency arbitrator shall, in accordance with Article 13, disclose to the Administrator any circumstances that may give rise to justifiable doubts as to the 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 Administrator to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.

3. The emergency arbitrator shall as soon as possible, and in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such schedule shall provide a reasonable opportunity to all parties to be heard and may provide for proceedings by telephone, video, written submissions, or other suitable means, as alternatives to an in-person hearing. The emergency arbitrator shall have the authority vested in the arbitral tribunal under Article 19, including the authority to rule on her/his own jurisdiction, and shall resolve any disputes over the applicability of this Article

4. The emergency arbitrator shall have the power to order or award any interim or conservancy measures that the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property. Any such measures may take the form of an interim award or of an order. The emergency arbitrator shall give reasons in either case. The emergency arbitrator may modify or vacate the interim award or order. Any interim award or order shall have the same effect as an interim measure made pursuant to Article 24 and shall be binding on the parties when rendered The parties shall undertake to comply with such an interim award or order without delay.

5. The emergency arbitrator shall have no further power to act after the arbitral tribunal is constituted. Once the tribunal has been constituted, the tribunal may reconsider, modify, or vacate the interim award or order of emergency relief issued by the emergency arbitrator. The emergency arbitrator may not serve as a member of the tribunal unless the parties agree otherwise.

6. Any interim award or order of emergency relief may be conditioned on provision of appropriate security by the party seeking such relief.

7. A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this Article 6 or with the agreement to arbitrate or a waiver of the right to arbitrate.

8. The costs associated with applications for emergency relief shall be addressed by the emergency arbitrator, subject to the power of the arbitral tribunal to determine finally the allocation of such costs

Article 7: Joinder

1. A party wishing to join an additional party to the arbitration shall submit to the Administrator a Notice of Arbitration against the additional party. No additional party may be joined after the appointment of any arbitrator, unless all parties, including the additional party, otherwise agree. The party wishing to join the additional party shall, at that same time, submit the Notice of Arbitration to the additional party and all other parties. The date on which such Notice of Arbitration is received by the Administrator shall be deemed to be the date of the commencement of arbitration against the additional party Any joinder shall be subject to the provisions of Articles 12 and 19

2. The request for joinder shall contain the same information required of a Notice of Arbitration under Article 2(3) and shall be accompanied by the appropriate filing fee.
3. The additional party shall submit an Answer in accordance with the provisions of Article 3.
4. The additional party may make claims, counterclaims, or assert setoffs against any other party in accordance with the provisions of Article 3

Article 8: Consolidation

1. At the request of a party, the Administrator may appoint a consolidation arbitrator, who will have the power to consolidate two or more arbitrations pending under these Rules, or these and other arbitration rules administered by the AAA or ICDR, into a single arbitration where:
   a. the parties have expressly agreed to consolidation; or
   b. all of the claims and counterclaims in the arbitrations are made under the same arbitration agreement; or
   c. the claims, counterclaims, or setoffs in the arbitrations are made under more than one arbitration agreement; the arbitrations involve the same parties; the disputes in the arbitrations arise in connection with the same legal relationship; and the consolidation arbitrator finds the arbitration agreements to be compatible.
2. A consolidation arbitrator shall be appointed as follows:
   a. The Administrator shall notify the parties in writing of its intention to appoint a consolidation arbitrator and invite the parties to agree upon a procedure for the appointment of a consolidation arbitrator.
   b. If the parties have not within 15 days of such notice agreed upon a procedure for appointment of a consolidation arbitrator, the Administrator shall appoint the consolidation arbitrator.
   c. Absent the agreement of all parties, the consolidation arbitrator shall not be an arbitrator who is appointed to any pending arbitration subject to potential consolidation under this Article.
   d. The provisions of Articles 13-15 of these Rules shall apply to the appointment of the consolidation arbitrator.
3. In deciding whether to consolidate, the consolidation arbitrator shall consult the parties and may consult the arbitral tribunal(s) and may take into account all relevant circumstances, including:
   a. applicable law;
   b. whether one or more arbitrators have been appointed in more than one of the arbitrations and, if so, whether the same or different persons have been appointed;

c. the progress already made in the arbitrations;

d. whether the arbitrations raise common issues of law and/or facts; and

e. whether the consolidation of the arbitrations would serve the interests of justice and efficiency.

4. The consolidation arbitrator may order that any or all arbitrations subject to potential consolidation be stayed pending a ruling on a request for consolidation

5. When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties or the consolidation arbitrator finds otherwise.

6. Where the consolidation arbitrator decides to consolidate an arbitration with one or more other arbitrations, each party in those arbitrations shall be deemed to have waived its right to appoint an arbitrator. The consolidation arbitrator may revoke the appointment of any arbitrators and may select one of the previously-appointed tribunals to serve in the consolidated proceeding. The Administrator shall, as necessary, complete the appointment of the tribunal in the consolidated proceeding. Absent the agreement of all parties, the consolidation arbitrator shall not be appointed in the consolidated proceeding.

7. The decision as to consolidation, which need not include a statement of reasons, shall be rendered within 15 days of the date for final submissions on consolidation.

Article 9: Amendment or Supplement of Claim, Counterclaim, or Defense

Any party may amend or supplement its claim, counterclaim, setoff, or defense unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement because of the party's delay in making it, prejudice to the other parties, or any other circumstances. A party may not amend or supplement a claim or counterclaim if the amendment or supplement would fall outside the scope of the agreement to arbitrate. The tribunal may permit an amendment or supplement subject to an award of costs and/or the payment of filing fees as determined by the Administrator.

Article 10: Notices

1. Unless otherwise agreed by the parties or ordered by the arbitral tribunal, all notices and written communications may be transmitted by any means of communication that allows for a record of its transmission including mail, courier, fax, or other written forms of electronic communication addressed to the party or its representative at its last-known address, or by personal service.

2. For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice is made. If the last day of such period is an official holiday at the place received, the period is extended until the first business day that follows. Official holidays occurring during the running of the period of time are included in calculating the period.

The Tribunal

Article 11: Number of Arbitrators

If the parties have not agreed on the number of arbitrators, one arbitrator shall be appointed unless the Administrator determines in its discretion that three arbitrators are appropriate because of the size, complexity, or other circumstances of the case.

Article 12: Appointment of Arbitrators

1. The parties may agree upon any procedure for appointing arbitrators and shall inform the Administrator as to such procedure. In the absence of party agreement as to the method of appointment, the Administrator may use the ICDR list method as provided in Article 12(6).
2. The parties may agree to select arbitrators, with or without the assistance of the Administrator. When such selections are made, the parties shall take into account the arbitrators' availability to serve and shall notify the Administrator so that a Notice of Appointment can be communicated to the arbitrators, together with a copy of these Rules.
3. If within 45 days after the commencement of the arbitration, all parties have not agreed on a procedure for appointing the arbitrator(s) or have not agreed on the selection of the arbitrator(s), the Administrator shall, at the written request of any party, appoint the arbitrator(s). Where the parties have agreed upon a procedure for selecting the arbitrator(s), but all appointments have not been made within the time limits provided by that procedure, the Administrator shall, at the written request of any party, perform all functions provided for in that procedure that remain to be performed.
4. In making appointments, the Administrator shall, after inviting consultation with the parties, endeavor to appoint suitable arbitrators, taking into account their availability to serve. At the request of any party or on its own initiative, the Administrator may appoint nationals of a country other than that of any of the parties.
5. If there are more than two parties to the arbitration, the Administrator may appoint all arbitrators unless the parties have agreed otherwise no later than 45 days after the commencement of the arbitration.

6. If the parties have not selected an arbitrator(s) and have not agreed upon any other method of appointment, the Administrator, at its discretion, may appoint the arbitrator(s) in the following manner using the ICDR list method. The Administrator shall send simultaneously to each party an identical list of names of persons for consideration as arbitrator(s) The parties are encouraged to agree to an arbitrator(s) from the submitted list and shall advise the Administrator of their agreement. If, after receipt of the list, the parties are unable to agree upon an arbitrator(s), each party shall have 15 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 Administrator. 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. From among the persons who have been approved on the parties' lists, and in accordance with the designated order of mutual preference, the Administrator shall invite an arbitrator(s) to serve. If the parties fail to agree on any of the persons listed, or if acceptable arbitrators are unable or unavailable to act, or if for any other reason the appointment cannot be made from the submitted lists, the Administrator shall have the power to make the appointment without the submission of additional lists The Administrator shall, if necessary, designate the presiding arbitrator in consultation with the tribunal
7. The appointment of an arbitrator is effective upon receipt by the Administrator of the Administrator's Notice of Appointment completed and signed by the arbitrator.

Article 13: Impartiality and Independence of Arbitrator

1. Arbitrators acting under these Rules shall be impartial and independent and shall act in accordance with the terms of the Notice of Appointment provided by the Administrator.
2. Upon accepting appointment, an arbitrator shall sign the Notice of Appointment provided by the Administrator affirming that the arbitrator is available to serve and is independent and impartial The arbitrator shall disclose any circumstances that may give rise to justifiable doubts as to the arbitrator's impartiality or independence and any other relevant facts the arbitrator wishes to bring to the attention of the parties.
3. If, at any stage during the arbitration, circumstances arise that may give rise to such doubts, an arbitrator or party shall promptly disclose such information to all parties and to the Administrator. Upon receipt of such information from an arbitrator or a party, the Administrator shall communicate it to all parties and to the tribunal.
4. Disclosure by an arbitrator or party does not necessarily indicate belief by the arbitrator or party that the disclosed information gives rise to justifiable doubts as to the arbitrator's impartiality or independence.

5. Failure of a party to disclose any circumstances that may give rise to justifiable doubts as to an arbitrator's impartiality or independence within a reasonable period after the party becomes aware of such information constitutes a waiver of the right to challenge an arbitrator based on those circumstances.

6. No party or anyone acting on its behalf shall have any *ex parte* communication relating to the case with any arbitrator, or with any candidate for party-appointed arbitrator, except 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 impartiality and independence in relation to the parties, or to discuss the suitability of candidates for selection as a presiding arbitrator where the parties or party-appointed arbitrators are to participate in that selection. No party or anyone acting on its behalf shall have any ex parte communication relating to the case with any candidate for presiding arbitrator

Article 14: Challenge of an Arbitrator

1. A party may challenge an arbitrator whenever circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. A party shall send a written notice of the challenge to the Administrator within 15 days after being notified of the appointment of the arbitrator or within 15 days after the circumstances giving rise to the challenge become known to that party. The challenge shall state in writing the reasons for the challenge. The party shall not send this notice to any member of the arbitral tribunal.

2. Upon receipt of such a challenge, the Administrator shall notify the other party of the challenge and give such party an opportunity to respond. The Administrator shall not send the notice of challenge to any member of the tribunal but shall notify the tribunal that a challenge has been received, without identifying the party challenging. The Administrator may advise the challenged arbitrator of the challenge and request information from the challenged arbitrator relating to the challenge When an arbitrator has been challenged by a party, the other party may agree to the acceptance of the challenge and, if there is agreement, the arbitrator shall withdraw. The challenged arbitrator, after consultation with the Administrator, also may withdraw in the absence of such agreement. In neither case does withdrawal imply acceptance of the validity of the grounds for the challenge.

3. If the other party does not agree to the challenge or the challenged arbitrator does not withdraw, the Administrator in its sole discretion shall make the decision on the challenge.

4. The Administrator, on its own initiative, may remove an arbitrator for failing to perform his or her duties

Article 15. Replacement of an Arbitrator

1. If an arbitrator resigns, is incapable of performing the duties of an arbitrator, or is removed for any reason and the office becomes vacant, a substitute arbitrator shall be appointed pursuant to the provisions of Article 12, unless the parties otherwise agree.
2. If a substitute arbitrator is appointed under this Article, unless the parties otherwise agree, the arbitral tribunal shall determine at its sole discretion whether all or part of the case shall be repeated.
3. If an arbitrator on a three-person arbitral tribunal fails to participate in the arbitration for reasons other than those identified in Article 15(1), the two other arbitrators shall have the power in their sole discretion to continue the arbitration and to make any decision, ruling, order, or award, notwithstanding the failure of the third arbitrator to participate. In determining whether to continue the arbitration or to render any decision, ruling, order, 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 non-participation 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 the third arbitrator, the Administrator on proof satisfactory to it shall declare the office vacant, and a substitute arbitrator shall be appointed pursuant to the provisions of Article 12, unless the parties otherwise agree.

General Conditions

Article 16: Party Representation

Any party may be represented in the arbitration. The names, addresses, telephone numbers, fax numbers, and email addresses of representatives shall be communicated in writing to the other party and to the Administrator. Unless instructed otherwise by the Administrator, once the arbitral tribunal has been established, the parties or their representatives may communicate in writing directly with the tribunal with simultaneous copies to the other party and, unless otherwise instructed by the Administrator, to the Administrator. The conduct of party representatives shall be in accordance with such guidelines as the ICDR may issue on the subject.

Article 17: Place of Arbitration

1. If the parties do not agree on the place of arbitration by a date established by the Administrator, the Administrator may initially determine the place of arbitration, subject to the power of the arbitral tribunal to determine finally the place of arbitration within 45 days after its constitution.

2. The tribunal may meet at any place it deems appropriate for any purpose, including to conduct hearings, hold conferences, hear witnesses, inspect property or documents, or deliberate, and, if done elsewhere than the place of arbitration, the arbitration shall be deemed conducted at the place of arbitration and any award shall be deemed made at the place of arbitration

Article 18: Language of Arbitration

If the parties have not agreed otherwise, the language(s) of the arbitration shall be the language(s) of the documents containing the arbitration agreement, subject to the power of the arbitral tribunal to determine otherwise. The tribunal may order that any documents delivered in another language shall be accompanied by a translation into the language(s) of the arbitration.

Article 19: Arbitral Jurisdiction

1. The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement(s), or with respect to whether all of the claims, counterclaims, and setoffs made in the arbitration may be determined in a single arbitration.
2. The tribunal 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 tribunal that the contract is null and void shall not for that reason alone render invalid the arbitration clause.
3. A party must object to the jurisdiction of the tribunal or to arbitral jurisdiction respecting the admissibility of a claim, counterclaim, or setoff no later than the filing of the Answer, as provided in Article 3, to the claim, counterclaim, or setoff that gives rise to the objection. The tribunal may extend such time limit and may rule on any objection under this Article as a preliminary matter or as part of the final award.
4. Issues regarding arbitral jurisdiction raised prior to the constitution of the tribunal shall not preclude the Administrator from proceeding with administration and shall be referred to the tribunal for determination once constituted.

Article 20: Conduct of Proceedings

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in whatever manner it considers appropriate, 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.

2. The tribunal shall conduct the proceedings with a view to expediting the resolution of the dispute. The tribunal may, promptly after being constituted, conduct a preparatory conference with the parties for the purpose of organizing, scheduling, and agreeing to procedures, including the setting of deadlines for any submissions by the parties. In establishing procedures for the case, the tribunal and the parties may consider how technology, including electronic communications, could be used to increase the efficiency and economy of the proceedings.
3. The tribunal may decide preliminary issues, bifurcate proceedings, direct the order of proof, exclude cumulative or irrelevant testimony or other evidence, and direct the parties to focus their presentations on issues whose resolution could dispose of all or part of the case.
4. At any time during the proceedings, the tribunal may order the parties to produce documents, exhibits, or other evidence it deems necessary or appropriate. Unless the parties agree otherwise in writing, the tribunal shall apply Article 21.
5. Documents or information submitted to the tribunal by one party shall at the same time be transmitted by that party to all parties and, unless instructed otherwise by the Administrator, to the Administrator.
6. The tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence.
7. The parties shall make every effort to avoid unnecessary delay and expense in the arbitration. The arbitral tribunal may allocate costs, draw adverse inferences, and take such additional steps as are necessary to protect the efficiency and integrity of the arbitration.

Article 21: Exchange of Information

1. The arbitral tribunal shall manage the exchange of information between the parties 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 avoiding surprise, assuring equality of treatment, and safeguarding each party's opportunity to present its claims and defenses fairly.
2. 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 the extent that the parties wish to depart from this Article, they may do so only by written agreement and in consultation with the tribunal.
3. The parties shall exchange all documents upon which each intends to rely on a schedule set by the tribunal.
4. The tribunal may, upon application, require a party to make available to another party documents in that 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.

5. The tribunal may condition any exchange of information subject to claims of commercial or technical confidentiality on appropriate measures to protect such confidentiality.
6. When documents to be exchanged are maintained in electronic form, the party in possession of such documents may make them available in the form (which may be paper copies) 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. Requests for documents maintained in electronic form should be narrowly focused and structured to make searching for them as economical as possible. The tribunal may direct testing or other means of focusing and limiting any search.
7. The tribunal may, on application, require a party to permit inspection on reasonable notice of relevant premises or objects.
8. 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.
9. In the event a party fails to comply with an order for information exchange, the tribunal may draw adverse inferences and may take such failure into account in allocating costs
10. Depositions, interrogatories, and requests to admit as developed for use in U.S. court procedures generally are not appropriate procedures for obtaining information in an arbitration under these Rules.

Article 22: Privilege

The arbitral tribunal shall take into account applicable principles of privilege, such as those involving the confidentiality of communications between a lawyer and client. When the parties, their counsel, or their documents would be subject under applicable law to different rules, the tribunal should, to the extent possible, apply the same rule to all parties, giving preference to the rule that provides the highest level of protection.

Article 23: Hearing

1. The arbitral tribunal shall give the parties reasonable notice of the date, time, and place of any oral hearing.
2. At least 15 days before the hearings, each party shall give the tribunal and the other parties the names and addresses of any witnesses it intends to present, the subject of their testimony, and the languages in which such witnesses will give their testimony

3. The tribunal shall determine the manner in which witnesses are examined and who shall be present during witness examination.
4. 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. In accordance with a schedule set by the tribunal, each party shall notify the tribunal and the other parties of the names of any witnesses who have presented a witness statement whom it requests to examine. The tribunal may require any witness to appear at a hearing. If a witness whose appearance has been requested fails to appear without valid excuse as determined by the tribunal, the tribunal may disregard any written statement by that witness.
5. The tribunal may direct that witnesses be examined through means that do not require their physical presence.
6. Hearings are private unless the parties agree otherwise or the law provides to the contrary.

Article 24: Interim Measures

1. At the request of any party, the arbitral tribunal may order or award any interim or conservatory measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.
2. Such interim measures may take the form of an interim order or award, and the tribunal may require security for the costs of such measures.
3. 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.
4. The arbitral tribunal may in its discretion allocate costs associated with applications for interim relief in any interim order or award or in the final award
5. An application for emergency relief prior to the constitution of the arbitral tribunal may be made as provided for in Article 6.

Article 25: Tribunal-Appointed Expert

1. The arbitral tribunal, after consultation with the parties, may appoint one or more independent experts to report to it, in writing, on issues designated by the tribunal and communicated to the parties.
2. The parties shall provide such an expert with any relevant information or produce for inspection any relevant documents or goods that the expert may require. Any dispute between a party and the expert as to the relevance of the requested information or goods shall be referred to the tribunal for decision
3. Upon receipt of an expert's report, the tribunal shall send a copy of the report to all parties and shall give the parties an opportunity to express, in writing, their opinion of the report. A party may examine any document on which the expert has relied in such a report.

4. At the request of any party, the tribunal shall give the parties an opportunity to question the expert at a hearing. At this hearing, parties may present expert witnesses to testify on the points at issue.

Article 26: Default

1. If a party fails to submit an Answer in accordance with Article 3, the arbitral tribunal may proceed with the arbitration
2. If a party, duly notified under these Rules, fails to appear at a hearing without showing sufficient cause for such failure, the tribunal may proceed with the hearing.
3. If a party, duly invited to produce evidence or take any other steps in the proceedings, fails to do so within the time established by the tribunal without showing sufficient cause for such failure, the tribunal may make the award on the evidence before it.

Article 27: Closure of Hearing

1. The arbitral tribunal may ask the parties if they have any further submissions and upon receiving negative replies or if satisfied that the record is complete, the tribunal may declare the arbitral hearing closed.
2. The tribunal in its discretion, on its own motion, or upon application of a party, may reopen the arbitral hearing at any time before the award is made.

Article 28: Waiver

A party who knows of any non-compliance with any provision or requirement of the Rules or the arbitration agreement, and proceeds with the arbitration without promptly stating an objection in writing, waives the right to object.

Article 29: Awards, Orders, Decisions, and Rulings

1. In addition to making a final award, the arbitral tribunal may make interim, interlocutory, or partial awards, orders, decisions, and rulings.
2. When there is more than one arbitrator, any award, order, decision, or ruling of the tribunal shall be made by a majority of the arbitrators.
3. When the parties or the tribunal so authorize, the presiding arbitrator may make orders, decisions, or rulings on questions of procedure, including exchanges of information, subject to revision by the tribunal

Article 30: Time, Form, and Effect of Award

1. Awards shall be made in writing by the arbitral tribunal and shall be final and binding on the parties. The tribunal shall make every effort to deliberate and prepare the award as quickly as possible after the hearing. Unless otherwise agreed by the parties, specified by law, or determined by the Administrator, the final award shall be made no later than 60 days from the date of the closing of the hearing. The parties shall carry out any such award without delay and, absent agreement otherwise, waive irrevocably their right to any form of appeal, review, or recourse to any court or other judicial authority, insofar as such waiver can validly be made The tribunal shall state the reasons upon which an award is based, unless the parties have agreed that no reasons need be given.
2. An award shall be signed by the arbitrator(s) and shall state the date on which the award was made and the place of arbitration pursuant to Article 17. Where there is more than one arbitrator and any of them fails to sign an award, the award shall include or be accompanied by a statement of the reason for the absence of such signature.
3. An award may be made public only with the consent of all parties or as required by law, except that the Administrator may publish or otherwise make publicly available selected awards, orders, decisions, and rulings that have become public in the course of enforcement or otherwise and, unless otherwise agreed by the parties, may publish selected awards, orders, decisions, and rulings that have been edited to conceal the names of the parties and other identifying details
4. The award shall be transmitted in draft form by the tribunal to the Administrator The award shall be communicated to the parties by the Administrator.
5. If applicable law requires an award to be filed or registered, the tribunal shall cause such requirement to be satisfied. It is the responsibility of the parties to bring such requirements or any other procedural requirements of the place of arbitration to the attention of the tribunal.

Article 31: Applicable Laws and Remedies

1. The arbitral tribunal shall apply the substantive law(s) or rules of law agreed by the parties as applicable to the dispute. Failing such an agreement by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be appropriate.
2. 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.
3. The tribunal shall not decide as *amiable compositeur* or *ex aequo et bono* unless the parties have expressly authorized it to do so.

4. A monetary award shall be in the currency or currencies of the contract unless the tribunal considers another currency more appropriate, and 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(s).
5. Unless the parties agree otherwise, the parties expressly waive and forego any right to punitive, exemplary, or similar damages unless any applicable law(s) requires that compensatory damages be increased in a specified manner. This provision shall not apply to an award of arbitration costs to a party to compensate for misconduct in the arbitration

Article 32: Settlement or Other Reasons for Termination

1. If the parties settle the dispute before a final award is made, the arbitral tribunal shall terminate the arbitration and, if requested by all parties, may record the settlement in the form of a consent award on agreed terms The tribunal is not obliged to give reasons for such an award.
2. If continuation of the arbitration becomes unnecessary or impossible due to the non-payment of deposits required by the Administrator, the arbitration may be suspended or terminated as provided in Article 36(3)
3. If continuation of the arbitration becomes unnecessary or impossible for any reason other than as stated in Sections 1 and 2 of this Article, the tribunal shall inform the parties of its intention to terminate the arbitration. The tribunal shall thereafter issue an order terminating the arbitration, unless a party raises justifiable grounds for objection.

Article 33: Interpretation and Correction of Award

1. Within 30 days after the receipt of an award, any party, with notice to the other party, may request the arbitral tribunal to interpret the award or correct any clerical, typographical, or computational errors or make an additional award as to claims, counterclaims, or setoffs presented but omitted from the award.
2. If the tribunal considers such a request justified after considering the contentions of the parties, it shall comply with such a request within 30 days after receipt of the parties' last submissions respecting the requested interpretation, correction, or additional award. Any interpretation, correction, or additional award made by the tribunal shall contain reasoning and shall form part of the award.
3. The tribunal on its own initiative may, within 30 days of the date of the award, correct any clerical, typographical, or computational errors or make an additional award as to claims presented but omitted from the award.
4. The parties shall be responsible for all costs associated with any request for interpretation, correction, or an additional award, and the tribunal may allocate such costs.

Article 34: Costs of Arbitration

The arbitral tribunal shall fix the costs of arbitration in its award(s). The tribunal may allocate such costs among the parties if it determines that allocation is reasonable, taking into account the circumstances of the case.

Such costs may include:

a. the fees and expenses of the arbitrators;

b. the costs of assistance required by the tribunal, including its experts;

c. the fees and expenses of the Administrator;

d. the reasonable legal and other costs incurred by the parties;

e. any costs incurred in connection with a notice for interim or emergency relief pursuant to Articles 6 or 24;

f. any costs incurred in connection with a request for consolidation pursuant to Article 8; and

g. any costs associated with information exchange pursuant to Article 21.

Article 35: Fees and Expenses of Arbitral Tribunal

1. The fees and expenses of the arbitrators shall be reasonable in amount, taking into account the time spent by the arbitrators, the size and complexity of the case, and any other relevant circumstances.

2. As soon as practicable after the commencement of the arbitration, the Administrator shall designate an appropriate daily or hourly rate of compensation in consultation with the parties and all arbitrators, taking into account the arbitrators' stated rate of compensation and the size and complexity of the case

3. Any dispute regarding the fees and expenses of the arbitrators shall be determined by the Administrator.

Article 36: Deposits

1. The Administrator may request that the parties deposit appropriate amounts as an advance for the costs referred to in Article 34.

2. During the course of the arbitration, the Administrator may request supplementary deposits from the parties

3. If the deposits requested are not paid promptly and in full, the Administrator shall so inform the parties in order that one or more of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the proceedings If the tribunal has not yet been appointed, the Administrator may suspend or terminate the proceedings.

4. Failure of a party asserting a claim or counterclaim to pay the required deposits shall be deemed a withdrawal of the claim or counterclaim.
5. After the final award has been made, the Administrator shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

Article 37: Confidentiality

1. Confidential information disclosed during the arbitration by the parties or by witnesses shall not be divulged by an arbitrator or by the Administrator. Except as provided in Article 30, unless otherwise agreed by the parties or required by applicable law, the members of the arbitral tribunal and the Administrator shall keep confidential all matters relating to the arbitration or the award.
2. 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

Article 38: Exclusion of Liability

The members of the arbitral tribunal, any emergency arbitrator appointed under Article 6, any consolidation arbitrator appointed under Article 8, and the Administrator shall not be liable to any party for any act or omission in connection with any arbitration under these Rules, except to the extent that such a limitation of liability is prohibited by applicable law. The parties agree that no arbitrator, emergency arbitrator, or consolidation arbitrator, nor the Administrator shall be under any obligation to make any statement about the arbitration, and no party shall seek to make any of these persons a party or witness in any judicial or other proceedings relating to the arbitration.

Article 39: Interpretation of Rules

The arbitral tribunal, any emergency arbitrator appointed under Article 6, and any consolidation arbitrator appointed under Article 8, shall interpret and apply these Rules insofar as they relate to their powers and duties. The Administrator shall interpret and apply all other Rules.

International Expedited Procedures

Article E-1: Scope of Expedited Procedures

These Expedited Procedures supplement the International Arbitration Rules as provided in Article 1(4).

Article E-2: Detailed Submissions

Parties are to present detailed submissions on the facts, claims, counterclaims, setoffs, and defenses, together with all of the evidence then available on which such party intends to rely, in the Notice of Arbitration and the Answer. The arbitrator, in consultation with the parties, shall establish a procedural order, including a timetable, for completion of any written submissions.

Article E-3: Administrative Conference

The Administrator may conduct an administrative conference with the parties and their representatives to discuss the application of these procedures, arbitrator selection, mediating the dispute, and any other administrative matters.

Article E-4: Objection to the Applicability of the Expedited Procedures

If an objection is submitted before the arbitrator is appointed, the Administrator may initially determine the applicability of these Expedited Procedures, subject to the power of the arbitrator to make a final determination. The arbitrator shall take into account the amount in dispute and any other relevant circumstances.

Article E-5: Changes of Claim or Counterclaim

If, after filing of the initial claims and counterclaims, a party amends its claim or counterclaim to exceed USD $250,000.00 exclusive of interest and the costs of arbitration, the case will continue to be administered pursuant to these Expedited Procedures unless the parties agree otherwise, or the Administrator or the arbitrator determines otherwise. After the arbitrator is appointed, no new or different claim, counterclaim or setoff and no change in amount may be submitted except with the arbitrator's consent.

Article E-6: Appointment and Qualifications of the Arbitrator

A sole arbitrator shall be appointed as follows. The Administrator shall simultaneously submit to each party an identical list of five proposed arbitrators. The parties may agree to an arbitrator from this list and shall so advise the Administrator. If the parties are unable to agree upon an arbitrator, each party may strike two names from the list and return it to the Administrator within 10 days from the transmittal date of the list to the parties. The parties are not required to exchange selection lists. If the parties fail to agree on any of the arbitrators or if acceptable arbitrators are unable or unavailable to act, or if for any other reason the appointment cannot be made from the submitted lists, the Administrator may make the appointment without the circulation of additional lists. The parties will be given notice by the Administrator of the appointment of the arbitrator, together with any disclosures.

Article E-7: Procedural Conference and Order

After the arbitrator's appointment, the arbitrator may schedule a procedural conference call with the parties, their representatives, and the Administrator to discuss the procedure and schedule for the case. Within 14 days of appointment, the arbitrator shall issue a procedural order.

Article E-8: Proceedings by Written Submissions

In expedited proceedings based on written submissions, all submissions are due within 60 days of the date of the procedural order, unless the arbitrator determines otherwise. The arbitrator may require an oral hearing if deemed necessary.

Article E-9: Proceedings with an Oral Hearing

In expedited proceedings in which an oral hearing is to be held, the arbitrator shall set the date, time, and location of the hearing. The oral hearing shall take place within 60 days of the date of the procedural order unless the arbitrator deems it necessary to extend that period. Hearings may take place in person or via video conference or other suitable means, at the discretion of the arbitrator. Generally, there will be no transcript or stenographic record. Any party desiring a stenographic record may arrange for one. The oral hearing shall not exceed one day unless the arbitrator determines otherwise. The Administrator will notify the parties in advance of the hearing date.

Article E-10: The Award

Awards shall be made in writing and shall be final and binding on the parties. Unless otherwise agreed by the parties, specified by law, or determined by the Administrator, the award shall be made not later than 30 days from the date of the closing of the hearing or from the time established for final written submissions.

Administrative Fees

Administrative Fee Schedules (Standard and Flexible Fee)

The ICDR has two administrative fee options for parties filing claims or counterclaims: the Standard Fee Schedule and the Flexible Fee Schedule. The Standard Fee Schedule has a two-payment schedule, and the Flexible Fee Schedule has a three-payment schedule that offers lower initial filing fees but potentially higher total administrative fees of approximately 12% to 19% for cases that proceed to a hearing. The administrative fees of the ICDR are based on the amount of the claim or counterclaim. Arbitrator compensation is not included in this schedule. Unless the parties agree otherwise, arbitrator compensation and administrative fees are subject to allocation by the arbitrator in the award.

Fees for incomplete or deficient filings: Where the applicable arbitration agreement does not reference the ICDR or the AAA, the ICDR will attempt to obtain the agreement of the other parties to the dispute to have the arbitration administered by the ICDR. However, where the ICDR is unable to obtain the agreement of the parties to have the ICDR administer the arbitration, the ICDR will administratively close the case and will not proceed with the administration of the arbitration. In these cases, the ICDR will return the filing fees to the filing party, less the amount specified in the fee schedule below for deficient filings.

Parties that file demands for arbitration that are incomplete or otherwise do not meet the filing requirements contained in these Rules shall also be charged the amount specified below for deficient filings if they fail or are unable to respond to the ICDR's request to correct the deficiency.

Fees for additional services: The ICDR reserves the right to assess additional administrative fees for services performed by the ICDR beyond those provided for in these Rules, which may be required by the parties' agreement or stipulation.

Suspension for Nonpayment: If arbitrator compensation or administrative charges have not been paid in full, the administrator may so inform the parties in order that one of them may advance the required payment. If such payment is not made, the tribunal may order the suspension or termination of the proceedings. If no arbitrator has yet been appointed, the ICDR may suspend or terminate the proceedings.

Standard Fee Schedule

An Initial Filing Fee is payable in full by a filing party when a claim, counterclaim, setoff, or additional claim, counterclaim, or setoff is filed. A Final Fee will be incurred for all cases that proceed to their first hearing. This fee will be payable in advance at the time that the first hearing is scheduled. This fee will be refunded at the conclusion of the case if no hearings have occurred. However, if the Administrator is not notified at least 24 hours before the time of the scheduled hearing, the Final Fee will remain due and will not be refunded.

The Standard Fee Schedule begins on the next page.

These fees will be billed in accordance with the following schedule:

AMOUNT OF CLAIM	INITIAL FILING FEE	FINAL FEE
Above $0 to $10,000	$775	$200
Above $10,000 to $75,000	$975	$300
Above $75,000 to $150,000	$1,850	$750
Above $150,000 to $300,000	$2,800	$1,250
Above $300,000 to $500,000	$4,350	$1,750
Above $500,000 to $1,000,000	$6,200	$2,500
Above $1,000,000 to $5,000,000	$8,200	$3,250
Above $5,000,000 to $10,000,000	$10,200	$4,000
Above $10,000,000	Base fee of $12,800 plus .01% of the amount of claim above $10,000,000 Fee Capped at $65,000	$6,000
Nonmonetary Claims[1]	$3,350	$1,250
Deficient Claim Filing[2]	$350	
Additional Services[3]		

[1]*This fee is applicable when a claim or counterclaim is not for a monetary amount. Where a monetary claim amount is not known, parties will be required to state a range of claims or be subject to a filing fee of $10,200.*

[2]*The Deficient Claim Filing Fee shall not be charged in cases filed by a consumer in an arbitration governed by the Supplementary Procedures for the Resolution of Consumer-Related Disputes or in cases filed by an Employee who is submitting a dispute to arbitration pursuant to an employer-promulgated plan.*

[3]*The ICDR may assess additional fees where procedures or services outside the Rules sections are required under the parties' agreement or by stipulation.*

Fees are subject to increase if the amount of a claim or counterclaim is modified after the initial filing date. Fees are subject to decrease if the amount of a claim or counterclaim is modified before the first hearing.

The minimum fees for any case having three or more arbitrators are $2,800 for the filing fee, plus a $1,250 Case Service Fee.

Each party on cases filed under either the Flexible Fee Schedule or the Standard Fee Schedule that are held in abeyance for one year will be assessed an annual abeyance fee of $300. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, failing which the matter will be administratively closed.

For more information, please contact the ICDR at +1.212.484.4181.

Refund Schedule for Standard Fee Schedule

The ICDR offers a refund schedule on filing fees connected with the Standard Fee Schedule. For cases with claims up to $75,000, a minimum filing fee of $350 will not be refunded. For all other cases, a minimum fee of $600 will not be refunded. Subject to the minimum fee requirements, refunds will be calculated as follows:

- 100% of the filing fee, above the minimum fee, will be refunded if the case is settled or withdrawn within five calendar days of filing.
- 50% of the filing fee will be refunded if the case is settled or withdrawn between six and 30 calendar days of filing.
- 25% of the filing fee will be refunded if the case is settled or withdrawn between 31 and 60 calendar days of filing.

No refund will be made once an arbitrator has been appointed (this includes one arbitrator on a three-arbitrator panel). No refunds will be granted on awarded cases.

Note: The date of receipt of the demand for arbitration with the ICDR will be used to calculate refunds of filing fees for both claims and counterclaims.

Flexible Fee Schedule

A non-refundable Initial Filing Fee is payable in full by a filing party when a claim, counterclaim, or additional claim is filed. Upon receipt of the Demand for Arbitration, the ICDR will promptly initiate the case and notify all parties as well as establish the due date for filing of an Answer, which may include a Counterclaim. In order to proceed with the further administration of the arbitration and appointment of the arbitrator(s), the appropriate, non-refundable Proceed Fee outlined below must be paid.

If a Proceed Fee is not submitted within 90 days of the filing of the Claimant's Demand for Arbitration, the ICDR will administratively close the file and notify all parties.

No refunds or refund schedule will apply to the Filing or Proceed Fees once received.

The following Flexible Fee Schedule also may be utilized for the filing of counterclaims. However, as with the Claimant's claim, the counterclaim will not be presented to the arbitrator until the Proceed Fee is paid.

A Final Fee will be incurred for all claims and/or counterclaims that proceed to their first hearing. This fee will be payable in advance when the first hearing is scheduled but will be refunded at the conclusion of the case if no hearings have occurred. However, if the administrator is not notified of a cancellation at least 24 hours before the time of the scheduled hearing, the Final Fee will remain due and will not be refunded.

The Flexible Fee Schedule begins on the next page.

All fees will be billed in accordance with the following schedule:

AMOUNT OF CLAIM	INITIAL FILING FEE	PROCEED FEE	FINAL FEE
Above $0 to $10,000	$400	$475	$200
Above $10,000 to $75,000	$625	$500	$300
Above $75,000 to $150,000	$850	$1,250	$750
Above $150,000 to $300,000	$1,000	$2,125	$1,250
Above $300,000 to $500,000	$1,500	$3,400	$1,750
Above $500,000 to $1,000,000	$2,500	$4,500	$2,500
Above $1,000,000 to $5,000,000	$2,500	$6,700	$3,250
Above $5,000,000 to $10,000,000	$3,500	$8,200	$4,000
Above $10,000,000	$4,500	$10,300 plus 01% of claim amount over $10,000,000 up to $65,000	$6,000
Nonmonetary Claims[1]	$2,000	$2,000	$1,250
Deficient Claim Filing Fee	$350		
Additional Services[2]			

[1]*This fee is applicable when a claim or counterclaim is not for a monetary amount. Where a monetary claim amount is not known, parties will be required to state a range of claims or be subject to a filing fee of $3,500 and a proceed fee of $8,200.*

[2]*The ICDR reserves the right to assess additional administrative fees for services performed by the ICDR beyond those provided for in these Rules and which may be required by the parties' agreement or stipulation.*

All fees are subject to increase if the amount of a claim or counterclaim is modified after the initial filing date. Fees are subject to decrease if the amount of a claim or counterclaim is modified before the first hearing.

The minimum fees for any case having three or more arbitrators are $1,000 for the Initial Filing Fee; $2,125 for the Proceed Fee; and $1,250 for the Final Fee.

Under the Flexible Fee Schedule, a party's obligation to pay the Proceed Fee shall remain in effect regardless of any agreement of the parties to stay, postpone, or otherwise modify the arbitration proceedings. Parties that, through mutual agreement, have held their case in abeyance for one year will be assessed an annual abeyance fee of $300. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be administratively closed.

Note: The date of receipt by the ICDR of the demand/notice for arbitration will be used to calculate the 90-day time limit for payment of the Proceed Fee.

There is no Refund Schedule in the Flexible Fee Schedule.

For more information, please contact the ICDR at +1.212.484.4181.

Expedited Procedures – Fees and Compensation

There are no additional administrative fees beyond the Fees outlined above to initiate a case under the Expedited Procedures. The compensation of the arbitrator will be determined by the Administrator, in consultation with the arbitrator, and in consideration of the specific nature of the case and the amount in dispute. There is no refund schedule for cases managed under the Expedited Procedures.

Hearing Room Rental

The fees described above do not cover the cost of hearing rooms, which are available on a rental basis. Check with the ICDR for availability and rates.

Notes:

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INTERNATIONAL CENTRE
FOR DISPUTE RESOLUTION®

The New ICDR International Arbitration Rules

Paul Friedland & John Templeman, White & Case LLP[1]

The International Centre for Dispute Resolution (ICDR) of the American Arbitration Association (AAA) has completed a comprehensive review of its International Arbitration Rules and issued a revised set of rules, effective June 1, 2014. The revised rules are the result of a multi-year effort by the ICDR management team and an ICDR Subcommittee tasked with reviewing and recommending changes to the ICDR's International Arbitration Rules.[2]

While the ICDR's International Arbitration Rules have been modified from time to time since they were first issued in 1991, the new revisions effect by far the most significant changes made to the Rules to date

The revisions are progressive and wide-ranging. They underscore that efficiency is a prime objective, codify certain well-established administrative practices and introduce several new provisions to reflect best international arbitration practices.

The changes effected by the revisions can be categorized as follows·

- The new Rules address matters, such as consolidation, joinder and e-disclosure, that the old Rules did not. These revisions conform the ICDR's International Arbitration Rules to best international practices.
- The new Rules maintain what is distinctive about ICDR arbitration, and further distinguish ICDR arbitration from other institutional options For example, many users find the ICDR list method for appointing arbitrators to be the best way to resolve the tension between respect for party input and the excesses of party appointments. The old Rules, though, omitted any mention of the ICDR list method. The new Rules explain the list method and thereby provide new users of the Rules with transparency as to a well-established administrative practice. Even where the Rules have been revised to reflect best international practices, the revisions include innovations unique to the ICDR, such as a consolidation arbitrator to determine whether cases should be consolidated.
- The revisions go further than the old Rules in establishing procedures to avoid unnecessary delay and expense, expanding both the arbitrators' powers and the parties' obligations in this regard.
- Other changes are the product of wordsmithing, making clearer the content of the Rules, and correcting unintended inconsistencies.

Brief History of the ICDR International Arbitration Rules

The first step taken by the AAA to create a set of specialized international arbitration rules was the 1986 "Supplement for International Commercial Arbitration," which was added as an annex to the AAA Commercial Rules.

The AAA's first set of "International Arbitration Rules" was introduced in 1991, and was closely modeled on the UNCITRAL Arbitration Rules 1976.

In 1993, a minor revision of the International Arbitration Rules was made to provide that the Rules would apply only where the parties agreed to apply them, which inevitably slowed the growth of cases covered by the Rules.

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[1] This article reflects substantive input by Stephanie Cohen, a New York-based international arbitrator and expert in the ICDR Rules

[2] Paul Friedland (Chair), Mark Appel (ICDR Liaison), Mark Baker, Stephanie Cohen, John Fellas, Grant Hanessian, James Hosking, Reza Mohtashami, Peter Rees and Daniel Aun (Secretary). The revisions also reflect substantial input by ICDR Senior Vice President Richard Naimark and ICDR Vice Presidents Luis Martinez, Steve Andersen, Thomas Ventrone and Michael Lee.

In 1996, the ICDR was created, and the Rules were amended in 1997 to give the ICDR exclusive administration of all international arbitrations before the AAA. There were also important changes to the Rules regarding the effective management of the proceedings, such as providing the tribunal with the authority to convene an organizational hearing (a procedure now recognized as global best practice), and providing the tribunal with the explicit authority to limit or exclude cumulative or repetitive evidence

In 2003, a provision was added to allow the ICDR to publish awards under certain conditions. The ICDR also at that time combined its International Arbitration Rules with its International Mediation Rules into a single publication: the International Dispute Resolution Procedures.

In 2006, provisions on emergency relief before the formation of the tribunal were introduced. The ICDR was the first of the major arbitral institutions to introduce such provisions.

In 2009, additional minor revisions were made, primarily to the fee schedule.

Other than the above, the ICDR's International Arbitration Rules have remained essentially the same as when introduced in 1991.

Significant Changes

1. **International Expedited Procedures (Articles 1(4) and E-1 to E-10)**: The old Rules had no provision regarding expedited arbitration. The new Rules contain International Expedited Procedures (Articles E-1 to E-10), which provide for the appointment of a sole arbitrator and will apply in any case where no disclosed claim or counterclaim exceeds USD $250,000 exclusive of interest and the costs of arbitration (unless the parties agree or the ICDR determines otherwise). Parties may also agree to use these Procedures in other cases. These Rules distinguish the ICDR from other arbitral institutions, as the ICC, LCIA and UNCITRAL Rules contain no such provisions (the ICC in 2003 published "Guidelines for Arbitrating Small Claims under the ICC Rules of Arbitration").

2. **Mediation (Article 5)**: The old Rules had no provisions regarding mediation. The new Rules state that, following the time for submission of an Answer, the ICDR may invite the parties to mediate in accordance with the ICDR's International Mediation Rules, and the parties may thereafter agree to mediate in accordance with the ICDR's International Mediation Rules at any stage of the proceedings Unless the parties agree otherwise, any mediation shall proceed concurrently with the arbitration, and the mediator shall not be an arbitrator appointed to the case. These provisions distinguish the ICDR from other arbitral institutions, as the LCIA, SCC, SIAC and UNCITRAL Rules contain no such provisions.

3. **Joinder (Article 7)**: The old Rules had no provision regarding joinder. The new Rules contain a joinder provision allowing a party to join an additional party by submitting a Notice of Arbitration against the additional party. No additional party may be joined after the appointment of any arbitrator, unless all parties, including the additional party, otherwise agree.

4. **Consolidation (Article 8)**: The old Rules had no provision regarding consolidation. The new Rules contain a consolidation provision allowing a party to request the Administrator to appoint a consolidation arbitrator who will have the power to consolidate two or more arbitrations pending under the Rules, or under the Rules and other arbitration rules administered by the AAA or ICDR. The role of the consolidation arbitrator is unique to the ICDR.

5. **Express description of the ICDR's "list" procedure as the default method of arbitrator appointment (Article 12(6))**: The old Rules provided for the ICDR to appoint the arbitrator(s) in the event the parties cannot agree on either the designation of the arbitrator(s) or a procedure for appointing them, and made no reference to the ICDR's "list" procedure that has been a distinguishing feature of ICDR practice (the list procedure is described in the AAA's Commercial

Arbitration Rules but not in the old ICDR Rules). The new Rules explain that, in the absence of party agreement on the method of appointment, the ICDR shall send to each party a list of arbitrator candidates and, failing agreement, the parties have 15 days to strike names and number the remaining names in order of preference. The ICDR shall then invite the acceptance of an arbitrator(s) to serve from among the persons who have been approved on the parties' lists and in accordance with the designated order of mutual preference.

6. **Impartiality and independence of arbitrators and arbitrator disclosure (Article 13)**: The old Rules did not require arbitrators to confirm their impartiality, independence or availability to serve (though this was done in practice). Under previous practice, there was, moreover, a tacit disincentive for arbitrators to disclose circumstances that could give rise to justifiable doubts as to their impartiality and independence in situations where the arbitrator considered that the disclosures should not give rise to justifiable doubts. The new Rules require prospective arbitrators to sign a Notice of Appointment affirming their independence, impartiality and availability, and in which any circumstances that may give rise to justifiable doubts as to their independence or impartiality are disclosed. The new Rules also state that disclosure does not necessarily indicate a belief by the disclosing arbitrator or party that the disclosed information gives rise to justifiable doubts as to the arbitrator's independence or impartiality.

7. **Conduct of party representatives (Article 16)**: The old Rules had no provision regarding the conduct of party representatives The new Rules state that the conduct of party representatives shall be in accordance with such guidelines as the ICDR may issue on the subject. This provision can be seen as a placeholder until such time as the ICDR finalizes its review of guidelines as to party representation, at which time the ICDR may choose to include all or part of such guidelines in the Rules.

8. **Avoiding unnecessary delay and expense (Article 20(2) & (7); Article 21(8) & (9))**: The old Rules had no provision regarding either the parties' responsibility to avoid unnecessary delay and expense or the use of technology to increase efficiency and economy The new Rules build on changes to the Rules in 1997 as well as the ICDR Guidelines for Arbitrators Concerning Exchanges of Information to make clear that efficiency is a prime objective of arbitrations under the Rules. They state that the parties shall make every effort to avoid unnecessary delay and expense and that the tribunal may allocate costs, draw adverse inferences and take such additional steps as are necessary to protect the efficiency and integrity of the arbitration. Furthermore, they give the tribunal express authority to take such action in resolving any dispute about pre-hearing exchanges of information or as a means of dealing with a party's failure to comply with an order for information exchange. The new Rules also state that, in establishing procedures for the case, the tribunal and the parties may consider how technology, including electronic communications, can be used to increase the efficiency and economy of the proceedings.

9. **Exchange of information (Article 21)**: The old Rules contained minimal provisions regarding the exchange of information, providing merely that the tribunal may order a party to produce (i) a summary of the documents and other evidence which that party intends to present, and (ii) other documents, exhibits or other evidence the tribunal deems necessary or appropriate. The new Rules incorporate the essence of the ICDR Guidelines for Arbitrators Concerning Exchanges of Information, including the following provisions regarding the exchange of information:

   a. The new Rules mandate that the tribunal manage the exchange of information among the parties with a view to maintaining efficiency and economy.
   b. As a new mandatory rule, the parties shall exchange all documents upon which each intends to rely on a schedule set by the tribunal.
   c. Echoing the standard in the IBA Rules on the Taking of Evidence (2010), the new Rules provide that the tribunal may, upon application, require one party to make available to another party those documents in the party's possession that are reasonably believed to exist and to be relevant and material to the outcome of the case.

d. Upon application, the new Rules permit the tribunal to require a party to permit inspections on reasonable notice of relevant premises or objects.

10. **Electronic documents (Article 21(6))**: The old Rules made no mention of electronic documents. The new Rules address this indispensable subject, stating that electronic documents may be made available in the form most convenient and economical for the possessing party, unless the tribunal determines otherwise, that requests for electronic documents should be narrowly focused and structured to make searching for them as economical as possible, and that the tribunal may direct testing or other means of focusing and limiting any search. These provisions, which stem from the ICDR Guidelines for Arbitrators Concerning Exchanges of Information, distinguish the ICDR from other arbitral institutions, as the ICC, LCIA, SCC, SIAC and UNCITRAL Rules contain no such provisions.

11. **Express exclusion of US litigation procedures (Article 21(10))**: The old Rules made no mention of depositions and other features of US litigation. The new Rules state that depositions, interrogatories, and requests to admit are generally not appropriate procedures for obtaining information in arbitrations under these Rules. This provision is unique to the ICDR and is responsive to concern among users that U.S. litigation techniques might be incorporated into arbitrations in the US.

12. **Privilege (Article 22)**: The old Rules did not address applicable rules of privilege, other than to provide that the tribunal shall take into account applicable principles of legal privilege. The new Rules state that, when the parties, their counsel or their documents would be subject under applicable law to different rules, the tribunal should, to the extent possible, apply the same rule to all parties, giving preference to the rule that provides the highest level of protection. This provision again stems from the ICDR Guidelines for Arbitrators Concerning Exchanges of Information and distinguishes the ICDR from other arbitral institutions, as the ICC, LCIA, SCC, SIAC and UNCITRAL Rules contain no such provisions.

13. **Time of the award (Article 30)**: In an expansion from the old Rules (which provided merely that the award be made "promptly by the tribunal"), the new Rules provide that, unless otherwise agreed by the parties, specified by law or determined by the ICDR, the final award shall be made no later than 60 days from the date of the closing of the hearing.

14. **Internationalized language**: Throughout the new Rules, terms have been amended to bring the Rules in line with the language used in international arbitration. Examples include replacing "Statement of Claim" with "Notice of Arbitration," and "Statement of Defense" with "Answer."

15. **Reduced references to the hearing as the focal event of the arbitration**: The old Rules contained multiple references to the hearing as the focal point of a case. The new Rules reduce these references, reflecting the reality that many international arbitrations have an extensive written phase before a hearing.[3]

Significant Changes Considered but Not Made

1. **Arbitral tribunal to be consulted before seeking court assistance for production of information**: The old Rules made no mention of assistance from judicial authorities in respect of the exchange or production of information. In light of a series of discovery applications to US courts pursuant to 28 U.S.C. § 1782, the Subcommittee considered adding a provision that a

[3] *But see* Article 23.2 ("At least 15 days before the hearing, each party shall give the tribunal and the other parties the names and addresses of any witnesses it intends to present, the subject of their testimony and the languages in which such witnesses will give their testimony.) This provision may be seen as a vestige of early AAA rules. After debate, the ICDR decided to retain the rule because experience has shown that it is useful to parties and arbitrators.

party which intends to seek court assistance for the production of information either from another party or from a non-party for use in the arbitration, shall give notice to all parties and to the tribunal in order to permit the tribunal to issue an order or other direction regarding the prospective application for court assistance. Ultimately, the ICDR decided against including such a provision in part because of the risk that a requirement of prior consultation could be used to interfere with a party's right to make emergency applications to the courts for assistance outside the § 1782 context.

2. **Class arbitration**: The old Rules had no provision regarding class arbitration. The Subcommittee considered adding a provision that no arbitration under these Rules shall proceed as a class arbitration, absent the express consent of the all parties. The ICDR ultimately decided not to address this point of controversy under U.S. arbitration law.

3. **Default mediation**: The old Rules had no provision regarding mediation. In addition to the new provisions concerning mediation that were added, the Subcommittee considered a default mediation clause with an opt-out available, stating that, following the submission of an Answer, the ICDR may direct the parties to mediate their dispute in accordance with the ICDR's International Mediation Rules. Such clause would have had the effect of requiring the parties to mediate unless any party objected in writing. Ultimately the ICDR decided to empower the Administrator to invite the parties to mediate rather than to refer them to mediation, as the alternative was considered intrusive of party autonomy.

4. **Party representation**: The old Rules had no provision regarding the conduct of party representatives. The Subcommittee considered adding a provision giving the tribunal authority to rule on matters of party representation and to take any measures it deems appropriate to ensure the integrity and fairness of the proceedings. Instead, the ICDR decided to reserve authority to issue guidelines on the conduct of party representatives at a later date.

Additional Changes

1. **Deletion of "in writing" requirement (Article 1):** The old Rules provided for application of the Rules "[w]here parties have agreed *in writing* to arbitrate disputes . . ." The new Rules simply provide for their application "[w]here parties have agreed to arbitrate disputes . . ." Elimination of a formal writing requirement is consistent with modern national arbitration laws and the most recent revisions to the ICC Rules and the UNCITRAL Rules.

2. **Administrative conference (Article 4)**: The old Rules had no provision regarding administrative conferences routinely conducted by the ICDR. The new Rules state that the ICDR may conduct an administrative conference before the tribunal is constituted to address issues such as arbitrator selection, mediation, process efficiencies and other administrative matters. The ICC, LCIA, SCC, SIAC and UNCITRAL Rules contain no such provision.

3. **Waiver of right to challenge an arbitrator (Article 13(3))**: The old Rules had no provision regarding waiver of the right to challenge an arbitrator The new Rules state that failure of a party to disclose promptly circumstances that may give rise to justifiable doubts as to the arbitrator's impartiality or independence constitutes a waiver of the right to challenge an arbitrator based on those circumstances.

4. **Challenge of an arbitrator (Article 14)**: The old Rules had no provision giving non-challenging parties an opportunity to respond to arbitrator challenges (though this was done in practice), and were silent on what information should be provided to the tribunal and the challenged arbitrator. The new Rules explain that, when a party challenges an arbitrator, all non-challenging parties have an opportunity to respond. The ICDR shall notify the tribunal only that a challenge has been

received, without identifying the party challenging, and may request information from the challenged arbitrator relating to the challenge.

5. **Removal of an arbitrator by the ICDR (Article 14(4))**: The old Rules had no provision allowing the ICDR to remove an arbitrator. The new Rules allow the ICDR, on its own initiative, to remove an arbitrator for failing to perform his or her duties.

6. **Place of arbitration (Article 17)**: The old Rules did not address the tribunal's authority (though well-established in international practice) to conduct deliberations elsewhere than the place of arbitration. The new Rules clarify this authority and provide that if deliberations are held elsewhere than the place of arbitration, the arbitration shall be deemed conducted at the place of arbitration and any award shall be deemed made at the place of arbitration.

7. **Jurisdictional challenges before constitution of the tribunal (Article 19(4))**: The old Rules had no provision regarding jurisdictional challenges made before the constitution of the tribunal. The new Rules state that issues regarding arbitral jurisdiction raised before the constitution of the tribunal do not preclude the ICDR from proceeding with administration and shall be referred to the tribunal for determination once the tribunal is constituted.

8. **Witness examination (Article 23)**: The old Rules provided that the tribunal "may require any witness or witnesses to retire during the testimony of other witnesses." The new Rules state more simply and broadly that the tribunal may determine who shall be present during witness examination and may direct that witnesses be examined through means that do not require their physical presence.

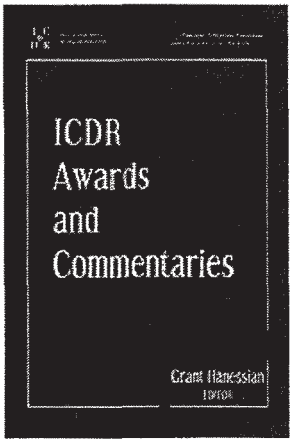
9. **Interpretation and correction of the award (Article 33)**: The new Rules contain several new provisions on interpretation and correction of the award and additional awards. They now state that any interpretation, correction or additional award made by the tribunal shall contain reasoning and shall form part of the award. The tribunal may, on its own initiative, within 30 days of the date of the award, correct any clerical, typographical or computation errors or make an additional award as to claims presented but omitted from the award. The parties will be responsible for all costs associated with any request for interpretation, correction or an additional award, and the tribunal may allocate such costs.

10. **Arbitrators' fees and expenses (Article 35)**: The new Rules contain several new provisions on arbitrators' fees and expenses. They now state that the fees and expenses of the arbitrators shall be reasonable in amount, taking into account the time spent by the arbitrators, the size and complexity of the case, and any other relevant circumstances Any dispute regarding the fees and expenses of the arbitrators shall be determined by the ICDR.

11. **Deposits (Article 36(4))**: The old Rules were silent on what occurs when a party fails to pay the required deposit The new Rules state that failure of a party asserting a claim or counterclaim to pay the required deposits shall be deemed a withdrawal of the claim or counterclaim.

12. **Confidentiality (Article 37)**: The new Rules contain several new provisions on confidentiality. They now state that the tribunal may make orders concerning the confidentiality of the arbitration proceedings or any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information (unless the parties agree otherwise).

13. **Statements and proceedings outside of the arbitration (Article 38)**: The old Rules had no provision regarding the obligation (or otherwise) to make statements about the arbitration outside of the proceedings. The new Rules state that neither the arbitrator(s), emergency arbitrator, consolidation arbitrator nor the ICDR shall be under any obligation to make any statement about the arbitration, and no party shall seek to make any such person a party or witness in any judicial or other proceedings relating to the arbitration.



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CHAPTER 1
A GUIDE TO ICDR CASE MANAGEMENT

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Luis M. Martinez is Vice President of the International Centre for Dispute Resolution (ICDR), located in New York, and Honorary President of the Inter-American Commercial Arbitration Commission (IACAC). Mr. Martinez serves as an integral part of the ICDR's international strategy team and is responsible for international arbitration and mediation business development for the United States' North-East region and Central and South America. In his capacity as President of the IACAC, Mr. Martinez is responsible for the oversight of its network of arbitral centers throughout the Americas. For the last several years, Mr. Martinez worked as the Vice President responsible for the ICDR's international administrative services and prior to that he held the position of a staff attorney for the AAA's Office of the General Counsel. Mr. Martinez received a Bachelor's Degree from Georgian Court College and a Juris Doctor degree from St. John's University School of Law. He has had numerous articles published on international arbitration and has appeared as a speaker in programs throughout the world.

PART I

ARTICLES ON ICDR ARBITRATION PRACTICE

CHAPTER 1

A GUIDE TO ICDR CASE MANAGEMENT

Luis Manuel Martinez[*]

The International Centre for Dispute Resolution (ICDR) is the international division of the American Arbitration Association (AAA)[1] and since its creation in 1996 its focus has been on providing international conflict management services for the global business and legal communities. These services include a full range of international alternative dispute resolution (ADR) processes administered by multilingual staff applying tried and tested international arbitration and mediation rules. The ICDR administrators are divided into regionally specialized teams where their knowledge of local culture, different legal traditions and linguistic capabilities are important components of the administrative regime.[2] This framework provides a level of procedural predictability under the ICDR system and creates in its users an expectation of a quick, efficient and economical ADR process.

Meeting expectations is challenging under the best of circumstances. While justice, speed and economy are the generally accepted goals of ADR, expectations may vary depending on the role and strategy of the party in a particular matter and ultimately whether in their estimations

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[*] The opinions made are solely attributable to the author. They do not necessarily represent the views of the International Centre for Dispute Resolution, the International Division of the American Arbitration Association or the Inter-American Commercial Arbitration Commission.

[1] The global leader in conflict management since 1926, the AAA is a not-for-profit, public service organization committed to the resolution of disputes through the use of arbitration, mediation, conciliation, negotiation, democratic elections and other voluntary procedures. In 2011, over 187,000 cases were filed with the AAA in a full range of matters including commercial, construction, labor, employment, insurance, international and claims program disputes. The AAA has promulgated rules and procedures for commercial, construction, employment, labor and many other kinds of disputes. It has developed a roster of impartial expert arbitrators and mediators through 30 offices in the United States, and with the ICDR, which has offices in Mexico, Singapore, and Bahrain through the BCDR-AAA.

[2] The ICDR Case Management Team, located in our New York office, is staffed by professionals from throughout the world, many of whom are licensed to practice law in these jurisdictions. Some of the countries represented include Brazil, Colombia, Mexico, Italy, Germany, Romania, and Russia.

they prevailed or not.[3] The ICDR, strives to meet the expectations of its users but its efforts are balanced against its goals of preserving due process and the integrity of the ADR cases conducted under its auspices. It may be more accurate to describe the ICDR's role as one of managing expectations with its focus on the client and the aforementioned goals of ADR at the core of the ICDR system driving many of its initiatives.[4]

In the current economic climate managing expectations has not been made any easier. The ICDR has noted that its users during this economic downturn have striven for greater efficiencies and an increasingly sophisticated approach to conflict management. The need for greater efficiencies is no longer a mere platitude but rather the inescapable reality for today's international business manager facing increased competition and strict budgetary controls where untimely disputes and costly delays cannot be tolerated.

This new reality is not lost on the ICDR whose international arbitration caseload continues to be the largest in the world.[5]

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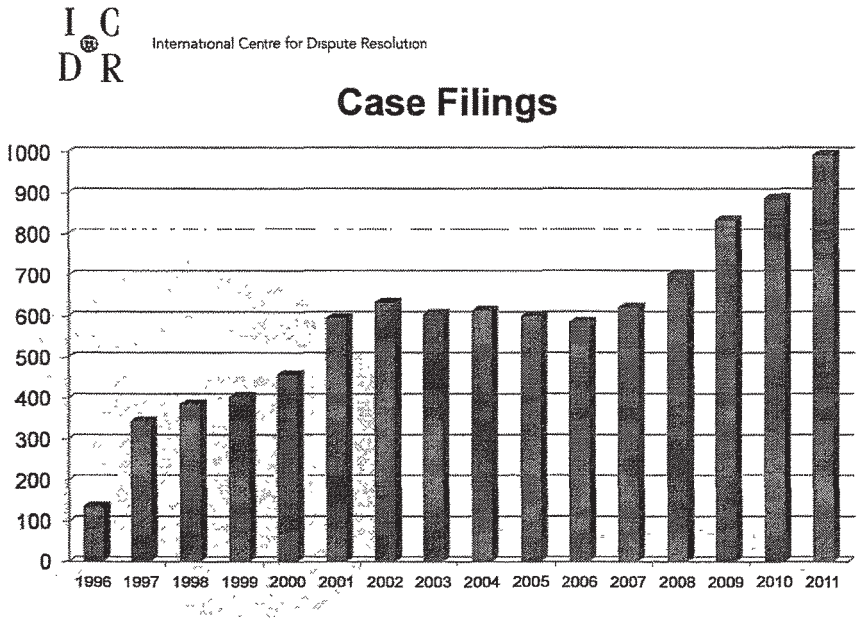
[3] For further reading on whether arbitrators make compromise awards or are cases decided in favor of one party over another, see Stephanie E. Keer & Richard W. Naimark, *Arbitrators Do Not "Split the Baby", Empirical Evidence from International Business Arbitrations*, 18 J. INT'L ARB. 573 (2001).

[4] The ICDR/AAA's mission statement is as follows: "The American Arbitration Association is dedicated to effective, efficient, and economical methods of dispute resolution through education, technology and solutions-oriented service."

[5] The ICDR administered 994 new international arbitration cases in 2011. In 2010 the ICDR administered 888 cases, in 2009 the ICDR administered 836 cases and in 2008 the ICDR administered 703 cases.



Parties increasingly design their dispute resolution mechanism with an eye towards maximizing predictability and reducing time and costs under the ICDR system. An important caveat to note is whether you are in the drafting and negotiating phase or perhaps considering the formulation of a standing corporate ADR policy with preapproved ADR clauses, parties are encouraged to first review the ICDR's rules, policies and procedures to consider their impact as they design their dispute resolution process.[6] The review of these elements in advance will provide parties with the knowledge of the ICDR's framework to customize an arbitral regime that best meets the needs of their cross-border transaction.[7] Unfortunately it is not uncommon for an arbitration

[6] For an extensive review on the ICDR's rules and administrative processes, see Gusy, Hosking and Schwarz, *A Guide To the ICDR International Arbitration Rules*, Oxford University Press, 2011. See also Mark Appel, *Taking Your Case to the ICDR*, which can be found on the ICDR's website at www.ICDR.org.

[7] The ICDR's Conflict-Management Team can assist the parties in exploring various options for their dispute resolution agreement and can review customized clauses to maximize predictability and avoid surprises. The ICDR can provide insights regarding the formulation of corporate ADR strategies. For assistance ICDR regional contact information can be found at www.ICDR.org under ICDR Team Contacts.

agreement to be copied at the eleventh hour from a form book or another contract and pasted into the new contract too often resulting in surprise and the diminished satisfaction of the users or in the worst case scenario a process that may be frustrated by a pathological clause.[8] If time is of the essence parties should opt for the security of the ICDR's model clause or other options from its clause drafting guide.[9]

Not all arbitrations are created equal. In the world of international commercial arbitration, the difference between an efficient and economical resolution to a cross-border business dispute and finding oneself in a protracted, expensive arbitral process (where parties may be subjected to procedural irregularities, bad faith, dilatory tactics, biased or unqualified arbitrators) may hinge on whether the arbitration is administered by an arbitral institution and if one is selected, the rules policies and procedures of that institution.[10]

Moreover with the volume of arbitral institutions throughout the world today there are a number of unqualified administrators that have entered the market expecting to be successful from the outset without considering the full scope and responsibilities that administrators have to the users and the process. Some may be plagued with rosters of arbitrators that lack qualifications and inexperienced staff rendering administrative decisions that are unsound or motivated by self-interest. If challenges or procedural problems arise they may lack the independence

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[8] Pathological clauses are arbitration agreements that are not capable of being performed and ultimately frustrate the parties' wishes to submit their disputes to arbitration. One example the ICDR encountered read as follows; "The arbitration shall be administered by the American Arbitration Association pursuant to the Rules of the International Chamber of Commerce." As it was impossible to combine the administrative role of the two institutions the parties were forced to turn to the courts for a clarification of their arbitral regime.

[9] For further information regarding ICDR arbitration and mediation clauses, please consult the *ICDR Guide to Drafting International Dispute Resolution Clauses* on the ICDR's website at www.ICDR.org.

[10] Arbitrations that are not managed by an arbitral institution are called ad hoc arbitrations. Some argue that ad hoc arbitration is less expensive because the parties do not have to pay administrative fees to an administering institution. However, others recognize that these savings are illusory since the administrative work has to be done by the arbitrator or by a person on either the arbitrator's staff or a third-party hired for the case. Neither arbitrators nor party staff can provide the experienced independent oversight of a respected arbitral institution and consistent interpretations of their arbitral rules as well as the implementation of the institution's policies that protect the arbitral process. For an example of a protective policy, the ICDR requires the implementation of its Consumer Due Process Protocol in all cases where a consumer is a party as referenced in note 11. For a discussion of the advantages and disadvantages of ad hoc arbitration, see Hunter Redfern, *Law and Practice of International Commercial Arbitration*, Sweet & Maxwell, 1-83 to 1-84.

to make determinations against a prominent arbitrator from their jurisdiction or fail to move the matter forward when faced with dilatory tactics by an economically powerful local party. One important concept that inexperienced administrative institutions may fail to grasp is while it is important to provide a service it must never be at the expense of the integrity of the arbitral process. That will erode the support and confidence of the judiciary and legislature in their jurisdiction's ADR legal regime and lead to a backlash against the future development of their arbitral culture as well as the recognition of their awards. The administrator's mission to protect the arbitral process at times requires that it not accept every case when the parties' agreement conflicts with due process, fair play and integrity.[11] International business managers recognize that there is an institutional difference when they place their confidence in the ICDR/AAA to administer their international ADR matters opting for an administrator that strives to meet the goals of ADR while safeguarding the process and rendering highly enforceable awards.[12]

I. The ICDR

The ICDR officially opened in New York City on June 1, 1996. Prior to that time international cases filed with the AAA since its founding in 1926 were administered by its network of regional offices in the United States. As a result, the AAA developed a wealth of experience in administering international cases. In the mid-1990s, the AAA recognized that it was time to build on that international experience and respond to the increase in demand for its international ADR services. This meant placing the administration of all international cases under one division and hiring multilingual attorneys with law degrees from a variety of nations to serve as case managers after they were trained in the application of the ICDR's administrative system and its International Arbitration Rules (IAR).

The ICDR's goals were to create a case administrative system with an international focus that incorporated cultural sensitivity as it was expected that international parties would come from many different counties and

[11] For example in the consumer arbitration field the AAA has a long established policy of procedural protections and policies before accepting consumer cases and they must be in compliance with its Consumer Due Process Protocol. *See* the AAA's website at the following link, www.adr.org/consumer_arbitration.

[12] *See* Luis Martinez, *The Introduction to Global Arbitration Review*, Asia-Pacific Arbitration Review 2008.

legal systems. The importance of being able to understand different cultural and legal traditions, verbal and nonverbal communications, cultural mores and biases are necessary skill sets for an international administrator and if lacking, can serve to derail or delay an international dispute resolution process. The ICDR staff can manage these cultural issues saving time and ultimately avoiding increased costs.[13]

Other goals were to apply a client driven common sense approach to the administrative process combining state of the art technology to efficiently track and oversee all aspects of the ICDR's cases. The ICDR system has been developed with the benefit of extensive user feedback and has evolved to offer a proactive administrative flexible process with less formality and without unnecessary procedural steps. Parties can then customize the ICDR arbitral regime for their particular needs subject only to the institutional requirement of due process, fair play and integrity.[14]

The ICDR's international administrative system is premised on its ability to perform several important tasks which include moving the matter forward, facilitating communications while acting as a buffer between the parties and the arbitrators, ensuring the appointment of qualified arbitrators, monitoring and controlling costs, understanding cultural sensitivities, resolving procedural impasses, and properly interpreting and applying its rules.

The ICDR has a full-time business development team and in addition to its headquarters in New York, has an office in Mexico City, and joint facilities with regional arbitration centres in Singapore and Bahrain.[15] It has a panel of more than 600 international arbitrators and mediators[16] and a network of important cooperative agreements with arbitral institutions around the world, which gives the ICDR access to additional hearing facilities and infrastructure along with local expertise on the ADR culture

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[13] For a discussion on culture in international commercial arbitration, *see* William K. Slate II, *Paying Attention to Culture in International Commercial Arbitration*, 59 (3) Disp. Resol. J. 96 (Aug.-Oct. 2004).

[14] In addition the parties may not derogate from any mandatory provisions of the law applicable to the arbitration. *See* Article 1, (b) of the ICDR's International Arbitration Rules, (IAR).

[15] For further information regarding the ICDR's international alliances, please consult the *ICDR's Newsletter, The ICDR International Reporter, vol. 1* on the ICDR's website at www.ICDR.org.

[16] For information on applying to the ICDR's international panel of arbitrators and mediators please see the Application for International Roster on the ICDR's website at www.ICDR.org.

and legal framework to provide administrative services as needed globally.[17]

II. The ICDR International Arbitration Rules (IAR)

The ICDR administers cases pursuant to various sets of the AAA's rules and its own international arbitration and mediation rules.[18] If the parties have selected a specific set of rules in their arbitration clause they will be applied.[19] If the clause is silent as to a specific set of rules and it is an international matter the case will be administered pursuant to the ICDR's IAR.[20]

The ICDR's IAR were specifically designed for international disputes and incorporate the latest provisions that are expected in an international arbitration today. They provide the arbitrators with the framework to be able to consider different legal traditions and cultural differences along with the powers to render all necessary procedural determinations to bring the process to its conclusion with awards that will be recognized and enforced pursuant to the enforcement treaties.[21]

The IAR were modeled on the UNCITRAL Arbitration Rules and have undergone a number of revisions. The IAR contain all the necessary default mechanisms to ensure that the arbitration moves forward to its completion and is not frustrated by the failure of a party to perform or in the event of an impasse, and contain all the necessary gap fillers so that

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[17] Horacio A. Grigera Naón and Paul E. Mason, International Commercial Arbitration Practice: 21st Century Perspectives Chs. 43 and 55, Martinez & Ventrone (LexisNexis Matthew Bender).

[18] In 2003, the ICDR's International Arbitration Rules were renamed the "International Dispute Resolution Procedures" upon incorporating international mediation rules.

[19] In 2011 the ICDR administered 477 cases pursuant to the AAA's Commercial Arbitration Rules and Mediation Procedures, 96 cases pursuant to the Construction Industry Arbitration Rules and Mediation Procedures, 71 cases pursuant to the ICDR's Procedures for Cases under the UNCITRAL Arbitration Rules and 75 cases pursuant to the Employment Arbitration Rules and Mediation Procedures in addition to its 251cases under the ICDR's International Arbitration Rules.

[20] The ICDR's definition of an international matter is based on Article. 1 of the UNCITRAL Model Law, as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended on 7 July 2006.

[21] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Done at New York, June 10, 1958, 21 UST 2517, TIAS No. 6997, 330 UNTS 3. As of this writing 145 countries are parties. The Inter-American Convention on International Commercial Arbitration, Done at Panama City, January 30, 1975 O.A.S.T.S. No. 42, 14 I.L.M. 336 (1975). As of this writing 19 countries are parties.

the parties need not worry about addressing every element individually in their arbitration agreement. They can then focus their attention on any particular elements they may wish to include in their customized process.[22]

III. Commencing the Case

The filing and initiation stage is an important phase of the arbitral process and presents the filer with a number of options. All new case filings are handled by the AAA/ICDR's specialized Intake Office.[23] The claimant has the option of filing the case with either the Intake Office directly or at any of the AAA's offices including the ICDR in New York. The case may also be filed electronically online.[24] If filing by mail the claimant starts the process by submitting a completed Notice of Arbitration form to comply with Article 2 of the IAR and the appropriate filing fee.[25] The Notice of Arbitration must be sent simultaneously to the respondent in compliance with Article 18 of the IAR.[26]

Article 2 states that the notice of arbitration must contain:

a) A demand that the dispute be referred to arbitration;
b) The names, addresses and telephone numbers of the parties;
c) A reference to the arbitration clause or agreement that is invoked;
d) A reference to any contract out of or in relation to which the dispute arises;

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[22] The current International Dispute Resolution Procedures Amended and Effective June 1, 2009 and the current Fee Schedule Amended and Effective June 1, 2010.

[23] The ICDR/AAA Case Filing Services Office.
1101 Laurel Oak Road, Suite 100
Voorhees, NJ 08043
Phone: 856-435-6401
Toll free number in the US 877-495-4185
Fax number 877-304-8457
Fax number outside the US: 212-484-4178
Email box: casefiling@adr.org.

[24] For information on the various filing options see the ICDR website at www.ICDR.org.

[25] The Notice of Arbitration form and the submission form as well as a link to the AAA's Webfile can be found on the ICDR's website at www.ICDR.org.

[26] It is important to review Article 18 of the IAR to comply with the notice requirements for serving documents on the other side and to understand how periods of time are calculated for the arbitration

e) A description of the claim and an indication of the facts supporting it;
f) The relief or remedy sought and the amount claimed; and
g) May include proposals as to the means of designating and the number of arbitrators, the place of arbitration and the language(s) of the arbitration.

The ICDR is ultimately responsible for reviewing all newly initiated cases to ensure that the ICDR or AAA is named in the clause and that it has the authority to proceed with the administration of the case.[27] If the ICDR or AAA are not named in the clause the parties can agree to submit the matter to arbitration under its auspices by completing and signing a joint submission agreement. However it must be noted that parties are less likely to agree on anything after a dispute has arisen.

If any of the requirements of Article 2 above are not met the case cannot be commenced. The ICDR will contact the claimant to obtain the required information. If the respondent contends that the requirements for commencing the arbitration have still not been satisfied, the ICDR will determine whether to proceed to administer the case or request additional information from the claimant.[28] If the ICDR decides to

[27] A determination of the ICDR to proceed with the administration of an arbitration should not be confused with a determination of the ICDR as to the arbitrability of a dispute. A determination of the ICDR to administer an arbitration is only an administrative determination that the filing requirements contained in the applicable AAA/ICDR rules have been met. A determination regarding the arbitrability of a dispute, on the other hand, must be made by an arbitral tribunal or a court. *See* IAR Article 15.

[28] The Statement of Claim is referenced in Article 2 (3), (a) to (g). There is no requirement regarding the amount of detail that is required for the Statement of Claim and in a number of cases the ICDR has received submissions that provided the bare minimum to comply with Article 2 sending only a copy of the arbitration agreement and a completed Notice of Arbitration form. The amount of detail is really a question of strategy for each party to decide and the ICDR does not take a firm position as to the precise level of detail for the Statement of Claim pursuant to Article 2. While the ICDR's Notice of Arbitration form will address the IAR Article 2's requirements in some instances respondents have argued that the form alone is not sufficient and that the case was not properly commenced. In those cases the ICDR will determine whether the standards of Article 2 have been met. The ICDR can make the initial determination regarding this issue, see IAR Article 36 and note 29 *infra*. It should be noted that the arbitrators have the ability to request additional submissions as needed once appointed. In the majority of cases and in an increasing trend there has been a move towards Statement of Claims with greater detail and specificity providing the arbitrators with a better understanding of the claimant's position at the outset. This trend of providing more information at this early stage is useful for the arbitrators if called upon to make some early determinations regarding the scope of discovery and to have a better grasp of the case to gauge its length and complexity.

proceed with the administration and the respondent maintains that the case was not properly commenced (for example, not commenced properly as to a specific party who claims they are a non-signatory to the arbitration agreement and should not be required to participate), then these issues shall be referred to the arbitrators for their early determination once appointed.[29] There is case law in the United States holding that an arbitral institution in fulfilling its administrative role is not required to conduct a searching analysis to determine whether or not a party is a signatory to an arbitration agreement.[30] If the filing party presents a plausible argument that satisfies the ICDR prima facie, then the ICDR can exercise its administrative mandate and commence the case, leaving any remaining issues for the arbitrators once appointed. The ICDR has discretion to interpret its own rules and can initially decide if the filing party has complied with Article 2 giving it the authority to commence the matter over the objections of a party.[31]

Once any jurisdictional issues presented are resolved or held over for the arbitrators, the case will be initiated usually within a period of 48 hours. The ICDR prepares an initiation letter officially commencing the arbitration which is sent with the applicable rules to all parties. The file is created in the ICDR's proprietary electronic case management system and the case is deemed commenced on the date the demand was received by the ICDR.[32] The case is then assigned to one of the ICDR's regional teams, based upon the place of arbitration, language, type of dispute, along with a consideration of the team's current caseloads. The initiation letter will contain the date of commencement and instruct the respondent that they will have 30 days in which to prepare its Statement of Defense which will respond to the claimant's claims and assert counter-claims or set-offs if any.[33] The parties must also include by the date the Statement

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[29] *See* IAR Article 15, reflecting the principle of *kompetenz-kompetenz*, the ability of the arbitral tribunal to rule on its jurisdiction and the existence, scope and validity of the arbitration agreement.

[30] This precise issue was the subject of one case where the Court of Appeals for the Seventh Circuit—in a case where damages were sought against the AAA—held "that no rule or principle required the AAA to make a searching analysis of the claim's merits prior to placing it on the docket—scheduling the matter if you will—the AAA's role was analogous to that of a court clerk placing the matter on the schedule for the arbitrator to hear." International Medical Group, Inc., v. American Arbitration Ass'n, Inc., 312 F. 3d 833 (7th Cir. 2002).

[31] *See* IAR Article 36, where the ICDR shall interpret and apply all other Rules not relating to the arbitrator's powers and duties.

[32] *See* IAR Article 2, (2)

[33] *See* IAR Article 3.

of Defense is due any objections to the jurisdiction of the tribunal or to the arbitrability of a claim or counterclaim.[34] The initiation letter will include the date of the administrative conference call which is the next step, and the agenda for the call in which the ICDR brings the parties together at the earliest possible time to discuss all of the important procedural issues and options for the ICDR's arbitral process.[35]

The administrative conference call is an important tool for the ICDR as its international administrative system emphasizes the importance of communicating with the parties (as often as needed) to explore all possible efficiencies at this early stage of the process. It also serves to address any potential problems, respond to any questions and ensure that all parties have adequate notice of the arbitral proceedings. There are several items on the agenda for this call listed as follows.

- Introduction of staff who will be involved in the management of the file.
- Means of communication between the ICDR and the parties. The possibility of submitting this dispute to mediation.
- The number of arbitrators.
- The method of appointment of the arbitrators.
- The parties' views on the qualifications of the arbitrator(s) to be proposed.
- The handling of extension requests.
- The scheduling of the arbitration including the dates for the expected exchange of documents and submissions as well as the hearings.
- The possibility of utilizing a documents only process.
- Any other relevant issues that the parties wish to bring to the attention of the ICDR at this early stage.

The possibility of mediation is suggested in all ICDR cases. A further discussion of the ICDR's mediation services and options will follow. If mediation is not an option, the ICDR will discuss other issues that may need to be clarified absent the agreement of the parties and will move on to discuss the appointment of the arbitrators which is addressed

[34] *See* IAR Article 15 (3), if the claimant is objecting to the arbitrability of the counterclaim it will be expected in the response to the counterclaim.

[35] The administrative conference call is usually scheduled within 14 days of the date of the initiation letter.

in Article 6 of the IAR. The parties are free to agree on the method for the appointment and the number of arbitrators for their particular case.[36]

IV. Appointing the Arbitrators

One method used to appoint international arbitrators is the party-appointed method. The parties may each designate their own arbitrator and then those two arbitrators may designate the presiding arbitrator, the president of the tribunal. At the request of any party or on its own initiative, the ICDR may appoint nationals of a country other than that of any of the parties.[37] For example, if one side is a Brazilian national and the other side is a French national, the presiding arbitrator will be selected from the ICDR's international panel excluding arbitrators who are either Brazilian or French nationals. If within 45 days from the date of the commencement of the arbitration, the parties have not mutually agreed on a procedure for appointing the arbitrators, or have not designated their arbitrators by following their agreed upon procedure from the clause, the ICDR, at the written request of any party, shall complete the appointment process.[38]

In the event of multiparty cases the ICDR applies IAR Article 6 (5). The issue of the selection of arbitrators in multiparty cases came to the forefront with the holding of the well known Dutco case where the Cour de Cassation set aside an ICC interim award. In that award the tribunal had rejected the objections of the two respondents in the underlying arbitration, who each were seeking the appointment of their own respective arbitrator. The tribunal rejected their argument against the proper composition of the panel. The Cour de Cassation by contrast considered the appointment process to be contrary to public policy stating that the "equality of the parties in the appointment of arbitrators is

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[36] Again we see the ICDR's approach to encourage party autonomy and agreement as to the number of arbitrators. Whether in the arbitration clause (as suggested by the ICDR in their model clause) or by agreement after the case has been commenced the parties are encouraged to decide the issue. If the parties cannot reach agreement the ICDR after consulting with the parties will be guided by Article 5. It provides that one arbitrator shall be appointed, unless the ICDR determines "in its discretion that three arbitrators are appropriate because of the large size, complexity or other circumstances of the case." *See* IAR Article 5.

[37] *See* IAR Article 6 (4).

[38] *See* IAR Article 6 (3) which includes an administrative pause should the parties be conducting settlement discussions as the ICDR requires a written request to complete the appointment process.

a matter of public policy which can be waived only after the disputes has arisen."[39] To avoid any potential for mischief absent the agreement of the parties the ICDR will appoint the entire tribunal. In reality this hardly happens as the ICDR consistent with its preference for party autonomy will at the conclusion of the administrative conference call encourage the parties to agree to the selection of the arbitrators in a multiparty case. If they fail to agree in the end the ICDR will unilaterally complete the appointment process. Typically the parties do tend to agree on the appointment mechanism.

Consolidation and joinder are also issues that arise in multiparty arbitrations. The ICDR's administrative policy on consolidation and joinder is to initiate the arbitration as filed by the filing party even though separate contracts may be involved, thereby providing parties with an opportunity to proceed jointly to the extent they mutually agree. Experience has shown that even where separate contracts are involved, parties often voluntarily participate in a multiparty arbitration to dispose of all common claims in a single arbitration. Should one or more parties object to such a procedure, the cases will be separated and processed individually unless a court orders otherwise. Separately instituted cases may be consolidated whenever all parties mutually agree or consolidation is ordered by the courts. The IAR do not contain a specific article regarding consolidation as one can find in the AAA's Construction Rules but the issue may be brought before the arbitrators once appointed for their determination.[40]

Another important ICDR feature is its institutional preference to use the list method as its default method of appointment. Absent the agreement of the parties, the ICDR employs the use of a list when called upon to complete the appointment process. The ICDR will consider all of the qualifications requested by the parties including a specific nationality, type of expertise or experience in a particular industry or fluency in a particular language and together with its own views from its review of the case create a balanced list of potential arbitrators for selection by the parties.

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[39] Stefan Kröll, Dutco Revisited? Balancing Party Autonomy and Equality of the Parties in the Appointment Process in Multiparty Cases, ITA Blog, 15 Oct 2010.

[40] *See* R-7 of the Construction Industry Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Construction Disputes), Rules Amended and Effective October 1, 2009.

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Example of the list

•	Jose Martinez	1	Jose Martinez	X
•	John Smith	X	John Smith	1
•	Ricardo Suarez	X	Ricardo Suarez	4
•	**Antonio San Martin**	**3**	**Antonio San Martin**	**3**
•	James Jones	X	James Jones	X
•	**Linda Cruz**	**4**	**Linda Cruz**	**2**
•	Charles Brown	X	Charles Brown	6
•	Ramon Gonzales	X	Ramon Gonzales	X
•	**Francisco Jimenez**	**2**	**Francisco Jimenez**	**5**
•	George Webber	5	George Webber	X

The list of names will be transmitted along with their corresponding curriculum vitae which provide the arbitrator's professional work and ADR experience, as well as education, publications, affiliations, language capabilities and rate of compensation. Parties are asked not to exchange these lists and are allowed to object to anyone listed without providing any reasons. The parties must rank the remaining arbitrators with number 1 reflecting their first choice down to their last acceptable arbitrator remaining on the list. Once the parties return their lists to the ICDR, the arbitrators with the lowest combined rankings are invited to serve and once they clear the conflicts stage their appointments are confirmed by the ICDR.

From the ICDR's perspective, the list method has a number of advantages over the party-appointed method. For instance, during the listing process there is less of a potential for mischief as parties do not engage in any ex parte conversations with the arbitrators that may be appointed, conversations which later may be used to establish the foundation for possible bias or evident partiality during an action to vacate an arbitral award.[41] While it is true that all party-appointed

[41] It is worth noting that the majority of arbitration awards are complied with voluntarily yet a losing party seeking to vacate an award in the United States may seek to establish evident partiality on the part of an arbitrator. *See* note 47 *infra.*

arbitrators have to be impartial and independent pursuant to the ICDR's IAR Article 7, arguably there may be an inherent flaw in the party-appointed system that occurs during the ex parte interview conducted to select the arbitrator. In some cases, less experienced arbitrators may not appropriately control the interview process and fail to establish strict parameters regarding the permissible scope of acceptable questions. They may fail to counter a parties' possible spoken or unspoken expectation or belief that their appointed arbitrator at a bare minimum will ensure that the other two arbitrators understand their parties' position which may conflict with the independence requirement and the need to not be predisposed to a parties' position.[42] Some arbitrators may have the mistaken belief that they have an obligation to the party that appointed them which will impede their ability to be impartial and independent.

In one article, a noted scholar discussed two ICC studies observing that in over 95% of the dissenting opinions the authors were party-appointed arbitrators.[43] This troubling statistic may suggest that a disproportionate number of party-appointed arbitrators lack impartiality or independence in arriving at their final decision. In another article this trend was further confirmed by a review of dissenting opinions in the International Centre for Settlement of Investment Disputes (ICSID) investor-treaty arbitration awards where another noted scholar examined 150 awards and found that nearly all of the 34 dissenting opinions were issued by the arbitrators appointed by the party that lost the case.[44] These findings support the trend to move away from the direct appointment by a party method towards appointments being made by the institutions either directly or from their panels using the list method thereby creating an important buffer between the arbitrators and the parties removing the potential for the aforementioned problems.

The list method has a number of added benefits including the fact that if the arbitrators are selected from the ICDR's roster they have been vetted and their qualifications scrutinized in advance by a number of ICDR advisors. They have also gone through the ICDR's international

[42] For a review of the impartiality and independence requirement of the arbitrators and the permissible scope of communications between the arbitrators and the parties. *See* IAR Article 7.

[43] Jan Paulsson, *Are Unilateral Appointments Defensible?*, Kluwer Arbitration Blog, 02 April 2009.

[44] Albert Jan van den Berg, *Dissents and Sensibility*, Global Arbitration Review, 28 February 2011.

training programs highlighting "best practices" in a mock complex international arbitration and the application of the ICDR's rules and its Guidelines for Arbitrators Concerning Exchanges of Information (discussed below) along with its administrative system and policies. A lack of such training may lead to procedural errors regarding the application of the ICDR's framework and perhaps other failures such as the improper completion of the clearing of conflicts phase or failing to comply with the ICDR's expectations regarding time deadlines and the managing of the arbitration. Finally as the ICDR (or for that matter any other administrative institution) has little or no control over the party-appointed arbitrators by virtue of their not being on the institution's lists, these arbitrators do not have an expectation of future appointments and are less concerned about the institution's policies but may have a greater motivation to establish the track record of an arbitrator that has as their primary consideration the position of the party that appointed them.

The party-appointed method can be used effectively with safeguards in place but the list method in the final analysis has added security as it removes the ex parte contact between the parties and the arbitrators and any confusion over their role or responsibilities towards the party that selected them which can be a significant advantage in an international arbitration especially during enforcement proceedings. It is sine qua non that the list method is only as good as the quality of the members who comprise that list. Recognizing the need for these exceptional international arbitrators, the ICDR has established a demanding set of qualifications for potential arbitrators seeking admission to its international panel. Openings on the panel are limited depending on the ICDR's caseload needs which may in turn drive the needs for a particular nationality, expertise or linguistic capability for that particular year. Applicants undergo a two tiered review process that has resulted in a panel of eminently qualified international dispute resolution specialists.[45]

V. Clearing Conflicts and Challenges

The ICDR's IAR Article 7 requires that all arbitrators be impartial and independent. Prior to accepting an appointment, the arbitrator must disclose to the administrator any circumstances likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence. These disclosures should be made when arbitrators are invited to serve

[45] *See* note 16, *supra.*

and that responsibility is continuing throughout the entire arbitration should new circumstances arise that may give rise to such doubts. An arbitrator must be impartial, essentially not predisposed nor favoring a party or their position and must be independent without any financial interest or the possibility of financial gain from either of the parties.

The ICDR plays an important role in ensuring that conflicts are dealt with at this stage in a thorough manner. This reduces the potential for challenges later on which could lead to delay or problems for the award.[46] The ICDR does not apply the IBA's Guidelines on Conflicts of Interest in International Arbitration as there are a number of scenarios where these Guidelines do not establish a duty to disclose and would not be consistent with the ICDR policy of broad disclosure which requires that all disclosures be made sufficient to providing the parties in every instance with the ***option*** to waive them if they wish to proceed with the arbitrator. Once conflicts are cleared, the arbitrator signs the Oath of Office and is officially appointed to the case.[47]

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[46] Having the ICDR focus a great deal of attention on clearing conflicts at this early stage is important to avoid potential problems later on when undisclosed relationships can create havoc and cost the parties time and money. It is the ICDR's preference to start the arbitration with a panel that has cleared all conflicts providing the parties with the utmost confidence in their ultimate decision makers. This emphasis on a broad check of all conflicts and disclosures keeps the number of challenges down that the ICDR has to handle throughout the year. The ICDR has seen an average of 60 challenges per year. In 2010, the ICDR handled 63 challenges with 34 reaffirmations and 29 removals. Challenges are conducted pursuant to Articles 8 and 9 of the IAR. A party may challenge an arbitrator "whenever circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence". The challenge must be raised within fifteen days of being notified of his/her appointment or learning of the circumstances giving rise to the challenge and if the parties agree, the arbitrator shall withdraw. The arbitrator may also decide to withdraw. If the parties fail to agree and the arbitrator does not withdraw the ICDR pursuant to IAR Article 9 shall make the final determination. The ICDR does not provide reasons as these challenges are part of its administrative mandate to ensure that the arbitrators are appointed. Providing the reasons for its administrative decisions would only add to the time and costs and perhaps open the door to having to provide reasons for other administrative determinations such as the number of arbitrators or the place of the arbitration without any arguable benefit. This would be inconstant with the goals of international ADR. If the arbitrator has to be replaced IAR Articles 10 and 11 provide the procedural steps to follow. The IAR do provide for a truncated panel should the need arise, see IAR Article 11.

[47] The ICDR maintains that the parties must always have the choice to object to a disclosure made by the arbitrator as it is the parties' process. The IBA Guidelines color coding system of disclosures provides scenarios where disclosures that the ICDR believes should be made are not required. For example under the orange list the disclosures are triggered for various potential conflicts if they took place within three years only. Under the green list a disclosure is not required. For example pursuant to section 4.2.1 of the IBA

VI. The Preparatory Conference

Upon completing the appointment of the arbitrators, the case manager will schedule a preparatory conference usually done telephonically with the parties and the arbitrators for the earliest possible date, to place the matter in the hands of the decision makers. Prior to the preparatory conference the case manager will contact the arbitrators to brief them on the particulars of the case including what has transpired prior to their appointments and to alert them of any issues of arbitrability or procedural determinations (for example the ICDR's decision as to the place of the arbitration) they may need to resolve early on and ensure they have copies of all of the filing submissions made to date.[48]

The ICDR provides the arbitrators with a sample preparatory conference call checklist that they can use and modify as they deem appropriate. The preparatory conference is an important step in the ICDR system. This is the first opportunity to bring the parties (counsel along with their clients) together with the ICDR and the arbitrators. In addition to the goal of organizing the framework and schedule for the entire arbitration process and hearings and dealing with any preliminary issues this conference provides an excellent opportunity to address and manage the expectations of the parties who may be from different legal cultures or unfamiliar with an international arbitration. ICDR arbitrators will establish the foundation for effective case management and discuss the possibility of all efficiencies especially as to how they pertain to the exchange of information and the application of the ICDR's Guidelines for Arbitrators Concerning Exchanges of Information discussed below. The checklist below covers a number of suggested issues that the arbitrators may need to discuss for their particular matter.

Preparatory Conference Checklist [Suggested]

- Explain the purpose and goals of the preparatory conference.
- Opening Statements (Statements of Claims and Issues).

Guidelines establish that if the arbitrator's law firm has acted against one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator there is no need for a disclosure. For further analysis and discussion regarding disclosures and evident partiality, *see* AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, revised and effective March 1, 2004. See also *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968); *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994); *Positive Software v. New Century Mortgage Corp* , 476 F.3d 278 (5th Cir. 2007).

[48] *See* IAR Article 16 (2).

- Have each party make a brief opening statement outlining the issues in dispute and associated claims.
- Preliminary Matters (if any).
- Schedule the Hearing.
- Establish the date(s) for the evidentiary hearing—schedule consecutive days as much as possible advise the parties of the daily schedule that will be followed during the evidentiary hearing. For example, the day(s) will begin at 9:00 a.m. and go until 5:00 p.m. with no more than one hour for lunch and breaks limited to ten minutes.
- Specifications of Claims & Counterclaims.
- Establish a date by which the parties must specify and quantify (monetary amounts) their respective claims and counterclaims or amend their respective claims or counterclaims.
- Related Entities.
- Establish a date by which the parties must provide the identities of any affiliated, related or successor persons or entities connected with the case. (This is for the purpose of allowing arbitrators to determine whether they have any conflicts.)
- Exchange of Information—explain that the tribunal will be applying the ICDR's Guidelines for the Exchange of Information.
- Resolve any exchange of information or document production issues and establish a method and schedule for such exchanges and production. (Include reports from experts.)
- Exchange & Filing of Exhibits.
- Establish a date by which the parties are to exchange copies of (or, when appropriate, make available for inspection) all exhibits to be offered at the hearing —include all reports, summaries, diagrams and charts to be used direct that all exhibits be pre-marked for identification—direct or strongly suggest, the parties submit a consolidated and comprehensive set of joint exhibits - direct that the appropriate number of exhibits be made.
- Witnesses & Experts.
- Establish a schedule for the exchange of witness lists and amendments thereto—direct that lists contain the full name of each witness, titles if applicable, and a short summary of anticipated testimony—if experts are used, C.V.'s of each should be exchanged.

- Miscellaneous Issues: stipulation of uncontested facts; filing of pre-hearing briefs; stenographic record/court reporter; use of interpreters; any other issues the parties wish to raise.
- Form of Award: request advice from the parties as to their positions on the form of the award they would like to see—Standard award—Findings of fact and conclusions of law.

Following the preparatory conference call, the tribunal will issue a procedural order, which will include the calendar for the arbitration and all established dates for the hearings along with any other determinations ranging from the exchange of documents, additional submissions to the form of the award. The arbitration is now fully in motion and the ICDR monitors the implementation of each step of the arbitral process along the way until the award is rendered and the case is closed.

The IAR have a number of additional provisions that parties should consider when selecting the ICDR as their administrator. Regarding the place of arbitration, absent the agreement of the parties the ICDR may initially determine the place of arbitration, subject to the final decision of the tribunal within 60 days after its constitution. The ICDR will as it does throughout the process encourage the parties to agree but if they do not, it will consider various elements in making its initial determination. Factors to be considered include the logistical convenience of the parties, the language and applicable law of the contract, political neutrality and the intervention of state courts during the arbitral process, the legal framework at the potential place of arbitration and whether they are parties to one of the enforcement treaties along with costs and other case specific factors. The ICDR will balance those factors with the wishes of the parties while protecting the international currency of the award in its determination.[49]

As to the language of the arbitration, absent the agreement of the parties the IAR provides that language of the arbitration shall be that of the documents containing the arbitration clause subject to the power of the tribunal to determine otherwise.[50]

For the conduct of the arbitration the tribunal may conduct the arbitration in whatever manner it considers appropriate, 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. This provides the tribunal with the flexibility it needs for an international case. It may

[49] *See* IAR Article 13.
[50] *See* IAR Article 14.

consider the impact of common law and civil traditions depending upon the needs of the particular case and the application of the ICDR's Guidelines for Arbitrators Concerning Exchanges of Information. The tribunal, is required to conduct the proceedings with a view to expediting the resolution of the dispute and may in its discretion direct the order of proof, bifurcate proceedings, (deciding liability before damages) exclude cumulative or irrelevant testimony or other evidence, and direct the parties to focus their presentations.[51]

The parties shall have the burden of proving the facts relied on to support its claim or defense. At any time during the proceedings the tribunal may order the parties to produce other documents, exhibits or other evidence it deems necessary. The tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered by any party.[52]

Hearings are private unless the parties agree otherwise. Evidence of witnesses may be presented in the form of written statements signed by them. The IAR provides for the periods of time required for advance notice of hearings, admissibility of evidence and discusses privileges which are impacted by the ICDR Guidelines.[53]

The fact that the hearings are private should not be confused with the ICDR's policy on confidentiality. On July 1, 2003, the ICDR revised its IAR to allow for the publication of redacted arbitration awards. The ICDR will select a number of awards that will be edited to conceal the names of the parties and other identifying details. These awards will be made public in an effort to advance the study of international commercial arbitration.[54] In addition during the 2003 revision the ICDR added a new section for international mediation. These international mediation rules reflect the ICDR's international mediation experience, as it is one of the

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[51] *See* IAR Article 16. Although to a large extent the common law – civil law differences in international arbitration are not as broad today where we have seen a movement towards the harmonization of these traditions, see Pierre Karrer, *The Civil Law and Common Law Divide, An International Arbitrator Tells It Like He Sees It*, Dispute Resolution Journal, Vol. 63, # 1 (February-April 2008).

[52] *See* IAR Article 19.

[53] *See* IAR Article 20. The ICDR Guidelines for Arbitrators Concerning Exchanges of Information can be found on the ICDR's website at www.ICDR.org and do contain a provision on privileges.

[54] *See* IAR Article 27 (8). The ICDR maintains a policy of confidentiality that pertains to the arbitrators and the administrators, see IAR Article 34.

world's few arbitral institutions that consistently administer international mediations each year.[55]

The tribunal shall not decide as amiable *compositeur* or *ex aequo et bono* and the IAR expressly exclude an award of punitive damages unless it is for one of the listed exceptions pursuant to the IAR.[56] Pursuant to the IAR the tribunal has the power to award attorney's fees.[57]

VII. Emergency Arbitrator Procedure

The ICDR on May 1, 2006 revised its IAR to provide the parties' access to an emergency arbitrator at the time an arbitration is filed.[58] This provision was groundbreaking when announced and today a number of institutions have adopted similar provisions and others are considering its application. Parties in the past were left with a void when they were trying to submit their entire dispute to ADR and, more importantly, hoping to stay out of each other's courts. Prior to the passage of this mechanism parties in need of provisional or conservatory measures would either have to wait for the appointment of the arbitrators which can typically take 30-60 days or seek these emergency measures of protection directly from the courts.[59] The IAR provides that this mechanism is available in cases where the contract with the arbitration agreement was signed after May 1, 2006. Parties in need of emergency relief prior to the appointment of the panel will notify the ICDR and all other parties in writing of the nature of the relief sought and the reasons why it is needed on an emergency basis. The ICDR did not follow the UNCITRAL Model Law 2006 revision to allow interim relief on an ex parte basis. The ICDR took the position that by engaging in ex parte conversations with a party requesting emergency relief it would have a negative impact on its ability to be seen as an impartial and independent administrator by the party against whom the relief was sought. The ICDR will appoint a single emergency arbitrator from its list of international emergency arbitrators. The prospective arbitrator will clear conflicts as

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[55] *See* the ICDR's International Mediation Rules.

[56] *See* IAR Article 28.

[57] *See* IAR Article 31, discussed in one U.S. case, see F. Hoffman-La Roche v Qiagen Gaithersburg, Inc., 730 F Supp. 2d 318 (S.D.N.Y. 2010).

[58] *See* Ben H. Sheppard and John M. Townsend, *Holding the Fort Until the Arbitrators Are Appointed: The New ICDR International Emergency Rule*, Dispute Resolution Journal, vol. 61, no. 2 (May-July 2006).

[59] *See* IAR Article 21.

all ICDR arbitrators are required to do so and any challenges are determined by the ICDR with these steps being completed in 24–48 hours. The emergency arbitrator has a number of the same powers as the tribunal including the power to determine their jurisdiction, issues of arbitrability and the conduct of the hearings. The ICDR expects a reasoned interim award or order within 14 days from initiation.[60] Once the emergency arbitrator renders a determination, absent any requests to modify or vacate for good cause shown, he/she are *functus officio* at the moment the tribunal is constituted.[61] The tribunal can modify or vacate the emergency arbitrator's interim award or order. They can also take notice of a parties' failure to comply with the interim award or order which aside from the possibility of being enforced provides a further incentive for the parties to comply voluntarily.

The ICDR recognizes that this process is not suitable for all cases. The fact that notice is required and that in some jurisdictions arbitrators do not have the authority to grant interim relief nor would the local courts enforce those awards requires the parties to analyze whether invoking Article 37 makes sense. Parties can still request interim relief from a judicial authority directly without fear of waiving the right to arbitrate.[62] Article 37 in the right circumstances provides the parties with the opportunity to remain within the arbitral regime for all phases of their case. It is not for use in all cases but when appropriate will result in an incredibly fast and efficient way to obtain interim relief in an international arbitration.

The ICDR as of this writing has successfully administered 20 Article 37 cases. Information on the first 4 cases filed can be found on the ICDR's website.[63] These Article 37 cases move at a frantic pace with the majority having their arbitrators appointed in one business day and the longest was 5 business days where the ICDR went through the disclosure and challenge procedure for the first two emergency arbitrators and finally clearing the third for the case. The nationalities of the emergency arbitrators have varied extensively.[64] The cases usually have a preparatory conference call by the second or third business day followed

[60] *See* IAR Article 37.

[61] *See* IAR Article 37(6).

[62] *See* IAR Article 37(8).

[63] Guillaume Lemenez, Paul Quigley, The *ICDR Emergency Arbitrator Procedure in Action, Part 1,Part 2,* on the ICDR's web site www.ICDR.org.

[64] The ICDR has appointed Article 37 emergency arbitrators from Belgium, Brazil, Canada, Republic of Korea, Republic of Singapore, United Kingdom and the United States.

by a scheduling order. The conduct of the arbitration is based on written submissions along with a telephonic hearing and in those cases that resulted in an award the reasoning was included. The average time frame from filing to the award was approximately 15 business days and parties have to date complied with these decisions voluntarily.[65]

VIII. The ICDR's Guidelines for Arbitrators Concerning Exchanges of Information

In recent years broad discovery requests which are not typically accepted international practice and it is worth noting that the word "discovery" does not appear in the ICDR's IAR, have increased costs and caused delays. In response to the 'discovery' abuse problems or "fishing expeditions", the ICDR has promulgated a set of Guidelines for Arbitrators Concerning Exchanges of Information, (Guidelines) which reflect the institution's policy and expectations for the cases administered pursuant to its rules that these abuses must be curtailed and eventually stopped. The purpose of these Guidelines is to make it clear to arbitrators that they have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process. The arbitrators are advised against accepting overly broad discovery requests that conflict with the Guidelines. These Guidelines are required to be applied by all arbitrators serving on ICDR cases and the parties are advised of this during various phases of an ICDR arbitration. The following chart highlights the criteria established for document exchange requests.

[65] This statistic is impacted by the fact that parties in a number of the cases agreed to extensions or the case was withdrawn.

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ICDR Guidelines for Arbitrators Concerning Exchanges of Information

Binding	• Applies to International Cases commenced after May 31, 2008
Document Production	• All document requests must be "relevant and material"
E-discovery limitations	• e-docs produced in most convenient form • Requests must be "narrowly focused"
Depositions and other Discovery Tools	• Generally not appropriate for international arbitration
Attorney-client privilege	• Most protective privilege rule
Arbitration Tribunal Responsibility	• Manage with a view to maintain efficiency and economy of process and avoid unnecessary delay
Arbitration Tribunal Authority	• Tribunal maintains authority to manage case effectively and efficiently

In reference to the ICDR fees its administrative fee schedule can be found in the IAR. Responding to the feedback from its users the ICDR offers a number of payment options including its standard fee schedule and a flexible fee schedule where the initial filing fees are lower but may result in higher total fees. The ICDR also includes a refund schedule where parties that reach an early resolution of their dispute perhaps pursuant to an ICDR mediation can obtain a full refund of their filing fees if the case is settled or withdrawn within 5 calendar days of filing and a 50% refund of the filing fee if settled or withdrawn 30 calendar days of filing. The refund schedule reflects the ICDR policy to incorporate an incentive for its users to resolve these cases as quickly as possible.[66]

[66] For assistance with the ICDR administrative fees or any questions regarding its fee structures or refund schedule, see the *International Case Filing Fee Schedule* on the ICDR's website at www.ICDR.org or contact the ICDR's Conflict-Management Team. *See* note 7, *supra.*

IX. Other Rules Administered by the ICDR

The ICDR also administers international cases pursuant to the AAA's Commercial Arbitration Rules.[67] The commercial Rules have a U.S. domestic arbitration focus but are routinely used by international parties with ICDR administration. 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 and in cases of at least $500,000 the Procedures for Large, Complex Commercial Disputes shall apply. There are a number of differences between the Commercial Rules and the IAR as referenced in the following chart but the Commercial Rules can and are applied in international cases as agreed to by the parties. The ICDR will advise the parties that they will incorporate its Institutional Commercial Arbitration Supplementary Procedures to require a reasoned award and to comply with the enforcement treaties.[68]

I C D R International Centre for Dispute Resolution •Rules Comparison

ICDR International Arbitration Rules	AAA Commercial Arbitration Rules
• International Arbitration Focus	• Domestic Commercial Focus
• Tribunal can reconsider ICDR decision regarding place of arbitration decision, see Art. 13.	• AAA decision regarding place of arbitration is final, see R-10.
• Opt-Out Emergency Interim Relief Procedures, see Art. 37.	• Opt-in Emergency Interim Relief Procedure, see O-1.
• Arbitrator may award attorney's fees, see Art. 31.	• The power to award attorney's fees not explicitly authorized, see R-43 (d).
• Guidelines Concerning Exchanges of Information applies to all cases administered by ICDR after May 31, 2008.	• Guidelines do not apply unless parties agree – broader discovery options available especially in the LCCP, see L-3 and L-4.
• No time of award provided – prompt standard, see Art. 27 (1).	• Award done within 30 Days from close of hearings, see R-41.
• Provides for reasoned award, see Art. 27 (2).	• Open question for tribunal to consider, see R-42.
• Remedy Scope - International standards – amiable compositeur not permitted without express agreement, see Art. 28 (3).	• Remedy Scope – any remedy or relief that the arbitrator deems just and equitable, see R-43.
• Punitive damages excluded, see Art. 28 (5)	• No reference to punitive damages.

[67] *See* note 19, *supra*, stating the number of ICDR administered cases where the clause references the Commercial Rules.

[68] The ICDR will apply unless the parties object the International Commercial Arbitration Supplementary Procedures, Amended and in Effect April 1, 1999. This version is scheduled to be revised.

The ICDR also administers cases pursuant to the Construction Industry Arbitration Rules and Mediation Procedures.[69] These Rules which were revised in 2009 are primarily designed for domestic construction cases but can be applied by the agreement of the parties in an international case. The ICDR will suggest to the parties that they incorporate certain international practice provisions when selecting these Rules in their arbitration agreement and will require a reasoned award to comply with the enforcement treaties.

I C D R International Centre for Dispute Resolution •Rules Comparison

ICDR International Arbitration Rules	AAA Construction Arbitration Rules
• International Arbitration Focus	• Domestic Construction Focus
• Tribunal can reconsider ICDR decision regarding place of arbitration decision, see Art 13.	• Tribunal can reconsider AAA locale decision – Closest to site criteria, see R-12.
• Opt-Out Emergency Interim Relief Procedures, see Art 37.	• No Emergency Interim Relief Procedure
• No Consolidation or Joinder Procedure – No Inspection or Investigation Procedure	• Consolidation or Joinder Procedure Provided – Inspection or Investigation Procedure Provided, see R-7.
• Guidelines Concerning Exchanges of Information applies to all cases administered by ICDR after May 31, 2008	• Guidelines do not apply unless parties agree – No discovery pursuant to Fast Track, see F-8 and F-9, broader discovery allowed LCCP, see L-4 and L-5
• No time of award provided – prompt standard, see Art. 27 (1).	• Award done within 30 Days from close of hearings, see R-43.
• Provides for reasoned award, see Art. 27 (2).	• Open question for tribunal to consider, see R-44.
• Remedy Scope - International standards - amiable compositeur not permitted without express agreement, see Art. 28 (3). Power to avoid attorney's fees, see Art. 31	• Remedy Scope – any remedy or relief that the arbitrator deems just and equitable, Attorney's fees not explicitly authorized. See R-45
• Punitive damages excluded, see Art. 28 (5).	• No reference to punitive damages

Another set of Rules administered by the ICDR especially in international construction disputes are the UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules. In international construction contracts parties may reference provisions from the FIDIC (The International Federation of Consulting Engineers) Contracts Guide. FIDIC provides for the use of the UNCITRAL Rules and each year the ICDR provides administrative services pursuant to the UNCITRAL Rules. The ICDR in conjunction with these Rules will also

[69] *See* note 19, *supra*, stating the number of ICDR administered cases where the clause references the Construction Rules.

suggest to the parties that they incorporate certain construction practice provisions along with a reference to the ICDR's administrative and appointing role as the UNCITRAL Rules are designed for an ad hoc commercial arbitration process. UNCITRAL in 2010 revised these Rules and the ICDR is administering this new version.

The ICDR is also the official administrator for all arbitration cases pursuant to the arbitration rules of the Inter-American Commercial Arbitration Commission (IACAC). The IACAC established an alliance with its national section in the United States the ICDR to administer all IACAC cases under the auspices of the IACAC's Director General. IACAC maintains a permanent desk at the ICDR and cases pursuant to its rules are administered in accordance with its policies and arbitrator appointments are made from its lists. Administrative services are available in English, Spanish and Portuguese.[70]

X. International Mediation

With increases in time and costs international mediation continues to gain in popularity and interest. The ICDR is a proponent of the use of mediation, offering mediation in all its cases while maintaining the aforementioned refund schedule as an added incentive for the parties to consider mediating their international matters. Parties can agree to mediate in their arbitration agreement by referencing mediation as a condition precedent to the arbitration.[71] The ICDR incorporated international mediation rules to its IAR in 2003 and they contain the modern provisions that are needed for a cross-border mediation providing the framework for the mediation from initiation to a settlement.

One of the often heard objections to mediation is that it is used to delay the commencement of the arbitration process. Parties have a number of options to counter any possible delays including specifying strict time limits for the mediation to occur or opting for a concurrent mediation. In a concurrent mediation the arbitration and the mediation

[70] The Rules of the IACAC can be found on the ICDR's website at www.ICDR.org. The IACAC Rules of Procedure are referenced in the Inter-American Convention on International Commercial Arbitration, the Panama Convention in its Article 3 as the default Rules and administrator where parties who are nationals from countries that are signatories to the treaty have entered into an arbitration agreement but have not designated a set of Rules. *See* note 21, *supra.*

[71] *See* note 9 *supra*, regarding a number of clauses that can be used for ICDR mediations.

proceed on a parallel track so the arbitration is not delayed. As the mediator can be appointed quickly and the mediation scheduled shortly thereafter it is possible to complete the mediation before the arbitrators in the parallel arbitration are appointed. It is an understatement to say that a successful mediation is a win-win for all the parties. It is a tremendous savings of time and money and as the parties agree to the settlement they often are able to preserve valuable business relationships.[72] Moreover the dispute is resolved and even in those cases where the parties do not reach the full settlement of all disputed issues the mediator can encourage a settlement of some of the issues and claims which will be of value in the subsequent arbitration where fewer claims result again in a savings of time and money.

The ICDR has found that parties at the commencement of the arbitration may not have a sufficient grasp of the other side's case. Consequently parties may be reluctant to agree to mediate or perhaps they are apprehensive of being seen as having a weak case. Recognizing this the ICDR has adopted the policy of not only offering mediation at the early stages of the case but also to offer mediation again after the arbitrators are appointed before the hearings. At this stage the parties may be more amenable to trying mediation and they do not have any concerns about appearing weak as the offer is made by the ICDR to all parties. The ICDR also encourages its arbitrators to alert the case administrators of any cases that they consider suitable for mediation where they immediately offer mediation again.

In further pursuit of ICDR's continuing effort to promote credible mediation and, in response to users and the international mediation communities, the ICDR/AAA became a founding institution of the International Mediation Institute (IMI).[73] IMI's purpose is to generate enhanced confidence in mediators and to improve the understanding of international mediation processes among businesses and other disputants by encouraging high standards of training and certifying mediator's qualifications worldwide. IMI will aid users to find suitable, competent mediators quickly and easily and will certify registered mediators using independent assessors and testing to ensure the accuracy and proficiency of all mediators placed on the IMI roster. IMI will additionally strive to have its certification accepted as a global mediator competency standard

[72] For further reading on the Mediation Concurrent Clause, see Steve Andersen, ICDR Offers Concurrent Mediation/Arbitration Clause, Dispute Resolution Journal, vol. 63, no. 4 (November 2008-January 2009),

[73] *See* the IMI website at www.imimediation.org.

and will contribute to the further development of the mediator's professional standards in the field.[74]

XI. Conflict Management Efficiencies

Arbitrations do not occur in a vacuum. They exist because the parties have agreed to an arbitration agreement. This agreement reflects the will of the parties and as we continue to see the growth of international trade where attention to all efficiencies is needed to compete, parties are revising their arbitration agreements to focus on these efficiencies.

The ICDR as illustrated offers a range of services and options to achieve greater conflict management efficiencies.[75] Parties knowing the ICDR system and the types of disputes they are likely to face from experience or from past similar cross-border transactions may consider some of the following drafting options to add to the ICDR model clause to maximize efficiencies.

It must be recognized that the best way to maximize these efficiencies has to be with their inclusion in the arbitration clause itself. If the clause lacks provisions such as those suggested below, a problem may arise when one side seeks these efficiencies and the other side objects. At that point the institution and the arbitrators concerned with due process and equality find these issues to be problematic. If these efficiencies are in the clause, which reflects the negotiated agreement of the parties, then the clause will be applied in its entirety and these problems can be avoided.

- Parties may wish to include ICDR mediation as part of their ADR agreement whether a condition precedent or concurrently with the mediation.

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[74] Luis Martinez and Thomas Ventrone. *The ICDR's Mediation Practice, Contemporary Issues in International Arbitration and Mediation:* The Fordham Papers 2010, to be published by Martinus Nijhoff Publishers in 2011.

[75] It starts with the ICDR's model arbitration clause, *"Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules."*

The parties should consider adding:

"The number of arbitrators shall be (one or three)";

"The place of arbitration shall be [city, (province or state), country]";

"The language(s) of the arbitration shall be ___."

- Parties may opt for a sole arbitrator and to waiving in-person hearings thereby agreeing to have their dispute decided on the documents alone or perhaps telephonic hearing.
- Parties may wish to explore the various expedited procedures available through the AAA Rules or by reducing the time frames pursuant to the IAR.
- Parties may wish to further limit the document exchange perhaps going beyond the ICDR's Guidelines or the International Bar Association's Rules on the Taking of Evidence in International Arbitration.
- Parties may wish to waive any access to e-discovery at all.
- Parties may wish to adopt a procedure where each side drafts their version of the award and the arbitrators are empowered to select only one version as the final ICDR award, "last best offer or baseball arbitration".
- Parties may wish to have the ICDR make the arbitrator appointments without a list.
- Parties may wish to consider modifications depending upon the transaction of the underlying dispute, for example if it is an international construction dispute incorporate additional ADR mechanisms such as a consolidation provision.

The list is not exhaustive and variations for these ADR efficiencies are extensive. Factor in the additional variations that may be specific to an industry or type of contract and more options arise. In the end the ICDR conflict management team welcomes the opportunity to be considered a resource in examining these clauses and is available to discuss these and other drafting options as needed.[76]

[76] *See* notes 7 and 9 *supra.*

The Fair and Efficient Hearing

What Advocates and Arbitrators Need To Do To Conduct a Fair, Effective and Well-Managed International Arbitration Hearing

Charles J. Moxley, Jr.

Overview

- Much of what we have said about conducting hearings in domestic arbitrations is applicable to international arbitrations.
- However, there are some distinctive differences between domestic and international arbitration, which are highlighted in this outline. The differences largely flow from differences in how litigation is conducted in different legal systems. A big contrast is between the common law and civil law systems. While domestic arbitration in the United States is heavily reflective of the common law approach followed in the U.S. legal system, international arbitration, to the extent it involves counsel and/or arbitrators from civil law systems, will often consist of an amalgam of the main characteristics of the two systems.
- In recent years, there have been significant convergences of the characteristic features of the litigative approaches of the common law and civil law systems, as such features are carried over into international arbitration. However, significant distinctive features of the two systems are still reflected in contemporary international arbitration practice, making it essential for lawyers and arbitrators making the transition from domestic to international arbitration to have a sensitivity to the differing expectations of participants in international arbitration coming from civil law systems.
- Salient differences between the common law and civil law systems arise, *inter alia*, in the following areas, each of which can have a significant impact on a hearing in an international arbitration:
    - the detailed nature of pleadings and attachments thereto and the continuing importance of such papers in civil law systems, as contrasted with the lesser focus on pleadings in common law systems;
    - the less extensive use of substantive motions in civil law systems;
    - the pervasive use of witness statements in civil law systems;
    - differing overall attitudes towards oral versus written testimony in the two systems;
    - broadly divergent views as to discovery/disclosure in the two systems;
    - the different ways in which expert witnesses are used in the two systems; and
    - the types of cross-examination used in the two systems.
- It is the experience of practitioners and arbitrators in the area that the calibration of the respective use of common law and civil law approaches in a particular

international arbitration will largely depend upon the attitudes of the arbitrators in the particular case.

- The purpose of this outline is to highlight the main distinctive features of hearings in international arbitration that result from the amalgam of common law and civil law approaches that may be used in the particular case, depending on the expectations, attitudes and pre-conceptions of the arbitrators and attorneys involved.

Witness Statements

- In civil law systems, there is a preference for written as opposed to oral testimony. The normal practice is for the direct testimony of witnesses to be presented in detailed sworn witness statements, to which the documents upon which the witness relies are attached. While this practice has become not uncommon in bench trials in some courts in the United States, it is not favored by many common law-based arbitrators, who like to hear the direct testimony orally and be able to assess it as it is presented.
- A main – almost epistemological – point is that, just as common law-oriented advocates and arbitrators tend to regard oral testimony as most persuasive, civil law-oriented practitioners and judges tend to see the written word as more persuasive, essentially believing that "all witnesses lie" and not being particularly enamored with the notion of cross-examination as the "most powerful engine for unearthing truth ever designed."
- The focus on witness statements in international arbitration persists, notwithstanding that everyone understands that witness statements are prepared by the lawyers and, indeed, that, given limitations on lawyers' talking with witnesses in some civil law systems, the lawyers preparing the witness statements have, in some instances, had limited communications at most with the witnesses in question.
- The use of witness statements imposes special burdens on counsel and arbitrators. Obviously, it requires counsel to develop their case and present it in some detail in advance of the hearing, both as to testimony and exhibits.
- For arbitrators from a common law system, there is a risk of overlooking the need to allot and spend whatever time is necessary to really assimilate the witness statements and the exhibits thereto in advance of the hearing, to the extent that, at least theoretically, the arbitrator is as familiar with them as he or she would have been if the witness's testimony and accompanying exhibits had been presented live on direct.
- When witness statements are used in international arbitration, it becomes important, particularly for common law-based arbitrators not that familiar with the civil law approach, to be careful to control the extent of redirect testimony, so

that redirect does not become, in effect, a delayed direct examination. Specifically, within reason, the scope of redirect testimony in international arbitration should be rather strictly limited to that of the cross, subject, obviously, to the needs of the particular case.

- It should be noted that the witness statement approach assumes the availability of the witness for cross-examination at the hearing. However, there are traps for the unwary here, both for counsel and arbitrators, if the opposing party decides not to cross–examine the witness, leading to the situation where the only evidence of record directly from the witness will be the witness statement. Many practitioners and arbitrators believe that, in such circumstances, it is appropriate for arbitrators to permit or even require some direct testimony from the witness, so they can get a sense of the witness's demeanor and the like and have any questions answered.
- It should also be noted that, under the witness statement approach, there will generally be a "warm-up period" of some period of time, typically 15 to 30 minutes or the like, for the witness to summarize his or her testimony very broadly and comment on what the other side's expert witness on the subject has said and other matters that have come up in the case subsequent to the preparation of the witness statement, provided, however, that this warm-up period can be extended for good cause shown.
- It is worth noting that witness statements, if interposed early enough in a case, can serve a purpose akin to discovery, at least to the extent of giving an adversary notice of what the direct testimony of the witness will be – indeed what that testimony is.
- The jury is out on the extent to which arbitrators actually rely on witness statements, as opposed to largely ignoring them and relying almost exclusively on the cross-examination and redirect testimony. Some practitioners and arbitrators believe that arbitrators generally rely fairly heavily on witness statements and others believe that they tend to largely discount them because of the known reality that the witness statements are generally prepared by counsel.
- However, in support of the notion that arbitrators often rely rather heavily on witness statements, it is noteworthy that it is the practice of some arbitrators in international arbitrations to meet after receipt and review of the witness statements, but before the commencement of the hearing, to discuss their preliminary views of the case.

Cross-Examination

- While the opposing side in civil law trials has the opportunity and usually utilizes it to cross-examine witnesses whose witness statements have been offered into evidence, civil law practitioners are not accustomed to the aggressive cross-examination that often occurs in common law systems and are can be offended by

it. It is important both for counsel in international arbitrations and for members of arbitration panels in such cases to be aware of the varying approaches and attitudes of case participants as to the appropriateness of harsh cross-examination.

Underlying Cognitive Issues

- These differing attitudes as to the reliability of written versus oral testimony may affect, if only subliminally, the cognitive styles of advocates and arbitrators from the two systems, leading to the situation where common law-based arbitration practitioners may assimilate witnesses' view of the world more readily from oral testimony and civil law-based practitioners may assimilate such matters more readily from written statements.
- Individual arbitrators will, of course, each have their own particular epistemological and cognitive styles, affecting how they best assimilate evidence, whether from oral or written presentations, and what kinds of evidence they will ultimately find most persuasive.
- A lot of work has also been done in recent years on the subject of heuristics – mental short cuts – that humans typically use in hearing, assimilating, and evaluating information. Such heuristics are made up essentially of unconscious, instantaneous reactions humans have to what is presented to them, based on preconceptions, ways of looking at the world, and even physiological factors, such as the time of day, food one has imbibed, the order of the evidence presented, and the like. Given differences in life experience — perhaps across the entire spectrum of influences based on nature and nurture — between people from different parts of world and cultures, it may be that the heuristics affecting common and civil law practitioners are somewhat different.

Expert Witnesses

- Where, in common law-based domestic arbitration, counsel select expert witnesses and generally expect them to present as strong a case as they can on behalf of the side that retained them, in international arbitrations influenced by civil law systems, the arbitrators will sometimes select the experts and expect them to be truly neutral.
- In international arbitration, the practice of "hot-tubbing" of expert witnesses is often followed, whereby, to one extent or another, such witnesses will be expected to cooperate with one another in narrowing their areas of disagreement and refining their analysis as to such areas.

Secrecy Laws

- Some civil law systems, including notably in Western Europe, have secrecy laws that are very protective of individual witnesses, including of employees of

corporate and other entities. These laws essentially create a zone of privacy that cannot be invaded by the arbitration process, even as to matters at issue in the arbitration that the witnesses were involved in as part of their employment.

- While issues relating to such secrecy laws will typically have been addressed earlier in an arbitration, particularly in the early planning phase of the case, such as at the preliminary hearing and in follow-up preliminary hearings, such issues can come up at the hearing, making it important for counsel and the arbitrators to be prepared to make whatever adjustments to the hearing process are reasonably necessary in light of such privacy laws.
- A most important consideration in this regard is to make sure that the two sides to the case are treated fairly and equally in that they are playing by and subject to the same rules, to the extent practicable.

Party-Appointed Arbitrators

- While in domestic arbitration in the United States, there is still a sense, depending somewhat on the arbitrators, provider institutions, and industries involved in the particular case, that party-appointed arbitrators may be partisan, or somewhat partisan, notwithstanding the default rule under the ABA/AAA Code of Ethics that arbitrators are neutral unless specifically designated as non-neutral, in international arbitration the expectation is much higher and more definite that party-appointed arbitrators will be truly neutral.
- Nonetheless, this expectation in international arbitration is ameliorated somewhat by the preconception, even in international arbitration, at least in the mind of some practitioners and arbitrators in the area, that party-appointed arbitrators are expected to make sure that their appointing party's positions in the case are "understood."
- Accordingly, even in international arbitration, the situation can arise where a party-appointed arbitrator is aggressively asking questions of witnesses designed to elicit or develop the position espoused by his or her appointing-party in the particular case or is overtly partisan in the deliberations in this regard.
- The arbitrators in each case need to make sure the case is being handled appropriately and fairly. The chair will have particular responsibility in this regard.
- Among other things, the chair has to devise and administer a fair approach for communications within the panel and for communications of the arbitrators with counsel and the parties at the hearing.

The Role of Arbitrators in Finding/Developing the Facts

- In civil law systems, judges play an active role in developing the facts at trial, as contrasted with the common law approach, where judges are typically more reliant on counsel to develop and present their case.
- This civil law approach sometimes flows over into the attitude of some civil law-based arbitrators in international arbitration, who sometimes see themselves as having somewhat more of a fact-finding role than arbitrators schooled in the common law system would typically expect.
- This can lead to arbitrators with such a civil law-orientation sometimes taking a somewhat more active role in questioning than U.S. arbitrators are prone to do in domestic arbitration.
- It is important that arbitrators communicate clearly and candidly with one another in this regard to make sure that the particular case is administered in a way that is both fair and has the appearance of being fair. The chair has particular responsibility in this regard.

Absence of Depositions

- Because depositions have historically not been used and are even today rarely used in civil law systems, civil law-based arbitrators in international arbitrations generally believe that depositions are not the norm and should rarely be permitted.
- Nonetheless, as noted above, there has been somewhat of a convergence of common law and civil law practice in international arbitration, to the extent that depositions are occasionally now proposed by counsel in international arbitrations and permitted, at least to some extent, in such arbitrations by arbitrators whose backgrounds are in civil law systems.
- This point as to whether depositions have been permitted can have an impact on the conduct of the hearing in an international arbitration, in terms of whether testimony is presented by deposition and available to counsel for use in cross-examination.

Significance to the Hearing of Potential Issues as to the Enforcement of Awards in International Arbitrations

- Since, by definition, international arbitrations will typically involve parties located in many jurisdictions, awards in international arbitrations will often potentially have to be enforced in multiple jurisdictions, depending on where assets of the losing party are located. Given the overriding importance to arbitrators that their awards be enforceable, this reality as to the need for awards to be enforceable in multiple jurisdictions imposes the burden on counsel and arbitrators in international arbitrations to take whatever steps are reasonably

necessary to assure that the award in the particular case meets the standards of the various jurisdictions in which enforcement might be sought.

- This concern is greatly simplified by the existence of several widely acceded-to multi-national conventions, including, most notably, the New York Convention, to which most of the countries in the world are signatories, making arbitration awards generally enforceable in most countries throughout the world.
- It is obviously quite important for counsel and arbitrators to have a sense of the requirements of such conventions so the award in the particular case will be enforceable. As merely one example, in many countries of the world, unlike in the United States, arbitration awards generally must be of a reasoned nature to be enforced.
- Arbitrators need to be aware of the extent, if any, to which the manner of administration of the hearing may affect the enforceability of the resultant award in the potentially relevant jurisdictions.

Rules Regulating the Conduct of Counsel in International Arbitrations

- To the extent that differences in the ethical regimes applicable to different attorneys and even, possibly, arbitrators in a case can impact on what conduct is permissible in the arbitration, it is obviously important that this matter be focused on early in the case, so everyone is prepared to do whatever is necessary to make the process work smoothly and effectively within the applicable standards.
- The IBA Guidelines on Party Representation in International Arbitration set forth guidelines for the conducting of international arbitrations by advocates, including provisions directly applicable to advocates' performance of their representation of clients at the hearing.
- For example, the Guidelines provide that advocates, who discover that they or a fact or expert witness has made a false statement of fact to the tribunal, should, subject to applicable considerations of privilege and confidentiality, take prompt remedial measures (discussed in the Guidelines) as to the false statement;
- While the Guidelines are merely that, guidelines, they highlight the need for counsel and arbitrators to be aware of whatever legal and ethical regimes may apply in each particular international arbitration.
- While the Guidelines are new and not yet widely followed, they are an invaluable resource for counsel and arbitrators in terms of meeting and managing reasonable expectations in international arbitration.
- Counsel and arbitrators are well advised to familiarize themselves with the Guidelines and refer to them frequently throughout the course of an international arbitration.

Choice of Law

- Because of the multiple jurisdictions from which parties, counsel and arbitrators may come in the typical international arbitration, and the multinational nature of the transactions that are typically involved in such arbitrations, complex issues as to choice of law will often be presented, including as to the law applicable to such matters as the following:
  - arbitrability of claims or defenses asserted in the case;
  - the underlying transactions or matters at issue in the case;
  - the conducting of the hearing;
  - the enforcement of the award in the various – sometimes numerous – jurisdictions in which enforcement may need to be sought; and
  - the ethical and legal obligations of counsel and the arbitrators.
- Advocates and arbitrators need to be aware of the requirements of these various possible legal regimes that may apply in a particular international arbitration.
- Obviously, arbitrators need to conduct the hearing in light of legal considerations applicable to matters being presented in the hearing.

Implication of Need for Reasoned Award

- Arbitrators in international cases will need to consider the need for a reasoned award and take whatever steps are necessary to enable them to prepare such an award.
- Some arbitrator believe that they need a transcript of the hearing to write the award and hence press counsel to arrange for a court reporter for the case. Other arbitrators are more flexible in this regard and are comfortable preparing their awards based on their notes.

Arbitrability

- While issues in an international case as to the arbitrability of the claims presented will typically have been addressed earlier in the case, at times the issue will be left for the hearing and in other instances there will be a separate hearing as to arbitrability, where much of what is said in this outline may be applicable.

Rules of Evidence Applied at the Hearing

- While in international arbitration, as in domestic arbitration, the rules of evidence are not strictly enforceable, nonetheless, since the lawyers and many of the arbitrators will be present or former litigators and sometimes retired judges, the rules of evidence will nonetheless continue to have an impact, or at least a potential impact, on the conducting of international arbitrations.
- This makes the underlying attitudes and expectations of the lawyers and arbitrators involved as to the purpose and usefulness of the rules of evidence

particularly important in the given case, making it crucial that counsel understand the orientation of their arbitrators in this regard and that arbitrators have a sense of the attitudes and expectations of counsel and parties in terms of what is fair and reasonable.

- It is equally important that co-arbitrators consult with one another in advance of the hearing in an effort to get on the same page as to what approach will be taken as to the application of rules of evidence in the hearing.
- Because of the potential for different approaches and expectations in terms of the approach to be taken with respect to the receipt of evidence at hearings in international arbitrators, it is important that this matter and matters of this nature be sorted out as much as possible in advance of the hearing, to avoid undue surprises and potential unfairness at the hearing.

Getting Acknowledgements from Parties at the End of the Hearing that They Had the Opportunity to Offer Whatever Evidence They Wanted to Offer

- Because of the differences in expectations of participants in international as opposed to domestic arbitration, the practice, generally followed in domestic arbitration, of asking parties at the end of the case whether they have had an opportunity to offer any evidence and make any arguments that they want to make, is particularly important in international arbitration.

Interpreters

- Witnesses will often need to testify in different languages at hearings in international arbitrations, requiring the use of interpreters.
- This presents various issues that need to be addressed in advance and worked out, to make the hearing go as smoothly as possible, including such issues as the following: the qualifications of the interpreters; who the interpreters will be; the mode of interpretation, whether sequential or simultaneous; the extent to which questions and comments by the interpreter will be permitted; how it will be handled if the other side wants to have its own interpreter in the room and wants to question interpretations provided by the official interpreter, as the matter proceeds; what the official language of the proceeding is; who bears the cost of the interpreter; and the like.

Translations of Documents

- Similar issues are regularly presented in international arbitration as to the language of exhibits that are presented in the case, including issues as to the official language of the proceeding; the permissible language or languages in which exhibits may be presented to the arbitrators; the handling of the original

documents and the translated versions thereof; proceedings for challenging translations; and the like.

IBA Rules on the Taking of Evidence in International Arbitration

- Approaches to many of the above matters are set forth in the IBA Rules on Taking Evidence. Matters covered in the Rules include hearing the testimony of witnesses, the admission into evidence of exhibits, the use of witness statements, the hearing of experts (both party and tribunal-appointed), the order of testimony at the hearing, and the overall admissibility and assessment of evidence.
- While the Rules are not necessarily binding, they are applied in many international arbitrations, in some cases because the parties have agreed or the arbitrators have directed that they will be applicable, and in other cases because counsel and arbitrators rely on them informally, whether specifically or implicitly.
- It well behooves counsel and arbitrators in international arbitrations to review the Rules throughout the proceeding.

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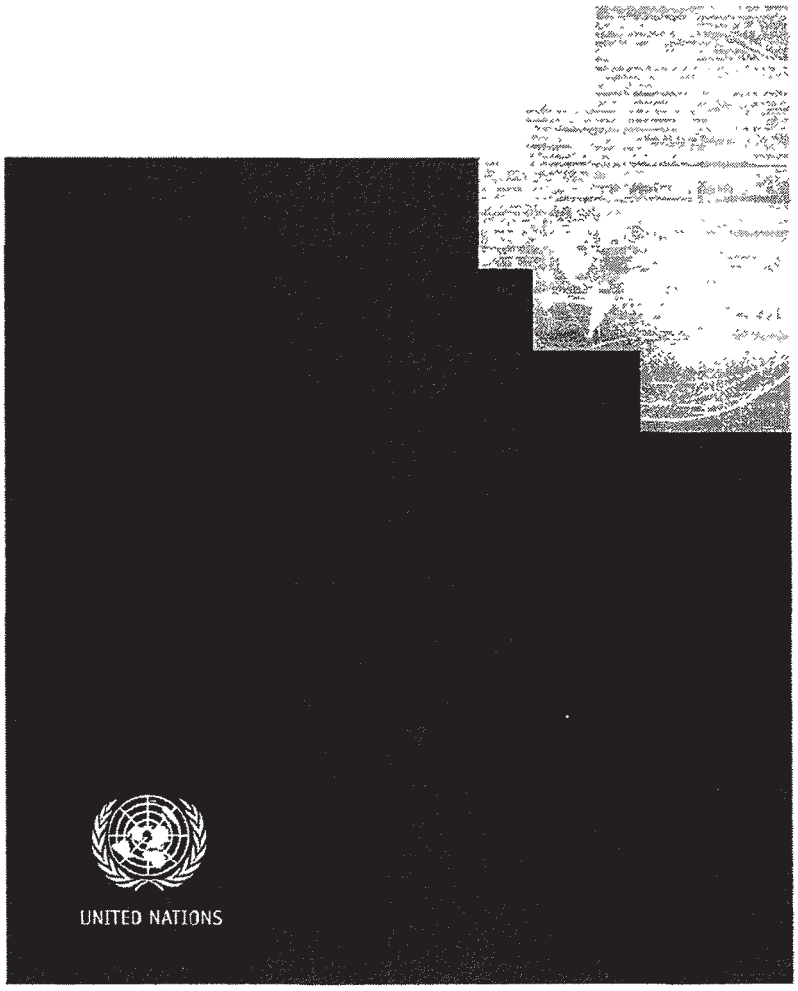
UNCITRAL Notes on Organizing Arbitral Proceedings



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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL
Notes on Organizing Arbitral Proceedings

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Preface

The United Nations Commission on International Trade Law (UNCITRAL) finalized the Notes at its twenty-ninth session (New York, 28 May–14 June 1996). In addition to the 36 member States of the Commission, representatives of many other States and of a number of international organizations had participated in the deliberations. In preparing the draft materials, the Secretariat consulted with experts from various legal systems, national arbitration bodies, as well as international professional associations.

The Commission, after an initial discussion on the project in 1993,[1] considered in 1994 a draft entitled "Draft Guidelines for Preparatory Conferences in Arbitral Proceedings".[2] That draft was also discussed at several meetings of arbitration practitioners, including the XIIth International Arbitration Congress, held by the International Council for Commercial Arbitration (ICCA) at Vienna from 3 to 6 November 1994.[3] On the basis of those discussions in the Commission and elsewhere, the Secretariat prepared "draft Notes on Organizing Arbitral Proceedings".[4] The Commission considered the draft Notes in 1995,[5] and a revised draft in 1996,[6] when the Notes were finalized.[7]

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[1] Report of the United Nations Commission on International Trade Law on the work of its twenty-sixth session, *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17* (A/48/17) (reproduced in *UNCITRAL Yearbook*, vol XXIV 1993, part one), paras 291-296.

[2] The draft Guidelines have been published as document A/CN.9/396 and Add 1 (reproduced in *UNCITRAL Yearbook*, vol XXV. 1994, part two, IV); the considerations of the Commission are reflected in the report of the United Nations Commission on International Trade Law on the work of its twenty-seventh session, *Official Records of the General Assembly, Forty-ninth Session Supplement No. 17* (A/49/17) (reproduced in *UNCITRAL Yearbook*, Vol. XXV 1994, part two, IV), paras 111-195

[3] The proceedings of the Congress are published in *Planning Efficient Arbitration Proceedings/The Law Applicable in International Arbitration, ICCA Congress Series No 7*, Kluwer Law International, The Hague, 1996

[4] The draft Notes have been published as document A/CN 9/410 (reproduced in *UNCITRAL Yearbook*, vol. XXVI· 1995, part two, III)

[5] Report of the United Nations Commission on International Trade Law on the work of its twenty-eighth session, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 17* (A/50/17) (reproduced in *UNCITRAL Yearbook*, vol. XXVI: 1995, part one), paras. 314-373

[6] The revised draft Notes have been published as document A/CN.9/423 (reproduced in *UNCITRAL Yearbook*, vol XXVII: 1996, part two)

[7] Report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session, *Official Records of the General Assembly, Fifty-first Session, Supplement No 17* (A/51/17) (reproduced in *UNCITRAL Yearbook*, vol XXVII· 1996, part one), paras. 11-54

Contents

INTRODUCTION

Purpose of the Notes

1. The purpose of the Notes is to assist arbitration practitioners by listing and briefly describing questions on which appropriately timed decisions on organizing arbitral proceedings may be useful. The text, prepared with a particular view to international arbitrations, may be used whether or not the arbitration is administered by an arbitral institution.

Non-binding character of the Notes

2. No legal requirement binding on the arbitrators or the parties is imposed by the Notes. The arbitral tribunal remains free to use the Notes as it sees fit and is not required to give reasons for disregarding them.

3. The Notes are not suitable to be used as arbitration rules, since they do not establish any obligation of the arbitral tribunal or the parties to act in a particular way. Accordingly, the use of the Notes cannot imply any modification of the arbitration rules that the parties may have agreed upon.

Discretion in conduct of proceedings and usefulness of timely decisions on organizing proceedings

4. Laws governing the arbitral procedure and arbitration rules that parties may agree upon typically allow the arbitral tribunal broad discretion and flexibility in the conduct of arbitral proceedings.[8] This is useful in that it enables the arbitral tribunal to take decisions on the organization of proceedings that take into account the circumstances of the case, the expectations of the parties and of the members of the arbitral tribunal, and the need for a just and cost-efficient resolution of the dispute.

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[8] A prominent example of such rules are the UNCITRAL Arbitration Rules, which provide in article 15(1): "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."

5. Such discretion may make it desirable for the arbitral tribunal to give the parties a timely indication as to the organization of the proceedings and the manner in which the tribunal intends to proceed. This is particularly desirable in international arbitrations, where the participants may be accustomed to differing styles of conducting arbitrations. Without such guidance, a party may find aspects of the proceedings unpredictable and difficult to prepare for. That may lead to misunderstandings, delays and increased costs.

Multi-party arbitration

6. These Notes are intended for use not only in arbitrations with two parties but also in arbitrations with three or more parties. Use of the Notes in multi-party arbitration is referred to below in paragraphs 86-88 (item 18).

Process of making decisions on organizing arbitral proceedings

7. Decisions by the arbitral tribunal on organizing arbitral proceedings may be taken with or without previous consultations with the parties. The method chosen depends on whether, in view of the type of the question to be decided, the arbitral tribunal considers that consultations are not necessary or that hearing the views of the parties would be beneficial for increasing the predictability of the proceedings or improving the procedural atmosphere.

8. The consultations, whether they involve only the arbitrators or also the parties, can be held in one or more meetings, or can be carried out by correspondence or telecommunications such as telefax or conference telephone calls or other electronic means. Meetings may be held at the venue of arbitration or at some other appropriate location.

9. In some arbitrations a special meeting may be devoted exclusively to such procedural consultations; alternatively, the consultations may be held in conjunction with a hearing on the substance of the dispute. Practices differ as to whether such special meetings should be held and how they should be organized. Special procedural meetings of the arbitrators and the parties separate from hearings are in practice referred to by expressions such as "preliminary meeting", "pre-hearing conference", "preparatory conference", "pre-hearing review", or terms of similar

meaning. The terms used partly depend on the stage of the proceedings at which the meeting is taking place.

List of matters for possible consideration in organizing arbitral proceedings

10. The Notes provide a list, followed by annotations, of matters on which the arbitral tribunal may wish to formulate decisions on organizing arbitral proceedings.

11. Given that procedural styles and practices in arbitration vary widely, that the purpose of the Notes is not to promote any practice as best practice, and that the Notes are designed for universal use, it is not attempted in the Notes to describe in detail different arbitral practices or express a preference for any of them.

12. The list, while not exhaustive, covers a broad range of situations that may arise in an arbitration. In many arbitrations, however, only a limited number of the matters mentioned in the list need to be considered. It also depends on the circumstances of the case at which stage or stages of the proceedings it would be useful to consider matters concerning the organization of the proceedings. Generally, in order not to create opportunities for unnecessary discussions and delay, it is advisable not to raise a matter prematurely, i.e. before it is clear that a decision is needed.

13. When the Notes are used, it should be borne in mind that the discretion of the arbitral tribunal in organizing the proceedings may be limited by arbitration rules, by other provisions agreed to by the parties and by the law applicable to the arbitral procedure. When an arbitration is administered by an arbitral institution, various matters discussed in the Notes may be covered by the rules and practices of that institution.

LIST OF MATTERS FOR POSSIBLE CONSIDERATION IN ORGANIZING ARBITRAL PROCEEDINGS

ANNOTATIONS

1. Set of arbitration rules

If the parties have not agreed on a set of arbitration rules, would they wish to do so

14. Sometimes parties who have not included in their arbitration agreement a stipulation that a set of arbitration rules will govern their arbitral proceedings might wish to do so after the arbitration has begun. If that occurs, the UNCITRAL Arbitration Rules may be used either without modification or with such modifications as the parties might wish to agree upon In the alternative, the parties might wish to adopt the rules of an arbitral institution; in that case, it may be necessary to secure the agreement of that institution and to stipulate the terms under which the arbitration could be carried out in accordance with the rules of that institution.

15. However, caution is advised as consideration of a set of arbitration rules might delay the proceedings or give rise to unnecessary controversy.

16. It should be noted that agreement on arbitration rules is not a necessity and that, if the parties do not agree on a set of arbitration rules, the arbitral tribunal has the power to continue the proceedings and determine how the case will be conducted.

2. Language of proceedings

17. Many rules and laws on arbitral procedure empower the arbitral tribunal to determine the language or languages to be used in the proceedings, if the parties have not reached an agreement thereon.

(a) Possible need for translation of documents, in full or in part

18. Some documents annexed to the statements of claim and defence or submitted later may not be in the language of the proceedings. Bearing in mind the needs of the proceedings and economy, it may be considered whether the arbitral tribunal should order that any of those documents or parts thereof should be accompanied by a translation into the language of the proceedings.

(b) Possible need for interpretation of oral presentations

19 If interpretation will be necessary during oral hearings, it is advisable to consider whether the interpretation will be simultaneous or consecutive and whether the arrangements should be the responsibility of a party or the arbitral tribunal. In an arbitration administered by an institution, interpretation as well as translation services are often arranged by the arbitral institution.

(c) Cost of translation and interpretation

20. In taking decisions about translation or interpretation, it is advisable to decide whether any or all of the costs are to be paid directly by a party or whether they will be paid out of the deposits and apportioned between the parties along with the other arbitration costs.

3. Place of arbitration

(a) Determination of the place of arbitration, if not already agreed upon by the parties

21. Arbitration rules usually allow the parties to agree on the place of arbitration, subject to the requirement of some arbitral institutions that arbitrations under their rules be conducted at a particular place, usually the location of the institution. If the place has not been so agreed upon, the rules governing the arbitration typically provide that it is in the power of the arbitral tribunal or the institution administering the arbitration to determine the place. If the arbitral tribunal is to make that determination, it may wish to hear the views of the parties before doing so.

22. Various factual and legal factors influence the choice of the place of arbitration, and their relative importance varies from case to case. Among the more prominent factors are: *(a)* suitability of the law on arbitral procedure of the place of arbitration; *(b)* whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced; *(c)* convenience of the parties and the arbitrators, including the travel distances; *(d)* availability and cost of support services needed; and *(e)* location of the subject-matter in dispute and proximity of evidence.

(b) Possibility of meetings outside the place of arbitration

23. Many sets of arbitration rules and laws on arbitral procedure expressly allow the arbitral tribunal to hold meetings elsewhere than at the place of arbitration. For example, under the UNCITRAL Model Law on International Commercial Arbitration "the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents" (article 20(2)). The purpose of this discretion is to permit arbitral proceedings to be carried out in a manner that is most efficient and economical.

4. Administrative services that may be needed for the arbitral tribunal to carry out its functions

24. Various administrative services (e.g. hearing rooms or secretarial services) may need to be procured for the arbitral tribunal to be able to carry out its functions. When the arbitration is administered by an arbitral institution, the institution will usually provide all or a good part of the required administrative support to the arbitral tribunal. When an arbitration administered by an arbitral institution takes place away from the seat of the institution, the institution may be able to arrange for administrative services to be obtained from another source, often an arbitral institution, some arbitral institutions have entered into cooperation agreements with a view to providing mutual assistance in servicing arbitral proceedings.

25. When the case is not administered by an institution, or the involvement of the institution does not include providing administrative support, usually the administrative arrangements for the proceedings will be made by the arbitral tribunal or the presiding arbitrator; it may also be acceptable to leave some of the arrangements to the parties, or to one of the parties subject to agreement of the other party or parties. Even in such cases, a convenient source of administrative support might be found in arbitral institutions, which often offer their facilities to arbitrations not governed by the rules of the institution. Otherwise, some services could be procured from entities such as chambers of commerce, hotels or specialized firms providing secretarial or other support services.

26. Administrative services might be secured by engaging a secretary of the arbitral tribunal (also referred to as registrar, clerk,

administrator or rapporteur), who carries out the tasks under the direction of the arbitral tribunal. Some arbitral institutions routinely assign such persons to the cases administered by them. In arbitrations not administered by an institution or where the arbitral institution does not appoint a secretary, some arbitrators frequently engage such persons, at least in certain types of cases, whereas many others normally conduct the proceedings without them.

27. To the extent the tasks of the secretary are purely organizational (e.g. obtaining meeting rooms and providing or coordinating secretarial services), this is usually not controversial. Differences in views, however, may arise if the tasks include legal research and other professional assistance to the arbitral tribunal (e.g. collecting case law or published commentaries on legal issues defined by the arbitral tribunal, preparing summaries from case law and publications, and sometimes also preparing drafts of procedural decisions or drafts of certain parts of the award, in particular those concerning the facts of the case). Views or expectations may differ especially where a task of the secretary is similar to professional functions of the arbitrators. Such a role of the secretary is in the view of some commentators inappropriate or is appropriate only under certain conditions, such as that the parties agree thereto. However, it is typically recognized that it is important to ensure that the secretary does not perform any decision-making function of the arbitral tribunal.

5. Deposits in respect of costs

(a) Amount to be deposited

28. In an arbitration administered by an institution, the institution often sets, on the basis of an estimate of the costs of the proceedings, the amount to be deposited as an advance for the costs of the arbitration. In other cases it is customary for the arbitral tribunal to make such an estimate and request a deposit. The estimate typically includes travel and other expenses by the arbitrators, expenditures for administrative assistance required by the arbitral tribunal, costs of any expert advice required by the arbitral tribunal, and the fees for the arbitrators. Many arbitration rules have provisions on this matter, including on whether the deposit should be made by the two parties (or all parties in a multi-party case) or only by the claimant.

(b) Management of deposits

29. When the arbitration is administered by an institution, the institution's services may include managing and accounting for

the deposited money. Where that is not the case, it might be useful to clarify matters such as the type and location of the account in which the money will be kept and how the deposits will be managed.

(c) Supplementary deposits

30. If during the course of proceedings it emerges that the costs will be higher than anticipated, supplementary deposits may be required (e.g. because the arbitral tribunal decides pursuant to the arbitration rules to appoint an expert).

6. Confidentiality of information relating to the arbitration; possible agreement thereon

31. It is widely viewed that confidentiality is one of the advantageous and helpful features of arbitration. Nevertheless, there is no uniform answer in national laws as to the extent to which the participants in an arbitration are under the duty to observe the confidentiality of information relating to the case. Moreover, parties that have agreed on arbitration rules or other provisions that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognize an implied commitment to confidentiality. Furthermore, the participants in an arbitration might not have the same understanding as regards the extent of confidentiality that is expected. Therefore, the arbitral tribunal might wish to discuss that with the parties and, if considered appropriate, record any agreed principles on the duty of confidentiality.

32. An agreement on confidentiality might cover, for example, one or more of the following matters: the material or information that is to be kept confidential (e g. pieces of evidence, written and oral arguments, the fact that the arbitration is taking place, identity of the arbitrators, content of the award); measures for maintaining confidentiality of such information and hearings; whether any special procedures should be employed for maintaining the confidentiality of information transmitted by electronic means (e.g. because communication equipment is shared by several users, or because electronic mail over public networks is considered not sufficiently protected against unauthorized access); circumstances in which confidential information may be disclosed in part or in whole (e.g. in the context of disclosures of information in the public domain, or if required by law or a regulatory body).

7. Routing of written communications among the parties and the arbitrators

33. To the extent the question how documents and other written communications should be routed among the parties and the arbitrators is not settled by the agreed rules, or, if an institution administers the case, by the practices of the institution, it is useful for the arbitral tribunal to clarify the question suitably early so as to avoid misunderstandings and delays.

34. Among various possible patterns of routing, one example is that a party transmits the appropriate number of copies to the arbitral tribunal, or to the arbitral institution, if one is involved, which then forwards them as appropriate. Another example is that a party is to send copies simultaneously to the arbitrators and the other party or parties. Documents and other written communications directed by the arbitral tribunal or the presiding arbitrator to one or more parties may also follow a determined pattern, such as through the arbitral institution or by direct transmission. For some communications, in particular those on organizational matters (e.g. dates for hearings), more direct routes of communication may be agreed, even if, for example, the arbitral institution acts as an intermediary for documents such as the statements of claim and defence, evidence or written arguments

8. Telefax and other electronic means of sending documents

(a) Telefax

35. Telefax, which offers many advantages over traditional means of communication, is widely used in arbitral proceedings. Nevertheless, should it be thought that, because of the characteristics of the equipment used, it would be preferable not to rely only on a telefacsimile of a document, special arrangements may be considered, such as that a particular piece of written evidence should be mailed or otherwise physically delivered, or that certain telefax messages should be confirmed by mailing or otherwise delivering documents whose facsimile were transmitted by electronic means. When a document should not be sent by telefax, it may, however, be appropriate, in order to avoid an unnecessarily rigid procedure, for the arbitral tribunal to retain discretion to accept an advance copy of a document by telefax for the purposes of meeting a deadline, provided that the document itself is received within a reasonable time thereafter.

(b) Other electronic means (e.g. electronic mail and magnetic or optical disk)

36. It might be agreed that documents, or some of them, will be exchanged not only in paper-based form, but in addition also in an electronic form other than telefax (e.g. as electronic mail, or on a magnetic or optical disk), or only in electronic form. Since the use of electronic means depends on the aptitude of the persons involved and the availability of equipment and computer programs, agreement is necessary for such means to be used. If both paper-based and electronic means are to be used, it is advisable to decide which one is controlling and, if there is a time-limit for submitting a document, which act constitutes submission.

37 When the exchange of documents in electronic form is planned, it is useful, in order to avoid technical difficulties, to agree on matters such as: data carriers (e.g. electronic mail or computer disks) and their technical characteristics; computer programs to be used in preparing the electronic records; instructions for transforming the electronic records into human-readable form; keeping of logs and back-up records of communications sent and received; information in human-readable form that should accompany the disks (e.g. the names of the originator and recipient, computer program, titles of the electronic files and the back-up methods used); procedures when a message is lost or the communication system otherwise fails; and identification of persons who can be contacted if a problem occurs.

9. Arrangements for the exchange of written submissions

38. After the parties have initially stated their claims and defences, they may wish, or the arbitral tribunal might request them, to present further written submissions so as to prepare for the hearings or to provide the basis for a decision without hearings. In such submissions, the parties, for example, present or comment on allegations and evidence, cite or explain law, or make or react to proposals. In practice such submissions are referred to variously as, for example, statement, memorial, counter-memorial, brief, counter-brief, reply, réplique, duplique, rebuttal or rejoinder; the terminology is a matter of linguistic usage and the scope or sequence of the submission.

(a) Scheduling of written submissions

39. It is advisable that the arbitral tribunal set time-limits for written submissions. In enforcing the time-limits, the arbitral

tribunal may wish, on the one hand, to make sure that the case is not unduly protracted and, on the other hand, to reserve a degree of discretion and allow late submissions if appropriate under the circumstances. In some cases the arbitral tribunal might prefer not to plan the written submissions in advance, thus leaving such matters, including time-limits, to be decided in light of the developments in the proceedings. In other cases, the arbitral tribunal may wish to determine, when scheduling the first written submissions, the number of subsequent submissions.

40. Practices differ as to whether, after the hearings have been held, written submissions are still acceptable. While some arbitral tribunals consider post-hearing submissions unacceptable, others might request or allow them on a particular issue. Some arbitral tribunals follow the procedure according to which the parties are not requested to present written evidence and legal arguments to the arbitral tribunal before the hearings; in such a case, the arbitral tribunal may regard it as appropriate that written submissions be made after the hearings.

(b) Consecutive or simultaneous submissions

41. Written submissions on an issue may be made consecutively, i.e. the party who receives a submission is given a period of time to react with its counter submission. Another possibility is to request each party to make the submission within the same time period to the arbitral tribunal or the institution administering the case; the received submissions are then forwarded simultaneously to the respective other party or parties. The approach used may depend on the type of issues to be commented upon and the time in which the views should be clarified. With consecutive submissions, it may take longer than with simultaneous ones to obtain views of the parties on a given issue. Consecutive submissions, however, allow the reacting party to comment on all points raised by the other party or parties, which simultaneous submissions do not, thus, simultaneous submissions might possibly necessitate further submissions.

10. Practical details concerning written submissions and evidence (e.g. method of submission, copies, numbering, references)

42. Depending on the volume and kind of documents to be handled, it might be considered whether practical arrangements on details such as the following would be helpful:

- Whether the submissions will be made as paper documents or by electronic means, or both (see paragraphs 35-37);
- The number of copies in which each document is to be submitted;
- A system for numbering documents and items of evidence, and a method for marking them, including by tabs;
- The form of references to documents (e.g. by the heading and the number assigned to the document or its date);
- Paragraph numbering in written submissions, in order to facilitate precise references to parts of a text;
- When translations are to be submitted as paper documents, whether the translations are to be contained in the same volume as the original texts or included in separate volumes.

11. Defining points at issue; order of deciding issues; defining relief or remedy sought

(a) Should a list of points at issue be prepared

43. In considering the parties' allegations and arguments, the arbitral tribunal may come to the conclusion that it would be useful for it or for the parties to prepare, for analytical purposes and for ease of discussion, a list of the points at issue, as opposed to those that are undisputed. If the arbitral tribunal determines that the advantages of working on the basis of such a list outweigh the disadvantages, it chooses the appropriate stage of the proceedings for preparing a list, bearing in mind also that subsequent developments in the proceedings may require a revision of the points at issue. Such an identification of points at issue might help to concentrate on the essential matters, to reduce the number of points at issue by agreement of the parties, and to select the best and most economical process for resolving the dispute. However, possible disadvantages of preparing such a list include delay, adverse effect on the flexibility of the proceedings, or unnecessary disagreements about whether the arbitral tribunal has decided all issues submitted to it or whether the award contains decisions on matters beyond the scope of the submission to arbitration. The terms of reference required under some arbitration rules, or in agreements of parties, may serve the same purpose as the above-described list of points at issue.

(b) In which order should the points at issue be decided

44 While it is often appropriate to deal with all the points at issue collectively, the arbitral tribunal might decide to take them

up during the proceedings in a particular order. The order may be due to a point being preliminary relative to another (e.g a decision on the jurisdiction of the arbitral tribunal is preliminary to consideration of substantive issues, or the issue of responsibility for a breach of contract is preliminary to the issue of the resulting damages). A particular order may be decided also when the breach of various contracts is in dispute or when damages arising from various events are claimed.

45. If the arbitral tribunal has adopted a particular order of deciding points at issue, it might consider it appropriate to issue a decision on one of the points earlier than on the other ones. This might be done, for example, when a discrete part of a claim is ready for decision while the other parts still require extensive consideration, or when it is expected that after deciding certain issues the parties might be more inclined to settle the remaining ones. Such earlier decisions are referred to by expressions such as "partial", "interlocutory" or "interim" awards or decisions, depending on the type of issue dealt with and on whether the decision is final with respect to the issue it resolves. Questions that might be the subject of such decisions are, for example, jurisdiction of the arbitral tribunal, interim measures of protection, or the liability of a party.

(c) Is there a need to define more precisely the relief or remedy sought

46. If the arbitral tribunal considers that the relief or remedy sought is insufficiently definite, it may wish to explain to the parties the degree of definiteness with which their claims should be formulated. Such an explanation may be useful since criteria are not uniform as to how specific the claimant must be in formulating a relief or remedy.

12. Possible settlement negotiations and their effect on scheduling proceedings

47. Attitudes differ as to whether it is appropriate for the arbitral tribunal to bring up the possibility of settlement. Given the divergence of practices in this regard, the arbitral tribunal should only suggest settlement negotiations with caution. However, it may be opportune for the arbitral tribunal to schedule the proceedings in a way that might facilitate the continuation or initiation of settlement negotiations.

13. Documentary evidence

(a) Time-limits for submission of documentary evidence intended to be submitted by the parties; consequences of late submission

48. Often the written submissions of the parties contain sufficient information for the arbitral tribunal to fix the time-limit for submitting evidence. Otherwise, in order to set realistic time periods, the arbitral tribunal may wish to consult with the parties about the time that they would reasonably need.

49. The arbitral tribunal may wish to clarify that evidence submitted late will as a rule not be accepted. It may wish not to preclude itself from accepting a late submission of evidence if the party shows sufficient cause for the delay.

(b) Whether the arbitral tribunal intends to require a party to produce documentary evidence

50. Procedures and practices differ widely as to the conditions under which the arbitral tribunal may require a party to produce documents. Therefore, the arbitral tribunal might consider it useful, when the agreed arbitration rules do not provide specific conditions, to clarify to the parties the manner in which it intends to proceed.

51. The arbitral tribunal may wish to establish time-limits for the production of documents. The parties might be reminded that, if the requested party duly invited to produce documentary evidence fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal is free to draw its conclusions from the failure and may make the award on the evidence before it.

(c) Should assertions about the origin and receipt of documents and about the correctness of photocopies be assumed as accurate

52. It may be helpful for the arbitral tribunal to inform the parties that it intends to conduct the proceedings on the basis that, unless a party raises an objection to any of the following conclusions within a specified period of time: *(a)* a document is accepted as having originated from the source indicated in the document; *(b)* a copy of a dispatched communication (e.g. letter, telex, telefax or other electronic message) is accepted without further proof

as having been received by the addressee; and *(c)* a copy is accepted as correct. A statement by the arbitral tribunal to that effect can simplify the introduction of documentary evidence and discourage unfounded and dilatory objections, at a late stage of the proceedings, to the probative value of documents. It is advisable to provide that the time-limit for objections will not be enforced if the arbitral tribunal considers the delay justified.

(d) Are the parties willing to submit jointly a single set of documentary evidence

53. The parties may consider submitting jointly a single set of documentary evidence whose authenticity is not disputed. The purpose would be to avoid duplicate submissions and unnecessary discussions concerning the authenticity of documents, without prejudicing the position of the parties concerning the content of the documents. Additional documents may be inserted later if the parties agree. When a single set of documents would be too voluminous to be easily manageable, it might be practical to select a number of frequently used documents and establish a set of "working" documents. A convenient arrangement of documents in the set may be according to chronological order or subject-matter. It is useful to keep a table of contents of the documents, for example, by their short headings and dates, and to provide that the parties will refer to documents by those headings and dates.

(e) Should voluminous and complicated documentary evidence be presented through summaries, tabulations, charts, extracts or samples

54. When documentary evidence is voluminous and complicated, it may save time and costs if such evidence is presented by a report of a person competent in the relevant field (e.g. public accountant or consulting engineer). The report may present the information in the form of summaries, tabulations, charts, extracts or samples. Such presentation of evidence should be combined with arrangements that give the interested party the opportunity to review the underlying data and the methodology of preparing the report.

14. Physical evidence other than documents

55. In some arbitrations the arbitral tribunal is called upon to assess physical evidence other than documents, for example, by inspecting samples of goods, viewing a video recording or observing the functioning of a machine.

(a) What arrangements should be made if physical evidence will be submitted

56. If physical evidence will be submitted, the arbitral tribunal may wish to fix the time schedule for presenting the evidence, make arrangements for the other party or parties to have a suitable opportunity to prepare itself for the presentation of the evidence, and possibly take measures for safekeeping the items of evidence.

(b) What arrangements should be made if an on-site inspection is necessary

57. If an on-site inspection of property or goods will take place, the arbitral tribunal may consider matters such as timing, meeting places, other arrangements to provide the opportunity for all parties to be present, and the need to avoid communications between arbitrators and a party about points at issue without the presence of the other party or parties.

58. The site to be inspected is often under the control of one of the parties, which typically means that employees or representatives of that party will be present to give guidance and explanations. It should be borne in mind that statements of those representatives or employees made during an on-site inspection, as contrasted with statements those persons might make as witnesses in a hearing, should not be treated as evidence in the proceedings.

15. Witnesses

59. While laws and rules on arbitral procedure typically leave broad freedom concerning the manner of taking evidence of witnesses, practices on procedural points are varied. In order to facilitate the preparations of the parties for the hearings, the arbitral tribunal may consider it appropriate to clarify, in advance of the hearings, some or all of the following issues.

(a) Advance notice about a witness whom a party intends to present; written witnesses' statements

60. To the extent the applicable arbitration rules do not deal with the matter, the arbitral tribunal may wish to require that each party give advance notice to the arbitral tribunal and the other party or parties of any witness it intends to present. As to the

content of the notice, the following is an example of what might be required, in addition to the names and addresses of the witnesses: *(a)* the subject upon which the witnesses will testify; *(b)* the language in which the witnesses will testify; and *(c)* the nature of the relationship with any of the parties, qualifications and experience of the witnesses if and to the extent these are relevant to the dispute or the testimony, and how the witnesses learned about the facts on which they will testify. However, it may not be necessary to require such a notice, in particular if the thrust of the testimony can be clearly ascertained from the party's allegations.

61. Some practitioners favour the procedure according to which the party presenting witness evidence submits a signed witness's statement containing testimony itself. It should be noted, however, that such practice, which implies interviewing the witness by the party presenting the testimony, is not known in all parts of the world and, moreover, that some practitioners disapprove of it on the ground that such contacts between the party and the witness may compromise the credibility of the testimony and are therefore improper (see paragraph 67). Notwithstanding these reservations, signed witness's testimony has advantages in that it may expedite the proceedings by making it easier for the other party or parties to prepare for the hearings or for the parties to identify uncontested matters. However, those advantages might be outweighed by the time and expense involved in obtaining the written testimony.

62 If a signed witness's statement should be made under oath or similar affirmation of truthfulness, it may be necessary to clarify by whom the oath or affirmation should be administered and whether any formal authentication will be required by the arbitral tribunal.

(b) Manner of taking oral evidence of witnesses

(i) Order in which questions will be asked and the manner in which the hearing of witnesses will be conducted

63. To the extent that the applicable rules do not provide an answer, it may be useful for the arbitral tribunal to clarify how witnesses will be heard. One of the various possibilities is that a witness is first questioned by the arbitral tribunal, whereupon questions are asked by the parties, first by the party who called the witness. Another possibility is for the witness to be questioned by the party presenting the witness and then by the other party or parties, while the arbitral tribunal might pose questions

during the questioning or after the parties on points that in the tribunal's view have not been sufficiently clarified. Differences exist also as to the degree of control the arbitral tribunal exercises over the hearing of witnesses. For example, some arbitrators prefer to permit the parties to pose questions freely and directly to the witness, but may disallow a question if a party objects; other arbitrators tend to exercise more control and may disallow a question on their initiative or even require that questions from the parties be asked through the arbitral tribunal.

(ii) Whether oral testimony will be given under oath or affirmation and, if so, in what form an oath or affirmation should be made

64. Practices and laws differ as to whether or not oral testimony is to be given under oath or affirmation. In some legal systems, the arbitrators are empowered to put witnesses on oath, but it is usually in their discretion whether they want to do so. In other systems, oral testimony under oath is either unknown or may even be considered improper as only an official such as a judge or notary may have the authority to administer oaths

(iii) May witnesses be in the hearing room when they are not testifying

65. Some arbitrators favour the procedure that, except if the circumstances suggest otherwise, the presence of a witness in the hearing room is limited to the time the witness is testifying; the purpose is to prevent the witness from being influenced by what is said in the hearing room, or to prevent that the presence of the witness would influence another witness. Other arbitrators consider that the presence of a witness during the testimony of other witnesses may be beneficial in that possible contradictions may be readily clarified or that their presence may act as a deterrent against untrue statements. Other possible approaches may be that witnesses are not present in the hearing room before their testimony, but stay in the room after they have testified, or that the arbitral tribunal decides the question for each witness individually depending on what the arbitral tribunal considers most appropriate. The arbitral tribunal may leave the procedure to be decided during the hearings, or may give guidance on the question in advance of the hearings.

(c) The order in which the witnesses will be called

66 When several witnesses are to be heard and longer testimony is expected, it is likely to reduce costs if the order in which they will be called is known in advance and their presence can be

scheduled accordingly. Each party might be invited to suggest the order in which it intends to present the witnesses, while it would be up to the arbitral tribunal to approve the scheduling and to make departures from it.

(d) Interviewing witnesses prior to their appearance at a hearing

67. In some legal systems, parties or their representatives are permitted to interview witnesses, prior to their appearance at the hearing, as to such matters as their recollection of the relevant events, their experience, qualifications or relation with a participant in the proceedings. In those legal systems such contacts are usually not permitted once the witness's oral testimony has begun. In other systems such contacts with witnesses are considered improper. In order to avoid misunderstandings, the arbitral tribunal may consider it useful to clarify what kind of contacts a party is permitted to have with a witness in the preparations for the hearings.

(e) Hearing representatives of a party

68. According to some legal systems, certain persons affiliated with a party may only be heard as representatives of the party but not as witnesses. In such a case, it may be necessary to consider ground rules for determining which persons may not testify as witnesses (e.g. certain executives, employees or agents) and for hearing statements of those persons and for questioning them.

16. Experts and expert witnesses

69. Many arbitration rules and laws on arbitral procedure address the participation of experts in arbitral proceedings. A frequent solution is that the arbitral tribunal has the power to appoint an expert to report on issues determined by the tribunal; in addition, the parties may be permitted to present expert witnesses on points at issue. In other cases, it is for the parties to present expert testimony, and it is not expected that the arbitral tribunal will appoint an expert.

(a) Expert appointed by the arbitral tribunal

70. If the arbitral tribunal is empowered to appoint an expert, one possible approach is for the tribunal to proceed directly to

selecting the expert. Another possibility is to consult the parties as to who should be the expert; this may be done, for example, without mentioning a candidate, by presenting to the parties a list of candidates, soliciting proposals from the parties, or by discussing with the parties the "profile" of the expert the arbitral tribunal intends to appoint, i.e. the qualifications, experience and abilities of the expert.

(i) The expert's terms of reference

71. The purpose of the expert's terms of reference is to indicate the questions on which the expert is to provide clarification, to avoid opinions on points that are not for the expert to assess and to commit the expert to a time schedule. While the discretion to appoint an expert normally includes the determination of the expert's terms of reference, the arbitral tribunal may decide to consult the parties before finalizing the terms. It might also be useful to determine details about how the expert will receive from the parties any relevant information or have access to any relevant documents, goods or other property, so as to enable the expert to prepare the report. In order to facilitate the evaluation of the expert's report, it is advisable to require the expert to include in the report information on the method used in arriving at the conclusions and the evidence and information used in preparing the report.

(ii) The opportunity of the parties to comment on the expert's report, including by presenting expert testimony

72. Arbitration rules that contain provisions on experts usually also have provisions on the right of a party to comment on the report of the expert appointed by the arbitral tribunal. If no such provisions apply or more specific procedures than those prescribed are deemed necessary, the arbitral tribunal may, in light of those provisions, consider it opportune to determine, for example, the time period for presenting written comments of the parties, or, if hearings are to be held for the purpose of hearing the expert, the procedures for interrogating the expert by the parties or for the participation of any expert witnesses presented by the parties.

(b) Expert opinion presented by a party (expert witness)

73 If a party presents an expert opinion, the arbitral tribunal might consider requiring, for example, that the opinion be in writing, that the expert should be available to answer questions at hearings, and that, if a party will present an expert witness at a

hearing, advance notice must be given or that the written opinion must be presented in advance, as in the case of other witnesses (see paragraphs 60-62).

17. Hearings

(a) Decision whether to hold hearings

74. Laws on arbitral procedure and arbitration rules often have provisions as to the cases in which oral hearings must be held and as to when the arbitral tribunal has discretion to decide whether to hold hearings.

75. If it is up to the arbitral tribunal to decide whether to hold hearings, the decision is likely to be influenced by factors such as, on the one hand, that it is usually quicker and easier to clarify points at issue pursuant to a direct confrontation of arguments than on the basis of correspondence and, on the other hand, the travel and other cost of holding hearings, and that the need of finding acceptable dates for the hearings might delay the proceedings. The arbitral tribunal may wish to consult the parties on this matter.

(b) Whether one period of hearings should be held or separate periods of hearings

76. Attitudes vary as to whether hearings should be held in a single period of hearings or in separate periods, especially when more than a few days are needed to complete the hearings. According to some arbitrators, the entire hearings should normally be held in a single period, even if the hearings are to last for more than a week. Other arbitrators in such cases tend to schedule separate periods of hearings. In some cases issues to be decided are separated, and separate hearings set for those issues, with the aim that oral presentation on those issues will be completed within the allotted time. Among the advantages of one period of hearings are that it involves less travel costs, memory will not fade, and it is unlikely that people representing a party will change. On the other hand, the longer the hearings, the more difficult it may be to find early dates acceptable to all participants. Furthermore, separate periods of hearings may be easier to schedule, the subsequent hearings may be tailored to the development of the case, and the period between the hearings leaves time for analysing the records and negotiations between the parties aimed at narrowing the points at issue by agreement.

(c) Setting dates for hearings

77. Typically, firm dates will be fixed for hearings. Exceptionally, the arbitral tribunal may initially wish to set only "target dates" as opposed to definitive dates. This may be done at a stage of the proceedings when not all information necessary to schedule hearings is yet available, with the understanding that the target dates will either be confirmed or rescheduled within a reasonably short period. Such provisional planning can be useful to participants who are generally not available on short notice.

(d) Whether there should be a limit on the aggregate amount of time each party will have for oral arguments and questioning witnesses

78. Some arbitrators consider it useful to limit the aggregate amount of time each party has for any of the following: *(a)* making oral statements; *(b)* questioning its witnesses; and *(c)* questioning the witnesses of the other party or parties. In general, the same aggregate amount of time is considered appropriate for each party, unless the arbitral tribunal considers that a different allocation is justified. Before deciding, the arbitral tribunal may wish to consult the parties as to how much time they think they will need.

79. Such planning of time, provided it is realistic, fair and subject to judiciously firm control by the arbitral tribunal, will make it easier for the parties to plan the presentation of the various items of evidence and arguments, reduce the likelihood of running out of time towards the end of the hearings and avoid that one party would unfairly use up a disproportionate amount of time.

(e) The order in which the parties will present their arguments and evidence

80 Arbitration rules typically give broad latitude to the arbitral tribunal to determine the order of presentations at the hearings. Within that latitude, practices differ, for example, as to whether opening or closing statements are heard and their level of detail; the sequence in which the claimant and the respondent present their opening statements, arguments, witnesses and other evidence; and whether the respondent or the claimant has the last word. In view of such differences, or when no arbitration rules apply, it may foster efficiency of the proceedings if the arbitral tribunal clarifies to the parties, in advance of the hearings, the manner in which it will conduct the hearings, at least in broad lines.

(f) Length of hearings

81. The length of a hearing primarily depends on the complexity of the issues to be argued and the amount of witness evidence to be presented. The length also depends on the procedural style used in the arbitration. Some practitioners prefer to have written evidence and written arguments presented before the hearings, which thus can focus on the issues that have not been sufficiently clarified. Those practitioners generally tend to plan shorter hearings than those practitioners who prefer that most if not all evidence and arguments are presented to the arbitral tribunal orally and in full detail. In order to facilitate the parties' preparations and avoid misunderstandings, the arbitral tribunal may wish to clarify to the parties, in advance of the hearings, the intended use of time and style of work at the hearings.

(g) Arrangements for a record of the hearings

82. The arbitral tribunal should decide, possibly after consulting with the parties, on the method of preparing a record of oral statements and testimony during hearings. Among different possibilities, one method is that the members of the arbitral tribunal take personal notes. Another is that the presiding arbitrator during the hearing dictates to a typist a summary of oral statements and testimony. A further method, possible when a secretary of the arbitral tribunal has been appointed, may be to leave to that person the preparation of a summary record. A useful, though costly, method is for professional stenographers to prepare verbatim transcripts, often within the next day or a similarly short time period. A written record may be combined with tape-recording, so as to enable reference to the tape in case of a disagreement over the written record.

83 If transcripts are to be produced, it may be considered how the persons who made the statements will be given an opportunity to check the transcripts. For example, it may be determined that the changes to the record would be approved by the parties or, failing their agreement, would be referred for decision to the arbitral tribunal.

(h) Whether and when the parties are permitted to submit notes summarizing their oral arguments

84. Some legal counsel are accustomed to giving notes summarizing their oral arguments to the arbitral tribunal and to the

other party or parties. If such notes are presented, this is usually done during the hearings or shortly thereafter; in some cases, the notes are sent before the hearing. In order to avoid surprise, foster equal treatment of the parties and facilitate preparations for the hearings, advance clarification is advisable as to whether submitting such notes is acceptable and the time for doing so.

85. In closing the hearings, the arbitral tribunal will normally assume that no further proof is to be offered or submission to be made. Therefore, if notes are to be presented to be read after the closure of the hearings, the arbitral tribunal may find it worthwhile to stress that the notes should be limited to summarizing what was said orally and in particular should not refer to new evidence or new argument.

18. Multi-party arbitration

86. When a single arbitration involves more than two parties (multi-party arbitration), considerations regarding the need to organize arbitral proceedings, and matters that may be considered in that connection, are generally not different from two-party arbitrations. A possible difference may be that, because of the need to deal with more than two parties, multi-party proceedings can be more complicated to manage than bilateral proceedings. The Notes, notwithstanding a possible greater complexity of multi-party arbitration, can be used in multi-party as well as in two-party proceedings.

87. The areas of possibly increased complexity in multi-party arbitration are, for example, the flow of communications among the parties and the arbitral tribunal (see paragraphs 33, 34 and 38-41); if points at issue are to be decided at different points in time, the order of deciding them (paragraphs 44-45); the manner in which the parties will participate in hearing witnesses (paragraph 63); the appointment of experts and the participation of the parties in considering their reports (paragraphs 70-72); the scheduling of hearings (paragraph 76); the order in which the parties will present their arguments and evidence at hearings (paragraph 80).

88 The Notes, which are limited to pointing out matters that may be considered in organizing arbitral proceedings in general, do not cover the drafting of the arbitration agreement or the constitution of the arbitral tribunal, both issues that give rise to special questions in multi-party arbitration as compared to two-party arbitration.

19. Possible requirements concerning filing or delivering the award

89. Some national laws require that arbitral awards be filed or registered with a court or similar authority, or that they be delivered in a particular manner or through a particular authority. Those laws differ with respect to, for example, the type of award to which the requirement applies (e.g. to all awards or only to awards not rendered under the auspices of an arbitral institution); time periods for filing, registering or delivering the award (in some cases those time periods may be rather short); or consequences for failing to comply with the requirement (which might be, for example, invalidity of the award or inability to enforce it in a particular manner).

Who should take steps to fulfil any requirement

90. If such a requirement exists, it is useful, some time before the award is to be issued, to plan who should take the necessary steps to meet the requirement and how the costs are to be borne.

IBA Guidelines on Conflicts of Interest in International Arbitration

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of the IBA Council
on Thursday 23 October 2014

the global voice of
the legal profession®

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Contents

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IBA Guidelines on Conflicts of Interest in International Arbitration 2014

Since their issuance in 2004, the *IBA Guidelines on Conflicts of Interest in International Arbitration* (the 'Guidelines')[1] have gained wide acceptance within the international arbitration community. Arbitrators commonly use the Guidelines when making decisions about prospective appointments and disclosures. Likewise, parties and their counsel frequently consider the Guidelines in assessing the impartiality and independence of arbitrators, and arbitral institutions and courts also often consult the Guidelines in considering challenges to arbitrators. As contemplated when the Guidelines were first adopted, on the eve of their tenth anniversary it was considered appropriate to reflect on the accumulated experience of using them and to identify areas of possible clarification or improvement. Accordingly, in 2012, the IBA Arbitration Committee initiated a review of the Guidelines, which was conducted by an expanded Conflicts of Interest Subcommittee (the 'Subcommittee'),[2] representing diverse legal

1 The 2004 Guidelines were drafted by a Working Group of 19 experts: Henri Alvarez, Canada; John Beechey, England; Jim Carter, United States; Emmanuel Gaillard, France; Emilio Gonzales de Castilla, Mexico; Bernard Hanotiau, Belgium; Michael Hwang, Singapore; Albert Jan van den Berg, Belgium; Doug Jones, Australia; Gabrielle Kaufmann-Kohler, Switzerland; Arthur Marriott, England; Tore Wiwen Nilsson, Sweden; Hilmar Raeschke-Kessler, Germany; David W Rivkin, United States; Klaus Sachs, Germany; Nathalie Voser, Switzerland (Rapporteur); David Williams, New Zealand; Des Williams, South Africa; and Otto de Witt Wijnen, The Netherlands (Chair).

2 The members of the expanded Subcommittee on Conflicts of Interest were: Habib Almulla, United Arab Emirates; David Arias, Spain (Co-Chair); Julie Bédard,

cultures and a range of perspectives, including counsel, arbitrators and arbitration users. The Subcommittee was chaired by David Arias, later co-chaired by Julie Bédard, and the review process was conducted under the leadership of Pierre Bienvenu and Bernard Hanotiau.

While the Guidelines were originally intended to apply to both commercial and investment arbitration, it was found in the course of the review process that uncertainty lingered as to their application to investment arbitration. Similarly, despite a comment in the original version of the Guidelines that their application extended to non-legal professionals serving as arbitrator, there appeared to remain uncertainty in this regard as well. A consensus emerged in favour of a general affirmation that the Guidelines apply to both commercial and investment arbitration, and to both legal and non-legal professionals serving as arbitrator.

The Subcommittee has carefully considered a number of issues that have received attention in international arbitration practice since 2004, such as the effects of so-called 'advance waivers', whether the fact of acting concurrently as counsel and arbitrator in unrelated cases raising similar legal issues warrants disclosure, 'issue' conflicts, the independence and impartiality of arbitral or administrative secretaries and third-party funding. The revised Guidelines reflect the Subcommittee's conclusions on these issues.

United States (Co-Chair);José Astigarraga, United States; Pierre Bienvenu, Canada (Review Process Co-Chair); Karl-Heinz Böckstiegel, Germany; Yves Derains, France; Teresa Giovannini, Switzerland; Eduardo Damião Gonçalves, Brazil; Bernard Hanotiau, Belgium (Review Process Co-Chair); Paula Hodges, England; Toby Landau, England; Christian Leathley, England; Carole Malinvaud, France; Ciccu Mukhopadhaya, India; Yoshimi Ohara, Japan; Tinuade Oyekunle, Nigeria; Eun Young Park, Korea; Constantine Partasides, England; Peter Rees, The Netherlands; Anke Sessler, Germany; Guido Tawil, Argentina; Jingzhou Tao, China; Gäetan Verhoosel, England (Rapporteur); Nathalie Voser, Switzerland; Nassib Ziadé, United Arab Emirates; and Alexis Mourre. Assistance was provided by: Niuscha Bassiri, Belgium; Alison Fitzgerald, Canada; Oliver Cojo, Spain; and Ricardo Dalmaso Marques, Brazil.

The Subcommittee has also considered, in view of the evolution of the global practice of international arbitration, whether the revised Guidelines should impose stricter standards in regard to arbitrator disclosure. The revised Guidelines reflect the conclusion that, while the basic approach of the 2004 Guidelines should not be altered, disclosure should be required in certain circumstances not contemplated in the 2004 Guidelines. It is also essential to reaffirm that the fact of requiring disclosure – or of an arbitrator making a disclosure – does not imply the existence of doubts as to the impartiality or independence of the arbitrator. Indeed, the standard for disclosure differs from the standard for challenge. Similarly, the revised Guidelines are not in any way intended to discourage the service as arbitrators of lawyers practising in large firms or legal associations.

The Guidelines were adopted by resolution of the IBA Council on Thursday 23 October 2014. The Guidelines are available for download at: **www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx**

Signed by the Co-Chairs of the Arbitration Committee
Thursday 23 October 2014

Eduardo Zuleta

Paul Friedland

Introduction

1. Arbitrators and party representatives are often unsure about the scope of their disclosure obligations. The growth of international business, including larger corporate groups and international law firms, has generated more disclosures and resulted in increased complexity in the analysis of disclosure and conflict of interest issues. Parties have more opportunities to use challenges of arbitrators to delay arbitrations, or to deny the opposing party the arbitrator of its choice. Disclosure of any relationship, no matter how minor or serious, may lead to unwarranted or frivolous challenges. At the same time, it is important that more information be made available to the parties, so as to protect awards against challenges based upon alleged failures to disclose, and to promote a level playing field among parties and among counsel engaged in international arbitration.

2. Parties, arbitrators, institutions and courts face complex decisions about the information that arbitrators should disclose and the standards to apply to disclosure. In addition, institutions and courts face difficult decisions when an objection or a challenge is made after a disclosure. There is a tension between, on the one hand, the parties' right to disclosure of circumstances that may call into question an arbitrator's impartiality or independence in order to protect the parties' right to a fair hearing, and, on the other hand, the need to avoid unnecessary challenges against arbitrators in order to protect the parties' ability to select arbitrators of their choosing.

3. It is in the interest of the international arbitration community that arbitration proceedings are not hindered by ill-founded challenges against arbitrators and that the legitimacy of the process is not affected by uncertainty and a lack of uniformity in the applicable standards for

disclosures, objections and challenges. The 2004 Guidelines reflected the view that the standards existing at the time lacked sufficient clarity and uniformity in their application. The Guidelines, therefore, set forth some 'General Standards and Explanatory Notes on the Standards'. Moreover, in order to promote greater consistency and to avoid unnecessary challenges and arbitrator withdrawals and removals, the Guidelines list specific situations indicating whether they warrant disclosure or disqualification of an arbitrator. Such lists, designated 'Red', 'Orange' and 'Green' (the 'Application Lists'), have been updated and appear at the end of these revised Guidelines.

4. The Guidelines reflect the understanding of the IBA Arbitration Committee as to the best current international practice, firmly rooted in the principles expressed in the General Standards below. The General Standards and the Application Lists are based upon statutes and case law in a cross-section of jurisdictions, and upon the judgement and experience of practitioners involved in international arbitration. In reviewing the 2004 Guidelines, the IBA Arbitration Committee updated its analysis of the laws and practices in a number of jurisdictions. The Guidelines seek to balance the various interests of parties, representatives, arbitrators and arbitration institutions, all of whom have a responsibility for ensuring the integrity, reputation and efficiency of international arbitration. Both the 2004 Working Group and the Subcommittee in 2012/2014 have sought and considered the views of leading arbitration institutions, corporate counsel and other persons involved in international arbitration through public consultations at IBA annual meetings, and at meetings with arbitrators and practitioners. The comments received were reviewed in detail and many were adopted. The IBA Arbitration Committee is grateful for the serious consideration given to its proposals by so many institutions and individuals.

5. The Guidelines apply to international commercial arbitration and investment arbitration, whether the representation of the parties is carried out by lawyers or non-lawyers, and irrespective of whether or not non-legal professionals serve as arbitrators.

6. These Guidelines are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties. However, it is hoped that, as was the case for the 2004 Guidelines and other sets of rules and guidelines of the IBA Arbitration Committee, the revised Guidelines will find broad acceptance within the international arbitration community, and that they will assist parties, practitioners, arbitrators, institutions and courts in dealing with these important questions of impartiality and independence. The IBA Arbitration Committee trusts that the Guidelines will be applied with robust common sense and without unduly formalistic interpretation.

7. The Application Lists cover many of the varied situations that commonly arise in practice, but they do not purport to be exhaustive, nor could they be. Nevertheless, the IBA Arbitration Committee is confident that the Application Lists provide concrete guidance that is useful in applying the General Standards. The IBA Arbitration Committee will continue to study the actual use of the Guidelines with a view to furthering their improvement.

8. In 1987, the IBA published *Rules of Ethics for International Arbitrators*. Those Rules cover more topics than these Guidelines, and they remain in effect as to subjects that are not discussed in the Guidelines. The Guidelines supersede the *Rules of Ethics* as to the matters treated here.

Part I: General Standards Regarding Impartiality, Independence and Disclosure

(1) General Principle

Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.

Explanation to General Standard 1:

A fundamental principle underlying these Guidelines is that each arbitrator must be impartial and independent of the parties at the time he or she accepts an appointment to act as arbitrator, and must remain so during the entire course of the arbitration proceeding, including the time period for the correction or interpretation of a final award under the relevant rules, assuming such time period is known or readily ascertainable.

The question has arisen as to whether this obligation should extend to the period during which the award may be challenged before the relevant courts. The decision taken is that this obligation should not extend in this manner, unless the final award may be referred back to the original Arbitral Tribunal under the relevant applicable law or relevant institutional rules. Thus, the arbitrator's obligation in this regard ends when the Arbitral Tribunal has rendered the final award, and any correction or interpretation as may be permitted under the relevant rules has been

issued, or the time for seeking the same has elapsed, the proceedings have been finally terminated (for example, because of a settlement), or the arbitrator otherwise no longer has jurisdiction. If, after setting aside or other proceedings, the dispute is referred back to the same Arbitral Tribunal, a fresh round of disclosure and review of potential conflicts of interests may be necessary.

(2) Conflicts of Interest

(a) An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if he or she has any doubt as to his or her ability to be impartial or independent.

(b) The same principle applies if facts or circumstances exist, or have arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard 4.

(c) Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.

(d) Justifiable doubts necessarily exist as to the arbitrator's impartiality or independence in any of the situations described in the Non-Waivable Red List.

Explanation to General Standard 2:

(a) If the arbitrator has doubts as to his or her ability to be impartial and independent, the arbitrator must decline the appointment. This standard should apply regardless of the stage of the proceedings. This is a basic principle

that is spelled out in these Guidelines in order to avoid confusion and to foster confidence in the arbitral process.

(b) In order for standards to be applied as consistently as possible, the test for disqualification is an objective one. The wording 'impartiality or independence' derives from the widely adopted Article 12 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law, and the use of an appearance test based on justifiable doubts as to the impartiality or independence of the arbitrator, as provided in Article 12(2) of the UNCITRAL Model Law, is to be applied objectively (a 'reasonable third person test'). Again, as described in the Explanation to General Standard 3(e), this standard applies regardless of the stage of the proceedings.

(c) Laws and rules that rely on the standard of justifiable doubts often do not define that standard. This General Standard is intended to provide some context for making this determination.

(d) The Non-Waivable Red List describes circumstances that necessarily raise justifiable doubts as to the arbitrator's impartiality or independence. For example, because no one is allowed to be his or her own judge, there cannot be identity between an arbitrator and a party. The parties, therefore, cannot waive the conflict of interest arising in such a situation.

(3) Disclosure by the Arbitrator

(a) If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and the co-arbitrators, if any, prior to accepting his or her appointment

or, if thereafter, as soon as he or she learns of them.

(b) An advance declaration or waiver in relation to possible conflicts of interest arising from facts and circumstances that may arise in the future does not discharge the arbitrator's ongoing duty of disclosure under General Standard 3(a).

(c) It follows from General Standards 1 and 2(a) that an arbitrator who has made a disclosure considers himself or herself to be impartial and independent of the parties, despite the disclosed facts, and, therefore, capable of performing his or her duties as arbitrator. Otherwise, he or she would have declined the nomination or appointment at the outset, or resigned.

(d) Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.

(e) When considering whether facts or circumstances exist that should be disclosed, the arbitrator shall not take into account whether the arbitration is at the beginning or at a later stage.

Explanation to General Standard 3:

(a) The arbitrator's duty to disclose under General Standard 3(a) rests on the principle that the parties have an interest in being fully informed of any facts or circumstances that may be relevant in their view. Accordingly, General Standard 3(d) provides that any doubt as to whether certain facts or circumstances should be disclosed should be resolved in favour of disclosure. However, situations that, such as those set out in the Green List, could never lead to disqualification under the objective test set out in General Standard 2, need not be disclosed. As reflected in General Standard 3(c), a disclosure does not imply that the disclosed facts are such as to disqualify the arbitrator under General Standard 2.

The duty of disclosure under General Standard 3(a) is ongoing in nature.

(b) The IBA Arbitration Committee has considered the increasing use by prospective arbitrators of declarations in respect of facts or circumstances that may arise in the future, and the possible conflicts of interest that may result, sometimes referred to as 'advance waivers'. Such declarations do not discharge the arbitrator's ongoing duty of disclosure under General Standard 3(a). The Guidelines, however, do not otherwise take a position as to the validity and effect of advance declarations or waivers, because the validity and effect of any advance declaration or waiver must be assessed in view of the specific text of the advance declaration or waiver, the particular circumstances at hand and the applicable law.

(c) A disclosure does not imply the existence of a conflict of interest. An arbitrator who has made a disclosure to the parties considers himself or herself to be impartial and independent of the parties, despite the disclosed facts, or else he or she would have declined the nomination, or resigned. An arbitrator making a disclosure thus feels capable of performing his or her duties. It is the purpose of disclosure to allow the parties to judge whether they agree with the evaluation of the arbitrator and, if they so wish, to explore the situation further. It is hoped that the promulgation of this General Standard will eliminate the misconception that disclosure itself implies doubts sufficient to disqualify the arbitrator, or even creates a presumption in favour of disqualification. Instead, any challenge should only be successful if an objective test, as set forth in General Standard 2 above, is met. Under Comment 5 of the Practical Application of the General Standards, a failure to disclose certain facts and circumstances that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, does

not necessarily mean that a conflict of interest exists, or that a disqualification should ensue.

(d) In determining which facts should be disclosed, an arbitrator should take into account all circumstances known to him or her. If the arbitrator finds that he or she should make a disclosure, but that professional secrecy rules or other rules of practice or professional conduct prevent such disclosure, he or she should not accept the appointment, or should resign.

(e) Disclosure or disqualification (as set out in General Standards 2 and 3) should not depend on the particular stage of the arbitration. In order to determine whether the arbitrator should disclose, decline the appointment or refuse to continue to act, the facts and circumstances alone are relevant, not the current stage of the proceedings, or the consequences of the withdrawal. As a practical matter, arbitration institutions may make a distinction depending on the stage of the arbitration. Courts may likewise apply different standards. Nevertheless, no distinction is made by these Guidelines depending on the stage of the arbitral proceedings. While there are practical concerns, if an arbitrator must withdraw after the arbitration has commenced, a distinction based on the stage of the arbitration would be inconsistent with the General Standards.

(4) Waiver by the Parties

(a) If, within 30 days after the receipt of any disclosure by the arbitrator, or after a party otherwise learns of facts or circumstances that could constitute a potential conflict of interest for an arbitrator, a party does not raise an express objection with regard to that arbitrator, subject to paragraphs (b) and (c) of this General Standard, the party is deemed to have waived any potential conflict of interest in respect of the arbitrator based on such facts or circumstances and may not raise any

objection based on such facts or circumstances at a later stage.

(b) However, if facts or circumstances exist as described in the Non-Waivable Red List, any waiver by a party (including any declaration or advance waiver, such as that contemplated in General Standard 3(b)), or any agreement by the parties to have such a person serve as arbitrator, shall be regarded as invalid.

(c) A person should not serve as an arbitrator when a conflict of interest, such as those exemplified in the Waivable Red List, exists. Nevertheless, such a person may accept appointment as arbitrator, or continue to act as an arbitrator, if the following conditions are met:

(i) all parties, all arbitrators and the arbitration institution, or other appointing authority (if any), have full knowledge of the conflict of interest; and

(ii) all parties expressly agree that such a person may serve as arbitrator, despite the conflict of interest.

(d) An arbitrator may assist the parties in reaching a settlement of the dispute, through conciliation, mediation or otherwise, at any stage of the proceedings. However, before doing so, the arbitrator should receive an express agreement by the parties that acting in such a manner shall not disqualify the arbitrator from continuing to serve as arbitrator. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the arbitrator's participation in such a process, or from information that the arbitrator may learn in the process. If the assistance by the arbitrator does not lead to the final settlement of the case, the parties remain bound by their waiver. However, consistent with General Standard 2(a) and notwithstanding such agreement, the arbitrator shall resign if,

as a consequence of his or her involvement in the settlement process, the arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration.

Explanation to General Standard 4:

(a) Under General Standard 4(a), a party is deemed to have waived any potential conflict of interest, if such party has not raised an objection in respect of such conflict of interest within 30 days. This time limit should run from the date on which the party learns of the relevant facts or circumstances, including through the disclosure process.

(b) General Standard 4(b) serves to exclude from the scope of General Standard 4(a) the facts and circumstances described in the Non-Waivable Red List. Some arbitrators make declarations that seek waivers from the parties with respect to facts or circumstances that may arise in the future. Irrespective of any such waiver sought by the arbitrator, as provided in General Standard 3(b), facts and circumstances arising in the course of the arbitration should be disclosed to the parties by virtue of the arbitrator's ongoing duty of disclosure.

(c) Notwithstanding a serious conflict of interest, such as those that are described by way of example in the Waivable Red List, the parties may wish to engage such a person as an arbitrator. Here, party autonomy and the desire to have only impartial and independent arbitrators must be balanced. Persons with a serious conflict of interest, such as those that are described by way of example in the Waivable Red List, may serve as arbitrators only if the parties make fully informed, explicit waivers.

(d) The concept of the Arbitral Tribunal assisting the parties in reaching a settlement of their dispute in the course of the arbitration proceedings is well-established in some jurisdictions, but not in others. Informed consent by the parties to such a process prior to its beginning should be regarded as an effective waiver of a potential conflict of interest. Certain jurisdictions may require such

consent to be in writing and signed by the parties. Subject to any requirements of applicable law, express consent may be sufficient and may be given at a hearing and reflected in the minutes or transcript of the proceeding. In addition, in order to avoid parties using an arbitrator as mediator as a means of disqualifying the arbitrator, the General Standard makes clear that the waiver should remain effective, if the mediation is unsuccessful. In giving their express consent, the parties should realise the consequences of the arbitrator assisting them in a settlement process, including the risk of the resignation of the arbitrator.

(5) Scope

(a) These Guidelines apply equally to tribunal chairs, sole arbitrators and co-arbitrators, howsoever appointed.

(b) Arbitral or administrative secretaries and assistants, to an individual arbitrator or the Arbitral Tribunal, are bound by the same duty of independence and impartiality as arbitrators, and it is the responsibility of the Arbitral Tribunal to ensure that such duty is respected at all stages of the arbitration.

Explanation to General Standard 5:

(a) Because each member of an Arbitral Tribunal has an obligation to be impartial and independent, the General Standards do not distinguish between sole arbitrators, tribunal chairs, party-appointed arbitrators or arbitrators appointed by an institution.

(b) Some arbitration institutions require arbitral or administrative secretaries and assistants to sign a declaration of independence and impartiality. Whether or not such a requirement exists, arbitral or administrative secretaries and assistants to the Arbitral Tribunal are bound by the same duty of independence and impartiality (including the duty of disclosure) as arbitrators, and it is the responsibility of the Arbitral Tribunal to

ensure that such duty is respected at all stages of the arbitration. Furthermore, this duty applies to arbitral or administrative secretaries and assistants to either the Arbitral Tribunal or individual members of the Arbitral Tribunal.

(6) Relationships

(a) The arbitrator is in principle considered to bear the identity of his or her law firm, but when considering the relevance of facts or circumstances to determine whether a potential conflict of interest exists, or whether disclosure should be made, the activities of an arbitrator's law firm, if any, and the relationship of the arbitrator with the law firm, should be considered in each individual case. The fact that the activities of the arbitrator's firm involve one of the parties shall not necessarily constitute a source of such conflict, or a reason for disclosure. Similarly, if one of the parties is a member of a group with which the arbitrator's firm has a relationship, such fact should be considered in each individual case, but shall not necessarily constitute by itself a source of a conflict of interest, or a reason for disclosure.

(b) If one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of such party.

Explanation to General Standard 6:

(a) The growing size of law firms should be taken into account as part of today's reality in international arbitration. There is a need to balance the interests of a party to appoint the arbitrator of its choice, who may be a partner at a large law firm, and the importance of maintaining confidence in the impartiality and independence of international arbitrators. The arbitrator must, in principle,

be considered to bear the identity of his or her law firm, but the activities of the arbitrator's firm should not automatically create a conflict of interest. The relevance of the activities of the arbitrator's firm, such as the nature, timing and scope of the work by the law firm, and the relationship of the arbitrator with the law firm, should be considered in each case. General Standard 6(a) uses the term 'involve' rather than 'acting for' because the relevant connections with a party may include activities other than representation on a legal matter. Although barristers' chambers should not be equated with law firms for the purposes of conflicts, and no general standard is proffered for barristers' chambers, disclosure may be warranted in view of the relationships among barristers, parties or counsel. When a party to an arbitration is a member of a group of companies, special questions regarding conflicts of interest arise. Because individual corporate structure arrangements vary widely, a catch-all rule is not appropriate. Instead, the particular circumstances of an affiliation with another entity within the same group of companies, and the relationship of that entity with the arbitrator's law firm, should be considered in each individual case.

(b) When a party in international arbitration is a legal entity, other legal and physical persons may have a controlling influence on this legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. Each situation should be assessed individually, and General Standard 6(b) clarifies that such legal persons and individuals may be considered effectively to be that party. Third-party funders and insurers in relation to the dispute may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party. For these purposes, the terms 'third-party funder' and 'insurer' refer to any person or entity that is contributing funds, or other material support,

to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.

(7) Duty of the Parties and the Arbitrator

(a) A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration), or between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. The party shall do so on its own initiative at the earliest opportunity.

(b) A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of the identity of its counsel appearing in the arbitration, as well as of any relationship, including membership of the same barristers' chambers, between its counsel and the arbitrator. The party shall do so on its own initiative at the earliest opportunity, and upon any change in its counsel team.

(c) In order to comply with General Standard 7(a), a party shall perform reasonable enquiries and provide any relevant information available to it.

(d) An arbitrator is under a duty to make reasonable enquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to his or her impartiality or independence. Failure to disclose a conflict is not excused by lack of knowledge, if the arbitrator does not perform such reasonable enquiries.

Explanation to General Standard 7:

(a) The parties are required to disclose any relationship with the arbitrator. Disclosure of such relationships should reduce the risk of an unmeritorious challenge of an arbitrator's impartiality or independence based on information learned after the appointment. The parties' duty of disclosure of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration) has been extended to relationships with persons or entities having a direct economic interest in the award to be rendered in the arbitration, such as an entity providing funding for the arbitration, or having a duty to indemnify a party for the award.

(b) Counsel appearing in the arbitration, namely the persons involved in the representation of the parties in the arbitration, must be identified by the parties at the earliest opportunity. A party's duty to disclose the identity of counsel appearing in the arbitration extends to all members of that party's counsel team and arises from the outset of the proceedings.

(c) In order to satisfy their duty of disclosure, the parties are required to investigate any relevant information that is reasonably available to them. In addition, any party to an arbitration is required, at the outset and on an ongoing basis during the entirety of the proceedings, to make a reasonable effort to ascertain and to disclose available information that, applying the general standard, might affect the arbitrator's impartiality or independence.

(d) In order to satisfy their duty of disclosure under the Guidelines, arbitrators are required to investigate any relevant information that is reasonably available to them.

Part II: Practical Application of the General Standards

1. If the Guidelines are to have an important practical influence, they should address situations that are likely to occur in today's arbitration practice and should provide specific guidance to arbitrators, parties, institutions and courts as to which situations do or do not constitute conflicts of interest, or should or should not be disclosed. For this purpose, the Guidelines categorise situations that may occur in the following Application Lists. These lists cannot cover every situation. In all cases, the General Standards should control the outcome.

2. The Red List consists of two parts: 'a Non-Waivable Red List' (see General Standards 2(d) and 4(b)); and 'a Waivable Red List' (see General Standard 4(c)). These lists are non-exhaustive and detail specific situations that, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence. That is, in these circumstances, an objective conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances (see General Standard 2(b)). The Non-Waivable Red List includes situations deriving from the overriding principle that no person can be his or her own judge. Therefore, acceptance of such a situation cannot cure the conflict. The Waivable Red List covers situations that are serious but not as severe. Because of their seriousness, unlike circumstances described in the Orange List, these situations should be considered waivable, but only if and when the parties, being aware of the conflict of interest situation, expressly state their willingness to have such a person act as arbitrator, as set forth in General Standard 4(c).

3. The Orange List is a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence. The Orange List thus reflects situations that would fall under General Standard 3(a), with the consequence that the arbitrator has a duty to disclose such situations. In all these situations, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made, as established in General Standard 4(a).

4. Disclosure does not imply the existence of a conflict of interest; nor should it by itself result either in a disqualification of the arbitrator, or in a presumption regarding disqualification. The purpose of the disclosure is to inform the parties of a situation that they may wish to explore further in order to determine whether objectively – that is, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances – there are justifiable doubts as to the arbitrator's impartiality or independence. If the conclusion is that there are no justifiable doubts, the arbitrator can act. Apart from the situations covered by the Non-Waivable Red List, he or she can also act if there is no timely objection by the parties or, in situations covered by the Waivable Red List, if there is a specific acceptance by the parties in accordance with General Standard 4(c). If a party challenges the arbitrator, he or she can nevertheless act, if the authority that rules on the challenge decides that the challenge does not meet the objective test for disqualification.

5. A later challenge based on the fact that an arbitrator did not disclose such facts or circumstances should not result automatically in non-appointment, later disqualification or a successful challenge to any award. Nondisclosure cannot by itself make an arbitrator partial or lacking independence: only the facts or circumstances that he or she failed to disclose can do so.

6. Situations not listed in the Orange List or falling outside the time limits used in some of the

Orange List situations are generally not subject to disclosure. However, an arbitrator needs to assess on a case-by-case basis whether a given situation, even though not mentioned in the Orange List, is nevertheless such as to give rise to justifiable doubts as to his or her impartiality or independence. Because the Orange List is a non-exhaustive list of examples, there may be situations not mentioned, which, depending on the circumstances, may need to be disclosed by an arbitrator. Such may be the case, for example, in the event of repeat past appointments by the same party or the same counsel beyond the three-year period provided for in the Orange List, or when an arbitrator concurrently acts as counsel in an unrelated case in which similar issues of law are raised. Likewise, an appointment made by the same party or the same counsel appearing before an arbitrator, while the case is ongoing, may also have to be disclosed, depending on the circumstances. While the Guidelines do not require disclosure of the fact that an arbitrator concurrently serves, or has in the past served, on the same Arbitral Tribunal with another member of the tribunal, or with one of the counsel in the current proceedings, an arbitrator should assess on a case-by-case basis whether the fact of having frequently served as counsel with, or as an arbitrator on, Arbitral Tribunals with another member of the tribunal may create a perceived imbalance within the tribunal. If the conclusion is 'yes', the arbitrator should consider a disclosure.

7. The Green List is a non-exhaustive list of specific situations where no appearance and no actual conflict of interest exists from an objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the Green List. As stated in the Explanation to General Standard 3(a), there should be a limit to disclosure, based on reasonableness; in some situations, an objective test should prevail over the purely subjective test of 'the eyes' of the parties.

8. The borderline between the categories that comprise the Lists can be thin. It can be debated

whether a certain situation should be on one List instead of another. Also, the Lists contain, for various situations, general terms such as 'significant' and 'relevant'. The Lists reflect international principles and best practices to the extent possible. Further definition of the norms, which are to be interpreted reasonably in light of the facts and circumstances in each case, would be counterproductive.

1. Non-Waivable Red List

1.1 There is an identity between a party and the arbitrator, or the arbitrator is a legal representative or employee of an entity that is a party in the arbitration.

1.2 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on one of the parties or an entity that has a direct economic interest in the award to be rendered in the arbitration.

1.3 The arbitrator has a significant financial or personal interest in one of the parties, or the outcome of the case.

1.4 The arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom.

2. Waivable Red List

2.1 Relationship of the arbitrator to the dispute

2.1.1 The arbitrator has given legal advice, or provided an expert opinion, on the dispute to a party or an affiliate of one of the parties.

2.1.2 The arbitrator had a prior involvement in the dispute.

2.2 Arbitrator's direct or indirect interest in the dispute

2.2.1 The arbitrator holds shares, either directly or indirectly, in one of the parties, or an affiliate of one of the parties, this party or

an affiliate being privately held.

2.2.2 A close family member[3] of the arbitrator has a significant financial interest in the outcome of the dispute.

2.2.3 The arbitrator, or a close family member of the arbitrator, has a close relationship with a non-party who may be liable to recourse on the part of the unsuccessful party in the dispute.

2.3 Arbitrator's relationship with the parties or counsel

2.3.1 The arbitrator currently represents or advises one of the parties, or an affiliate of one of the parties.

2.3.2 The arbitrator currently represents or advises the lawyer or law firm acting as counsel for one of the parties.

2.3.3 The arbitrator is a lawyer in the same law firm as the counsel to one of the parties.

2.3.4 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence in an affiliate[4] of one of the parties, if the affiliate is directly involved in the matters in dispute in the arbitration.

2.3.5 The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.

2.3.6 The arbitrator's law firm currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties.

2.3.7 The arbitrator regularly advises one of

3 Throughout the Application Lists, the term 'close family member' refers to a: spouse, sibling, child, parent or life partner, in addition to any other family member with whom a close relationship exists.

4 Throughout the Application Lists, the term 'affiliate' encompasses all companies in a group of companies, including the parent company.

the parties, or an affiliate of one of the parties, but neither the arbitrator nor his or her firm derives a significant financial income therefrom.

2.3.8 The arbitrator has a close family relationship with one of the parties, or with a manager, director or member of the supervisory board, or any person having a controlling influence in one of the parties, or an affiliate of one of the parties, or with a counsel representing a party.

2.3.9 A close family member of the arbitrator has a significant financial or personal interest in one of the parties, or an affiliate of one of the parties.

3. Orange List

3.1 Previous services for one of the parties or other involvement in the case

3.1.1 The arbitrator has, within the past three years, served as counsel for one of the parties, or an affiliate of one of the parties, or has previously advised or been consulted by the party, or an affiliate of the party, making the appointment in an unrelated matter, but the arbitrator and the party, or the affiliate of the party, have no ongoing relationship.

3.1.2 The arbitrator has, within the past three years, served as counsel against one of the parties, or an affiliate of one of the parties, in an unrelated matter.

3.1.3 The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties.[5]

5 It may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialised pool of individuals. If in such fields it is the custom and practice for parties to frequently appoint the same arbitrator in different cases,

3.1.4 The arbitrator's law firm has, within the past three years, acted for or against one of the parties, or an affiliate of one of the parties, in an unrelated matter without the involvement of the arbitrator.

3.1.5 The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration involving one of the parties, or an affiliate of one of the parties.

3.2 Current services for one of the parties

3.2.1 The arbitrator's law firm is currently rendering services to one of the parties, or to an affiliate of one of the parties, without creating a significant commercial relationship for the law firm and without the involvement of the arbitrator.

3.2.2 A law firm or other legal organisation that shares significant fees or other revenues with the arbitrator's law firm renders services to one of the parties, or an affiliate of one of the parties, before the Arbitral Tribunal.

3.2.3 The arbitrator or his or her firm represents a party, or an affiliate of one of the parties to the arbitration, on a regular basis, but such representation does not concern the current dispute.

3.3 Relationship between an arbitrator and another arbitrator or counsel

3.3.1 The arbitrator and another arbitrator are lawyers in the same law firm.

3.3.2 The arbitrator and another arbitrator, or the counsel for one of the parties, are members of the same barristers' chambers.

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no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice.

3.3.3 The arbitrator was, within the past three years, a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the arbitration.

3.3.4 A lawyer in the arbitrator's law firm is an arbitrator in another dispute involving the same party or parties, or an affiliate of one of the parties.

3.3.5 A close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute.

3.3.6 A close personal friendship exists between an arbitrator and a counsel of a party.

3.3.7 Enmity exists between an arbitrator and counsel appearing in the arbitration.

3.3.8 The arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel, or the same law firm.

3.3.9 The arbitrator and another arbitrator, or counsel for one of the parties in the arbitration, currently act or have acted together within the past three years as co-counsel.

3.4 Relationship between arbitrator and party and others involved in the arbitration

3.4.1 The arbitrator's law firm is currently acting adversely to one of the parties, or an affiliate of one of the parties.

3.4.2 The arbitrator has been associated with a party, or an affiliate of one of the parties, in a professional capacity, such as a former employee or partner.

3.4.3 A close personal friendship exists between an arbitrator and a manager or director or a member of the supervisory board of: a party; an entity that has a direct economic interest in the award to be rendered in the arbitration; or any person

having a controlling influence, such as a controlling shareholder interest, on one of the parties or an affiliate of one of the parties or a witness or expert.

3.4.4 Enmity exists between an arbitrator and a manager or director or a member of the supervisory board of: a party; an entity that has a direct economic interest in the award; or any person having a controlling influence in one of the parties or an affiliate of one of the parties or a witness or expert.

3.4.5 If the arbitrator is a former judge, he or she has, within the past three years, heard a significant case involving one of the parties, or an affiliate of one of the parties.

3.5 Other circumstances

3.5.1 The arbitrator holds shares, either directly or indirectly, that by reason of number or denomination constitute a material holding in one of the parties, or an affiliate of one of the parties, this party or affiliate being publicly listed.

3.5.2 The arbitrator has publicly advocated a position on the case, whether in a published paper, or speech, or otherwise.

3.5.3 The arbitrator holds a position with the appointing authority with respect to the dispute.

3.5.4 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration.

4. Green List

4.1 Previously expressed legal opinions

4.1.1 The arbitrator has previously expressed a legal opinion (such as in a law review article or public lecture) concerning an

issue that also arises in the arbitration (but this opinion is not focused on the case).

4.2 Current services for one of the parties

4.2.1 A firm, in association or in alliance with the arbitrator's law firm, but that does not share significant fees or other revenues with the arbitrator's law firm, renders services to one of the parties, or an affiliate of one of the parties, in an unrelated matter.

4.3 Contacts with another arbitrator, or with counsel for one of the parties

4.3.1 The arbitrator has a relationship with another arbitrator, or with the counsel for one of the parties, through membership in the same professional association, or social or charitable organisation, or through a social media network.

4.3.2 The arbitrator and counsel for one of the parties have previously served together as arbitrators.

4.3.3 The arbitrator teaches in the same faculty or school as another arbitrator or counsel to one of the parties, or serves as an officer of a professional association or social or charitable organisation with another arbitrator or counsel for one of the parties.

4.3.4 The arbitrator was a speaker, moderator or organiser in one or more conferences, or participated in seminars or working parties of a professional, social or charitable organisation, with another arbitrator or counsel to the parties.

4.4 Contacts between the arbitrator and one of the parties

4.4.1 The arbitrator has had an initial contact with a party, or an affiliate of a party (or their counsel) prior to appointment, if this contact is limited to the arbitrator's availability and qualifications to serve,

or to the names of possible candidates for a chairperson, and did not address the merits or procedural aspects of the dispute, other than to provide the arbitrator with a basic understanding of the case.

4.4.2 The arbitrator holds an insignificant amount of shares in one of the parties, or an affiliate of one of the parties, which is publicly listed.

4.4.3 The arbitrator and a manager, director or member of the supervisory board, or any person having a controlling influence on one of the parties, or an affiliate of one of the parties, have worked together as joint experts, or in another professional capacity, including as arbitrators in the same case.

4.4.4 The arbitrator has a relationship with one of the parties or its affiliates through a social media network.

UNITED NATIONS CONFERENCE
ON INTERNATIONAL COMMERCIAL ARBITRATION

CONVENTION

ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

UNITED NATIONS
1958

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each 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.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each 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, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforce-

ment shall, at the time of the application, supply:

(*a*) The duly authenticated original award or a duly certified copy thereof;

(*b*) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(*a*) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(*b*) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(*c*) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(*d*) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(*e*) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(*a*) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(*b*) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (*e*), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive

any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(*a*) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(*b*) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(*c*) A federal State Party to this Convention shall, at the request of any other Contracting

State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(*a*) Signatures and ratifications in accordance with article VIII;

(*b*) Accessions in accordance with article IX;

(*c*) Declarations and notifications under articles I, X and XI;

(*d*) The date upon which this Convention enters into force in accordance with article XII;

(*e*) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

I hereby certify that the foregoing text is a true copy of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958, the original of which is deposited with the Secretary-General of the United Nations, as the said Convention was opened for signature, and that it includes the necessary rectifications of typographical errors, as approved by the Parties.

Je certifie que le texte qui précède est une copie conforme de la Convention pour la reconnaissance et l'exécution des sentences arbitrales étrangères, conclue à New York le 10 juin 1958 et dont l'original se trouve déposé auprès du Secrétaire général de l'Organisation des Nations Unies telle que ladite Convention a été ouverte à la signature, et que les rectifications matérielles nécessaires, telles qu'approuvées par les Parties, y ont été incorporées.

For the Secretary-General,
The Legal Counsel:

Pour le Secrétaire général,
Le Conseiller juridique :

Carl-August Fleischhauer

United Nations, New York
6 July 1988

Organisation des Nations Unies
New York, le 6 juillet 1988

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL Model Law on International Commercial Arbitration

1985

With amendments
as adopted in 2006

UNITED NATIONS
Vienna, 2008

NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

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Contents

Resolutions adopted by the General Assembly

40/72. Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law

The General Assembly,

Recognizing the value of arbitration as a method of settling disputes arising in international commercial relations,

Convinced that the establishment of a model law on arbitration that is acceptable to States with different legal, social and economic systems contributes to the development of harmonious international economic relations,

Noting that the Model Law on International Commercial Arbitration[1] was adopted by the United Nations Commission on International Trade Law at its eighteenth session, after due deliberation and extensive consultation with arbitral institutions and individual experts on international commercial arbitration,

Convinced that the Model Law, together with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[2] and the Arbitration Rules of the United Nations Commission on International Trade Law[3] recommended by the General Assembly in its resolution 31/98 of 15 December 1976, significantly contributes to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

1. *Requests* the Secretary-General to transmit the text of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, together with the *travaux préparatoires* from the eighteenth session of the Commission, to Governments and to arbitral institutions and other interested bodies, such as chambers of commerce;

2. *Recommends* that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice.

112th plenary meeting
11 December 1985

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[1] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I.

[2] United Nations, *Treaty Series*, vol. 330, No. 4739, p. 38.

[3] United Nations publication, Sales No E.77.V.6.

[*on the report of the Sixth Committee (A/61/453)*]

61/33. Revised articles of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, and the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958

The General Assembly,

Recognizing the value of arbitration as a method of settling disputes arising in the context of international commercial relations,

Recalling its resolution 40/72 of 11 December 1985 regarding the Model Law on International Commercial Arbitration,[1]

Recognizing the need for provisions in the Model Law to conform to current practices in international trade and modern means of contracting with regard to the form of the arbitration agreement and the granting of interim measures,

Believing that revised articles of the Model Law on the form of the arbitration agreement and interim measures reflecting those current practices will significantly enhance the operation of the Model Law,

Noting that the preparation of the revised articles of the Model Law on the form of the arbitration agreement and interim measures was the subject of due deliberation and extensive consultations with Governments and interested circles and would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international commercial disputes,

Believing that, in connection with the modernization of articles of the Model Law, the promotion of a uniform interpretation and application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958,[2] is particularly timely,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for formulating and adopting the revised articles of its Model Law on International Commercial Arbitration on the form of the arbitration agreement and interim measures, the text of which is contained in annex I to the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session,[3] and recommends that all States give favourable consideration to the enactment of the revised articles of the Model Law, or the revised Model Law on International Commercial Arbitration of the United Nations Commission on

[1] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I.

[2] United Nations, *Treaty Series*, vol. 330, No. 4739.

[3] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17).

International Trade Law, when they enact or revise their laws, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice;

2. *Also expresses its appreciation* to the United Nations Commission on International Trade Law for formulating and adopting the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958,[2] the text of which is contained in annex II to the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session;[3]

3. *Requests* the Secretary-General to make all efforts to ensure that the revised articles of the Model Law and the recommendation become generally known and available.

64th plenary meeting
4 December 2006

Part One

UNCITRAL Model Law on International Commercial Arbitration

(United Nations documents A/40/17,
annex I and A/61/17, annex I)

(As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006)

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application[1]

(1) This Law applies to international commercial[2] arbitration, subject to any agreement in force between this State and any other State or States.

(2) The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State.

(Article 1(2) has been amended by the Commission at its thirty-ninth session, in 2006)

(3) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

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[1]Article headings are for reference purposes only and are not to be used for purposes of interpretation.

[2]The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

Article 2. Definitions and rules of interpretation

For the purposes of this Law:

(a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;

(b) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

(c) "court" means a body or organ of the judicial system of a State;

(d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;

(e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;

(f) where a provision of this Law, other than in articles 25*(a)* and 32(2) *(a)*, refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

Article 2 A. International origin and general principles

(As adopted by the Commission at its thirty-ninth session, in 2006)

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Article 3. Receipt of written communications

(1) Unless otherwise agreed by the parties:

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;

(b) the communication is deemed to have been received on the day it is so delivered.

(2) The provisions of this article do not apply to communications in court proceedings.

Article 4. Waiver of right to object

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

Article 5. Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

Article 6. Court or other authority for certain functions of arbitration assistance and supervision

The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

CHAPTER II. ARBITRATION AGREEMENT

Option I

Article 7. Definition and form of arbitration agreement

(As adopted by the Commission at its thirty-ninth session, in 2006)

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not

limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

Option II

Article 7. Definition of arbitration agreement

(As adopted by the Commission at its thirty-ninth session, in 2006)

"Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Article 8. Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Article 9. Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

Article 10. Number of arbitrators

(1) The parties are free to determine the number of arbitrators.

(2) Failing such determination, the number of arbitrators shall be three.

Article 11. Appointment of arbitrators

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no

appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Article 12. Grounds for challenge

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Article 13. Challenge procedure

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Article 14. Failure or impossibility to act

(1) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

Article 15. Appointment of substitute arbitrator

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Article 16. Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the

matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

CHAPTER IV A. INTERIM MEASURES AND PRELIMINARY ORDERS

(As adopted by the Commission at its thirty-ninth session, in 2006)

Section I. Interim measures

Article 17. Power of arbitral tribunal to order interim measures

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

Article 17 A. Conditions for granting interim measures

(1) The party requesting an interim measure under article 17(2)*(a)*, *(b)* and *(c)* shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under article 17(2)*(d)*, the requirements in paragraphs (1)*(a)* and *(b)* of this article shall apply only to the extent the arbitral tribunal considers appropriate.

Section 2. Preliminary orders

Article 17 B. Applications for preliminary orders and conditions for granting preliminary orders

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under article 17A apply to any preliminary order, provided that the harm to be assessed under article 17A(1)*(a)*, is the harm likely to result from the order being granted or not.

Article 17 C. Specific regime for preliminary orders

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for

the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

Section 3. Provisions applicable to interim measures and preliminary orders

Article 17 D. Modification, suspension, termination

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

Article 17 E. Provision of security

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

Article 17 F. Disclosure

(1) The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph (1) of this article shall apply.

Article 17 G. Costs and damages

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

Section 4. Recognition and enforcement of interim measures

Article 17 H. Recognition and enforcement

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Article 17 I. Grounds for refusing recognition or enforcement[3]

(1) Recognition or enforcement of an interim measure may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

(i) Such refusal is warranted on the grounds set forth in article 36(1)*(a)*(i), (ii), (iii) or (iv); or

(ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

(iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

(i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) Any of the grounds set forth in article 36(1)*(b)*(i) or (ii), apply to the recognition and enforcement of the interim measure.

(2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

Section 5. Court-ordered interim measures

Article 17 J. Court-ordered interim measures

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in

[3]The conditions set forth in article 17 I are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused

the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 18. Equal treatment of parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 19. Determination of rules of procedure

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Article 20. Place of arbitration

(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

Article 21. Commencement of arbitral proceedings

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Article 22. Language

(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Article 23. Statements of claim and defence

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

Article 24. Hearings and written proceedings

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

Article 25. Default of a party

Unless otherwise agreed by the parties, if, without showing sufficient cause,

(a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

Article 26. Expert appointed by arbitral tribunal

(1) Unless otherwise agreed by the parties, the arbitral tribunal

(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

Article 27. Court assistance in taking evidence

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.

CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28. Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Article 29. Decision-making by panel of arbitrators

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

Article 30. Settlement

(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

Article 31. Form and contents of award

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

Article 32. Termination of proceedings

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

(a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings;

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).

Article 33. Correction and interpretation of award; additional award

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

(a) a party, with notice to the other party, may request the arbitral

tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)*(a)* of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

CHAPTER VII. RECOURSE AGAINST AWARD

Article 34. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not

valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35. Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the

competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.[4]

(Article 35(2) has been amended by the Commission at its thirty-ninth session, in 2006)

Article 36. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

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[4]The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)*(a)*(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

Part Two

Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006[1]

1. The UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985, at the end of the eighteenth session of the Commission. The General Assembly, in its resolution 40/72 of 11 December 1985, recommended "that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice". The Model Law was amended by UNCITRAL on 7 July 2006, at the thirty-ninth session of the Commission (see below, paragraphs 4, 19, 20, 27, 29 and 53). The General Assembly, in its resolution 61/33 of 4 December 2006, recommended "that all States give favourable consideration to the enactment of the revised articles of the UNCITRAL Model Law on International Commercial Arbitration, or the revised UNCITRAL Model Law on International Commercial Arbitration, when they enact or revise their laws (...)".

2. The Model Law constitutes a sound basis for the desired harmonization and improvement of national laws. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world. Since its adoption by UNCITRAL, the Model Law has come to represent the accepted international legislative standard for a modern arbitration law and a significant number of jurisdictions have enacted arbitration legislation based on the Model Law.

3. The form of a model law was chosen as the vehicle for harmonization and modernization in view of the flexibility it gives to States in preparing new arbitration laws. Notwithstanding that flexibility, and in order to increase the likelihood of achieving a satisfactory degree of harmonization, States are encouraged to make

[1]This note was prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for informational purposes only; it is not an official commentary on the Model Law. A commentary prepared by the Secretariat on an early draft of the Model Law appears in document A/CN.9/264 (reproduced in UNCITRAL Yearbook, vol. XVI — 1985, United Nations publication, Sales No. E 87.V.4).

as few changes as possible when incorporating the Model Law into their legal systems. Efforts to minimize variation from the text adopted by UNCITRAL are also expected to increase the visibility of harmonization, thus enhancing the confidence of foreign parties, as the primary users of international arbitration, in the reliability of arbitration law in the enacting State.

4. The revision of the Model Law adopted in 2006 includes article 2 A, which is designed to facilitate interpretation by reference to internationally accepted principles and is aimed at promoting a uniform understanding of the Model Law. Other substantive amendments to the Model Law relate to the form of the arbitration agreement and to interim measures. The original 1985 version of the provision on the form of the arbitration agreement (article 7) was modelled on the language used in article II (2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("the New York Convention"). The revision of article 7 is intended to address evolving practice in international trade and technological developments. The extensive revision of article 17 on interim measures was considered necessary in light of the fact that such measures are increasingly relied upon in the practice of international commercial arbitration. The revision also includes an enforcement regime for such measures in recognition of the fact that the effectiveness of arbitration frequently depends upon the possibility of enforcing interim measures. The new provisions are contained in a new chapter of the Model Law on interim measures and preliminary orders (chapter IV A).

A. Background to the Model Law

5. The Model Law was developed to address considerable disparities in national laws on arbitration. The need for improvement and harmonization was based on findings that national laws were often particularly inappropriate for international cases.

1. Inadequacy of domestic laws

6. Recurrent inadequacies to be found in outdated national laws include provisions that equate the arbitral process with court litigation and fragmentary provisions that fail to address all relevant substantive law issues. Even most of those laws that appear to be up-to-date and comprehensive were drafted with domestic arbitration primarily, if not exclusively, in mind. While this approach is understandable in view of the fact that even today the bulk of cases governed by arbitration law would be of a purely domestic nature, the unfortunate consequence is that traditional local concepts are imposed on international cases and the needs of modern practice are often not met.

7. The expectations of the parties as expressed in a chosen set of arbitration rules or a "one-off" arbitration agreement may be frustrated, especially by mandatory provisions of applicable law. Unexpected and undesired restrictions found in national

laws may prevent the parties, for example, from submitting future disputes to arbitration, from selecting the arbitrator freely, or from having the arbitral proceedings conducted according to agreed rules of procedure and with no more court involvement than appropriate. Frustration may also ensue from non-mandatory provisions that may impose undesired requirements on unwary parties who may not think about the need to provide otherwise when drafting the arbitration agreement. Even the absence of any legislative provision may cause difficulties simply by leaving unanswered some of the many procedural issues relevant in arbitration and not always settled in the arbitration agreement. The Model Law is intended to reduce the risk of such possible frustration, difficulties or surprise.

2. Disparity between national laws

8. Problems stemming from inadequate arbitration laws or from the absence of specific legislation governing arbitration are aggravated by the fact that national laws differ widely. Such differences are a frequent source of concern in international arbitration, where at least one of the parties is, and often both parties are, confronted with foreign and unfamiliar provisions and procedures. Obtaining a full and precise account of the law applicable to the arbitration is, in such circumstances often expensive, impractical or impossible.

9. Uncertainty about the local law with the inherent risk of frustration may adversely affect the functioning of the arbitral process and also impact on the selection of the place of arbitration. Due to such uncertainty, a party may hesitate or refuse to agree to a place, which for practical reasons would otherwise be appropriate. The range of places of arbitration acceptable to parties is thus widened and the smooth functioning of the arbitral proceedings is enhanced where States adopt the Model Law, which is easily recognizable, meets the specific needs of international commercial arbitration and provides an international standard based on solutions acceptable to parties from different legal systems.

B. Salient features of the Model Law

1. Special procedural regime for international commercial arbitration

10. The principles and solutions adopted in the Model Law aim at reducing or eliminating the above-mentioned concerns and difficulties. As a response to the inadequacies and disparities of national laws, the Model Law presents a special legal regime tailored to international commercial arbitration, without affecting any relevant treaty in force in the State adopting the Model Law. While the Model Law was designed with international commercial arbitration in mind, it offers a set of basic rules that are not, in and of themselves, unsuitable to any other type of arbitration. States may thus consider extending their enactment of the Model Law to cover also domestic disputes, as a number of enacting States already have.

(a) Substantive and territorial scope of application

11. Article 1 defines the scope of application of the Model Law by reference to the notion of "international commercial arbitration". The Model Law defines an arbitration as international if "the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States" (article 1 (3)). The vast majority of situations commonly regarded as international will meet this criterion. In addition, article 1 (3) broadens the notion of internationality so that the Model Law also covers cases where the place of arbitration, the place of contract performance, or the place of the subject-matter of the dispute is situated outside the State where the parties have their place of business, or cases where the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country. Article 1 thus recognizes extensively the freedom of the parties to submit a dispute to the legal regime established pursuant to the Model Law.

12. In respect of the term "commercial", the Model Law provides no strict definition. The footnote to article 1 (1) calls for "a wide interpretation" and offers an illustrative and open-ended list of relationships that might be described as commercial in nature, "whether contractual or not". The purpose of the footnote is to circumvent any technical difficulty that may arise, for example, in determining which transactions should be governed by a specific body of "commercial law" that may exist in some legal systems.

13. Another aspect of applicability is the territorial scope of application. The principle embodied in article 1 (2) is that the Model Law as enacted in a given State applies only if the place of arbitration is in the territory of that State. However, article 1 (2) also contains important exceptions to that principle, to the effect that certain articles apply, irrespective of whether the place of arbitration is in the enacting State or elsewhere (or, as the case may be, even before the place of arbitration is determined). These articles are the following: articles 8 (1) and 9, which deal with the recognition of arbitration agreements, including their compatibility with interim measures ordered by a court, article 17 J on court-ordered interim measures, articles 17 H and 17 I on the recognition and enforcement of interim measures ordered by an arbitral tribunal, and articles 35 and 36 on the recognition and enforcement of arbitral awards.

14. The territorial criterion governing most of the provisions of the Model Law was adopted for the sake of certainty and in view of the following facts. In most legal systems, the place of arbitration is the exclusive criterion for determining the applicability of national law and, where the national law allows parties to choose the procedural law of a State other than that where the arbitration takes place, experience shows that parties rarely make use of that possibility. Incidentally, enactment of the Model Law reduces any need for the parties to choose a "foreign" law, since the Model Law grants the parties wide freedom in shaping the rules of the arbitral proceedings. In addition to designating the law governing the arbitral procedure, the territorial criterion is of considerable practical importance in respect of articles 11, 13, 14, 16, 27 and 34, which entrust State courts at the place of

arbitration with functions of supervision and assistance to arbitration. It should be noted that the territorial criterion legally triggered by the parties' choice regarding the place of arbitration does not limit the arbitral tribunal's ability to meet at any place it considers appropriate for the conduct of the proceedings, as provided by article 20 (2).

(b) Delimitation of court assistance and supervision

15. Recent amendments to arbitration laws reveal a trend in favour of limiting and clearly defining court involvement in international commercial arbitration. This is justified in view of the fact that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the finality and expediency of the arbitral process.

16. In this spirit, the Model Law envisages court involvement in the following instances. A first group comprises issues of appointment, challenge and termination of the mandate of an arbitrator (articles 11, 13 and 14), jurisdiction of the arbitral tribunal (article 16) and setting aside of the arbitral award (article 34). These instances are listed in article 6 as functions that should be entrusted, for the sake of centralization, specialization and efficiency, to a specially designated court or, with respect to articles 11, 13 and 14, possibly to another authority (for example, an arbitral institution or a chamber of commerce). A second group comprises issues of court assistance in taking evidence (article 27), recognition of the arbitration agreement, including its compatibility with court-ordered interim measures (articles 8 and 9), court-ordered interim measures (article 17 J), and recognition and enforcement of interim measures (articles 17 H and 17 I) and of arbitral awards (articles 35 and 36).

17. Beyond the instances in these two groups, "no court shall intervene, in matters governed by this Law". Article 5 thus guarantees that all instances of possible court intervention are found in the piece of legislation enacting the Model Law, except for matters not regulated by it (for example, consolidation of arbitral proceedings, contractual relationship between arbitrators and parties or arbitral institutions, or fixing of costs and fees, including deposits). Protecting the arbitral process from unpredictable or disruptive court interference is essential to parties who choose arbitration (in particular foreign parties).

2. Arbitration agreement

18. Chapter II of the Model Law deals with the arbitration agreement, including its recognition by courts.

(a) Definition and form of arbitration agreement

19. The original 1985 version of the provision on the definition and form of arbitration agreement (article 7) closely followed article II (2) of the New York

Convention, which requires that an arbitration agreement be in writing. If the parties have agreed to arbitrate, but they entered into the arbitration agreement in a manner that does not meet the form requirement, any party may have grounds to object to the jurisdiction of the arbitral tribunal. It was pointed out by practitioners that, in a number of situations, the drafting of a written document was impossible or impractical. In such cases, where the willingness of the parties to arbitrate was not in question, the validity of the arbitration agreement should be recognized. For that reason, article 7 was amended in 2006 to better conform to international contract practices. In amending article 7, the Commission adopted two options, which reflect two different approaches on the question of definition and form of arbitration agreement. The first approach follows the detailed structure of the original 1985 text. It confirms the validity and effect of a commitment by the parties to submit to arbitration an existing dispute ("*compromis*") or a future dispute ("*clause compromissoire*"). It follows the New York Convention in requiring the written form of the arbitration agreement but recognizes a record of the "contents" of the agreement "in any form" as equivalent to traditional "writing". The agreement to arbitrate may be entered into in any form (e.g. including orally) as long as the content of the agreement is recorded. This new rule is significant in that it no longer requires signatures of the parties or an exchange of messages between the parties. It modernizes the language referring to the use of electronic commerce by adopting wording inspired from the 1996 UNCITRAL Model Law on Electronic Commerce and the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts. It covers the situation of "an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another". It also states that "the reference in a contract to any document" (for example, general conditions) "containing an arbitration clause constitutes an arbitration agreement in writing provided that the reference is such as to make that clause part of the contract". It thus clarifies that applicable contract law remains available to determine the level of consent necessary for a party to become bound by an arbitration agreement allegedly made "by reference". The second approach defines the arbitration agreement in a manner that omits any form requirement. No preference was expressed by the Commission in favour of either option I or II, both of which are offered for enacting States to consider, depending on their particular needs, and by reference to the legal context in which the Model Law is enacted, including the general contract law of the enacting State. Both options are intended to preserve the enforceability of arbitration agreements under the New York Convention.

20. In that respect, the Commission also adopted, at its thirty-ninth session in 2006, a "Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958" (A/61/17, Annex 2).[2] The General Assembly, in its resolution 61/33 of 4 December 2006 noted that "in connection with the modernization of articles of the Model Law, the promotion of a uniform interpretation and application of the Convention on the Recognition and

[2]Reproduced in Part Three hereafter.

Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, is particularly timely". The Recommendation was drafted in recognition of the widening use of electronic commerce and enactments of domestic legislation as well as case law, which are more favourable than the New York Convention in respect of the form requirement governing arbitration agreements, arbitration proceedings, and the enforcement of arbitral awards. The Recommendation encourages States to apply article II (2) of the New York Convention "recognizing that the circumstances described therein are not exhaustive". In addition, the Recommendation encourages States to adopt the revised article 7 of the Model Law. Both options of the revised article 7 establish a more favourable regime for the recognition and enforcement of arbitral awards than that provided under the New York Convention. By virtue of the "more favourable law provision" contained in article VII (1) of the New York Convention, the Recommendation clarifies that "any interested party" should be allowed "to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement".

(b) Arbitration agreement and the courts

21. Articles 8 and 9 deal with two important aspects of the complex relationship between the arbitration agreement and the resort to courts. Modelled on article II (3) of the New York Convention, article 8 (1) of the Model Law places any court under an obligation to refer the parties to arbitration if the court is seized with a claim on the same subject-matter unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The referral is dependent on a request, which a party may make not later than when submitting its first statement on the substance of the dispute. This provision, where adopted by a State enacting the Model Law, is by its nature binding only on the courts of that State. However, since article 8 is not limited in scope to agreements providing for arbitration to take place in the enacting State, it promotes the universal recognition and effect of international commercial arbitration agreements.

22. Article 9 expresses the principle that any interim measures of protection that may be obtained from courts under their procedural law (for example, pre-award attachments) are compatible with an arbitration agreement. That provision is ultimately addressed to the courts of any State, insofar as it establishes the compatibility between interim measures possibly issued by any court and an arbitration agreement, irrespective of the place of arbitration. Wherever a request for interim measures may be made to a court, it may not be relied upon, under the Model Law, as a waiver or an objection against the existence or effect of the arbitration agreement.

3. Composition of arbitral tribunal

23. Chapter III contains a number of detailed provisions on appointment, challenge, termination of mandate and replacement of an arbitrator. The chapter illustrates the

general approach taken by the Model Law in eliminating difficulties that arise from inappropriate or fragmentary laws or rules. First, the approach recognizes the freedom of the parties to determine, by reference to an existing set of arbitration rules or by an ad hoc agreement, the procedure to be followed, subject to the fundamental requirements of fairness and justice. Secondly, where the parties have not exercised their freedom to lay down the rules of procedure or they have failed to cover a particular issue, the Model Law ensures, by providing a set of suppletive rules, that the arbitration may commence and proceed effectively until the dispute is resolved.

24. Where under any procedure, agreed upon by the parties or based upon the suppletive rules of the Model Law, difficulties arise in the process of appointment, challenge or termination of the mandate of an arbitrator, articles 11, 13 and 14 provide for assistance by courts or other competent authorities designated by the enacting State. In view of the urgency of matters relating to the composition of the arbitral tribunal or its ability to function, and in order to reduce the risk and effect of any dilatory tactics, short time-periods are set and decisions rendered by courts or other authorities on such matters are not appealable.

4. Jurisdiction of arbitral tribunal

(a) Competence to rule on own jurisdiction

25. Article 16 (1) adopts the two important (not yet generally recognized) principles of "*Kompetenz-Kompetenz*" and of separability or autonomy of the arbitration clause. "*Kompetenz-Kompetenz*" means that the arbitral tribunal may independently rule on the question of whether it has jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, without having to resort to a court. Separability means that an arbitration clause shall be treated as an agreement independent of the other terms of the contract. As a consequence, a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. Detailed provisions in paragraph (2) require that any objections relating to the arbitrators' jurisdiction be made at the earliest possible time.

26. The competence of the arbitral tribunal to rule on its own jurisdiction (i.e. on the foundation, content and extent of its mandate and power) is, of course, subject to court control. Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, article 16 (3) allows for immediate court control in order to avoid waste of time and money. However, three procedural safeguards are added to reduce the risk and effect of dilatory tactics: short time-period for resort to court (30 days), court decision not appealable, and discretion of the arbitral tribunal to continue the proceedings and make an award while the matter is pending before the court. In those cases where the arbitral tribunal decides to combine its decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available in setting aside proceedings under article 34 or in enforcement proceedings under article 36.

(b) Power to order interim measures and preliminary orders

27. Chapter IV A on interim measures and preliminary orders was adopted by the Commission in 2006. It replaces article 17 of the original 1985 version of the Model Law. Section 1 provides a generic definition of interim measures and sets out the conditions for granting such measures. An important innovation of the revision lies in the establishment (in section 4) of a regime for the recognition and enforcement of interim measures, which was modelled, as appropriate, on the regime for the recognition and enforcement of arbitral awards under articles 35 and 36 of the Model Law.

28. Section 2 of chapter IV A deals with the application for, and conditions for the granting of, preliminary orders. Preliminary orders provide a means for preserving the status quo until the arbitral tribunal issues an interim measure adopting or modifying the preliminary order. Article 17 B (1) provides that "a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested". Article 17 B (2) permits an arbitral tribunal to grant a preliminary order if "it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure". Article 17 C contains carefully drafted safeguards for the party against whom the preliminary order is directed, such as prompt notification of the application for the preliminary order and of the preliminary order itself (if any), and an opportunity for that party to present its case "at the earliest practicable time". In any event, a preliminary order has a maximum duration of twenty days and, while binding on the parties, is not subject to court enforcement and does not constitute an award. The term "preliminary order" is used to emphasize its limited nature.

29. Section 3 sets out rules applicable to both preliminary orders and interim measures.

30. Section 5 includes article 17 J on interim measures ordered by courts in support of arbitration, and provides that "a court shall have the same power of issuing an interim measure in relation to arbitration proceedings irrespective of whether their place is in the territory of the enacting State, as it has in relation to proceedings in courts". That article has been added in 2006 to put it beyond any doubt that the existence of an arbitration agreement does not infringe on the powers of the competent court to issue interim measures and that the party to such an arbitration agreement is free to approach the court with a request to order interim measures.

5. Conduct of arbitral proceedings

31. Chapter V provides the legal framework for a fair and effective conduct of the arbitral proceedings. Article 18, which sets out fundamental requirements of procedural justice, and article 19 on the rights and powers to determine the rules of procedure, express principles that are central to the Model Law.

(a) Fundamental procedural rights of a party

32. Article 18 embodies the principles that the parties shall be treated with equality and given a full opportunity of presenting their case. A number of provisions illustrate those principles. For example, article 24 (1) provides that, unless the parties have agreed that no oral hearings be held for the presentation of evidence or for oral argument, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party. It should be noted that article 24 (1) deals only with the general entitlement of a party to oral hearings (as an alternative to proceedings conducted on the basis of documents and other materials) and not with the procedural aspects, such as the length, number or timing of hearings.

33. Another illustration of those principles relates to evidence by an expert appointed by the arbitral tribunal. Article 26 (2) requires the expert, after delivering his or her written or oral report, to participate in a hearing where the parties may put questions to the expert and present expert witnesses to testify on the points at issue, if such a hearing is requested by a party or deemed necessary by the arbitral tribunal. As another provision aimed at ensuring fairness, objectivity and impartiality, article 24 (3) provides that all statements, documents and other information supplied to the arbitral tribunal by one party shall be communicated to the other party, and that any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties. In order to enable the parties to be present at any hearing and at any meeting of the arbitral tribunal for inspection purposes, they shall be given sufficient notice in advance (article 24 (2)).

(b) Determination of rules of procedure

34. Article 19 guarantees the parties' freedom to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, subject to a few mandatory provisions on procedure, and empowers the arbitral tribunal, failing agreement by the parties, to conduct the arbitration in such a manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

35. Autonomy of the parties in determining the rules of procedure is of special importance in international cases since it allows the parties to select or tailor the rules according to their specific wishes and needs, unimpeded by traditional and possibly conflicting domestic concepts, thus obviating the earlier mentioned risk of frustration or surprise (see above, paras. 7 and 9). The supplementary discretion of the arbitral tribunal is equally important in that it allows the tribunal to tailor the conduct of the proceedings to the specific features of the case without being hindered by any restraint that may stem from traditional local law, including any domestic rule on evidence. Moreover, it provides grounds for displaying initiative in solving any procedural question not regulated in the arbitration agreement or the Model Law.

36. In addition to the general provisions of article 19, other provisions in the Model Law recognize party autonomy and, failing agreement, empower the arbitral tribunal to decide on certain matters. Examples of particular practical importance in international cases are article 20 on the place of arbitration and article 22 on the language to be used in the proceedings.

(c) Default of a party

37. The arbitral proceedings may be continued in the absence of a party, provided that due notice has been given. This applies, in particular, to the failure of the respondent to communicate its statement of defence (article 25 *(b)*). The arbitral tribunal may also continue the proceedings where a party fails to appear at a hearing or to produce documentary evidence without showing sufficient cause for the failure (article 25 *(c)*). However, if the claimant fails to submit its statement of claim, the arbitral tribunal is obliged to terminate the proceedings (article 25 *(a)*).

38. Provisions that empower the arbitral tribunal to carry out its task even if one of the parties does not participate are of considerable practical importance. As experience shows, it is not uncommon for one of the parties to have little interest in cooperating or expediting matters. Such provisions therefore provide international commercial arbitration its necessary effectiveness, within the limits of fundamental requirements of procedural justice.

6. Making of award and termination of proceedings

(a) Rules applicable to substance of dispute

39. Article 28 deals with the determination of the rules of law governing the substance of the dispute. Under paragraph (1), the arbitral tribunal decides the dispute in accordance with the rules of law chosen by the parties. This provision is significant in two respects. It grants the parties the freedom to choose the applicable substantive law, which is important where the national law does not clearly or fully recognize that right. In addition, by referring to the choice of "rules of law" instead of "law", the Model Law broadens the range of options available to the parties as regards the designation of the law applicable to the substance of the dispute. For example, parties may agree on rules of law that have been elaborated by an international forum but have not yet been incorporated into any national legal system. Parties could also choose directly an instrument such as the United Nations Convention on Contracts for the International Sale of Goods as the body of substantive law governing the arbitration, without having to refer to the national law of any State party to that Convention. The power of the arbitral tribunal, on the other hand, follows more traditional lines. When the parties have not chosen the applicable law, the arbitral tribunal shall apply the law (i.e., the national law) determined by the conflict-of-laws rules that it considers applicable.

40. Article 28 (3) recognizes that the parties may authorize the arbitral tribunal to decide the dispute *ex aequo et bono* or as *amiables compositeur*. This type of arbitration (where the arbitral tribunal may decide the dispute on the basis of principles it believes to be just, without having to refer to any particular body of law) is currently not known or used in all legal systems. The Model Law does not intend to regulate this area. It simply calls the attention of the parties on the need to provide clarification in the arbitration agreement and specifically to empower the arbitral tribunal. However, paragraph (4) makes it clear that in all cases where the dispute relates to a contract (including arbitration *ex aequo et bono*) the arbitral tribunal must decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

(b) Making of award and other decisions

41. In its rules on the making of the award (articles 29-31), the Model Law focuses on the situation where the arbitral tribunal consists of more than one arbitrator. In such a situation, any award and other decision shall be made by a majority of the arbitrators, except on questions of procedure, which may be left to a presiding arbitrator. The majority principle applies also to the signing of the award, provided that the reason for any omitted signature is stated.

42. Article 31 (3) provides that the award shall state the place of arbitration and shall be deemed to have been made at that place. The effect of the deeming provision is to emphasize that the final making of the award constitutes a legal act, which in practice does not necessarily coincide with one factual event. For the same reason that the arbitral proceedings need not be carried out at the place designated as the legal "place of arbitration", the making of the award may be completed through deliberations held at various places, by telephone or correspondence. In addition, the award does not have to be signed by the arbitrators physically gathering at the same place.

43. The arbitral award must be in writing and state its date. It must also state the reasons on which it is based, unless the parties have agreed otherwise or the award is "on agreed terms" (i.e., an award that records the terms of an amicable settlement by the parties). It may be added that the Model Law neither requires nor prohibits "dissenting opinions".

7. Recourse against award

44. The disparity found in national laws as regards the types of recourse against an arbitral award available to the parties presents a major difficulty in harmonizing international arbitration legislation. Some outdated laws on arbitration, by establishing parallel regimes for recourse against arbitral awards or against court decisions, provide various types of recourse, various (and often long) time periods for exercising the recourse, and extensive lists of grounds on which recourse may be based.

That situation (of considerable concern to those involved in international commercial arbitration) is greatly improved by the Model Law, which provides uniform grounds upon which (and clear time periods within which) recourse against an arbitral award may be made.

(a) Application for setting aside as exclusive recourse

45. The first measure of improvement is to allow only one type of recourse, to the exclusion of any other recourse regulated in any procedural law of the State in question. Article 34 (1) provides that the sole recourse against an arbitral award is by application for setting aside, which must be made within three months of receipt of the award (article 34 (3)). In regulating "recourse" (i.e., the means through which a party may actively "attack" the award), article 34 does not preclude a party from seeking court control by way of defence in enforcement proceedings (articles 35 and 36). Article 34 is limited to action before a court (i.e., an organ of the judicial system of a State). However, a party is not precluded from appealing to an arbitral tribunal of second instance if the parties have agreed on such a possibility (as is common in certain commodity trades).

(b) Grounds for setting aside

46. As a further measure of improvement, the Model Law lists exhaustively the grounds on which an award may be set aside. This list essentially mirrors that contained in article 36 (1), which is taken from article V of the New York Convention. The grounds provided in article 34 (2) are set out in two categories. Grounds which are to be proven by one party are as follows: lack of capacity of the parties to conclude an arbitration agreement; lack of a valid arbitration agreement; lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present its case; the award deals with matters not covered by the submission to arbitration; the composition of the arbitral tribunal or the conduct of arbitral proceedings are contrary to the effective agreement of the parties or, failing such agreement, to the Model Law. Grounds that a court may consider of its own initiative are as follows: non-arbitrability of the subject-matter of the dispute or violation of public policy (which is to be understood as serious departures from fundamental notions of procedural justice).

47. The approach under which the grounds for setting aside an award under the Model Law parallel the grounds for refusing recognition and enforcement of the award under article V of the New York Convention is reminiscent of the approach taken in the European Convention on International Commercial Arbitration (Geneva, 1961). Under article IX of the latter Convention, the decision of a foreign court to set aside an award for a reason other than the ones listed in article V of the New York Convention does not constitute a ground for refusing enforcement. The Model Law takes this philosophy one step further by directly limiting the reasons for setting aside.

48. Although the grounds for setting aside as set out in article 34 (2) are almost identical to those for refusing recognition or enforcement as set out in article 36 (1), a practical difference should be noted. An application for setting aside under article 34 (2) may only be made to a court in the State where the award was rendered whereas an application for enforcement might be made in a court in any State. For that reason, the grounds relating to public policy and non-arbitrability may vary in substance with the law applied by the court (in the State of setting aside or in the State of enforcement).

8. Recognition and enforcement of awards

49. The eighth and last chapter of the Model Law deals with the recognition and enforcement of awards. Its provisions reflect the significant policy decision that the same rules should apply to arbitral awards whether made in the country of enforcement or abroad, and that those rules should follow closely the New York Convention.

(a) Towards uniform treatment of all awards irrespective of country of origin

50. By treating awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made, the Model Law distinguishes between "international" and "non-international" awards instead of relying on the traditional distinction between "foreign" and "domestic" awards. This new line is based on substantive grounds rather than territorial borders, which are inappropriate in view of the limited importance of the place of arbitration in international cases. The place of arbitration is often chosen for reasons of convenience of the parties and the dispute may have little or no connection with the State where the arbitration legally takes place. Consequently, the recognition and enforcement of "international" awards, whether "foreign" or "domestic", should be governed by the same provisions.

51. By modelling the recognition and enforcement rules on the relevant provisions of the New York Convention, the Model Law supplements, without conflicting with, the regime of recognition and enforcement created by that successful Convention.

(b) Procedural conditions of recognition and enforcement

52. Under article 35 (1) any arbitral award, irrespective of the country in which it was made, shall be recognized as binding and enforceable, subject to the provisions of article 35 (2) and of article 36 (the latter of which sets forth the grounds on which recognition or enforcement may be refused). Based on the above consideration of the limited importance of the place of arbitration in international cases and the desire of overcoming territorial restrictions, reciprocity is not included as a condition for recognition and enforcement.

53. The Model Law does not lay down procedural details of recognition and enforcement, which are left to national procedural laws and practices. The Model Law merely sets certain conditions for obtaining enforcement under article 35 (2). It was amended in 2006 to liberalize formal requirements and reflect the amendment made to article 7 on the form of the arbitration agreement. Presentation of a copy of the arbitration agreement is no longer required under article 35 (2).

(c) Grounds for refusing recognition or enforcement

54. Although the grounds on which recognition or enforcement may be refused under the Model Law are identical to those listed in article V of the New York Convention, the grounds listed in the Model Law are relevant not only to foreign awards but to all awards rendered in the sphere of application of the piece of legislation enacting the Model Law. Generally, it was deemed desirable to adopt, for the sake of harmony, the same approach and wording as this important Convention. However, the first ground on the list as contained in the New York Convention (which provides that recognition and enforcement may be refused if "the parties to the arbitration agreement were, under the law applicable to them, under some incapacity") was modified since it was viewed as containing an incomplete and potentially misleading conflict-of-laws rule.

Further information on the Model Law may be obtained from:

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Part Three

Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session

The United Nations Commission on International Trade Law,

Recalling General Assembly resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

Conscious of the fact that the different legal, social and economic systems of the world, together with different levels of development, are represented in the Commission,

Recalling successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

Convinced that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958,[1] has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

Recalling that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference "considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes",

Bearing in mind differing interpretations of the form requirements under the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

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[1]United Nations, *Treaty Series*, vol. 330, No. 4739

Taking into account article VII, paragraph 1, of the Convention, a purpose of which is to enable the enforcement of foreign arbitral awards to the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention,

Considering the wide use of electronic commerce,

Taking into account international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration,[2] as subsequently revised, particularly with respect to article 7,[3] the UNCITRAL Model Law on Electronic Commerce,[4] the UNCITRAL Model Law on Electronic Signatures[5] and the United Nations Convention on the Use of Electronic Communications in International Contracts,[6]

Taking into account also enactments of domestic legislation, as well as case law, more favourable than the Convention in respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

Considering that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

1. *Recommends* that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive;

2. *Recommends also* that article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

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[2]*Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I, and United Nations publication, Sales No. E.95.V.18

[3]Ibid., *Sixty-first Session, Supplement No 17* (A/61/17), annex I.

[4]Ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), annex I, and United Nations publication, Sales No. E.99.V.4, which contains also an additional article 5 bis, adopted in 1998, and the accompanying Guide to Enactment.

[5]Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), annex II, and United Nations publication, Sales No. E.02.V.8, which contains also the accompanying Guide to Enactment.

[6]General Assembly resolution 60/21, annex.

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ALL'S FAIR IN LOVE AND WAR – OR IS IT? REFLECTIONS ON ETHICAL STANDARDS FOR COUNSEL IN INTERNATIONAL ARBITRATION

*Edna Sussman and Solomon Ebere**

While the topic of ethics for arbitrators has been the subject of discussion and debate for many years, recently the subject of ethics for counsel in arbitration has been generating increasing attention. In the past two years the International Bar Association's Arbitration Committee issued a survey regarding counsel ethics;[1] two codes of ethics[2] and a checklist[3] to guide counsel ethics in arbitration were also issued. Arbitral institutions are making rule changes that would further guide counsel conduct. "Guerrilla tactics" by counsel have been the theme of a growing number of scholarly writings[4] and have been the subject of several international arbitration conferences.[5]

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[1] *See* International Bar Association Arbitration Committee, *Counsel Ethics in International Arbitration Survey* [hereinafter IBA Survey], *available at* http://www.surveygizmo.com/s3/331908/IBA-Arbitration-Committee-Counsel-Ethics-in-International-Arbitration-Survey.

[2] *See* Doak Bishop & Margrete Stevens, *Advocacy and Ethics in International Arbitration: International Code of Ethics for Lawyers Practicing Before International Arbitral Tribunals, in* ARBITRATION ADVOCACY IN CHANGING TIMES, ICCA CONGRESS SERIES NO. 15 (Rio 2010) at 408 (Albert Jan van den Berg ed., 2011); International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals, *The Hague Principles on Ethical Standards* (Sep. 27, 2010) [hereinafter Hague Principles], *available at* www.ucl.ac.uk/laws/ cict/docs/Hague _Sept2010.pdf.

[3] *See* Cyrus Benson, *Can Professional Ethics Wait? The Need for Transparency in International Arbitration*, 3 DISP. RESOL. INT'L 78 (Mar. 2009), *available at* www.gibsondunn.com/ publications/Documents/Benson-CanProfessionalEthicsWait.pdf.

[4] *See* Stephan Wilske, *Arbitration Guerrillas at the Gate – Preserving the Civility of Arbitral Proceedings when the Going Gets (Extremely) Tough, in* AUSTRIAN Y.B. ON INT'L ARBITRATION 2011 at 315 (Christian Klausegger et al. eds., 2011); *see also* Gunther Horvath, *Guerrilla Tactics in Arbitration, an Ethical Battle· Is There Need for a Universal Code of Ethics?, in id.* at 297.

[5] *See* Vienna Arbitration Days 2010, Feb. 12 and 13, 2010, which dealt with "Guerrilla Tactics in Arbitration and Litigation"; *see also* the ICC Austria Conference,

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While the term "guerrilla" literally means little war in Spanish,[6] "guerrilla warfare" has come to mean a form of irregular warfare and refers to conflicts in which a small group of combatants including, but not limited to, armed civilians (or irregulars) use tactics such as ambush, raids and the element of surprise to harass a traditional army. In his classic *War and Peace*, Tolstoy reports on guerrilla warfare, apparently referring to a group that effectively used guerrilla warfare against Napoleon's army to disrupt supply and communication lines in a war in Spain in the early 1800s. In the international arbitration context, different strategies, methods and tactics, ranging from poor behavior to egregious and even criminal conduct, have together been described as "guerrilla tactics."

To explore whether the use of guerrilla tactics in international arbitration is really a problem of sufficient frequency and moment to warrant the attention it is now receiving with the promulgation of proposed ethical codes and institutional rule changes, we conducted an informal survey. We asked the following two questions:

1. As counsel in an arbitration or as an arbitrator, did you ever feel like one or both parties engaged in what you would call guerrilla tactics, whether technically unethical or not.
2. If your answer was yes, please describe a tactic you regarded as a guerrilla tactic.

I did not define guerrilla tactics on the theory that what needed to be discovered is whether counsel and arbitrators felt such tactics were being used and to learn what kinds of tactics they felt deserved to be labeled "guerrilla tactics." This was not intended to be, and does not pretend to be, a statistically valid survey, but it is a reflection of 81 responses from practitioners around the world involved in arbitration as arbitrators or counsel.

Fifty-five survey responders out of the 81, or 68%, checked off the "yes" box and reported that they had experienced what they felt were guerrilla tactics and provided an example. It is significant that 32% of the survey responders, including many well known international arbitration practitioners, reported that they had not seen such tactics utilized. While this is undoubtedly a result of a different definition being applied to the term guerrilla tactics by different people, perceptions matter, and that 32% number is worthy of note. It was also my sense from reading the many responses, that those who said they had encountered such tactics, had seen them only rarely. The international arbitration bar is perhaps, generally speaking, a quite civilized and ethical bar. Indeed, several respondents volunteered that they saw guerrilla tactics employed to a much greater extent in litigation.

A Fine Line: How to Counter – and Employ Guerrilla Tactics in International Arbitration & Litigation, Nov. 12-13, 2010.

[6] *See* THE COLUMBIA ENCYCLOPEDIA (6th ed. 2008), *available at* http://www.encyclopedia.com/topic/guerrilla_warfare.aspx.

However, attention must be paid to the fact that 68% reported that they had been subjected to or had witnessed guerrilla tactics. Moreover, the use of guerrilla tactics appears to be on the increase. In the past months we have seen reports of the arrest of a successful claimant by a host state,[7] fraudulent overstatement by over one billion dollars in a balance sheet submitted in arbitration,[8] death threats against witnesses,[9] and ex parte meetings of counsel for plaintiffs with the court-appointed "independent" expert to plan and write the expert's report.[10] One must, accordingly, conclude that arbitration tactics are an issue that requires serious exploration.

This article addresses (1) the nature of the activities that might be classified as guerrilla tactics; (2) the recent proposals to guide the ethics of counsel in international arbitration; and (3) the responses from bar associations and institutions.

I. THE SURVEY RESULTS

The results of the survey are best analyzed by breaking down the responses into categories and grouping the behaviors that respondents considered to be guerrilla tactics.

(i) *Document Production/Disclosure*: 19 out of 81 of respondents. Examples: Many respondents to the survey criticized the excessive use of the "leave no stone unturned" approach. Concomitantly, many respondents complained about another practice which consists of producing the requested documents at the last minute and/or burying the relevant documents in a pile of irrelevant ones, often in the midst of many multiple copies of the same document. One complained of the pages of a critical document spread out one page at a time through 18 boxes.

(ii) *Delay Tactics*: 9 out of 81 of respondents. Examples: Instances of counsel advancing client or personal health concerns, when they were in fact perfectly healthy, or of counsel failing to truthfully represent the client's availability for hearing appearances, were recurrent in the survey.

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[7] *See* Sebastian Perry, *ICSID Claimant Behind Bars on Bribery Charge*, GLOBAL ARB. REV. (Oct. 18, 2010).

[8] *See* Venture Global Engineering v. Satyam Computer Services Ltd., No. 9238, August 11, 2010 (Sup. Ct. India).

[9] *See* Znamensky Selekcionno-Gibridny Center LLC v. Donaldson International Livestock Ltd., 2009 CanLII 51197 (Ont. S.C.), *available at* http://www.canlii.org/en/on/onsc/doc/2009/ 2009canlii51197/2009canlii51197.html.

[10] *See* In re Application of Chevron Corporation et al., 709 F.Supp.2d 283 (S.D.N.Y. 2010) (while this concerns a court action in Ecuador, there is a companion arbitration proceeding; in addition to the conduct cited, the senior executives of the claimant and two of the claimant's lawyers were arrested during the court and arbitration proceedings. It must be noted that this case has an extensive subsequent and related history and the facts are hotly contested).

(iii) *Creating Conflicts*: 7 out of 81 of respondents. Examples: Several respondents reported instances of changing counsel during the arbitration process to create a conflict with an arbitrator. Another reported a motion to disqualify opposing counsel right at the outset of the evidentiary hearing for alleged conflict of interest.

(iv) *Frivolous Challenges of the Arbitrators*: 8 out of 81 of respondents. Examples: Respondents reported frivolous challenges to arbitrators such as on the ground that the arbitrator and one of the counsel attended a class together 25 years ago, or because the arbitrator and the opposing counsel share a bar association professional affiliation. Others reported that, after having sent abusive and inflammatory communications to the arbitrator or after having challenged the arbitrator, counsel then challenged the arbitrator for bias.

(v) *Last-Minute Surprise*: 18 out of 81 of respondents. Examples: A significant number of practitioners who answered the survey recalled some form of last-minute surprise. Introduction of important arguments or affidavits for the first time on the eve of the hearing, or during the hearing or in reply (or post-hearing) submissions; ignoring pre-hearing deadlines for producing documents or witnesses and just showing up at the hearing with the evidence or a witness without any notice; last minute changes of claim; production of documents long sought on the eve of the hearing and the like were tactics frequently reported to destabilize the opposing counsel.

(vi) *Anti-arbitration Injunction and other Approaches to Courts*: 12 out of 81 of respondents. Examples: Respondents reported filings of frivolous anti-arbitration injunctions; the initiation of criminal proceedings against party officers or counsel; litigation leading to fines imposed on the lawyers for the other side if they appeared at the hearing and a fraudulent insolvency filing.

(vii) *Ex-parte Communications*: 5 out of 81 of respondents. Example: A party had secured an anti-arbitration injunction. The party then sent a letter (ex parte) directly to the arbitrator appointed by the opposing party, instructing him not to proceed with the arbitration or he would face contempt proceedings before domestic courts. Other ex parte communications with the arbitrators were reported.

(viii) *Witness Tampering*: 7 out of 81 of respondents. Examples: The respondent party threatened a third-party witness that "he would never work again" if he came to testify in favor of the claimant. Another practitioner was involved in a case delayed for two years because opposing counsel was successful in scaring successive experts appointed in the case, filing different petitions against them before their professional body.

(ix) *Lack of Respect, Courtesy towards Tribunal and Opposing Counsel*: 17 out of 81 of respondents. Examples: Abusing the arbitrators after a bifurcated hearing on liability in order to try to keep down the amount of damages on the quantum hearing; repeatedly complaining to the tribunal of a deprivation of due process every time there is a denial of an application; hyper-aggressive behavior asking for reconsideration of every ruling not in their favor; disparaging adversaries; constantly alerting the arbitrators that they may be overturned on "appeal" unless they are given access to certain information. Several reported abusive behavior towards opposing counsel.

(x) *Frustrating an Orderly and Fair Hearing*: 25 out of 81 of respondents. Examples: Respondents reported many instances of such conduct: "Running out the clock;" raising (too) many objections in order to fluster opposing counsel; pretending to have documents in hand to scare witnesses into testifying as desired but actually holding blank pieces of paper; incorrect translations of pivotal documents; putting witnesses on the witness list whom counsel had no intention of calling to confuse the adversary and cover up who the real witnesses were; withdrawing the claim a day before the hearing, requiring a change in the order of proof and requiring counterclaimant to muster its case overnight; showing up at the hearing with boxes that appeared to be full of exhibits to intimidate the opposing party that were in fact empty; baiting witnesses and calling them liars; insisting upon the existence of supporting documentation but never submitting any.[11]

Which of these would the reader classify as guerilla tactics? All would agree that the tactics identified present different level of reprehensibility.[12] Some are not only unethical, but unlawful acts. Others may not amount to criminal behavior but run counter to ethics rules. Yet other strategies serve to delay the proceedings, confer unfair advantage or obstruct an orderly hearing. Finally, some may reflect cultural differences and may constitute completely acceptable behavior in some jurisdictions. Are these tactics acceptable and appropriate behavior in the vigorous representation of one's client? Is all fair in love and war? Or should guerrilla-like tactics, too, be addressed in any new ethical code for arbitration counsel in international arbitration?

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[11] The number of respondents to all categories adds up to more than the 55 who stated that they had been subjected to guerrilla tactics because some respondents gave more than one example.

[12] *See* Horvath, *supra* note 4, at 297 ("Guerrilla tactics range from the completely illegal and inappropriate, such as witness intimidation and phone tapping, to the merely sly, such as ambushing the opposing party with new evidence or ex-parte conversations with arbitrators").

II. HISTORY OF ETHICS PROPOSALS

While the topic of ethical standards for arbitrators in international arbitration has been the subject of codes and guidelines, major international arbitration providers are silent as to the question of ethics for counsel.[13] It should be noted that a few guidelines exist nevertheless,[14] including the *IBA Rules of Ethics for International Arbitrators (1986)*,[15] the *Union Internationale des Avocats "Turin Principles" of 2005*,[16] *IBA General Principles of the Legal Profession (2006)*,[17] and the *Code of Conduct for European Lawyers*, prepared by the Council of Bars and Law Societies of Europe ("CCBE Code") (2006).[18] However, these efforts do not provide meaningful guidance because they are either not specific to international arbitration, or do not address counsel conduct.

Many are of the view that this "ethical no-man's land,"[19] is unsatisfactory. Consequently, while some commentators believe that there is no workable solution to this problem,[20] an increasing number, on the contrary, believe that the

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[13] *See* Benson, *supra* note 3, at 78 ("[T]here are no 'rules of conduct' applied generally to lawyers before an international arbitration tribunal. The major institutional rules of arbitration, including the ICC and LCIA Rules, are silent as to the conduct of a party's legal representative" (quoting V.V. Veeder, *The 2001 Goff Lecture: The Lawyer's Duty to Arbitrate in Good Faith*, 18 ARB. INT'L 431, 433 (2002)).

[14] For a review of these ethical codes, see Catherine A. Rogers, *The Ethics of Advocacy in International Arbitration*, Penn State Univ., Dickinson Sch. Of Law, Legal Studies Research Paper No. 18-2010, at 2-3 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id =1559012 [hereinafter Rogers, *Ethics of Advocacy*]; *see also* Laurel S. Terry et al., *Transnational Legal Practice*, 42 INT'L LAWYER 833 (2008).

[15] *See* International Bar Association, RULES OF ETHICS FOR INTERNATIONAL ARBITRATORS (1986) (providing arbitrators with guidelines on how to behave in international arbitration; these are very broad guidelines, and more importantly, are specific to arbitrators, not counsel), *available at* www.int-bar.org/images/downloads/pubs/Ethics_arbitrators.pdf.

[16] *See* Union Internationale des Avocats *"Turin Principles" of 2005*, (a general initiative, not arbitration specific), *available at* http://www.abanet.org/cpr/gats/misc.html.

[17] *See* International Bar Association, IBA GENERAL PRINCIPLES OF THE LEGAL PROFESSION (2006) (a general initiative, not arbitration specific), *available at* http://www.ibanet.org/About_the_IBA/IBA_resolutions.aspx.

[18] *See* Council of Bars and Law Societies of Europe, CODE OF CONDUCT FOR EUROPEAN LAWYERS, *available at* http://www.ccbe.eu/index.php?id=32&L=0 (few provisions relating to conduct in arbitration).

[19] Rogers, *Ethics of Advocacy*, *supra* note 14, at 1.

[20] *See* authorities cited in Rogers, *Ethics of Advocacy*, *supra* note 14, at n. 28. *See also* International Bar Association, NEWSLETTER OF THE INTERNATIONAL BAR ASSOCIATION LEGAL PRACTICE DIVISION, Vol. 14 No. 1, at 11 (Mar. 2009) (recounting Audley Sheppard's opposition to the adoption of a global code, on the ground that it would be impossible to obtain consensus on rules that go beyond general statements of principle because local standards are sometimes fundamentally inconsistent with one another and cannot be

adoption of a code of ethics specific to the conduct of counsel in international arbitration is long overdue.

Michael Reisman and Detlev Vagts recognized the need for uniform ethical guidelines applicable to counsel in international arbitration long ago.[21] Jan Paulsson proposed the idea in 1992.[22] But only recently have "a number of other important scholars added their voices . . . [and the topic become] increasingly popular at international arbitration conferences."[23]

In reviewing this subject one must focus on what evils are sought to be corrected. A new ethics code can address two different areas of concern. The first are the tactics, which under some national codes or rules of professional conduct are unethical, while under other codes are not – a tension referred to as the double deontology problem. Where such conflicts exist counsel are faced with uncertainty as to which ethical code governs, while the parties whose counsel must answer to the more restrictive ethical mandate are at a disadvantage. The most familiar examples used to illustrate these significant divergences include witness preparation, disclosure, and ex parte communications.[24]

The issues raised by conflicting ethical norms and the lack of any overarching ethical code for international arbitration were discussed by Doak Bishop in his keynote address at the ICCA conference in 2010. He concluded that "there is a current, compelling need for the development of a Code of Ethics in International Arbitration and for the adaptation of tribunals and institutions to the adoption of such a Code."[25]

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reconciled). Those presenting at the ICC-YAF roundtable on September 29, 2010 expressed little enthusiasm for an international ethics code for counsel in international arbitration and speakers were of the view that the promulgation of such a code would undermine the effectiveness of existing codes and would represent a step backwards.

[21] *See* Rogers, *Ethics of Advocacy*, *supra* note 14, at 2, *citing* 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) (describing problems in the Iran Claims Tribunal caused by lack of ethical consensus among attorneys).

[22] *See* Jan Paulsson, *Standards of Conduct for Counsel in International Arbitration*, 3 AM. REV. INT'L ARB. 214 (1992).

[23] Rogers, *Ethics of Advocacy*, *supra* note 14, at 2.

[24] *Id.* at 3-5. For a discussion of several other areas of difference, *see* Benson, *supra* note 3, at 82-85 (also identifying as areas of difference lawyer communication with employees of an adverse corporate party, statements of fact to the tribunal known to be unsupported by the evidence, the obligation to advise the court of adverse legal authority, the nature of counsel's obligation to assure production of responsive documents, obligation to report perjury). *See also* Catherine A. Rogers, *Lawyers Without Borders*, 30 U. PA. J. INT'L L. 1035, 1038-39 (2009) [hereinafter Rogers, *Lawyers Without Borders*].

[25] Doak Bishop, ICCA, Keynote Address: Advocacy and Ethics in International Arbitration, at 1 (May 26, 2010) [hereinafter Bishop, Keynote Address], *available at* http://www.arbitration-icca.org/conferences-and-congresses/ICCA_RIO_2010/ICCA_RIO_2010_Doak_Bishop.html.

Indeed, practitioners should welcome the promulgation of such a code as it would clarify their obligations: without such an overriding ethical code there is no clear answer to the question of which ethical obligations are applicable – the ethical code of the home jurisdiction of counsel or the seat of the arbitration or some other law based on a conflicts of law analysis. Or are there no ethical obligations at all in this international no-man's land? An internationally applicable code would level the playing field; counsel would know what both he or she could do or could not do as well what ethical obligations adversary counsel would have to adhere to;[26] and clients would more easily understand why certain actions could or could not be taken.

The second area of concern which the ethical codes can address is one directed at assuring a fair, efficient and honorable process. Many of the guerrilla tactics described above do not fall technically afoul of any rules traditionally thought of as governing ethics. This is a time of concern about the disenchantment of many corporate users with arbitration because it no longer delivers on its earlier promise of low cost and speed, attributes still sought for many cases. The promulgation of a code of conduct with provisions that not only resolve problems of conflicting ethical responsibilities but also foster cooperation and efficiency may serve not only to return civility and enhance fairness but also return arbitration to the fulfillment of its promise.

III. RECENT ETHICS PROPOSALS

While numerous efforts have been made recently to address the issues arising out of counsel conduct in international arbitration, this article discusses the three leading new proposed sets of ethical rules and guidelines for counsel:

(i) *The International Code of Ethics for Lawyers*[27]

This proposed code adopts an approach of positing simple, elegant and essential rules in a short-form expression of each ethical duty. It is annotated to explain each proposed code provision, and cross references are provided to prior ethical codes where applicable.

(ii) *The Hague Principles on Ethical Standards*[28]

These principles, the work product of the International Law Association and developed by a working group of approximately 30 experts in the

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[26] It must be noted that there is a serious question as to whether adherence to an international ethics code for arbitration counsel that is not recognized with a provision in counsel's home jurisdiction really protects counsel from being in violation of the ethical code of the home jurisdiction. *See generally* discussion in Rogers, *Lawyers Without Borders*, *supra* note 24.

[27] *See* Bishop & Stevens, *supra* note 2.

[28] *See* Hague Principles, *supra* note 2.

field, provides another proposed set of ethical rules, more specific in some respects and more general in others.

(iii) *The Checklist of Ethical Standards for Counsel in International Arbitration*[29]

This proposal is presented in the form of a checklist to be reviewed at the start of the arbitration by all parties and is subject to the agreement of the parties. Any disagreements would be brought to the arbitrators for resolution. It would serve to level the playing field, as all would agree to the rules governing conduct for that arbitration. It would also serve to curb many of the guerrilla tactics described above, as counsel would be hard pressed not to agree to the "general conduct" provisions included, knowing that the arbitrators would learn of their unwillingness to abide by such mandates as not taking any action merely to delay, cause undue burden or harass another. The checklist is intended to empower the arbitrators to impose sanctions for violations of any agreed standards.

These three recent drafts introduce sets of rules and principles designed to further similar purposes:

(1) *Preserving the Legitimacy of the International Arbitration Process*

The large amounts at stake in modern arbitrations, the lack of transparency of the process, and the involvement of states as parties leading to greater public scrutiny, have created "a certain instability in the system that could result in a future crisis of confidence."[30] The proposed sets of rules aim to remedy that looming crisis and renew the confidence of arbitration users in the arbitral system.[31]

(2) *Promoting Procedural Fairness*

As Detlev Vagts explains, "[I]t would not be workable to allow the counsel for opposing sides in a civil case to enter the courtroom subject to different rules. . . . It would not do to prohibit one lawyer from a civil-law jurisdiction from interviewing a witness before the trial while the American lawyer would not only

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[29] *See* Benson, *supra* note 3.

[30] Bishop Keynote Address, *supra* note 25, at 11.

[31] *See* Charles N. Brower & Stephan W. Schill, *Regulating Counsel Conduct Before International Arbitral Tribunals, in* MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOUR OF DETLEV VAGTS 488, 491 (Pieter H.F. Bekker, Rudolf Dolzer & Michael Waibel eds., 2010) ("The need for uniform rules concerning counsel conduct before international tribunals stems not only from a need to ensure that counsel and parties operate on a *level playing field.* At issue may ultimately be the *legitimacy of the international arbitral system* as a whole.") (emphasis added).

be allowed to do so but would be guilty of professional negligence if he or she presented an un-interviewed witness."[32] While Article 4(3) of the IBA Rules for the Taking of Evidence attempts to reconcile this divergence, there are many other differences which continue to be problematic.

The proposed standards of ethics establish rules and guidelines to ensure a level playing field, where lawyers, irrespective of their home jurisdiction, are subject to the same rules. The rules tackle the most vexing procedural issues, such as witness communication, ex parte communication, and scope of disclosure.

(3) *Fostering an Atmosphere of Cooperation, Courtesy and Respect in Arbitral Proceedings*

The proposed rules also address the issue of civility in arbitral proceeding by policing counsel conduct towards the arbitral tribunal and between counsel.

In addition, these proposals also avoid the potential pitfall of adopting a "one-size-fits-all" approach. On the contrary, these rules encourage cooperation, giving the flexibility needed to accommodate procedural variations and modifications by the parties.

While all of these proposals generally seek to address the same problems, they differ in approach. The Benson Checklist is a radically different approach and can be used immediately without waiting for the resolution of the discussion of ethical codes, a process that will surely take years. It might be worthwhile for a few tribunals to experiment with using the checklist in an appropriate case. Reports on the success of the process, or its lack of success, could be shared with the arbitration community.

Careful thought should be given to how specific any new rules should be and cull from the best of the proposals made to date and refine and improve on them. Both the Bishop & Stevens Code and the Hague Principles provide an excellent foundation for the discussions that must follow. These authors take the position that unless the views of those who gather to assess an international code of ethics for arbitration counsel compel a conclusion that only a simple, short version will gain acceptance, more detailed proscriptions would be preferable. This is not love or war. Measures should be taken to foster a process that is as fair and efficient as possible. Specific guidance and the imposition of clearly articulated duties for counsel would do more to curb guerrilla tactics than loose general mandates. The final provisions should be vetted against the kinds of guerrilla tactics described above and a deliberate decision made as to which ones should be curbed and how best to word the new provisions to accomplish that goal.

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[32] Detlev Vagts, *Professional Responsibility in Transborder Practice: Conflict and Resolution*, 13 GEO. J. LEGAL ETHICS 677, 690 (2000).

IV. WHO AND HOW?

Who has the legitimacy to draft a universal code of ethics, and who could enforce a binding code of ethics are important questions. With regard to the drafting of such a code, Doak Bishop suggests that international bar associations, such as the ICCA or the IBA "appoint a working group of lawyers from different legal systems and geographical areas, including representatives of the major arbitral institutions, to consider [their] proposal, perhaps along with others, with a view toward building a consensus around a Code of Ethics that will have widespread support and can be adopted."[33] He then suggests "the major arbitral institutions consider incorporating this Code into their Rules by reference."[34] These are excellent suggestions.

With regard to the enforcement of such a code, as between courts, tribunals and arbitral institutions, Doak Bishop suggests that arbitral institutions adopt that role.[35] Cyrus Benson, however, suggests that tribunals should enforce these provisions, and if necessary impose sanctions.[36]

Incorporation by reference of ethical rules by the arbitral institutions would be useful as an affirmation by parties of their acceptance of those ethical norms. It would enable counsel to move forward on the same footing as their adversaries and would give the arbitrators a yardstick against which to measure counsel's conduct. Addressing these issues with institutional rules has precedent. For example, the ICDR addresses some of the concerns with its provisions; Article 7 of the International Dispute Resolution Procedures bars ex parte communications with the chair altogether and limits communications with the party-appointed arbitrators to the time before the selection of the chair and strictly limits the substance of those communications.[37] The ICDR Guidelines for Arbitrators Concerning Exchanges of Information, which will be incorporated into the ICDR rules when next amended, both seeks to put the parties on the same footing with respect to ethics and privilege and controls much of the document disclosure-related guerrilla tactics described above by establishing a limited scope for disclosure and empowering the arbitrator to exercise firm control.[38]

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[33] Bishop Keynote Address, *supra* note 25, at 15.

[34] *Id.*

[35] *Id.* at 14.

[36] *See* Benson, *supra* note 3, at 89 ("It is intended that violation of mandatory resolution (to the extent adopted) be subject to sanction by the tribunal").

[37] ICDR INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, Art. 7, *available at* http://www.adr.org.

[38] *See* ICDR GUIDELINES FOR ARBITRATORS CONCERNING EXCHANGES OF INFORMATION, *available at* http://www.adr.org.

But the institutions seem ill suited to accept the enforcement role.[39] The arbitrators can impose sanctions, where authorized, in the arbitral award; the institutions can just send a bill. While the nature of the sanctions that would be appropriate merits further consideration, it could include such measures as the drawing of negative inferences where such an inference would logically flow from the conduct in question or the imposition of monetary sanctions. While this is not a task arbitrators relish, they are in the best position to ensure a fair process.

V. OTHER INITIATIVES

There are several other related initiatives that are worth noting:

(1) *The IBA– Counsel Ethics in International Arbitration Survey*

The IBA Survey is intended to help the Task Force on Counsel Conduct in International Arbitration to investigate "the different and often contrasting ethical and cultural norms, standards and disciplinary rules that may apply to counsel in international arbitrations."[40] The Task Force's assessment was that "the lack of international guidelines and conflicting norms in counsel ethics undermines the fundamental protections of fairness and equality of treatment and the integrity of international arbitration proceedings."[41]

The IBA Survey comprehensively explores the many areas of double deontology, inquires as to whether the responder believes it would be helpful to have guidance on specific issues, and asks how guidance should be provided. The survey deals for the most part with double deontology issues and touches only lightly on other aspects of guerrilla tactics with an inquiry about document disclosure issues. Nonetheless, the results of the IBA Survey will undoubtedly play an important role in determining the international arbitration community's next steps on these important questions.

(2) *The ABA Ethics 20/20 Commission*

The ABA Ethics Commission[42] is reviewing lawyer ethics rules and regulation in the context of a global legal services marketplace. It has not as yet addressed any arbitration-specific problems. The subject of the lack of consistency in ethical codes for counsel engaged in cross-border arbitration was presented for consideration and was reserved for future discussion.

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[39] Domestic courts or local bar associations would not be suitable for enforcement as one of the purposes of international arbitration is to avoid reliance on local courts and local processes.

[40] IBA Survey, *supra* note 1.

[41] *Id.*

[42] For information about the ABA Ethics 20/20 initiative, *see* http://www.americanbar.org.

(3) *The Council of Bars and Law Societies of Europe*

The CCBE had established a working group to prepare recommendations/ guidelines for the use of European lawyers in arbitration but has terminated this initiative.

(4) *The Revisions to the ICC Rules of Arbitration*

The revised arbitration rules issued by the ICC in 2011[43] may serve to limit many of the guerilla tactics identified above. The new rule with respect to the allocation of costs by the arbitrators may prove to be a powerful tool to ensure appropriate conduct. The new ICC Rules provide that:

(i) The arbitral tribunal and the parties are to "make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute."[44]

(ii) "In making the decision as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner."[45]

VI. CONCLUSION

Seize the moment. The current attention to addressing counsel's ethical dilemma when subjected to conflicting or inconsistent ethical obligations and to assuring a fair and level playing field creates the opportunity to expand the ethical duties or standards of counsel in international arbitration to curb a broad range of guerrilla tactics. The inclusion of such standards would fill the vacuum which counsel happily fill when determined to win and willing to engage in what Stephan Wilske labels the "black arts." The elimination of such tactics would not only reduce cost and expedite the arbitration but would, like the leveling of the other ethical duties, also serve to afford parties a more equitable process. It would also help to preserve arbitration as a dispute resolution mechanism that is respected and utilized with enthusiasm.

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[43] ICC ARBITRATION RULES, *in force as of* Jan. 1, 2012.
[44] *Id.* Art. 22(1).
[45] *Id.* Art. 37(5).

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THE ARBITRATOR SURVEY – PRACTICES, PREFERENCES AND CHANGES ON THE HORIZON

*Edna Sussman**

Arbitration counsel want to win. Understanding how arbitrators think, what they favor, how they make decisions, and how they work together can guide counsel in devising their strategy and developing their presentations. For their part, arbitrators want to provide a fair hearing that meets the parties' needs. Knowing how other arbitrators handle various procedural aspects, what influences their thinking, and what they prefer can inform arbitrators in conducting their own arbitrations most effectively.

Several excellent works have been published in recent years which approach the subject of arbitrator decision-making from the perspective and mindset of many notable arbitration practitioners.[1] However, empirical data based on a pool of arbitrator responses is scarce. In order to inform the arbitration community and advance the knowledge base on arbitrator preferences and decision-making, I conducted a survey. The survey was distributed through various listservs both in the U.S. and to colleagues around the world and drew 401 responses.[2]

This article reports and comments on the survey responses, grouped into six sections: the constitution of the tribunal, fundamentals, narrowing the issues and preliminary views, deliberations, the award, and mediation. It is hoped that the discussion will aid counsel and arbitrators in the conduct of arbitrations and

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[1] *See, e.g.*, INSIDE THE BLACK BOX: HOW TRIBUNALS OPERATE AND REACH DECISIONS, ASA SPECIAL SERIES NO. 42 (Bernhard Berger & Michael Schneider eds., 2014); UGO DRAETTA, BEHIND THE SCENES IN INTERNATIONAL ARBITRATION (2011).

[2] The survey was disseminated from October 2012 to February 2013 by e-mail to several arbitration listservs. 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 on 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 for our review.

provoke consideration of ways to improve the process in the never-ending search for excellence in arbitration.

I. CONSTITUTION OF THE TRIBUNAL

Which do you prefer: sitting in a tribunal with three arbitrators or sitting as a sole arbitrator?
Sole 26.9%
Panel 73.1%

The vast majority of arbitrators prefer sitting with their colleagues. Sitting on a tribunal with others affords the arbitrators the opportunity to discuss difficult legal issues, consider collective reactions to the evidence, hear different insights and gain the benefit of different perspectives, cultural and legal backgrounds and experiences. While the literature on "group think" does not uniformly come to the conclusion that decisions by the group are better than decisions by the individual, noted commentators have concluded that three adjudicators are better than one and therefore "arbitration might yield more accurate determinations than bench trials."[3] So one could similarly conclude that a tribunal is more likely to provide a more accurate outcome than a single arbitrator. Thus, while it may be tempting to entrust a case to one arbitrator to reduce cost and time, and that may in many cases be the right choice, it is a choice to be made after careful consideration. Since the choice as to the number of arbitrators is commonly dictated by the arbitration agreement, care should be taken at the contract drafting stage to analyze the nature of the disputes that might arise, the likely size of any claim, the importance and complexity of the issues that might be decided, the need for different skill sets and expertise on the part of the decision-makers, and the desire for sensitivity to different legal and cultural perspectives.

If sitting on an arbitral panel do you prefer sitting as chair or as a co-arbitrator?
Chair 81.3%
Co-arbitrator 18.7%

Arbitrators are a self-assured lot. Serving as chair enables the arbitrator to exercise considerable control over the process and often to also have significant influence over the outcome. It is that increased control over the process and the ultimate decision that causes the overwhelming majority of arbitrators to state that they prefer to serve as chair (or president) of the tribunal. Arbitrators take the task entrusted to them by the parties seriously as the survey demonstrates, and prefer

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[3] Chris Guthrie, *Misjudging,* 7 NEV. L. J. 420, 453 (2007); *see also* Richard C. Waites & James E. Lawrence, *Psychological Dynamics in International Arbitration, in* THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION 69, 116 (Doak Bishop & Edward G. Kehoe eds., 2010).

the role that increases their ability to ensure that the arbitration is conducted properly, as they would conduct it ,and an outcome achieved that is in accordance with their view of the law and the facts. The survey response, with the overwhelming majority stating that they prefer to chair, suggests that arbitrators appreciate the responsibility with which they are being entrusted and are not looking for what for some may look like an easier ride, relying on the chair to do much of the heavy lifting.

II. FUNDAMENTALS

Do you regard yourself as influenced more by the facts or the law in making your decision?

Law	*3.5%*
Facts	*25.3%*
Both equally	*71.2%*

The more heavily weighted reliance on the facts reflected by the survey responses confirms the emphasis given to the advice that counsel must develop a sympathetic "story" that will resonate with the arbitrators if they want to prevail. The literature on persuasion in the law is evolving from the traditional model based solely on informal or formal models of logic to incorporate the "deeper" logic of narrative structures[4] and provides the theoretical underpinning for this advocacy advice. Narrative, the scholars say, is the "natural mode for understanding human experience,"[5] thus recognizing the nature of the workings of all human minds. Humans are hardwired to think in story terms, making storytelling an effective type of narrative reasoning for legal argumentation.[6] "The law always begins in story: usually in the story the client tells . . . It ends in story, too, with the decision by a court or jury . . . about what happened and what it means."[7]

In recent years, the Applied Legal Storytelling movement has focused on how storytelling, or "narrative theory," affects what lawyers and judges do in actual cases.[8] Narrative reasoning presents the arguments that motivate the decision-maker to want to rule in the party's favor. It is client-centered and fact-oriented. It

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[4] Christopher Rideout, *Storytelling, Narrative Rationality and Legal Persuasion,* 14 LEGAL WRITING: J. LEGAL WRITING INST. 53, 60 (2008). *See also* Stephen Paskey, *The Law is Made of Stories: Erasing the False Dichotomy Between Stories and Legal Rules,* 11 LEGAL COMMUNICATION AND RHETORIC: JALWD 51 (Fall 2014).

[5] Rideout, *supra* note 4, at 57.

[6] Kenneth D. Chestek, *Competing Stories: A Case Study of the Role of Narrative Reasoning in Judicial Decisions,* 9 LEGAL COMMUNICATION AND RHETORIC: JALWD 99, 102 (Fall 2012).

[7] Rideout, *supra* note 4, at 53, *quoting* JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 168 (1985).

[8] Chestek, *supra* note 6, at 99.

is a motivating argument as opposed to a justifying argument.[9] Scholars have described three features (or properties) of narratives that can be psychologically persuasive: narrative coherence (how well the parts of the story fit together, or narrative probability), narrative correspondence (what the decision-maker knows typically happens in the world and not contradicting that knowledge), and narrative fidelity (the perception that the story rings true with what the decision-maker knows to be true).[10] Counsel would do well to devote considerable attention to the development of the "story" even if they believe they have a strong legal position and keep these three properties in mind in organizing the "story," bearing in mind the particular background and life experiences of the arbitrators appointed in the case.

But the story must fit the legal theory. As Professor Chestek aptly summarized in his discussion of narrative reasoning: "[P]ersuasion is like a double helix: one strand of logos wound tightly with a strand of narrative reasoning. But for this technique to create a viable 'DNA' molecule, the two strands must complement each other in a natural way. If they don't fit together well, the persuasion won't work."[11]

Which do you find more difficult to decide, liability or quantum of damages?
Liability *18.6%*
Damages *43.7%*
Both the same *37.7%*

Most arbitrations are about damages. How much will the claimant or counterclaimant be awarded? As the survey response confirms, this central issue, the determination of damages, can be an enormously complicated process and arbitrators often find it more difficult to determine the quantum of damages than to determine that damages should be awarded. Forty-four percent of the arbitrators surveyed said that quantifying damages was more difficult than assessing liability. Only 19% found liability more difficult.

The decision on damages may require consideration of a host of issues.[12] What standard should be applied to the proof? Are there contractual limitations on the damages that may be awarded? Are damages limited by the applicable law?

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[9] *Id.* at 102.

[10] *See* Rideout, *supra* note 4, for an extensive discussion of the three properties.

[11] Chestek, *supra* note 6, at 129.

[12] For discussions of damages in arbitration, *see, e.g.,* Hilary Heilbron, *Assessing Damages in International Arbitration: Practical Considerations, in* THE LEADING ARBITRATORS GUIDE TO INTERNATIONAL ARBITRATION 857 (Larry Newman & Richard Hill eds., 3d ed. 2014); MARK KANTOR, VALUATION IN ARBITRATION (2008); HERFRIED WÖSS, ADRIANA SAN ROMAN RIVERA, PABLO T. SPILLER & SANTIAGO DELLEPIANE, DAMAGES IN INTERNATIONAL ARBITRATION UNDER COMPLEX LONG-TERM CONTRACTS (2014). The need for more discussion of the damages issue led to the launching at the end of 2014 of a new *Journal of Damages in International Arbitration* devoted to the subject.

What law governs? Has the claimant demonstrated causation? Has the respondent mitigated sufficiently? If comparative negligence is applicable, how should damages be allocated? Has corruption defeated claimant's right to damages? If there are several respondents, who should be held responsible and for how much? Should there be an award of costs and if so how should it be allocated? What interest rate should be applied and on what basis? And all these and other questions may present themselves before one even considers the unique complexities presented by the damages question. The damages analysis often requires valuations and projections into the future with all of its uncertainties and the application of metrics that can be particularly difficult to assess. What is the most convincing vision of the "but-for" world? What discount rate should be applied? Which multiple is the right one to use? These and many other questions often lead to presentations of complex calculations and computer models with competing experts whose testimony and analysis must be assessed.

While having the experts confer in advance to narrow the issues and hot-tubbing (having them appear at the hearing at the same time) can be of great assistance to the tribunal, the fact remains that damages are often more difficult to assess than liability. Counsel should make every effort to make the presentation as straightforward as possible while still giving the tribunal all the building blocks it needs to understand the analysis. Counsel should invite the tribunal to ask questions and provide the tribunal with whatever tools are necessary to enable it to reach a sound result. The tribunal should make sure it understands all of the presentations and ask for whatever else it needs to make a well grounded decision. The tribunal may, *inter alia,* ask for additional explanations or analysis, request the parties to calculate damages based on specified factual findings or a variety of factual findings, or, in appropriate cases, retain a tribunal expert or request a computer model that can be manipulated by the tribunal.

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	*1.0%*
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%*

Arbitrators tend not to exclude evidence. As the survey showed, 34% never excluded evidence that would otherwise be inadmissible in court and 55% excluded such evidence only 25% of the time. Since there is essentially no appeal, arbitrators have been especially careful to ensure that not only are the parties afforded a fair hearing but that the parties perceive it to be fair. In addition, arbitrators may feel that they could be jeopardizing the award and risking a

challenge for failure to afford a party a full and fair opportunity to present its case if they exclude evidence. While case law, at least in the United States, has confirmed awards that were challenged on this basis because they were found not to impair the "fundamental fairness" of the proceeding,[13] if the evidence is not time-consuming and does not cause the parties to incur meaningful additional costs, admitting such evidence may well be viewed as creating no harm and averting a challenge, which in and of itself costs time and money. Arbitrators are also comfortable that they can appropriately weigh the evidence and discard evidence that is not trustworthy.

While the current practice may well be the right one, increasing awareness of unconscious influences may begin to shift counsel and arbitrator conduct somewhat.[14] Persuasive studies have been conducted demonstrating that inadmissible evidence can unconsciously and significantly influence decision-making.[15] Will this new awareness cause arbitrators to be more discriminating in what evidence they admit? Will counsel, as they become more cognizant of these influences, take additional steps to avoid the potential impact of such evidence? It seems likely that as arbitration conferences and arbitration publications heighten awareness of the impact of the unconscious,[16] measures will be taken by both arbitrators and counsel to ensure that those impacts are taken into consideration in assessing the evidence.

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[13] *See, e.g.*, LJL 33rd Street Assocs. LLC v. Pitcairn Props. Inc., 725 F.3d 184 (2d Cir. 2013); Doral Financial Corp. v. Garcia-Velez, 725 F.3d 27 (1st Cir. 2013).

[14] For a discussion of the unconscious psychological influences in arbitration, *see, e.g.*, Edna Sussman, *Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them*, 12 AM. REV. INT'L ARB. 487 (2013); Doak Bishop, *The Quality of Arbitral Decision Making and Justification*, 6(4) WORLD ARB. & MED. REV. 801 (2012).

[15] 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). (For example, in one 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 per cent 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.).

[16] *E.g.*, 27th Annual ITA workshop entitled *Subconscious Influences in International Arbitration*, sponsored by the Institute for Transnational Arbitration in June of 2015; the forthcoming interdisciplinary book edited by Tony Cole of Brunel Law School on The Roles of Psychology in International Arbitration, both of which follow a series of conferences and programs in recent years on the subject.

III. NARROWING THE ISSUES AND PRELIMINARY VIEWS

Apart from decisions on jurisdiction or damages, how many times have you ruled in favor of a moving party on a preliminary issue that has terminated the case or eliminated a significant claim or defense?

Never	*21.4%*
0-5	*48.7%*
6-10	*21.7%*
11-20	*5.1%*
21-30	*2.3%*
31-40	*0.5%*
more than 40	*0.3%*

The survey results reflect the historical reluctance to grant dispositive motions. Seventy percent of the respondents ruled in favor of the moving party on a preliminary issue that terminated the case or eliminated a significant claim or defense between 0 and 5 times. Notwithstanding the fact that paragraph 3 of the preamble to the IBA Rules on the Taking of Evidence provides that "each Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, the issues that it may regard as relevant and material to the outcome of the case, including issues where a preliminary determination may be appropriate," dispositive motions on claims and defenses have not traditionally found frequent favor with tribunals. Given the sophistication of the respondent pool, this appears to be an accurate reflection of arbitrator practice. In recent years, however, much attention has been devoted to time and cost in arbitration, users have sought greater utilization of such motions which serve to abbreviate proceedings, and commentators have called for an expanded use of dispositive motions.[17]

While U.S. courts have long recognized the arbitrator's inherent authority to dismiss a claim based on a dispositive motion ruling,[18] the most recent amendments to the American Arbitration Association Commercial Rules added Rule 33, which expressly grants authority to the arbitrator to make rulings on dispositive motions, albeit only if "the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case." The rule strikes a balance between considering motions likely to be meritorious but not those which would result only in additional cost and time. Article 20(3) of the recently amended ICDR Rules provides that "the tribunal may direct the parties to focus their presentation on issues whose resolution could dispose of all or part of the case." Time will tell whether the practice gains momentum, but the current pressures to make arbitration more efficient and more responsive to user preferences suggests that the same question posed five years from now may lead to a different result.

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[17] *See, e.g.*, Adam Raviv, *No More Excuses: Toward a Workable System of Dispositive Motions in International Arbitration*, 28 ARB INT'L 487 (2012).

[18] Edna Sussman & Solomon Ebere, *Reflections on the Use of Dispositive Motions in Arbitration*, 4(1) N.Y. DISPUTE RESOL. LAWYER 28 (2011).

Do you confer with your co-arbitrators and advise the parties before the commencement of the hearing as what issues you would like them to be sure to address (or do this yourself if sitting as a sole arbitrator)?

Always	*5.6%*
Usually (i.e., around 75% of the time)	*16.1%*
Often (i.e., around 50% of the time)	*19.4%*
Sometimes (i.e., around 25% of the time)	*39.8%*
Never	*19.1%*

Only 6% always gave advice to the parties before the commencement of the hearing as to what they perceive to be the issues. Roughly 60% of the respondents provided such guidance 25% or less of the time. This, too, is an area that may be evolving.

Recently, leading practitioners have suggested that there be earlier focused exchanges of views by the arbitrators. David Rivkin, speaking as both arbitrator and counsel, has advocated for such a process.[19] Neil Kaplan has proposed the "Kaplan Opening," calling for an oral presentation of the case by counsel after the first round of written submissions and witness statements but well before the hearing, and including perhaps even some expert testimony, enabling the tribunal to work with counsel to craft a bespoke streamlined process for the later submissions and the hearing.[20] Lucy Reed has proposed the "Reed Retreat." This contemplates that a time be scheduled in the procedural timetable for the tribunal to meet in person to study the file well in advance of the hearing, with the goal of arriving together at targeted directions to the parties for the hearing.[21]

Whether counsel will welcome such interventions or view them as impinging on their ability to present their case in the way they believe would be most advantageous to their clients remains to be seen. But these measures, if they gain acceptance, offer the possibility of significant improvements to the arbitration process by ensuring well prepared arbitrators, providing guidance to the parties and narrowing the issues to be presented at the hearing.

Do you form a preliminary view of the merits of the case after receiving the prehearing submissions?

Always	*3.5%*
Usually (i.e. around 75% of the time)	*14.1%*
Often (i.e. around 50% of the time)	*19.3%*
Sometimes (i.e. around 25% of the time)	*50.8%*
Never	*12.3%*

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[19] *See* remarks by David Rivkin in INSIDE THE BLACK BOX, *supra* note 1, at 21-25.

[20] Neil Kaplan, *If It Ain't Broke Don't Change It,* 80(2) ARB. 172-75 (2014).

[21] Lucy Reed, *Arbitral Decision-Making: Art, Science or Sport?* 30(2) J. INT'L ARB. 85, 95-96 (2013).

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%	*9.8%*
11 -20%	*20.5%*
21 -30%	*31.4%*
31 - 40%	*16.5%*
41 -50%	*13.8%*
Over 50%	*8.0%*

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 that the unconscious often interferes with the ability to evaluate evidence in a truly open-minded fashion as it is received because of the influence of what has been labeled by the social scientists as "confirmation bias," that is the filtering out of information that does not fit a story already believed to be the correct version.[22] As Francis Bacon stated hundreds of years ago, "The first conclusion colors and brings into conformity with itself all that comes after."[23] A similar conclusion was reached by Waites and Lawrence, noted social psychologists known for their decision-making work, who concluded in their foremost article on the subject of psychology and arbitrators that "[a] typical arbitrator concludes the initial stage of the decision making process with a single dominant story in mind. . . . Arbitrators . . . will make every effort to fit their perceptions of the facts and circumstances of the case into the story they have formed." Waites and Lawrence conclude that "[o]nce 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.[24]

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. Does this mean that in too many arbitrations a conclusion reached early is substantiated by later evidence as conflicting evidence is filtered out by the arbitrator's unconscious? The law has recognized the impact of confirmation bias in the context of jury trials in the United States. Jurors are admonished not to talk about the case among themselves, 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. It is not suggested that this be adopted in

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[22] *See, e.g.*, Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2(2) REV. OF GENERAL PSYCHOLOGY 175 (1998).

[23] Francis Bacon, *Novum Organum*, XLVI (1620), *available at* http://intersci.ss.uci.edu/wiki/ebooks/BOOKS/Bacon/Novum%20Orgum%20Bacon.pdf (1620).

[24] Waites & Lawrence, *supra* note 3, at 109-110.

arbitration, as the exchange of views by the arbitrators is invaluable. Without even being aware of this psychological driver arbitrators already take many steps to ensure that they have fully reviewed the evidence and the law from all perspectives. However, a heightened awareness of confirmation bias may lead them to be even more vigilant to override any such unconscious impact with reasoning and deliberation grounded in the facts and the law.[25]

Do you think it is appropriate for the arbitral tribunal to give its preliminary views of the case after the prehearing submissions and before the hearing?
Yes 3.5%
No 72.2%
Sometimes 24.3%

Do you think it is appropriate for the arbitral tribunal to give its preliminary views of the case after all of the evidence has been presented?
Yes 8.0%
No 51.8%
Sometimes 40.2%

While the survey demonstrates that a very small number of arbitrators regularly deliver their preliminary views to the parties, the role of the arbitrator in facilitating settlement is another area of increasing interest. The delivery of preliminary views is an obvious driver to settlement. Structures and procedures are in place for the utilization of such a process which can be agreed to in the arbitration agreement or after the dispute has arisen. The Centre for Effective Dispute Resolution ("CEDR"), a leading London-based mediation and alternative dispute resolution body, issued its Rules for the Facilitation of Settlement in International Arbitration in 2009. Article 5 of those Rules provides, *inter alia,* that "the Arbitral Tribunal may, if it considers it helpful to do so . . . provide all Parties with the Arbitral Tribunal's preliminary views on the issues in dispute in the arbitration and what the Arbitral Tribunal considers will be necessary in terms of evidence from each Party in order to prevail on those issues; . . . provide all parties with preliminary non-binding findings on law or fact on key issues in the arbitration. . . "

Increasing attention is also being given to the Germanic approach to see if there are lessons to be learned from that practice. The German arbitrator's approach, following the practice of the German courts, calls for identifying the legal issues, establishing the burden and standard of proof, categorizing the facts that support each side's position, and streamlining the presentation of the evidence for the hearing to the material disputed facts. Furthermore, preliminary views may

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[25] For a discussion of confirmation bias and the steps that arbitrators can take to foster a more robust deliberative process which minimizes the impact of confirmation bias, see Sussman, *Arbitrator Decision-Making, supra* note 14, at 505-508.

be given either before or after the hearing if the parties agree to encourage settlement.[26]

However, preliminary views expressed are likely to generate an even stronger confirmation bias than those that are kept to oneself. Thus, arbitrators need to be even more careful after they have expressed their preliminary view. But this concern should not in and of itself preclude the delivery of preliminary views where sought by the parties since it can, and often does, serve to foster a settlement that leads to greater party satisfaction.

IV. DELIBERATIONS

Which of the following practices do you believe is better?
Share views early in the process and discuss reactions to the merits throughout the proceeding 63.3%
Wait until all the evidence is in before discussions among the arbitrators about the merits of the case 26.9%
No opinion 9.8%

A majority favor an ongoing discussion of the case within the tribunal, but a significant number took the minority view. Since discussions should generally be held with all arbitrators present, the unwillingness of one arbitrator to engage in such discussions often precludes substantive conversations between the others as well.

Ongoing discussions are often said to be favored because they (a) allow the tribunal members to identify issues in advance of the hearing and help them focus on what is important and advise counsel as to where attention should be devoted; (b) enable the tribunal members to discuss pieces of evidence or issues of law that they find significant, troubling, or puzzling as the case evolves; and (c) are more likely to lead to a unanimous award. When party-appointed arbitrators are interviewing prospective tribunal chairs, it may be useful to ask about the prospective chair's preference in this regard. Some arbitrators find it frustrating to sit with a colleague who is not willing to engage in discussions about the case until after the final submissions or argument.

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[26] Klaus Peter Berger, *The International Arbitrator's Dilemma: Transnational Procedure versus Home Jurisdiction – A German Perspective*, 25 ARB. INT'L 217 (2009); Jan K. Schäfer, *Focusing a Dispute on the Dispositive Legal and Factual Issues, or How German Arbitrators Think – An Introduction to a Traditional German Method*, B-ARBITRA 333 (No. 2, 2013).

Do you review the evidentiary record before you prepare the award?

Always	*70.1%*
Usually (i.e. around 75% of the time)	*17.7%*
Often (i.e. around 50% of the time)	*7.2%*
Sometimes (i.e. around 25% of the time)	*5%*
Never	*0%*

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	*31.5%*
Usually (i.e. around 75% of the time)	*22.6%*
Often (i.e. around 50% of the time)	*21.0%*
Sometimes (i.e. around 25% of the time)	*19.2%*
Never	*5.7%*

While the response to the first question suggests that arbitrators generally check the record to make sure that the evidence they are relying on is as they remember it and supportive of their conclusions, the response to the second question suggests that perhaps arbitrators are not religiously reviewing the record for the evidence that might drive them to a different conclusion. The learning on confirmation bias suggests that the better practice would be to review the evidence from both perspectives before the issuance of the award to ensure that the correct conclusion has been achieved. The institution of party-appointed arbitrators does serve to ensure that all perspectives are reviewed at all stages and particularly at the time of the final deliberations. However, it should not be necessary to use the unilateral appointment process to ensure that appropriate consideration is given to all arguments. As unconscious influences on decision-making become better known, all arbitrators may pause and rethink the case from other perspectives before coming to their final conclusion.

When you deliberate in the tribunal, how often is a straw poll taken at the outset of the deliberation to determine preliminary views?

Always	*4.7%*
Usually (i.e. around 75% of the time)	*17.5%*
Often (i.e. around 50% of the time)	*20.4%.*
Sometimes (i.e. around 25% of the time)	*26.2%*
Never	*31.2%*

It appears from the survey that it is a slightly less common practice to ask as a preliminary matter what ultimate conclusions each arbitrator has reached at the beginning of the deliberation. This would appear to be the better practice as it would foster a comprehensive review of the disputed material facts and of the applicable questions of law in the most open and collegial manner without anyone feeling like he or she has to defend a position taken. On the other hand, it may be that the response reflects the fact that the continuing discussions during the

hearing have already brought the tribunal to a common preliminary view, subject to reconsideration based on further discussion and review of the evidence and the law and that no such straw poll is necessary.

In what percentage of the cases have you found yourself persuaded to change your views after discussion with your co-arbitrators?
0 - 5% 16.7%
6 - 15% 26.4%
15 - 30% 36.9%
31 - 50% 15.9%
over 50% 4.1%

When sitting on an arbitral tribunal how often do you find the final decision heavily influenced by one arbitrator with very strong views?
0 - 10% (of the time) 42.5%
11 - 20% (of the time) 26.1%
21 - 40% (of the time) 18.4%
41 - 60% (of the time) 10.2%
Over 60% (of the time) 2.8%

The survey results suggest that in most cases each arbitrator comes independently to the same view of the case. Perhaps many cases aren't as close a call as the losing party thinks or a common view was developed through continuous discussions so the occasion for persuading a fellow arbitrator does not arise. However, the survey results suggest that the arbitrators are listening to one another and can be persuaded that they have come to the wrong conclusion. Arbitrators may change their mind based on a presentation of a factual perspective that they had not considered or a deeper and different analysis of the law. The survey suggests that cogently presented sound positions grounded in the facts and the law can serve to persuade others on the tribunal. They will listen.

In what percentage of your cases have you relied on the burden of proof to resolve a close case?
0 - 5% 12.3%
6 - 15% 24.2%
15 - 30% 30.5%
31 - 50% 17.4%
Over 50% 15.6%

At the International Council for Commercial Arbitration ("ICCA") conference in 2014 there was a plea for greater precision in several areas including significantly in the area of proof. That discussion centered on the standard of proof to be applied in assessing whether a party has met its burden of proof, in other words what degree of confidence must the tribunal have in the accuracy of its decisions. The standard of proof is expressed differently in different

jurisdictions and the meaning attributed to even the same or a similarly stated standard differs from jurisdiction to jurisdiction.[27] In common-law jurisdictions the standard of proof is typically stated as (a) a preponderance of the evidence for the ordinary civil claim; (b) clear and convincing or cogent evidence for a more serious claim such as an allegation of fraud; and (c) beyond a reasonable doubt for criminal charges. Civil-law jurisdictions, if they speak to a standard at all, refer to *l'intime conviction du juge* or free assessment.[28]

There is no clear consensus as to whether the substantive law governing the merits of the arbitration, or the law of the seat, or an overriding international norm controls which standard is applicable.[29] There is also no agreement as to whether it makes a significant difference or whether in fact how arbitrators actually assess cases is the same regardless of the stated standard.[30] However, some studies based on empirical psychological research support the view that there may be considerable differences in outcome when people are asked to apply different standards of proof. [31]

Thus the question of burden and standard of proof merits attention. It appears from the survey results that arbitrators generally decide cases without specific reliance on the burden of proof. Many cases are simply not so close that reliance on whether the burden of proof is met, whatever the standard applied, as the basis for the decision is necessary. One side or the other is clearly overwhelmingly right. However, the survey results suggest that the burden of proof is relied on with sufficient frequency to make the question of who bears the burden of proof and what standard of proof is required an important one which should be given due consideration by counsel and arbitrators. As has been suggested, arbitrators should consider raising the issue of the applicable standard of proof along with other substantive and procedural issues that must be addressed and counsel should raise the issue and urge the adoption of the standard that they believe is applicable and most advantageous for their position.[32]

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[27] *See* discussion in Michael Bond, *The Standard of Proof in International Commercial Arbitration,* 77 ARB. 304 (2011).

[28] *Id.*

[29] See discussion in Jennifer Smith & Sara Nadeau-Seguin, *The Illusive Standard of Proof in International Commercial Arbitration, in* LEGITIMACY : MYTHS, REALITIES, CHALLENGES, ICCA CONGRESS SERIES NO. 18 at 134 (Miami 2014) (Albert Jan van den Berg ed., 2015). *See also,* Abhinav Bhushan, *Standard and Burden of Proof in International Commercial Arbitration: Is There a Bright Line*, 25 AM. REV. INT'L ARB. 601 (2014).

[30] Smith & Nadeau-Seguin, *supra* note 29.

[31] Andreas Glockner & Christoph Engel, *Can We Trust Intuitive Jurors: Standards of Proof and the Probative Value of Evidence in Coherence-Based Reasoning*, 10(2) J. OF EMPIRICAL LEGAL STUDIES 2030 (June 2013).

[32] Smith & Nadeau-Seguin, *supra* note 29, at 155.

V. THE AWARD

What do you believe is important to accomplish in drafting the award? Check off all that apply.

Getting the award out promptly	*82.8%*
Making sure the award is not subject to a successful challenge	*79.1%*
Making it clear that all arguments are understood	*85.0%*
Clearly setting out the rationale for your decision	*94.5%*
Making a good impression on your fellow arbitrators and counsel (And others, if the award is likely to be viewed by those outside the process)	*25.2%*
Making sure all procedural issues or rulings are mentioned	*47.6%*
Creating a clear basis for the allocation of costs/attorneys fees	*62.6%*
In investor-state arbitration, establishing precedents that you believe are correct and may influence later arbitrations	*9.2%*

The objectives identified most frequently by the arbitrators appropriately look to accomplishing not only the objective of prompt resolution and finality, but also fall into a category that could be classified as making sure that the parties feel heard and understood and that the outcome was rational and based on the evidence. Many who added comments to this question said that they also wanted "to show respect for the parties and their arguments." Several stated that they take great pride in drafting the award and will spend the time necessary, regardless of whether or not they are remunerated for that time. A significant number specifically added that they "write the award for the loser." Writing the award with the loser in mind and seeking especially to have the loser understand the reasons for the result is important, as these arbitrators recognized, so that all feel that they received a fair hearing. This likely has the ancillary benefit of causing the loser to be less inclined to challenge the award. In the words of Aeschylus in the fifth century BC: "the word pacifies the anger."[33]

Do you believe an arbitrator may properly issue an award believed to be in accordance with equity even if that outcome cannot be justified with the application of the law to the facts?

Yes	*21.9%*
No	*78.1%*

This question is often debated as a hypothetical, and strong views have been expressed. The diverging views on the question are reflected in this survey result. However, research has shown that while arbitrators may like to differ in theoretical conversations on the subject, in fact they follow the law in rendering their awards. A study of publicly available reasoned awards in the United States

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[33] *Quoted in* Teresa Giovannini, *Philosophy Can Help Tribunals Draft Awards that Parties Will Accept as Legitimate,* DISPUTE RESOLUTION J. 78, 90 (May-July 2011).

reflects extensive citation by the arbitrators to legal authority in their decisions. Legal citation was used by the author as a proxy for determining if the awards were based on the application of law. The author concluded based on his study that "the evidence provides little support for the view that arbitrators and judges engage in qualitatively different kinds of decision-making or opinion writing."[34]

Arbitrators understand that businesses need predictability in the conduct of their business and in the resolution of their disputes. The application of the law specified to govern the contract provides that predictability and the contract governs the arbitrator's scope of authority. That does not mean that arbitrators cannot do justice. The law has been crafted over the years to do justice and to guide the decision-maker to a just result. Thus the application of the law to the facts achieves a just result in virtually every case. As Justice Scalia pointed out, quoting Chancellor James Kent who said, "I most always found [legal] principles suited to my views of the case."[35] As quoted above, Waites and Lawrence, concluded that "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," another way of saying that arbitrators will base their final resolution on the principles of law.[36]

In what percentage of your cases did you feel like you had a "Eureka" moment, when all of the various factual and legal arguments fell into place neatly?

0 to 5%	*25.1%*
6 to 15%	*24.3%*
16 to 30%	*27.6%*
31 to 50%	*13.3%*
Over 50%	*9.7%*

This question flowed from the judicial writing on the moment of closure as the decision is reached, described here as a "Eureka" moment, when all the pieces fall into place and the logic of the conclusion becomes clear. Justice Cardozo explained the process most eloquently: "Then suddenly the fog has lifted. I have reached a stage of mental peace . . . the judgment reached with so much pain has become the only possible conclusion, the antecedent doubts merged, and finally

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[34] Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90(4) N .C. L. REV. 1091 (2012).

[35] ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 27 (2008). Whether or not an arbitrator can introduce legal theories not raised by the parties, even assuming he or she brings them to the parties' attention for comment, is a subject beyond the scope of this article, and may be subject to differing views.

[36] Waites & Lawrence, *supra* note 3, at 114.

extinguished, in the calmness of conviction."[37] Judge Friendly spoke of the decisional conclusion as "flashes before the shaving mirror in the morning."[38] The survey results suggest that in most cases there is no such moment; and it is only in the occasional case where arbitrators have to wrestle with facts that just won't fit together or legal questions that are so difficult to resolve that such a moment is felt. But when such a moment does occur, the jurists have described it well.

In what percentage of your cases has the chair written the first draft of the entire award?

90 - 100%	*45.0%*
80 -89%	*19.9%*
70-79%	*13.4%*
40 - 60%	*11.9%*
less than 40%	*9.8%*

As can be seen from the survey result, the chair of the tribunal generally takes on the task of doing the first draft of the entire award. The writing of an award by a single individual facilitates the writing of the award in a consistent single voice and can often lead to a more expeditious finalization of the award. The draft should not be written until after the deliberations by the full tribunal so that it reflects the views of all, or at least the majority. There are occasions, especially in complex multi-faceted cases, in which the chair assigns discrete factual or legal issues to the co-arbitrators to prepare the first draft. Or there may be occasions where the chair finds himself or herself too busy to prepare the award in a timely manner and so delegates most or all of the task of preparing the first draft. Or the tribunal may find it impossible to come to a consensus based on its discussions and concludes that the only way to make further progress is to have the differing views written out as a draft of the award and then reconsider which view should prevail. But as the survey shows these are less frequent occurrences.

In approximately what percentage of your cases have you changed your view of the case outcome while writing the award?

0 to 10%	*55.7%*
11 to 20%	*28.2%*
21 to 35%	*10.1%*
36 to 50%	*5.7%*
More than 50%	*0.3%*

It doesn't happen often, but it does happen. As they say, "it's not over until it's over." Sometimes the award just doesn't write or the evidence doesn't stack

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[37] Benjamin N. Cardozo, *The Paradoxes of the Legal Science*, *in* THE SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 80-81 (Margaret E. Hall ed., 1947).

[38] Judge Henry J. Friendly, *Reactions of a Lawyer - Newly Become Judge*, 71 YALE L. J. 218, 230 (1961).

up on review as it is remembered or a deeper analysis of the applicable law dictates a different outcome. The fact that arbitrators do change their views even in the course of writing the award evidences that they continue to keep an open mind and continue to assess the facts and the law in their efforts to arrive at the right conclusion.

Do you write out for yourself the reason for an award (even in outline form) if you are issuing a standard/bare award with no reasons.

Yes	*42.6%*
No	*30.8%*
Sometimes	*26.6%*

While unreasoned or bare awards are rare in international arbitration and are not enforceable in some jurisdictions, there are jurisdictions in which they suffice. Occasionally parties seek an unreasoned award for such reasons as protection of trade secrets, the prevention of any possibility of preclusive consequences or just to save on the fees. As shown in the prior question, decisions can change in the writing of the award, as in the writing the arbitrator discovers the error of his or her initial conclusion. That possibility suggests that it is best for arbitrators to prepare at least an outline of their reasoning in order to verify and confirm the accuracy of the decision reached even in the issuance of an unreasoned or bare award.

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 signed the award?

1	*0.3%*
2	*0%*
3	*0.3%*
4	*0%*
5	*0.3%*
6	*0.3%*
7	*3.3%*
8	*16.3%*
9	*52.2%*
10	*27%*

As one arbitrator said when he heard the statistic, if you are not at least at a 9 in terms of certainty, you should continue to think about the case until you achieve that level of certainty. Indeed, that is excellent advice. The parties deserve to have the arbitrators continue their deliberations and their personal reviews until they reach a very high degree of certainty as to the correctness of the outcome. The survey reflects that arbitrators are careful in their decision-making and will continue to work through the issues and think about how to reconcile the facts and how to resolve difficult questions of law until they achieve a high degree of

certainty. The process follows 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.[39] 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. Justice Holmes 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."[40] As Judge Posner similarly remarked, "People hate being in a state of doubt and will do whatever is necessary to move from doubt to belief."[41] What is necessary here is that arbitrators continue to work through the case until they arrive at certainty. The survey reflects that they do so.

In how many cases have you dissented?	
0	*64.7%*
1	*19.3%*
2- 5	*16.0%*
6 or more	*0 %*

The respondents, virtually all of whom I suspect deal with commercial and not investor-state cases, almost never dissent. Much has been written on the subject of whether or not dissents are appropriate in commercial cases. Strong views have been expressed that except in the rare case, they are detrimental to the process in commercial arbitration. Dissents have been said to stifle deliberations, encourage challenges to the award, and provide a roadmap for how to attack it.[42] Whether motivated by these concerns, or simply the result of a consensus typically being achieved among the members of a tribunal after careful and reasoned deliberation, the survey results support the general perception that dissents are indeed rare and further supports the conclusion that party-appointed arbitrators are independent.

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[39] Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L. J. 1, 20 (1998).

[40] Oliver Wendell Holmes Jr., *The Path of the Law,* 10 HARV L. REV. 457, 465 (1897).

[41] Judge Richard Posner, *The Jurisprudence of Skepticism,* 86 MICH. L. REV. 827, 873 (1988).

[42] Mark Baker & Lucy Greenwood, *Dissent – But Only if You Really Feel You Must,* 7(1) DISPUTE RESOL. INT'L 31 (2013).

VI. MEDIATION

Do you think it is appropriate for an arbitral tribunal to discuss or suggest mediation?

Yes	*24.8%*
No	*23.4%*
Sometimes	*51.8%*

Mediation continues to gain attention and increased utilization around the world. A few examples: UNCITRAL's Working Group II is exploring the development of a convention for the cross-border enforcement of mediated settlement agreements.[43] The EU is working to foster the greater adoption of mediation pursuant to the EU Mediation Directive.[44] Pursuant to the most recent amendments in 2013, Rule 9 of the American Arbitration Association Commercial Rules now provides that the parties who have filed an arbitration "shall mediate their dispute" although any party may unilaterally opt out of the rule. Singapore has taken steps to make it easier to mediate and obtain an arbitral award recording the settlement agreement pursuant to the SIAC-SIMC Arb-Med-Arb Protocol.[45] In June of 2015, Brazil passed its first mediation law.[46]

With the growing acceptance of mediation it would not seem inappropriate for arbitrators to suggest mediation. Many arbitrators now inquire at the first procedural hearing whether the parties wish to include a mediation window in the arbitration scheduling order to establish a date on which the parties will discuss whether or not they wish to have a mediation and so eliminate the fear of many counsel that suggesting mediation will be viewed as a sign of weakness. There are some that harbor lingering concerns that having arbitrators raise mediation might intimate in some way how the tribunal is leaning, particularly if the matter is raised later in the process and not at the first conference with the parties. That concern may well fade as having more open discussions with the parties about the issues earlier in the proceeding gains as an emerging best practice. The 23% of the arbitrators who stated that it was never appropriate for the tribunal to discuss or suggest settlement or mediation may well change their views in the coming years.

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[43] *See* UNCITRAL Working Group II documents collected at http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html; *See also* Edna Sussman, *A Path Forward: A Convention for the Enforcement of Mediated Settlement Agreements*, TRANSNAT'L DISPUTE MANAGEMENT (March 2015).

[44] *See* European Parliament, Directorate General for Internal Policies, Policy Dept. C, Citizens' Rights and Constitutional Affairs, "*Rebooting" the Mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Measures to Increase the Number of Mediations in the EU* (2014).

[45] SIAC-SIMC Arb-Med-Arb Protocol is *available at* http://simc.com.sg/siac-simc-arb-med-arb-protocol.

[46] Law No. 13,140, the Brazilian Mediation Law, *enacted on* June 29, 2015.

Would you be willing to mediate a case in which you are sitting as an arbitrator if the parties give you informed consent?
Yes 51.9%
No 48.1%

The ICC in its promotional material for a conference held in Hong Kong in October 2015 entitled *The Use of Med-Arb in the Resolution of Cross-Border Disputes* describes med-arb as a "particularly hot topic" in the international arbitration sphere. Med-arb has been discussed for decades but has, as the ICC notes, become a subject of considerable conversation and debate in recent years as users seek more efficient dispute resolution processes and the perceived practices of the Far East and their mixing of roles have become more influential with the expansion of East-West trade. While the general perception has been that arbitrators schooled in common law and Western traditions are less inclined to view acting as both arbitrator and mediator in the same matter with favor, the survey results demonstrate that over 50% of the arbitrators would be willing to engage in such an exercise if the parties elect it and provide informed consent. Moreover, a study conducted in 2011 comparing Eastern and Western arbitrators on the subject suggests that the common perception is inaccurate and that there is in fact little difference in the willingness of arbitrators across nations to engage in med-arb. In that study, 58% of both Eastern and Western arbitration practitioners stated that it was appropriate for the arbitrator to actively engage in settlement negotiations at both parties' request.[47]

The surveys suggest that the use of med-arb may well finally be on the ascendancy. Indeed, additional empirical research suggests that this process design is being used a great deal more than is suspected.[48] Like all processes, it raises its own unique set of issues and the advantages and disadvantages of utilizing this mixed process must be considered carefully by the parties. Process issues such as, *inter alia*, whether caucus sessions during which the neutral meets separately with the parties should be conducted, whether the parties should be required to reconfirm continuation with the same neutral as he or she switches hats, the enforceability of any resulting resolution, and what is required to constitute informed consent, must all be reviewed with care.[49]

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[47] Shahla F. Ali, *The Morality of Conciliation: An Empirical Examination of Arbitrator "Role Moralities" in East Asia and the West*, 16 HARV. NEG. L. REV. 1 (2011).

[48] Thomas Stipanowich, *Commercial Arbitration and Settlement: Empirical Insights into the Roles Arbitrators Play*, 6 PENN STATE Y.B. OF ARB. AND MEDIATION 1, 25-28 (2014) (survey responses by mediators showed that 61.3% had some experience in mixed roles).

[49] For a discussion of these issues, see Edna Sussman, *Developing an Effective Med-arb/Arb-med Process,* 2(1) N.Y. DISPUTE RESOL. LAWYER 71-74 (2009); Edna Sussman, *Med-Arb: An Argument for Favoring Ex Parte Communications in the Mediation Phase*, 7 WORLD ARB. MED. REV. 421 (2013).

The world may well be moving towards a much more nuanced perspective on process design for the resolution of disputes outside the courts. To advance informed choices by parties as to the multiplicity of options available to them, the College of Commercial Arbitrators in cooperation with the International Mediation Institute and the Straus Institute has embarked upon a project to explore the many modalities for dispute resolution facilitated by a third-party outside the courts, and how those various modalities can be combined to maximize party satisfaction.

CONCLUSION

How arbitrators decide and the nature of their internal processes has been described by those who seek to explore them as going "inside the black box" or "behind the curtain." This article has hopefully shed some light on how arbitrators operate and provided some useful guidance to both arbitrators and counsel. The exploration of current practices has also suggested areas in which some changes and refinements may be coming in the future. The continuing evolution of arbitration practices in the coming years will prove or disprove the predicted emergence of some of the trends identified.

Evaluating the Advantages and Drawbacks of Emergency Arbitrators

Edna Sussman and Alexandra Dosman, New York Law Journal

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Commercial parties choose to resolve their disputes by international arbitration for many reasons, including greater confidentiality, a neutral forum, and increased control over the selection of decision-makers. Until recently, however, parties were required to go to national courts to request interim measures of protection—such as security, asset freezes, or orders for the protection of evidence—before the constitution of an arbitral tribunal.

In response to a perceived need for a mechanism for awarding interim relief within the arbitral system itself (rather than national courts), in 2006 the International Centre for Dispute Resolution (ICDR) incorporated emergency arbitrator proceedings into its rules. In the following nine years, almost every major international arbitration institution has followed suit.[1] Emergency arbitrator provisions are now the norm, including for new entrants in the field.[2] Were these amendments a response to a genuine need for emergency relief in international arbitration? Are emergency arbitrators being used, and are their decisions enforceable?

A review of information from the arbitral institutions reveals that parties are, in fact, using emergency arbitrator mechanisms, and that decisions of emergency arbitrators are generally rendered within very short time frames. The case law from U.S. courts—including the high-profile *Yahoo! v. Microsoft*—indicates decisions by emergency arbitrators are likely to be enforced. Given these factors, in certain circumstances the use of emergency mechanisms within the arbitral system will be preferable to going to a national court for interim relief.

A Trend That Has Become the Norm

The recent proliferation of emergency arbitrator mechanisms has its roots in innovations dating back some time. In 1999, the American Arbitration Association (AAA) made an opt-in emergency arbitrator process available with its Optional Rules for Emergency Measures of Protection. In 1990, the Court of Arbitration of the International Chamber of Commerce (ICC) began offering a similar optional ("opt-in") mechanism for pre-arbitral tribunal proceedings, under its Rules for a Pre-Arbitral Referee Procedure. The ICC Pre-Arbitral Referee Procedures (which are still available) have not proved popular, with only 14 cases in their first 24 years of existence.[3]

In contrast to these precursor mechanisms, the modern wave of emergency arbitrator rules apply by default—they are "opt out" rather than "opt in." Almost all of the emergency arbitrator rules apply prospectively, to arbitration agreements entered into after the relevant rules came into force. One exception is the SCC, which elected to make the emergency arbitrator provisions applicable to all SCC arbitrations *commenced* after Jan. 1, 2010, regardless of when the arbitration agreement was signed.[4]

The most obvious characteristic of emergency arbitrator proceedings is the speed at which they are to be established and completed. The rules surveyed provide for the appointment of an arbitrator by the institution within one day (ICDR, SCC, SIAC, CPR), two days (ICC, HKIAC), or three days (LCIA) of receipt of the application and payment of fees. Under the ICDR, ICC and SIAC Rules, the emergency arbitrator must set a procedural schedule for the arbitration within two days of appointment. The time limits for rendering an award range from five days (SCC) to 14 days (LCIA) to 15 days (ICC, HKIAC). The SIAC, CPR and ICDR Rules do not specify a time limit for rendering an award, but require decisions as expeditiously as possible.

All emergency arbitrator procedures call for the appointment of a sole emergency arbitrator by the institution. (The CPR Rules are unique in also recognizing the possibility that parties may jointly designate an emergency arbitrator.) The institutions appoint either from a list of emergency arbitrators or a non-list method. The ICC, for example, selects emergency arbitrators following discussion between the court and the Secretariat regarding the qualities required for each case; a shortlist is drawn up and an arbitrator is chosen from among those with availability who report no (or de minimus) conflicts. Location is also a factor. In contrast to its normal rule, the ICC Emergency Arbitrator Rules allow for nationals of the same state as one or more of the parties to serve as emergency arbitrator. All of the rules require the same standard of impartiality and independence for emergency arbitrators as for arbitrators in non-emergency proceedings; and all provide for an expedited challenge procedure.

Emergency Arbitration in Action

Information from public sources and from direct inquiries of arbitral institutions indicates that emergency arbitration procedures are being used in a reasonable number of cases. And the original premise has, so far, borne out: Interim relief has been awarded or denied within extraordinarily short time frames. What remains unclear, however, is whether a consensus is forming (or can form) about the legal standards that apply to an emergency arbitrator's deliberations.

Since 2006, the ICDR has registered 49 requests for emergency relief. Of those, the applicant was successful in obtaining full or partial emergency measures in almost half of the cases (24); the applicant was unsuccessful in 14 cases. Eight of the 49 cases settled, two were withdrawn, and one is still pending. At the ICDR, the average time for the rendering of an emergency decision is 21 days. The flexibility afforded by the rules to the arbitrator in not providing for a deadline by which a decision has to be rendered allows the arbitrator to tailor the process to the needs of the particular case.

Under its 2007 Rules for Non-Administered Arbitrations, CPR has received five requests for the appointment of a Special Arbitrator (as emergency arbitrators are denoted by the CPR). Two requests were denied, one request was granted, one request was withdrawn, and one resulted in agreed relief. JAMS has received six applications, only three of which went to a decision. One then settled and two are ongoing.

At the SCC, 13 emergency arbitrator applications had been registered as of Dec. 31, 2014, of which two were in the context of investment treaty claims. All 13 went to a

decision by the emergency arbitrator. One decision was rendered in the form of an award, by request of the parties. Interim relief was granted in three of the 13 cases. The SCC rules require a decision to be rendered within five days of transmission of the file to the emergency arbitrator. The five-day deadline to render a decision has been met in eight of the 13 cases; extensions in five other cases were granted upon request of the arbitrator; and all decisions have been rendered within 12 days.

SIAC has received 42 applications. Of those 42, at least 11 applications were denied, eight were granted, and four were withdrawn. No official data on settlement is available, but the institution is aware of "quite a few" cases in which the matter settled shortly after an emergency arbitrator's award or order. At SIAC, the average time for the issuance of an interim order is 2.5 days; and the average time for an award has been 8.5 days from when the adjudicator first hears from the parties.[5]

The ICC has received 15 applications to date, of which at least four were granted, four were denied, and two were withdrawn or settled (information is lacking on five cases). At least three cases were terminated by agreement before the constitution of the arbitral tribunal and one was terminated shortly after. As of 2014, all emergency orders had been rendered within the 15 day deadline prescribed by the ICC Emergency Arbitrator Rules.[6]

The HKIAC has received two applications under its emergency arbitrator proceedings, but both were withdrawn prior to a determination on whether or not to award interim relief (one proceeded to a costs award).

The AAA has received 15 requests for emergency arbitration under its October 2013 rules. A decision was issued by the emergency arbitrator in four cases; three cases were withdrawn; five settled; six remain pending before a later-constituted tribunal; and one resulted in a final award.

Neither the LCIA nor the CPR has received any applications under the new rules effective as of Oct. 1, 2014 and Dec. 1, 2014, respectively.

Broad Powers

Emergency arbitrators have broad powers to consider and determine their jurisdiction, to establish the procedure of the expedited application, and to order interim relief to the same extent as could a regular arbitral tribunal under the applicable arbitration agreement.[7] Interim measures may include orders to maintain the status quo while an arbitration proceeds, to protect the arbitral process, to preserve assets or to preserve evidence.

The law of the contract is not generally seen as controlling on the question of whether and which interim measures may be granted. Commentators and emergency arbitrators have, to date, preferred the view that interim relief is procedural in nature, and therefore not bound by the constraints of the law applicable to the contract itself.[8] This view has been endorsed by at least one New York court, with the result that an ICDR arbitrator was empowered to order an interim measure that the court itself would not be able to

grant.

In *CE International Resources Holdings v. S.A. Mineral Ltd. Partnership*, the court considered whether an ICDR arbitrator had the power to order pre-judgment security and a Mareva-style injunction freezing a party's assets during the pendency of the arbitration.[9] New York law does not permit a plaintiff to obtain pre-judgment security in an action for money damages, and under well-established case law neither federal nor state courts are empowered to award Mareva-style freezing orders. The court upheld the arbitrator's award of interim relief on the basis of the arbitral rules chosen by the parties (which allow the tribunal to "take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property") and the public policy favoring the enforcement of arbitration agreements.[10]

Varying Legal Standard

The test to be applied by emergency arbitrators in determining whether interim relief should be awarded is notably absent from most international arbitration rules. Instead, the rules state that emergency arbitrators may grant interim relief that is "urgent" (ICC, HKIAC), "necessary" (ICDR, SIAC, CPR), or "appropriate" (SCC).[11] Rules for domestic U.S. arbitrations provide more guidance. For example, under the AAA's Commercial Rules, the applicant must show that "immediate and irreparable loss or damage shall result in the absence of emergency relief and that such party is entitled to such relief." (Rule 38(e).) Similarly, the JAMS Rules provide that "the Emergency Arbitrator shall determine whether the Party seeking emergency relief has shown that immediate and irreparable loss or damage will result in the absence of emergency relief …" (Rule 2(c)(iv).)

In determining the legal test, emergency arbitrators have been guided by the applicable arbitration law, standards used in local courts, and international practice. The urgency of the matter, the requirements of irreparable harm and a balancing of the harm among the parties have been widely applied. But the identification of the standard to be applied and the strength of the case on the merits that must be presented have not been uniform among emergency arbitrators.

In SCC decisions alone, emergency arbitrators have referred to the Swedish Arbitration Act and the Swedish judicial code, and have described the standard as "reasonable probability of success on the merits," "prima facie case," "reasonable possibility," "serious claim," and "probable cause." One emergency arbitrator noted that there was a "universal consensus" with respect to the requirements: a prima facie case; urgency; and irreparable harm or serious or actual damage in the absence of interim relief.[12] Similarly, in SIAC cases, the tests applied have ranged from a "real probability" of success to a "good arguable case" test.[13]

In one ICDR case the emergency arbitrator applied a four-part test: a risk of irreparable harm; good prospects of success on the merits, no other remedy would be adequate; and any harm from wrongful injunctive relief could be compensated by damages.[14] In another, the parties agreed that the applicant must show "irreparable harm absent the requested relief, a likelihood of success on the merits of its claims, and a balance of hardships in its

favor."[15]

It is too soon to tell whether a consensus will form as to the legal standard employed by emergency arbitrators in international arbitration. One way forward—reportedly used regularly by ICDR emergency arbitrators in the absence of party agreement—is to apply the standards set out in the UNCITRAL Model Law on International Commercial Arbitration for interim measures issued by the duly appointed tribunal.[16] The Model Law test has three elements: (1) likelihood of irreparable harm (i.e., not reparable by money damages); (2) harm that substantially outweighs the harm to the party against whom the measure is granted; and (3) a "reasonable possibility" of success on the merits. Whether such a standard may also be applied in domestic arbitrations is an open question. In practice, it may yield the same results as the Second Circuit standard, which requires either (a) a likelihood of success on the merits, or (b) a sufficiently serious question going to the merits of the claim to make them fair ground for litigation."[17]

Are Emergency Decisions Enforceable?

Decisions issued by emergency arbitrators are, by their nature, interim. The rules of each arbitral institution are clear that the arbitral tribunal, once constituted, may modify, terminate or annul the decision of the emergency arbitrator.[18] The statistics from the arbitral institutions and anecdotal evidence suggest that parties often voluntarily comply with emergency arbitral awards or orders. But in the case of a recalcitrant party, are decisions by emergency arbitrators enforceable in court?

As a general rule, U.S. courts do not have the power to review interlocutory (non-final) decisions by arbitral tribunals. However, U.S. courts have the power to enforce interim awards to support the integrity of the arbitral process: "Without the ability to confirm such interim awards, parties would be free to disregard them, thus frustrating the effective and efficient resolution of disputes that is the hallmark of arbitration."[19] U.S. courts have also confirmed interim injunctive awards on the basis that they address issues that are separate, distinct and severable from the resolution of the underlying merits of the dispute.[20] Although these cases have arisen in the context of interim measures issued by regularly-appointed arbitrators, the same rationales apply to interim measures issued by emergency arbitrators.

Indeed, the Southern District of New York recently confirmed an award issued by an emergency arbitrator under the rules of the AAA (the parties had "opted in" to the AAA's 1999 Optional Rules for Emergency Measures of Protection). In *Yahoo! v. Microsoft*,[21] Judge Robert P. Patterson considered Yahoo's motion to vacate an emergency arbitration award that had granted an injunction in Microsoft's favor. After an emergency arbitral proceeding that involved witness testimony, briefing, and an oral hearing, the emergency arbitrator issued an order requiring Yahoo to continue to perform its obligations under the parties' contract. Having reviewed the parties' arbitration agreement, the arbitral rules and applicable law, the court denied the motion to vacate and confirmed the award, even though due to the nature of the case the order was tantamount to final relief, noting that "if an arbitral award of equitable relief based upon a finding of irreparable harm is to have any meaning at all, the parties must be capable of enforcing or vacating it at the time

it is made."[22]

Other U.S. cases have supported the orders of the emergency arbitrator.[23] Indeed, one court issued a temporary restraining order to preserve the status quo but stayed the action pending arbitration expressly leaving it to an emergency arbitrator to resolve what interim measure was appropriate.[24]

In the one known case in which a U.S. court declined to review a decision of an emergency arbitrator, it did so in support of the arbitral process. In that case, the losing party went to court to seek to vacate a decision of an emergency arbitrator. The court noted that under its circuit law, "temporary equitable orders calculated to preserve assets or performance needed to make a potential final award meaningful … are final orders that can be reviewed for confirmation and enforcement by district courts under the [Federal Arbitration Act]."[25] In this case, this rationale did not apply: The party seeking review wished to undo an order, not enforce it. The court declined to review the case for vacatur on the basis that it was not intended to be final and thus in essence left the order in place and effectively enforced it.[26]

Although the case law is sparse, parties to emergency arbitration proceedings in the United States have good reason to believe that the resulting decisions will be enforced.

Courts or Tribunals?

Emergency arbitrator systems appear to be working and provide a useful, and sometimes crucial, alternative, especially in the international context. But they will not be appropriate in all cases. In order to address that concern, all of the rules surveyed maintain the possibility of applications to national courts concurrently with the invocation of emergency arbitrator proceedings.

National courts will be the preferred venue when relief is required ex parte. With few exceptions, the emergency arbitrator rules surveyed do not allow for emergency relief on an ex parte basis: Notice is required to the responding party.[27] While the rationale for this policy is clear—fairness and enforceability concerns—the lack of an ex parte route may obviate the utility of emergency arbitrator proceedings, such as when the initiation of proceedings is itself expected to trigger a dissipation of assets. In addition, where emergency relief requires a third party to be bound (such as a bank), national courts will be the venue of choice.

Emergency arbitration has, in the last 10 years, become a standard feature of international arbitration. It offers key advantages—a neutral forum; a swift decision; increased confidentiality—and the limited data available shows that some parties are using this new tool. Jurisprudence from U.S. courts also shows reason for optimism that decisions of emergency arbitrators will be enforced.

Endnotes:

1. In 2007, the Institute for Conflict Prevention and Resolution (CPR); in 2010, the

Arbitration Institute of the Stockholm Chamber of Commerce (SCC) and the Singapore International Arbitration Centre (SIAC); in 2011, the Australian Centre for International Commercial Arbitration; in 2012, the Court of Arbitration of the International Chamber of Commerce (ICC); in 2013, the American Arbitration Association "AAA) and the Hong Kong International Arbitration Centre (HKIAC); in 2014, the London Court of Arbitration (LCIA), the CPR for its international rules, and JAMS; in 2015, the China International Economic and Trade Arbitration Commission (CIETAC). However, the move to include emergency arbitrator procedures is not universal. The Vienna International Arbitration Center made a considered decision not to offer such procedures as part of their rules, in part because of the view that decisions issuing from that process would not be enforceable as arbitral awards.

2. See The rules of the Kuala Lumpur Regional Centre for Arbitration, the Kigali International Arbitration Centre, and the Lagos Court of Arbitration.

3. Andrea Carlevaris and José Ricardo Feris, "Running in the ICC Emergency Arbitrator Rules: The First Ten Cases," ICC International Court of Arbitration Bulletin, Vol. 25, No. 1 (2014).

4. In the domestic U.S. context, the JAMS Rules incorporating emergency arbitrator procedures appear to apply to arbitrations "filed and served after July 1, 2014"—implying that they are not limited to arbitration *agreements* entered into after that date. (Rule 2(c)). The JAMS international rules, last updated in 2011, do not provide for emergency arbitration, but an update is expected shortly that will likely include such a provision.

5. Vivekananda N., "The SIAC Emergency Arbitrator Experience," available at www.siag.org.sg, at 4.

6. Carlevaris and Feris, ICC Emergency Arbitrator, supra note 3.

7. ICDR Rules, Article 6(4); SIAC Rules, Schedule I, 6; ICC Rules, Appendix V, Article 6(3); LCIA Rules, Article 9A, 9.8; CPR Rules, Rule 14.9. The jurisdiction of emergency arbitrators may be more limited than that of the arbitral tribunal. For example, the ICC rules explicitly limit the application of emergency proceedings to the signatories to the arbitration agreement (or their successors).

8. Emergency arbitrators remain subject to mandatory procedural laws of the seat that apply to the issuance of interim relief by arbitrators. For example, several jurisdictions appear to limit or eliminate the powers of arbitrators to issue injunctive relief (Quebec; Italy).

9. *CE International Resources Holdings v. S.A. Mineral Ltd. Partnership*, 2012 WL 6178236 176158 (S.D.N.Y. Dec. 10, 2012). (This was not an emergency arbitrator case.)

10. Id.

11. The HKIAC Rules Article 23(3) and 23(4) set out the type of temporary measure and

the relevant factors to be considered. However, Article 23 applies only to decisions by the "arbitral tribunal," which excludes emergency arbitrators (Article 3.6: "References in the Rules to the "arbitral tribunal" include one or more arbitrators. Such references do not include an Emergency Arbitrator as defined at para. 1 of Schedule 4.")

12. Johan Lundstedt, "SCC Practice: Emergency Arbitrator Decisions, 1 January 2010-31 December 2013."

13. Vivekananda N., "The SIAC Emergency Arbitrator Experience," at 3.

14. Guillaume Lemenez and Paul Quigley, "The ICDR's Emergency Arbitrator Procedure in Action," Dispute Resolution Journal (August/October 2008) at 5.

15. Order of the Emergency Arbitrator dated July 31, 2013 in *Irvine Scientific Sales Company v. Microbix Biosystems*, 986 F. Supp. 2d 1187 (D. Mont. 2013) (order submitted and available on PACER).

16. United Nations Commission on International Trade Law, Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (UNCITRAL Model Law). See Grant Hanessian, "Emergency Arbitrators" in L. Newman & R. Hill, eds., The Leading Arbitrators' Guide to International Arbitration (Juris, 2014).

17. *Otoe-Missouria Tribe of Indians v. New York State Dept. of Financial Services*, 769 F.3d 105, 110 (2d Cir. 2014).

18. Many institutions' rules provide that the decision of the emergency arbitrator may take the form of either an order or an award. Under the ICC Rules, however, the emergency arbitrator is limited to issuing an order; the decision will not undergo scrutiny by the ICC Court of Arbitration.

19. *Companion Property and Casualty Insurance Company v. Allied Provident Insurance*, Case No. 13-cv-7865, 2014 WL 4804466 at *3 (S.D.N.Y. Sept. 26, 2014) (and cases cited therein)

20. *Publicis Communications v. True North Communications*, 206 F.3d 725 (7th Cir. 2000).

21. 983 F. Supp. 2d 310 (S.D.N.Y. 2013).

22. Id., citing *Southern Seas Nav. v. Petroleos Mexicanos*, 606 F. Supp. 692, 694 (S.D.N.Y. 1985).

23. *Draeger Safety Diagnostics v. New Horizon Interlock*, 2011 WL 653651 (E.D. Mich. Feb. 11, 2011); see also *Blue Cross Blue Shield of Michigan v. Medimpact Healthcare Systems*, 2010 WL 2595340 (E.D. Mich. June 24, 2010).

24. *Pre-Paid Legal Services v. Kidd*, 2011 WL 5079538 (E.D. Okla. Oct. 26, 2011).

25. *Chinmax Medical Systems, Inc. v. Alere San Diego*, 2011 WL 2135350 (S.D. Ca. May 27, 2011) (internal citation omitted).

26. In a similar vein, in 2003 the Paris Court of Appeal declined to review an award granted by a Referee under the ICC's Pre-Arbitral Referee procedures. The losing party there sought to annul decisions of the Referee. The Paris court found that the Referee was not acting as an "arbitrator" and that therefore his decisions did not qualify as arbitration awards, meaning that they could not be subject to set-aside proceedings. Judgment of April 29, 2003, Docket No. 2002 / 05147, Court of Appeal of Paris, First Chamber, §C.

27. Under Article 26(3) of the Swiss Rules of International Arbitration, arbitral tribunals have the power, in "exceptional circumstances," to grant interim relief ex parte.

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Use Of Experts In Arbitration: Alternatives For Improved Efficiency

by
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Park Jensen Bennett LLP
New York, NY

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Commentary

Use Of Experts In Arbitration: Alternatives For Improved Efficiency

By
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Complex, technical disputes in arbitration often require expert analysis, to assist an arbitration tribunal in understanding the issues to be resolved, and to answer specific questions required for a fair and accurate resolution of a dispute. The expense, burden and time commitment required for expert analysis, however, represent potential limits on the efficiency of the arbitration process. This Article addresses some of the alternatives available to parties, their counsel, and the tribunal, in structuring expert analysis to maximize efficiency.[1]

Goals In Expert Analysis

An arbitral tribunal (individual arbitrator or arbitrator panel) often needs help in understanding technical issues in a case (accounting, engineering, valuation and more, depending on the case). The tribunal's mission is to decide the matter, fairly and efficiently. The role of an expert thus generally is not to opine on the ultimate issues in the case (that is the tribunal's function), but to address subsidiary questions (such as the proper accounting for certain transactions; the engineering implications of a particular design; the alternative potential valuations for a particular asset—again depending on the needs of the case). An expert may also perform specific functions (such as review of voluminous data sources, and on-site or laboratory testing of conditions) that are beyond the ken of the tribunal, or otherwise not suited to conventional evidentiary submissions. Experts may also be called upon to explain complex technical issues, or to summarize points of foreign law.[2]

Experts, even if engaged by the parties (or, more often, their counsel) are generally assumed to act with professionalism and independence, for the benefit of the tribunal. An expert opinion that is pure advocacy, with experts in substance serving as mere mouthpieces for the party (or counsel) that hired them, may undermine the search for fair and efficient resolution, in that, with "dueling" experts, a tribunal may be well-informed as to alternative theories, but not necessarily well-equipped to choose one theory over another. The question thus becomes: are there methods that a tribunal can use to discourage a pure clash of expert advocates, or (at very least) to focus the clash on only the points that matter most to a fair and efficient resolution?

An additional element of efficiency in the process of expert submissions concerns the form and timing of such submissions. Lengthy proceedings strain the ability of a tribunal to evaluate expert evidence fairly and completely. Reducing the time required for expert testimony, and focusing such testimony on the most important matters, that are actually in dispute, can enhance the ability of the tribunal to reach a just and accurate result. Further, ensuring that complete expert submissions are provided the tribunal, prior to the close of hearings, avoids the risk that the arbitrators must speculate, due to an incomplete record, or direct post-hearing submissions on open issues, thus extending the time and expense of the hearing process.

Efficiency is a "bang for the buck" question. More time spent in receiving expert submissions does not necessarily yield more useful information (or understanding) for the tribunal. Shaping the process to serve a fair and effective search for truth is the true goal. The tribunal, working with the input of the parties and counsel, must direct the form and manner of expert submissions to accomplish that goal, within the resource limitations (time, expense and burden) that attend to the particular case.

Contrasting Common Law And Civil Law Models

Historically, the practices of arbitrators and advocates, with regard to the use of experts, have tended to mirror the procedures adopted by the national court systems with which they are most familiar. The use of party-appointed experts is common in American civil litigation (and in many other common law jurisdictions). In parallel, American arbitration rules generally provide for the possibility of expert submissions, subject to the control of the tribunal.[3] American arbitration practices generally do not contemplate (although they do not exclude) the appointment, by the tribunal itself, of an expert to aid the tribunal.

By contrast, outside the United States, the appointment by an arbitration tribunal of an independent expert, to produce an expert report on issues identified by the tribunal, is a relatively frequent occurrence. Thus, although it is widely accepted in international arbitration that parties maintain rights to call their own experts in support of their positions,[4] international arbitration rules and norms also generally permit a tribunal (after consultation with the parties), to select its own expert, and to give the expert directions.[5]

These contrasting models essentially represent the differences between a Common Law approach to dispute resolution (party-appointed experts, in support of the advocacy of the parties, with the clash in positions ultimately resolved by the decision-maker) versus a Civil Law model (tribunal-appointed experts, in support of an inquisitorial investigation by the ultimate decision-maker).[6] Taking these two positions as polar opposites (although they are not, *per se*, opposite in all respects), the question becomes whether it is possible to describe circumstances where one or the other model is most efficient, and whether there are circumstances where a "blending" of the two models most serves the cause of fair and efficient dispute resolution. The remainder of this Article addresses those questions.

Party-Appointed Experts

The American system of party-appointed experts embodies, as a principal advantage, relatively little work for the tribunal. The parties decide whether they will proffer experts. They decide what subjects the experts will address. They (often) decide on the forms, and the timing, of disclosures regarding expert opinions (subject to applicable arbitral rules, contract terms—if any—regarding experts, and the direction of the tribunal). And, ultimately, the parties generally decide whether and how they will present their experts' opinions to the tribunal. Since strict rules of evidence (such as the Daubert expert qualification standard)[7] do not usually apply, the role of the tribunal can, in broad terms, be described as passive recipient of whatever the parties choose to present. And, given the possibility (even if distant) of vacatur of an award for refusal to hear evidence,[8] arbitrators may have an incentive to "take the evidence for what it's worth," even where there are serious questions about its provenance or usefulness.[9]

But, to loosely quote a famous phrase: a tribunal is "not a potted plant."[10] It is the task of the arbitration tribunal to exercise its "discretion," to conduct proceedings "with a view toward expediting the resolution of the dispute[.]"[11] A tribunal may direct the order of proof in a proceeding, and may exclude evidence "deemed by the arbitrator to be cumulative or irrelevant."[12] Thus, even though the parties and their counsel may hire and direct the experts in the matter, a tribunal may channel the process, to improve the efficiency of the proceedings.

One simple form of tribunal direction is a request that the parties "focus their presentations on issues the decision of which could dispose of all or part of the case."[13] Such a direction essentially asks that the party-appointed experts answer specific questions, or address specific issues, that the tribunal deems most relevant to a full understanding of the dispute. The tribunal may also give direction on the form of the reports to be provided by experts.[14] The earlier such direction can be given, the more efficient the process. Thus, for example, a tribunal might give directions at a pre-hearing conference, after review of the pleadings in the case. More likely, the tribunal might give directions after review of the expert reports (if produced in advance of the hearings). During the course of the hearings, the tribunal may pose specific questions

to experts, and (if the answer cannot be given immediately), ask that the experts provide additional submissions on the specific issue, prior to the close of hearings.

If the experts are asked to provide additional submissions late in the hearing process, however, the schedule for hearings may need to be extended, to preserve the right of the parties to conduct cross-examination of the witnesses. One solution to that problem might be the conduct of limited cross-examination (if not waived altogether by the parties), through the use of video or telephone conferencing.[15] The tribunal, having already heard the experts testify in live sessions, may have less concern about the ability to gauge the credibility of the experts through live interaction. Alternatively, the parties might waive any further oral testimony of the experts, and have the experts submit responses to the tribunal's questions in the form of written statements, with an opportunity for reply.[16]

Another simple method to improve the efficiency of expert presentations is an agreement (or direction) that the experts' written reports will stand as their direct testimony at the hearing, and that, in effect, their live testimony at the hearing will begin with cross-examination.[17] That solution is not perfect, however, in that issues may arise (between the completion of the report and the conduct of the hearing) that require supplementation of the expert report. A tribunal could permit written supplementation of expert reports, or replies to the main reports of opposing experts, on an agreed schedule; or, the tribunal might permit brief supplementation at the outset of a witness' live appearance to address any last-minute questions. The report-first, then cross-examination method, moreover, generally requires that the tribunal invest some time, in advance of the hearings, to become familiar with the submissions of the experts. In a very complicated case, with many exhibits and experts on multiple subjects, that preparation may be burdensome, and not particularly productive (as tribunal members may have difficulty absorbing the full meaning of complex expert analysis from written submissions). Thus, the parties may agree, or the tribunal may direct, that each expert give some brief overview testimony (essentially summarizing the expert's report) before cross-examination begins. The parties, in consultation with the tribunal, can best determine whether anything in excess of the expert reports is required.

Joint Expert Presentations

Hybrid (blended) forms of expert analysis may proceed from the fundamental Common Law assumption that parties determine when and how experts will be chosen and directed, but with a recognition that the needs of the tribunal can often be best served through modifications of the schedule of expert presentations, and through cooperation between the experts. These hybrid techniques may improve efficiency by reducing hearing time, and focusing expert submissions on the most significant points in dispute.

The simplest hybrid form involves little more than a scheduling modification. Conventional approaches to the presentation of expert witnesses can produce a disconnect, as one set of witnesses and evidence is presented by the claimant, and then days, weeks or even months later, another set is presented by the respondent. The tribunal must attempt to recall the substance of the claimant's earlier expert testimony, and compare it with respondent's expert submission. One increasingly common solution is to set aside an "expert day" (or days), where experts for each side testify, *seriatim*, providing the tribunal an opportunity to compare their methods and conclusions in close temporal proximity. In some instances, the expert portion of the hearings may be conducted at the very end of the process, when the tribunal has heard testimony from lay witnesses, has received other evidence, and is prepared to consider the technical issues in the case. Where there has been some bifurcation of the proceedings (e.g., liability and damages), the process might include essentially two (or more) mini-hearings, capped in each instance by expert testimony.

One potential advantage of this *seriatim* approach to expert testimony is in efficient scheduling of expert testimony. Experts are often busy people, and squeezing them into a hearing calendar may be difficult, especially where the hearings are expected to be lengthy, and the vicissitudes of travel and business conflicts may make the availability of experts uncertain. Setting a specific day (or days) when the experts will testify, *seriatim*, means that the experts can plan to be available and dedicated to the hearing appearance, for that specified period. The expert day(s), moreover, need not necessarily be contiguous with days of hearing lay testimony. Indeed, some separation of time between the main hearing and the expert hearing may avoid the scramble of last-minute adjustment of presentations,

to address unexpected developments during the factual presentations of the hearing. For a concentrated, set period of time, the experts may dedicate themselves to giving testimony, answering questions and responding to each other's opinions.[18]

Another increasingly common form of interaction between expert witnesses is a meet-and-confer process (often called a "conclave"), in advance of the hearings, to determine points on which the experts agree, and to identify actual issues in dispute. Such conclaves could be conducted before the experts prepare their reports, but, most commonly, occur thereafter. The general purpose of a conclave is to have the experts compare their views on the expert issues in the case, with an aim toward reducing the need for duplicative presentations regarding issues on which the experts agree. Such a conclave may be conducted "without prejudice," meaning that communications between the experts during the conclave cannot be used as evidence during any hearings (thus freeing the experts to engage in more candid discussions).[19] The conclave may also be conducted out of the presence of counsel (again, lessening the incentive toward posturing, pure advocacy, or obfuscation).[20] The net result of the conclave, typically, is a form of "joint" report of the experts, noting areas of agreement between them, and (often) outlining the specific issues on which they disagree.[21]

The hoped-for result of the conclave process is a reduction in hearing time, as agreed-points need not be addressed in detail (and certainly not repeated by each expert), and the tribunal can more carefully focus, during the hearings, on the essential disagreements between the experts (and the bases for those differences). At a minimum, the conclave process may avoid the "ships passing in the night" problem, where experts talk past each other, never fairly meeting each other's positions, to the consternation of the tribunal.[22]

Perhaps the most unique form of joint expert presentation is "concurrent expert evidence" (colloquially known as "hot-tubbing").[23] The procedure has been embraced in Australian courts,[24] but is not generally used in the United States.[25] International arbitration service providers and sponsoring associations have begun to experiment with this technique.[26] The essence of the process (which may be combined with the "conclave" process in advance of hearings) is that experts for each side are called to give evidence at the same time; they are sworn in together; they may give explanation of their own opinions, but they may also ask each other questions, may comment on each other's opinions, and may concurrently answer questions from the tribunal. The right of the parties' counsel to conduct cross-examination is preserved, but the focus of the process is interaction between the experts, to highlight areas of agreement, and the bases for any significant disagreements.

Proponents of the hot tub process suggest that it can improve efficiency in a variety of ways.[27] Like the conclave process, it can reduce the need for duplicative testimony on non-controversial points. It can focus the testimony given on points of actual (and significant) disagreement.[28] It can permit the tribunal to hear answers to critical questions contemporaneously, making it possible for the tribunal to compare, in real time (versus through recall or review of transcripts) the conflicting positions of the experts. In writing an award, moreover, the tribunal will have expert testimony available for review in a relatively condensed form.

Critics caution that the hot tub process may take control away from party counsel (who may be best placed to question experts, having extensively prepared for hearings), and that an ill-prepared or inarticulate expert may appear unconvincing (even though the expert's opinion is sound), or that the process may be hijacked by the more aggressive expert (actually re-introducing, and perhaps even increasing, the adversarial bias that may detract from the value of genuinely independent expert analysis). Because the process requires closer control by the tribunal, moreover, some of the efficiency saved in decreased hearing time may be offset by the need for the tribunal to spend substantial time, in advance of hearings, preparing for management of expert testimony.[29] One solution to these kinds of concerns involves a modified form of hot-tubbing, in which the experts provide their direct testimony (either through expert reports or live), and are subject to cross-examination; thereafter, the experts appear jointly for the tribunal to ask any clarifying questions that may have developed from the main presentations of the experts.

Whatever the overall merits (and specific method) of the hot tub process, proponents and critics generally agree that it is a procedure best addressed to more complex, technical disputes, especially those with multiple areas of

expert testimony (such as construction projects, or matters involving sophisticated economic analysis). The increased use of the process, and the increased attention it has gained in dispute resolution literature, however, suggest that hot tubbing remains a viable tool for efficiency enhancement, at least in some cases.[30]

Tribunal-Appointed Experts

On its face, the use of a tribunal-appointed expert may appear inefficient (duplicative), at least in circumstances where party-appointed experts are also to be used.[31] Yet, there is room for a tribunal-appointed expert to perform discrete functions that can enhance the efficiency of the process, even where other experts will appear. And there are occasions where parties and their counsel may recognize that a single, tribunal-appointed expert may most effectively help resolve specific issues in a proceeding.

One role for an expert involves service as a mediator/facilitator, to help the parties work through issues related to the conduct of the arbitration. An expert mediator, for example, might assist the parties in resolving disputes regarding disclosure matters, especially in large-document-volume cases, or in cases where difficult privilege or confidentiality issues might arise. The mediator would be available to guide discussions between the parties, suggest solutions, and encourage cooperation.[32] Discussions with the mediator would be "without prejudice;" and ultimate control of the disclosure process would be at the direction of the tribunal.

The role of the mediator might also involve guiding the conclave process between subject matter experts.[33] Again, on a "without prejudice" basis, the mediator might assist the experts in coming to agreement on issues not in dispute, and in determining the most efficient form for presentation of the experts' analyses. If assumptions are to be built into expert models (algorithms), for example, the tribunal would probably most benefit from a shared list of assumptions, applied by each of the experts, to make comparison of their results more accurate. The mediator might also encourage experts to provide "sensitivity" analyses, making clear how changes in specific assumptions might affect the outcome of the experts' analysis.[34] Where access to specific information is essential to fair and accurate expert reports on all sides, moreover, the mediator's role in guiding the disclosure process could overlap with the facilitation of expert discussions. Ensuring that each expert has access to information may help prevent disruption to the hearing process, if it were to become apparent during the hearing that some additional (previously-undisclosed) information is vital to meaningful expert analysis.

The appointment of a single expert (with no individual party experts), to address a particular task, could save the parties and the tribunal considerable time and burden. Discrete tasks might include: valuation of a specific asset, opinion on a particular issue of foreign law (not otherwise known to the tribunal), site inspection or forensic testing, and many others.

The efficiency of a single tribunal-appointed expert need not be adversely affected by the fact that the parties may have their own experts, even on related issues. Thus, for example, the valuation of a specific asset (by the tribunal expert) might be incorporated into the economic analyses (of the party experts), and that hybrid process could avoid overlap and inefficiency. Alternatively, such as on an issue of foreign law, the parties might determine that, since there probably is just one "right answer" to the specific legal question, there is no need for overlapping party-appointed experts on the same point. The parties, moreover, generally retain the right to pose questions to a tribunal-appointed expert at an evidentiary hearing;[35] thus, if an expert's analysis requires some further explanation or context, the parties may have it, without the need to engage their own experts.

Other Forms Of Expert Analysis

At the far end of the adversarial-inquisitorial spectrum we find systems where the expert effectively becomes a decision-maker in the dispute. One of the more controversial, though highly efficient, processes involves the appointment of an individual arbitrator (or individual member of a three-member arbitral tribunal) with specific expertise in an area relevant to the dispute. At its core, the notion is simple—parties often choose arbitration (at least in part) in order to obtain access to expert decision-makers who do not require tutorials or other background education to understand the context of a specific case. Specialty arbitration-sponsoring institutions (such as the WIPO Arbitration and Mediation Center, or the AIDA Reinsurance and Arbitration Society), offer rosters of specially-trained arbitrators, with extensive background knowledge of issues

and common practices in their industry. So, too, many of the major arbitration centers offer specialty rosters of arbitrators familiar with construction, labor and other particular types of disputes. An arbitrator steeped in the background of a particular industry or professional field may much more quickly absorb the facts of a particular dispute, and may more quickly appreciate the significance of the technical issues presented by the dispute, as compared to a relative novice. In that sense (and more) the expert arbitrator may be highly efficient.[36]

But what of arbitrators who might do more than simply apply their background knowledge related to the dispute? What if an arbitrator applies knowledge, not developed within the confines of the arbitration process, to reject the submissions of one party or another? What if an arbitrator concludes that both parties have failed to adduce essential evidence, and the arbitrator proceeds to conduct an independent investigation (e.g., by visiting a construction site, or consulting professional literature to obtain the "correct" answer)?

In the context of court proceedings, it is generally understood that a judge should not investigate the facts of a case, and that a judge must give parties notice if the judge wishes to take "judicial notice" of a particular fact.[37] So, too, in the context of arbitration. An arbitrator is not necessarily considered "partial" or "prejudiced" by having acquired some knowledge of "the parties, the applicable law or the customs and practices of the business involved" in the dispute.[38] Nor does an arbitrator violate the obligation of impartiality merely by "hav[ing] views on certain general issues likely to arise in the arbitration," so long as the arbitrator does not "prejudge[e] any of the specific factual or legal determinations" to be addressed by arbitration.[39] But an arbitrator may risk the validity of an award by conducting independent factual research, without the knowledge or input of the parties.[40] In broad terms, the obligation of arbitrators to conduct proceedings in a manner "fair to all," affording all parties the "right to be heard," and a "fair opportunity to present evidence,"[41] suggests that, when an arbitrator believes that more information is required to decide the case, the arbitrator may ask questions, or call for additional witness testimony or other evidence, but must do so on notice to the parties.[42]

The arbitration process might, by agreement of the parties, become almost entirely inquisitorial. On consent of the parties, arbitrators may engage in abbreviated forms of dispute resolution.[43] Such abbreviated forms may include paper-only submissions and on-line methods of dispute resolution.[44] More extreme forms of cost-savings might be obtained through the use of expert arbitrators, to review the specific (and limited) forms of information required to resolve a particular matter fairly. In certain trade goods disputes, for example, parties may select an arbitrator with specialized knowledge, providing the arbitrator with background documents (chiefly, on the specifications applicable to the goods) and the arbitrator may inspect the goods (in a process called "look-sniff" or simply "quality" arbitration) in the absence of the parties.[45] The expert arbitrator renders an award, without any further evidentiary hearing.[46] Although such a process surely is an extremely limited form of arbitration,[47] it does at least provide for some input by the parties, and thus might appropriately be termed a form of arbitration.[48] And the process might be expanded, to address other forms of technical disputes that require rapid, cost-effective resolution.[49]

At some extreme point, however, an expert resolution of an issue must lose its potential status as arbitration.[50] Under New York law, for example, an agreement that a "question of valuation, appraisal or other issue or controversy be determined by a person named or to be selected" by parties, may be enforced,[51] but such a process does not have the status of arbitration, and a determination, pursuant to such a process, cannot be enforced as an arbitration award.[52]

Yet, even at this extreme, one can imagine methods to foster the efficiencies of expert determination, and nevertheless maintain the benefits of an arbitration award.[53] Thus, for example, a dispute might be submitted to an expert for resolution (through an inquisitorial process), but subject to potential review by an arbitrator. If the parties were satisfied with the expert's determination, the result might be memorialized in the form of a "consent" arbitration award (by a "backup" arbitrator, appointed for such a purpose).[54] If the parties were in conflict as to the expert determination, then the backup arbitrator could be employed to perform some review of that determination, with the input of the parties. Alternatively, the parties might each appoint experts to examine the particular issue; if the experts agreed, then again a consent award would be entered. If they did not agree, then some further

arbitration process would ensue. The precise form of an expert determination (with or without elements of arbitration) is as flexible as the needs of the parties.[55]

Conclusion

The arbitration world does not divide neatly into Common Law and Civil Law camps. Arbitration, by virtue of its contractual basis, is subject to a wide array of variations, to suit the needs of the parties. Arbitrators, advocates and academics who originate in one or the other camp may benefit greatly from considering alternate procedures derived from other traditions. In the area of expert analysis (often one of the costliest elements of arbitration proceedings) the use of hybrid techniques may greatly enhance the efficiency of proceedings, while maintaining the essential elements of justice prized in both Common Law and Civil Law systems.

Endnotes

1. For additional suggestions (not confined to experts) regarding cost and time-saving procedures in arbitration, see generally Albert Jan van den Berg, Note-Time And Costs: Issues And Initiatives From An Arbitrator's Perspective, 28 ICSID Rev. 218 (2013).

2. See generally Bernd Ehle, Practical Aspects Of Using Expert Evidence In International Arbitration, 2 Y.B. on Int'l Arb. 75 (2012) (summarizing potential uses of experts in arbitration, and procedures for obtaining expert evidence and assistance); Michael Feutrill & Noah Rubins, The Preparation Of Expert Evidence In International Commercial Arbitration: Practical Aspects, 2009 Int'l Bus. L.J. 307 (2009) (same).

3. See, e.g., AAA Commercial Arbitration Rules, P-2(a)(xi) (suggesting subjects for discussion at a preliminary conference with the tribunal to include "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"); R-34(a) (parties may offer evidence as is "relevant and material" to the dispute; conformity to "legal rules of evidence shall not be necessary"); R-34(b) (arbitrator shall determine admissibility, relevance and materiality of evidence offered, and may exclude evidence deemed to be cumulative or irrelevant); JAMS Comprehensive Arbitration Rules & Procedures, R-17(c) (as they become aware of new documents or information, parties are obligated to provide documents and "supplement their identification of witnesses and experts"); R-20(a) (pre-hearing submissions to include "a list of witnesses" to be called, "including any experts"); R-22(d) ("Strict conformity to the rules of evidence is not required[.]").

4. See Chartered Institute of Arbitrators, International Arbitration Practice Guideline: Party-Appointed And Tribunal-Appointed Experts, Art. 1, Cmts. (2016), available at http://www.ciarb.org.

5. See, e.g., UNCITRAL Arbitration Rules, Art. 29 (tribunal may appoint expert to report on specific issues determined by tribunal); ICDR International Arb. Rules, Art. 25 (same); JAMS International Arb. Rules, Art. 27.7 (same); ICC Arb. Rules, Art. 25 (tribunal may hear experts appointed by the parties, and tribunal may appoint one or more experts, define their terms of reference and receive their reports); IBA Rules on Taking of Evidence in International Arbitration, Arts. 5-6 (same).

6. See generally Michael McIlwrath & Henri Alvarez, Common And Civil Law Approaches To Procedure: Party And Arbitrator Perspectives, in Paul E. Mason & Horacio A. Gregera Naron (eds.), International Arbitration: 21st Century Perspectives, Chap. 2 (2010); Ruth Fenton, A Civil Matter For A Common Expert: How Should Parties And Tribunals Use Experts In International Commercial Arbitration, 6 Pepperdine Disp. Resol. L.J. 279, 289 (2006) (summarizing differences between civil law and common law traditions regarding dispute resolution).

7. See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

8. See George Ruttinger, Joe Meadows & April Ham, Using Experts In Arbitration, Chapter 31 in AAA Handbook On Arbitration Practice (2d ed. 2016) (noting that counsel have flexibility in presenting experts as "failure to admit relevant evidence may be a ground for reversal or modification").

9. Ronald W. Haughton, Running The Hearing, in Arnold Zack (ed), Arbitration In Practice 44 (1994)

(suggesting arbitrator may use the "for what it's worth" ruling on evidence, and that arbitrator should apply "common sense" and remind the parties that the goal of arbitration is to "let the parties have their problem heard and resolved without excessive technicalities").

10. See Iran-Contra Hearings: Note Of Braggadocio Resounds At Hearing, N.Y. Times, July 10, 1987, available at https://www.nytimes.com (quoting lawyer Brendan Sullivan, attorney for Colonel Oliver North, on the attorney's right and obligation to object).

11. AAA Rules, R-32(b); see generally Patricia D. Galloway, Using Experts Effectively & Efficiently In Arbitration, 67 Dispute Resol. J. at 2 (2012) (suggesting that arbitration rules generally give a tribunal "flexibility in handling the proceeding, but the overriding goal is efficiency and lower costs").

12. AAA Rules, R-34(b).

13. AAA Rules, R-32(b).

14. The form may also be specified in the arbitration agreement, or the arbitral rules chosen by the parties. See, e.g., International Bar Association, Rules On The Taking Of Evidence In International Arbitration (2010), Art. 5.2 (listing required contents of expert reports).

15. See AAA Rules, R-32(c) (alternative means of presenting evidence 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").

16. See AAA Rules, R-35(c) (parties may agree, or arbitrator may direct that documents or other evidence be submitted "after the hearing," but "[a]ll parties shall be afforded an opportunity to examine and respond to such documents or other evidence").

17. See AAA Rules, R-35(a) (permitting written witness statements, subject to tribunal's right to "disregard" the statement if the witness does not appear at the hearing, to be questioned).

18. The parties and tribunal may also consider imposing a "chess clock" limitation on expert presentations, to ensure that the time spent is equally allocated between the experts. See Raymond A. Garcia, Nicole Liguori Micklich, & Michael V. Pepe, Chess Clock Arbitration, June 22, 2011, www.americanbar.org.

19. See Bell Gully, Expert Witness Conferencing—How Can We Get The Best Outcomes?, Nov. 1, 2012, available at www.lexology.com (suggesting that experts may seek the ability to communicate with their clients and counsel, so that they "should not worry about drafting precise wording" in any joint statement that may come from the witness conclave).

20. A more elaborate form of conclave would involve the use of a neutral facilitator, who might put the experts at ease during the process, and serve to encourage agreement between the experts. See infra, footnotes 34-35 and accompanying text.

21. The joint report of the experts may be drafted by the experts themselves, or may be drafted with the assistance of counsel.

22. See Issues For Arbitrators To Consider Regarding Experts, Vol. 21 No. 1 ICC International Court of Arbitration Bulletin (2009), available at www.iccwbo.org (noting risk that "experts may differ in the structure of their respective work product, their basic underlying date, or their methodology," which can be "particularly challenging for the tribunal to resolve where the tribunal cannot find flaws in the experts' methodologies or findings that would enable the tribunal to conclude that one expert's conclusions are more likely to be correct than the other's").

23. The image of the "hot tub," where professional colleagues can discuss a subject in an informal, collegial manner, addresses the central impetus for this procedure: to encourage experts to agree on non-controversial points, and to permit a give-and-take process that allows the tribunal to examine the points of difference between the experts with greater understanding and efficiency. See generally Francis P. Kao et al., Into The Hot Tub . . . A Practical Guide To Alternative Witness Procedures In International Arbitration, 44 Int'l Lawyer 1035 (2010).

24. See Hon. Rachel Pepper, 'Hot-Tubbing': The Use Of Concurrent Expert Evidence In The Land And Environment Court Of New South Wales And Beyond (2015), available at www.lec.justice.nsw.gov.au.

25. See Adam Elliott Butt, Concurrent Expert Evidence In U.S. Toxic Harms Cases And Civil Cases More Generally: Is There A Proper Role For Hot Tubbing, 40 Houston J. Int'l Law 1 (2017).

26. See, e.g., International Bar Association, Rules On The Taking Of Evidence In International Arbitration (2010), Art. 8.3(f) (tribunal may "vary" the order of proceeding, "including the arrangement of testimony by particular issues or in such a manner that witnesses may be questioned at the same time and in confrontation with each other (witness conferencing)"); Chartered Institute of Arbitrators, Protocol For The Use Of Party-Appointed Expert Witnesses In International Arbitration (2007), Art. 7.1 ("The manner in which an expert gives testimony shall be as directed by the Arbitral Tribunal. The expert's testimony shall be given with the purpose of assisting the Arbitral Tribunal to narrow the issues between the experts and to understand and efficiently to use the expert evidence."), Art. 7.2 ("The Arbitral Tribunal may at any time, up to and during the hearing, direct the experts to confer further and to provide further written reports to the Arbitral Tribunal either jointly or separately.").

27. See generally Kabir Singh, The "Additional Weapon:" Practical Tips For Effective Expert Conferencing In Arbitration, Mar. 28, 2016, available at www.arbitrationblog.kluwerarbitration.com (suggesting that hot tubbing may produce an "increase in the speed of the proceedings," and lead to "substantial savings for the parties," as well as "[m]ore clarity" on technical issues, and may lead to a "higher likelihood that the matter will be settled") (citing authorities).

28. Proponents also suggest that hot-tubbing may help mitigate the problem of "partisan" experts. See David Sonenshein & Charles Fitzpatrick, The Problem Of Partisan Experts And The Potential For Reform Through Concurrent Evidence, 32 Rev. Litig. 1 (2013).

29. See Jeffrey H. Dasteel, Experts In Arbitration (2013), available at www.lacba.org (suggesting that, in witness conferencing, "advocacy may overtake any real attempt to reach agreement," and "counsel may appoint experts based on the expert's willingness to understand and advocate" the party's position; and hot tubbing "may extend the hearing time and make it difficult for counsel to control the examination").

30. See ICC Court of Arbitration Bulletin, Issues For Arbitrators To Consider Regarding Experts (2010), available at www.library.iccwbo.org (witness conferencing method is "increasingly used to resolve the differences between conflicting expert opinions, but requires the tribunal's active participation and supervision" to maintain order at the hearing).

31. Where one of the parties is reluctant to authorize a tribunal-appointed expert, moreover, delays and other uncertainties may adversely affect the usefulness of the process. See Robert Horne & John Mullen, The Expert Witness In Construction, Chapter 4 (2013) (describing uses and limitations of tribunal-appointed experts).

32. See generally Steven C. Bennett, Mediation As A Means To Improve Cooperation In E-Discovery, 24 Albany Law J. of Sci. & Tech. 251 (2014).

33. See Eugene Romaniuk, Bruce Smith & Miiko Kumar, The New Default: Expert Witness Conclaves (June 24, 2016), available at www.lawyersweekly.com (summarizing results of a survey (in Australia), suggesting that the "overwhelming majority" of expert conclaves achieve "sensible results," with the cost of a facilitator for a conclave "more than saved by the efficiency of the process"); but see Karen Stott, Expert Witness Conclaves For Joint Report-5 Tips And Observations By a Facilitator, Apr. 8, 2018, available at www.linkedin.com (cautioning that conclave process can be "extremely" labor intensive, and noting that the process may require "a number of conclaves if the issues are lengthy and complicated").

34. See Richard Boulton, Joe Skilton & Amit Arora, The Function And Role Of Damages Experts, Chapter 2 in John A. Trenor (ed.), The Guide To Damages In International Arbitration (2017) (sensitivity analysis useful in allowing the tribunal to establish which of the experts' assumptions or areas of disagreement have a material effect on the damages calculation).

35. See, e.g., International Centre for Dispute Resolution, International Dispute Resolution Procedures, Art. 25.4 ("At the request of any party, the tribunal shall give the parties an opportunity to question the [tribunal-appointed] expert at a hearing."); IBA Rules, Art. 6.6 ("At the request of a Party or of the Arbitral Tribunal, the Tribunal-Appointed Expert shall be present at an Evidentiary Hearing. The Arbitral Tribunal

may question the Tribunal-Appointed Expert, and he or she may be question by the Parties or by any Party-Appointed Expert").

36. For an argument for the appointment of an economist expert as an arbitrator, in cases involving complicated damages analyses, see J. Gregory Sidak, Economists As Arbitrators, 30 Emory Int'l L. Rev. 2105, 2111, (2016) (suggesting that economist arbitrator may "hold the party economic experts to a higher standard of economic rigor," and more easily detect "error and bias in the economic testimony").

37. See ABA Model Code of Judicial Conduct, Rule 2.9(c) (judge "shall not investigate facts in a matter independently and shall consider only the evidence presented and any facts that may properly be judicially noticed"); Fed. R. Evid. 201 (allowing court to take judicial notice of facts "not subject to reasonable dispute," but recognizing that "a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed"). There is some controversy (at least within the judiciary) as to the authority of judges to conduct independent factual "background" research (and as to what "background" research includes). See Edward K. Cheng, Should Judges Do Independent Research On Scientific Issues? 90 Judicature 58, 61 (2006) ("Judges are deeply divided about the issue of independent research[.] To many judges, doing independent research when confronted with new and unfamiliar material seems the most responsible and natural thing to do. To others, it represents the worst kind of overreaching and a threat to long-cherished adversarial value.").

38. AAA/ABA Code Of Ethics For Arbitrators In Commercial Disputes, Canon I, Cmt. 1 ("Arbitrators may also have special experience or expertise in the areas of business, commerce or technology which are involved in the arbitration.").

39. See id.

40. See Quesada v. City of Tampa, 96 So.3d 924 (Fla. Dist. Ct. App. 2012) (award vacated where arbitrator conducted independent research on diet supplement at issue in proceedings, by reviewing manufacturer's website and contacting a dietician). There is some controversy about the ability of an arbitrator to conduct legal research without the knowledge or approval of the arbitration parties. Compare Paul Bennett Marrow, Can An Arbitrator Conduct Independent Legal Research? If Not, Why Not? N.Y.S.B.A.J. 24 (May 2013) (suggesting that there are "good reasons" for an arbitrator to refrain from "unauthorized" legal research) with M. Ross Shulmister, Attorney Arbitrators Should Research Law: Permission Of The Parties To Do So Is Not Required, 68 Disp. Resol. J. 29 (2013) (responding to, and criticizing, Marrow position; suggesting that attorney arbitrators are "actually under at least a moral obligation" to conduct independent legal research where necessary; yet, suggesting that it is "wise (although not required)" that an arbitrator advise parties of the results of any independent research, and "allow them to respond" to those findings).

41. See AAA/ABA Code of Ethics, Canons I(D) and IV(B).

42. Id., Canon IV(E); see generally Thomas Sonneborn, Conducting Independent Research: Should An Arbitrator Look Beyond The Record Or The Law?, 32 Ill. Pub. Emp. Rel. Rep. Nos. 3-4 (2015).

43. Judge Richard Posner famously stated: "short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract." Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994). The precise obligations of arbitrators to pursue a "decision-making process founded on a search for an accurate portrayal of the facts and the law," however, is a matter of some considerable academic debate. See William W. Park, Rectitude In International Arbitration, 27 Arb. Int'l 473, 521 (2011).

44. See Beth Trent & Colin Rule, Moving Arbitration Online: The Next Frontier, Apr. 3, 2013, N.Y.L.J., available at www.cpradr.org.

45. See Sundra Rajoo, Trade Disputes Solving Mechanisms (2009), available at www.sundrarajoo.com (noting use of look-sniff system by commodity exchange organizations).

46. See Sarika Tyagi, International Commercial Arbitration: An Ultimate Remedy In Commercial Obligation, With

Special Reference To India (PhD dissertation, Feb. 2, 2015), available at http://shodhganga.inflibnet.ac.in.

47. See Myles Stilwell, One Law For All, 8 ADR Bull. No. 8, Art. 5 (2006) (noting the "broad gulf" between look-sniff arbitration and more "court-based processes" in conventional arbitration, but noting possibility, "in the hands of agreeing parties," for "lessening" of the scope of procedural steps in arbitration).

48. The liberal provisions of the London Court of International Arbitration Rules (2014), available at www.lcia.org, provide something of a road map for such an extremely abbreviated arbitration. The Rules provide each party a right to an oral hearing, "unless the parties have agreed in writing upon a documents-only arbitration[.]" Rule 19.1. An arbitral tribunal, moreover, has the power "to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties' dispute[.]" Rule 22.1(iii). The parties may agree on methods for the conduct of the arbitration, Rule 14.2, and it is the obligation of the tribunal to "adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute[.]" Rule 14.4(ii). And, in the pursuit of these and other general duties, the tribunal "shall have the widest discretion to discharge these general duties[.]" Rule 14.5.

49. See Tying Up Loose Ends, And Dispute Resolution, In ICT Contracts: Quicker, Simpler And Better Solutions? (2004), available at www.wigleylaw.com (presentation to New Zealand Computer Society And Technology Law Society) (suggesting use of similar procedure for resolution of "urgent decisions" on technology projects, "particularly those that are complex and expensive"); but see Adham Kotb, Alternative Dispute Resolution: Arbitration Remains A Better 'Final And Binding' Alternative Than Expert Determination, 8 Queen Mary L.J. 125 (2017) (suggesting that "simplified arbitration can achieve the perceived cost and time benefits of expert determination without the need to jeopardize justice and fairness").

50. See Tomas Kennedy-Grant, Expert Determination And The Enforceability Of ADR Generally (Aug. 2010), available at www.aminz.org.nz (noting distinction between arbitration, as a "more or less formal adjudication," where a court may exercise "a degree of supervision," and an expert determination with "no such safeguards," and the expert deciding "solely by the use of his eyes, his knowledge and his skill") (quotation omitted); see also Frydman v. Cosmair, Inc., 1995 WL 404841 (S.D.N.Y. July 6, 1995) (rejecting enforcement of "award" in French price appraisal, where procedure, rather than resolving a dispute, provided missing term in contract).

51. Such a process is commonly used to resolve questions of business valuation, profit shares and capital account balances. See Daniel Djanogly, Expert Determination: An Attractive ADR Solution For Business Disputes, Oct. 11, 2016, available at www.linkedin.com.

52. See N.Y. Civ. Prac. Law & Rules Sec. 7601; see also Steven H. Reisberg, What Is Expert Determination? The Secret Alternative To Arbitration, Dec. 13, 2013, available at www. NYLJ.com (New York provision "was enacted in order to provide for judicial enforcement of expert determinations as separate and distinct from arbitration;" in an expert determination, "there are very significant differences in procedure," including the fact that "procedural restrictions do not automatically apply" in an expert determination).

53. At the domestic level, an arbitration award can easily be turned into a court judgment, making collection on the award a less difficult process. See Federal Arbitration Act, Section 9. At the international level, one of the principal benefits of an arbitration award is broad enforceability, by virtue of multilateral treaties, such as the New York Arbitration Convention. See Marcin Tustin, Do Awards From Expert Determination And Other Private Summary Dispute Resolution Mechanisms Fall Within The New York Arbitration Convention? (2013), available at www.nysbar.com/blogs.

54. See, e.g., AAA Commercial Rules, R-48 (provision for "consent award" if parties settle their dispute during the course of arbitration).

55. See generally John Kendall, Expert Determination, Introduction (3rd ed. 2001) (noting the "infinitely flexible" nature of expert determination processes). ■

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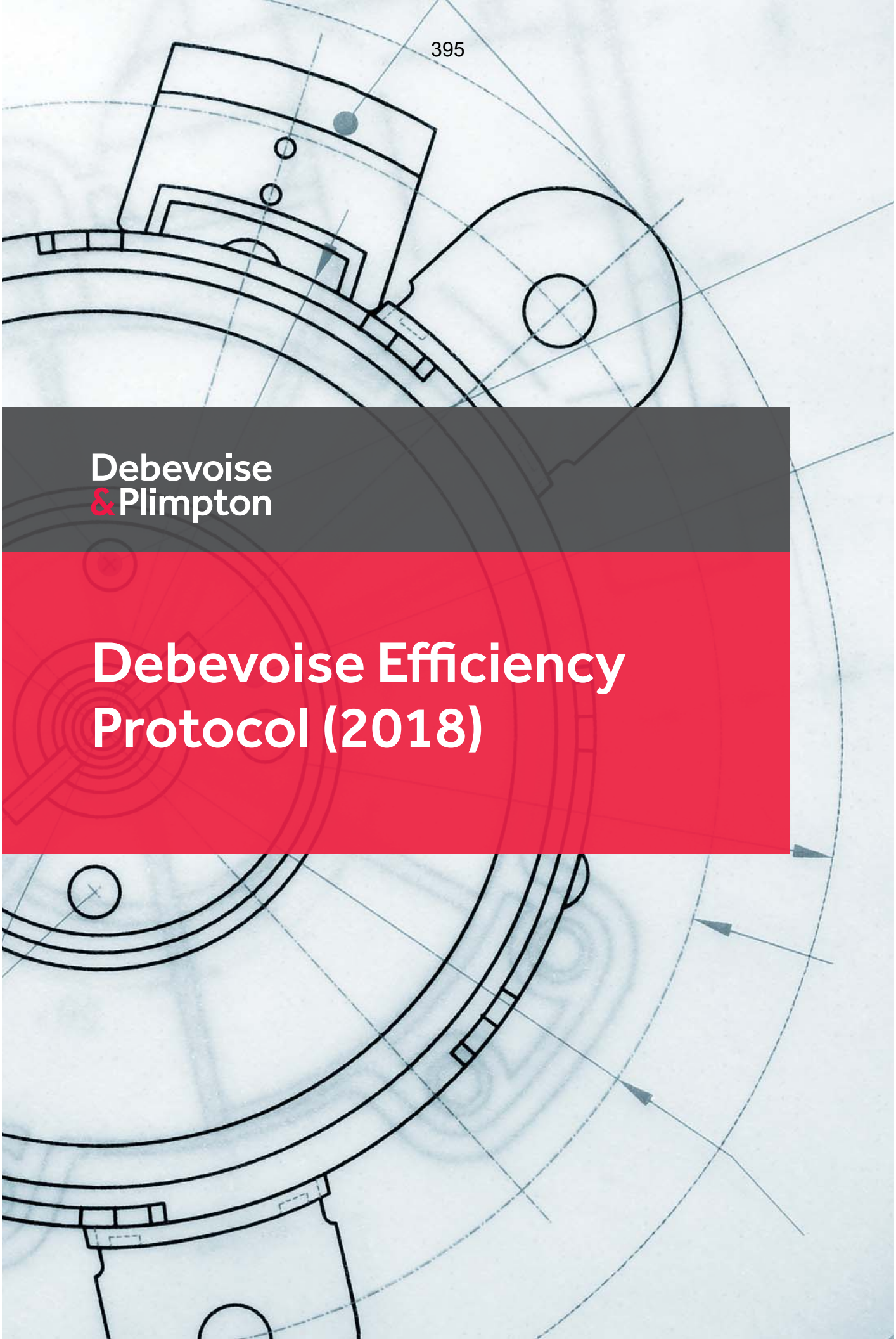


Debevoise & Plimpton

Debevoise Efficiency Protocol (2018)

To address concerns about increased length and cost in international arbitration, in 2010 the Debevoise & Plimpton International Dispute Resolution Group issued our Protocol to Promote Efficiency in International Arbitration. We now update our Efficiency Protocol. Through this Protocol, we reiterate our commitment to explore with our clients how, in each case, the participants can take advantage of international arbitration's inherent flexibility to promote efficiency without compromising fairness or our clients' chances of success. The procedures set out here are therefore not meant to be inflexible rules, but instead are considerations that, when appropriate for the case, can improve the arbitration

Formation of the Tribunal

1. Before appointing arbitrators, we will ask them to confirm:
   - **1.1** their availability to administer the case, including hearings, on an efficient and reasonably expeditious schedule;
   - **1.2** a commitment to conduct the proceedings efficiently and to adopt procedures suitable to the circumstances of the arbitration; and
   - **1.3** a commitment not to take on new appointments that would reduce the arbitrator's ability to conduct the case efficiently.
2. We will work with our opposing counsel to appoint a sole arbitrator for smaller disputes or where issues do not need the analysis of three arbitrators, even if the arbitration clause provides for three arbitrators.

Establishing the Case and the Procedure

3. We will seek to avoid unnecessary multiple proceedings, for example by considering joinder, consolidation, overlapping appointments, stays, and coordinated hearings and briefing schedules.
4. We will request that the arbitral tribunal hold an early procedural conference to establish procedures for the case.
5. We will request our clients and opposing clients to attend procedural meetings and hearings with the arbitral tribunal, so that they can have meaningful input on the procedures being adopted and consider what is best for the parties at that time.
6. We will propose procedures that are appropriate for the particular case, proportionate to its value and complexity, and designed to lead to an efficient resolution. We will use our experience in crafting such procedures,

and we will not simply adopt procedures that follow the format of prior cases. We will encourage active participation by the tribunal throughout the case. For example:

6.1 We will consider including a detailed statement of claim with the request for arbitration so that the tribunal will be able to set the procedures with more knowledge of the issues in dispute.

6.2 We will consider a fast-track schedule with fixed deadlines.

6.3 We will request additional procedural conferences following certain submissions to consider whether the procedures could be made more efficient in light of the submissions.

6.4 We will suggest page limits for memorials in order to ensure that they focus on the most important issues.

6.5 We will encourage the arbitral tribunal to establish cyberprotocols to protect transfer and use of sensitive information and to disclose cyber incidents, in line with the **Debevoise Protocol to Promote Cybersecurity in International Arbitration**.

7. When acting for claimants, we will seek to use the time between the filing of the arbitration and the initial procedural conference to prepare the first merits submission so that the schedule can commence soon after the conference.

8. We will explore whether bifurcation or a determination of preliminary issues may lead to a quicker and more efficient resolution.

8.1 For bifurcated proceedings, we will encourage the arbitral tribunal to set deadlines and hearing dates that include all phases of the case. This minimizes delay at a later stage caused by conflicting commitments of the tribunal members or counsel.

8.2 Such a schedule would include a deadline for the arbitral tribunal to indicate whether the proceeding should continue to the next phase. A reasoned decision can follow, but, in the meantime, the parties can be drafting the submissions in the next phase.

9. In order to avoid delays in drafting the award, we will ask the arbitral tribunal to include in the initial procedural schedule:

9.1 the dates on which they will deliberate following the hearing, including at least one day immediately following the hearing; and

9.2 a date by which the award will be issued.

10. We will encourage tribunals to award costs at the time of interim decisions, when appropriate, in order to discourage time-wasting or unmeritorious applications.

Evidence

11. We will limit and focus requests for the production of documents. We believe that the standards set forth in the IBA Rules on the Taking of Evidence generally provide an appropriate balance of interests.

11.1 We will work with opposing counsel to determine the most cost-effective means of dealing with electronic documents.

11.2 We will request the arbitral tribunal (or the Chair) to conduct a telephone conference following the submission of any objections to document requests to the tribunal. Such a conference can lead to a more effective weighing of the need for requested documents compared to the burden of production and potentially narrow the disputes.

12. When possible, we will make filings electronically and encourage paperless arbitrations.

13. We will seek to avoid having multiple witnesses testify about the same facts.

14. We will encourage meetings of experts, either before or after their reports are drafted, to identify points of agreement and to narrow points of disagreement before the hearing. Expert conferencing at the hearing, particularly with respect to quantum experts, can also often be time-saving and more effective.

15. We will brief the applicable law, rather than submit expert evidence as proof, except in unusual circumstances.

16. We will divide the presentation of exhibits between core exhibits and supplementary exhibits that provide necessary support for the claim or defense but are unlikely to be referenced at a hearing.

The Hearing

17. In order for the hearing to focus more effectively on the facts and issues that need to be decided, we will ask the arbitral tribunal to set in the initial procedural order:

17.1 a date following the final written submissions on which they will confer regarding the issues in the case and the upcoming hearing, and

17.2 a date for a prehearing conference at which they can discuss with the parties the disputed facts and issues on which they hope the hearing will focus.

18. We will consider the use of videoconferencing for testimony of witnesses who are located far from the hearing venue and whose testimony is expected to be less than two hours.

19. We will generally encourage the use of a chess-clock process (fixed time limits) for hearings.

20. We will not automatically request post-hearing briefs. We will consider in each case whether they would be helpful, and, if so, we will seek to limit the briefing to specific issues identified by the tribunal.

21. We will consider alternative briefing formats, such as the use of detailed outlines rather than narrative briefs, to focus the issues and to make the briefs more useful to the tribunal.

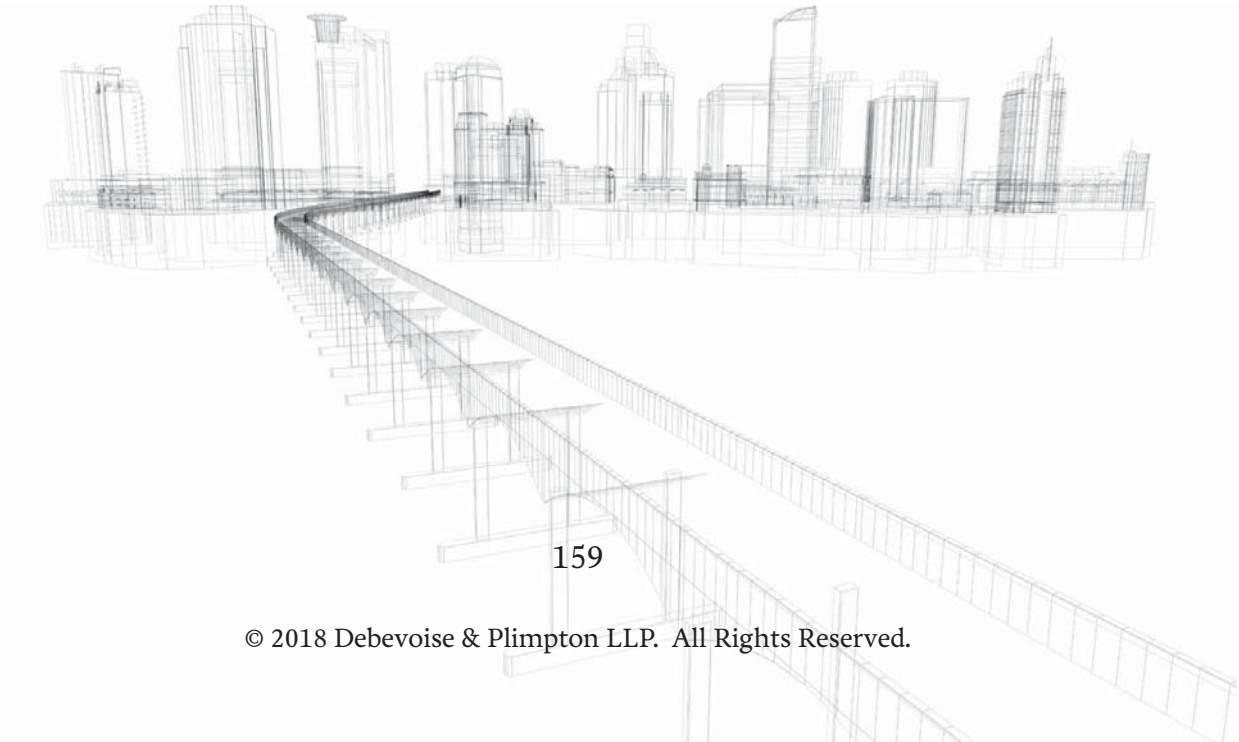
22. We will seek agreement on a common summary format for costs schedules to facilitate the tribunal's comparison and to avoid the expense of removing privileged information from daily time entries. We will also consider whether any argument about entitlement to costs is necessary.

Settlement Consideration

23. We will consider settlement options at the outset of each case and then at appropriate points such as when an exchange of submissions has clarified issues or a preliminary issue has been determined. Routes to settlement could include negotiations or other non-binding ADR such as early neutral evaluation.

24. Where applicable rules or law permit, we will consider making a "without prejudice except as to costs" settlement offer at an early stage.

25. We will consider asking arbitrators to provide preliminary views that could facilitate settlement.



Debevoise & Plimpton

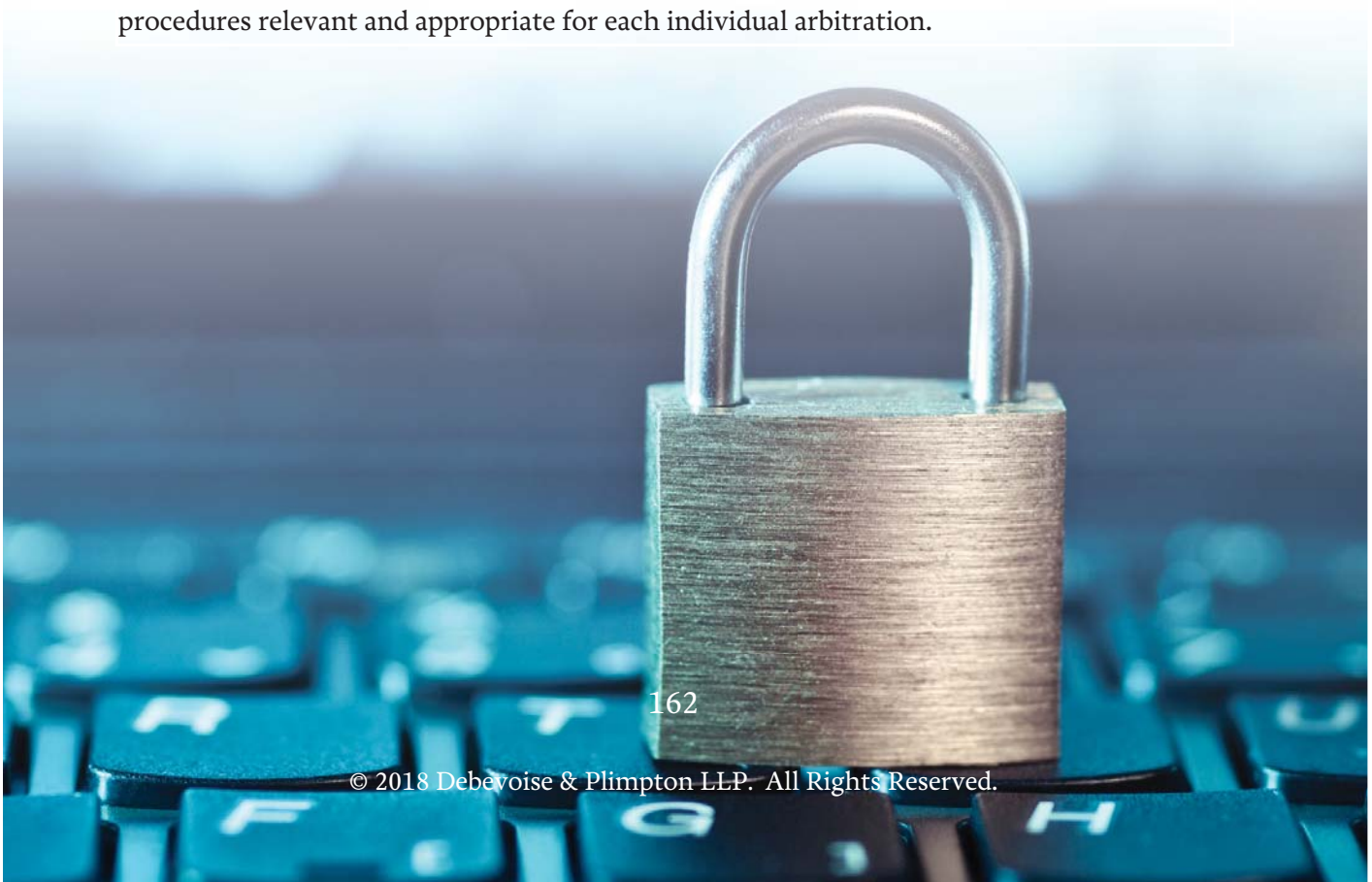
Protocol to Promote Cybersecurity in International Arbitration

Debevoise Protocol to Promote Cybersecurity in International

As the prevalence of malicious cyberactors and cyberattacks on high-profile companies and government organizations grows, parties to commercially or politically sensitive international arbitrations increasingly express concerns with respect to cybersecurity. Cybersecurity threats may create significant operational and legal problems that can compromise the arbitral process, including loss or unauthorized disclosure of sensitive data, breaches of attorney-client confidentiality, adverse media coverage and reputational damage, costs associated with breach notification or data recovery, and legal liability. In addition to the threat cyberattacks pose to the parties to an arbitration, failing to address this problem could ultimately lead to a loss of confidence in the arbitral system.

To respond to these concerns, the practitioners at Debevoise & Plimpton LLP have developed this Protocol to Promote Cybersecurity in International Arbitration. This Protocol operates on three principles: (i) Establishing Secure Protocols for the Transfer of Sensitive Information at the Outset of Proceedings, (ii) Limiting Disclosure and Use of Sensitive Information, and (iii) Developing Procedures for Disclosing Cyber Incidents.

The Protocol reflects our continued commitment to counsel clients on the most critical issues in international arbitration. We believe consideration of the procedures reflected in this Protocol will improve the arbitration process while appropriately managing risks. The procedures reflected in this Protocol are meant to be adaptable, so that parties, counsel and arbitral tribunals can use the flexibility inherent in international arbitration to develop procedures relevant and appropriate for each individual arbitration.



1. We will request that the arbitral tribunal establish protocols and procedures for the transfer of sensitive information at the outset of proceedings, usually in the first procedural conference. What constitutes such sensitive information should be defined in light of the particular circumstances of a dispute.
    a. These protocols and procedures may include: (i) defining categories of sensitive information, updated as necessary through the course of the proceeding; and (ii) agreeing on processes for the secure transfer of such sensitive information between and among the tribunal and the parties.
    b. This may include barring certain transfer methods (e.g., use of public WiFi to access sensitive information) or adopting certain transfer methods (e.g., use of secure portals instead of email).
2. We will ask the arbitral tribunal and the parties to consider and, if appropriate, agree to specific encryption standards for the transmission of sensitive information.
3. We will propose and encourage arbitral tribunals to disfavor the use of insecure email for the transmission of sensitive information unless additional measures are taken to secure the information. Such additional measures may include applying passwords to documents containing sensitive information that will be transmitted via separate channels (e.g., texting or via a phone call).
4. We will propose that, where possible, email accounts maintained by third party public servers (e.g., Gmail) have additional access protections such as multi-factor authentication (e.g., use of a token or similar mechanism in addition to username and password).
5. If third-party cloud storage is used, we will consider whether the third-party cloud storage incorporates adequate security protocols.
6. We will consider, and ask that the arbitral tribunal and opposing party consider, applicable governmental cross-border restrictions on the transfer of sensitive information and adopt reasonable measures to facilitate compliance with any restrictions.

Limited Disclosure and Use of Sensitive Information

7. Before submitting any sensitive information to the arbitral tribunal or opposing party, we will weigh the sensitivity of that information against the relevance and materiality of that information for that arbitration.
8. We will explore with the arbitral tribunal whether sensitive information may be submitted in a form that is only screen viewable (i.e., not readily downloadable or printable). If sensitive information is permitted to be printed, we will ask the tribunal to establish consistent policies and procedures related to the destruction of printed materials.
9. To the extent practicable, we will limit the persons who have access to sensitive information to those persons having a need-to-know with respect to such information.

10. To the extent practicable, access to sensitive information on computer systems should be restricted to those using a secure log-in ID and password, with a unique log-in ID and password assigned to each individual. We will consider, and ask that the arbitral tribunal and opposing party consider, the use of multi-factor authentication to access accounts or portals used to transmit and receive sensitive information.
11. We will restrict the ability to transfer sensitive information to mobile devices only if they use encryption or other appropriate security protocols.
12. At the client's request, we will establish procedures for returning or destroying sensitive information upon the conclusion of the arbitration.

Procedure for Disclosing Data Breaches

13. We will take reasonable steps to mitigate any potential breach, including by contracting with third-party vendors as necessary.
14. We will propose and work with the arbitral tribunal to establish policies and procedures related to detecting breaches, determining their scope, and notifying affected parties. Where the existence of the arbitration is itself confidential, we will work with the tribunal to consider means of notifying affected parties that best preserve the confidentiality of the arbitration.
15. We will propose and work with the arbitral tribunal to establish point-persons for each party to the arbitration and the tribunal itself to be responsible for coordinating communications in the event of a data breach or other incident that exposes or affects sensitive information.
16. We will consider whether there are any legal obligations to report the breach to affected parties, regulatory agencies, or other authorities.

Debevoise's Senior International Disputes Team

Catherine Amirfar

Catherine Amirfar is a partner in the International Dispute Resolution Group and Co-Chair of the firm's Public International Law Group. Her practice focuses on international commercial and treaty arbitration, international litigation, and public international law, and she regularly appears in U.S. courts and before international courts and arbitration tribunals. With over fifteen years of experience, Ms. Amirfar is recognized as a top practitioner in international disputes globally. Prior to rejoining Debevoise in 2016, Ms. Amirfar spent two years as the Counselor on International Law to the Legal Adviser at the U.S. Department of State, and received the State Department's Superior Honor Award in recognition of her contributions to the Department. Ms. Amirfar was one of the youngest lawyers ever to argue before the International Court of Justice.

Ms. Amirfar is admitted to practice in New York.

Donald Donovan

Donald Francis Donovan is Co-Chair of Debevoise's International Dispute Resolution Group and its Public International Law Group, and serves as counsel in international disputes before United States and international courts, as well as international arbitration tribunals. He currently serves as President of the International Council for Commercial Arbitration (ICCA), the leading global organization of international arbitrators and arbitration practitioners, and regularly sits as arbitrator in international cases, including under the auspices of ICSID, the ICC, and the ICDR, as president, chair, sole arbitrator, and co-arbitrator.

Mr. Donovan is widely regarded as one of the leading international arbitration practitioners, international lawyers, and international advocates in the world. He is admitted to practice in New York.

Tony Dymond

Tony Dymond is a partner in the International Dispute Resolution Group. His practice focuses on complex, multi-jurisdictional construction and engineering disputes in both litigation and arbitration. He has advised clients in a wide range of jurisdictions, having spent the last 20 years in London, Hong Kong and Seoul. Mr. Dymond has advised on some of the largest and most complex market-shaping disputes in these sectors, and is widely acknowledged as a leading lawyer in energy and infrastructure. He has appeared in arbitrations under the principal arbitration rules and in the English and Hong Kong courts. Mr. Dymond is a regular speaker at construction and arbitration conferences and contributor to construction law journals.

Mr. Dymond is admitted to practice in England & Wales and Hong Kong.

Mark Friedman

Mark W. Friedman is a partner in the International Dispute Resolution Group His practice concentrates on international arbitration and litigation, and he also has broad experience in civil and criminal matters. Mr. Friedman has represented clients in a wide variety of complex disputes across many industry sectors, including those concerning energy, mining, finance, insurance, construction, shareholder relationships, joint ventures, media, telecommunications, manufacturing, and investments. He has acted as counsel or arbitrator in disputes under the rules of the ICC, LCIA, AAA, ICDR, CPR, UNCITRAL and ICSID. He is a Vice President of the ICC Court of Arbitration and is a former Chair of the International Bar Association Arbitration Committee. Mr. Friedman was named "International Arbitration Attorney of the Year" by *Benchmark Litigation* for both 2016 & 2017.

Mr. Friedman is admitted to practice in New York and Massachusetts.

Lord Peter Goldsmith QC, PC

Lord Peter Goldsmith QC, PC is London Co-Managing Partner, Chair of European and Asian Litigation, and Co-Chair of Debevoise's Caribbean Practice. He regularly appears in European and international courts and tribunals, acting for a variety of clients in both arbitration and litigation. He conducts arbitrations under all the major institutions, including LCIA, ICC and SIAC, and in ad hoc arbitrations. Significant work includes partnership disputes, joint ventures, oil and gas disputes, investment treaties, auditors' liability, insurance and takeover law, banking law, company law, insolvency litigation, public law and public international law, including judicial review and human rights law. He served as the UK's Attorney General from 2001-2007, prior to which he was in private practice as one of the leading barristers in London. He has judicial experience as a Crown Court recorder and Deputy High Court Judge.

Lord Goldsmith is fluent in French. He became Queen's Counsel in 1987. He is admitted to practice in England & Wales, Paris, New South Wales, Northern Ireland, Belize and British Virgin Islands, and he regularly appears for clients in other Commonwealth courts.

Antoine Kirry

Antoine F. Kirry is a partner in the International Dispute Resolution Group. Mr. Kirry has substantial litigation and arbitration experience, with particular emphasis on M&A-related disputes. He has represented defendants in some of the most publicized insider trading cases brought before the French financial market regulator and the French criminal courts, and has also handled arbitrations under the auspices of the ICC Court of Arbitration, the Arbitration Institute of the Stockholm Chamber of Commerce and the Arbitration Court of the Russian Federation Chamber of Commerce and Industry, as well as ad hoc arbitrations in various European countries. For over nine years, Mr. Kirry was a member of the board of directors of Association Droit et Procédure, one of the oldest and most respected associations of litigation practitioners in France.

Mr. Kirry is fluent in English as well as his native French. He is admitted to practice in Paris and New York.

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Wendy J. Miles QC is a partner in the International Dispute Resolution Group. Her practice focuses on international arbitration and public international law, and she is recognized as one of the foremost practitioners in those fields. With over twenty years of experience, Ms. Miles has conducted arbitrations under all the major institutions, as well as undertaking significant public international law cases. She has advised a wide range of multi-nationals, sovereign states and state entities, and represents clients across numerous sectors, including energy, natural resources, gaming, manufacturing, financial services, pharmaceutical, licensing, telecommunications, insurance and construction. Ms. Miles is a Vice President of the ICC Court of Arbitration and former Vice Chair of the International Bar Association Arbitration Committee.

Ms. Miles became Queen's Counsel in 2015. She is admitted to practice in England & Wales and New Zealand.

Ina C. Popova

Ina C. Popova is a partner in the International Dispute Resolution Group who focuses on international arbitration and litigation and public international law, with particular expertise in matters in the mining, energy and media sectors. She represents individuals, corporations and States and has broad experience under the rules of the major arbitral institutions and several regional institutions. She also advises parties in international litigations involving proceedings in foreign and domestic courts, and has represented parties before the federal and state courts in the United States, including the United States Supreme Court. She has assumed leadership positions in various international arbitration organizations. Ms. Popova leads matters throughout the world, including in particular disputes arising out of Africa and Latin America.

Ms. Popova is fluent in French, Spanish, Italian and Bulgarian, and is proficient in Portuguese. She is admitted to practice in New York and Paris.

Dietmar W. Prager

Dietmar W. Prager is a partner in the International Dispute Resolution Group who focuses his practice on international arbitration and litigation, with a particular emphasis on Latin America. He is Co-Chair of the firm's Latin America Practice Group, and has represented parties in numerous arbitrations throughout the world under the auspices of the ICC, ICSID, LCIA, AAA, ICDR and the PCA as well as in ad hoc arbitration proceedings. Dr. Prager's recent representations include disputes involving complex construction projects, investment treaties, energy and mining projects, oil & gas projects, the retail sector, the finance sector, sovereign debt, and distribution agreements. Dr. Prager also regularly sits as arbitrator and was one of the youngest lawyers ever to argue before the International Court of Justice.

Dr. Prager is fluent in German, English, Spanish, and French, and is proficient in Portuguese. He is admitted to practice in New York.

Natalie Reid

Natalie L. Reid is a partner in the International Dispute Resolution Group and Co-Chair of Debevoise's Caribbean Practice. Ms. Reid focuses on international arbitration, public international law, and complex commercial litigation matters. A Jamaican national, she regularly advises and represents states, multinational corporations, international organizations, and non-governmental organizations in proceedings in U.S. courts and international fora. Ms. Reid acts as counsel in commercial and treaty arbitrations conducted under the rules of the major arbitral institutions, where her recent representations include disputes arising under bilateral investment treaties in South Asia and East Asia. She currently serves on the Board of Editors of the American Journal of International Law, and multiple committees of the American Society of International Law (ASIL).

Ms. Reid is proficient in French and Spanish. She is admitted to practice in New York.

David W. Rivkin

David W. Rivkin is Co-Chair of Debevoise & Plimpton's International Dispute Resolution Group and Immediate Past President of the International Bar Association. Mr. Rivkin is consistently ranked as one of the world's top international dispute resolution practitioners and international lawyers. He has acted as counsel and as arbitrator in international arbitrations throughout the world and in U.S. courts. He has won some of the largest investment treaty and commercial arbitration awards. Subjects of these arbitrations have included long-term energy concessions, investment treaties, public international law, joint venture agreements, financial issues, insurance coverage, construction contracts, distribution agreements and intellectual property, among others, and they have involved common law, civil law and Islamic law systems. Mr. Rivkin has served in leadership positions in arbitration institutions on five continents and has frequently worked to update their rules. In 2012, the *American Lawyer's Am Law Litigation Daily* named Mr. Rivkin one of two "Global Lawyers of the Year," and in 2011, the *National Law Journal* named him one of the country's "Most Influential Attorneys." He sits on many arbitration panels.

Mr. Rivkin is admitted to practice in New York.

William H. Taft V

William H. Taft V is a partner in the Litigation Department. His practice focuses on commercial and corporate governance litigation and international arbitration. Mr. Taft regularly acts for clients in U.S. litigation involving foreign parties and issues such as jurisdiction, forum non conveniens and foreign discovery. He also frequently advises clients in disputes arising from joint venture and partnership agreements, including matters involving commercial real estate and infrastructure development project companies, and has experience handling a broad range of contract disputes. He is a member of the American Society of International Law, the New York City Bar Association and has served on the International Disputes Committee of the New York City Bar Association.

Mr. Taft is admitted to practice in New York.

Christopher Tahbaz

Christopher K. Tahbaz is a partner in the International Dispute Resolution Group and currently serves as Debevoise's Co-Chair of Asian Litigation. He is a litigator and arbitrator with a broad range of U.S. and international experience. Mr. Tahbaz regularly represents U.S. and Asia-based multinational corporations in commercial arbitration before the ICC, the LCIA and other arbitral institutions; he also regularly represents clients in investment treaty arbitrations. In recent years, Mr. Tahbaz has represented clients in post-M&A disputes, and in commercial and investment treaty disputes arising out of the financial, pharmaceutical, solar energy and gaming sectors, among others. Mr. Tahbaz also regularly serves as arbitrator in arbitrations conducted under the HKIAC, UNCITRAL, ICDR/AAA and ICC rules. He recently concluded a term as Co-Chair of the International Bar Association Litigation Committee.

Mr. Tahbaz is admitted to practice in New York.

Patrick Taylor

Patrick Taylor is a partner in the International Dispute Resolution Group who focuses on commercial and investment treaty arbitration, with particular experience in the upstream oil & gas, energy and telecommunications sectors, and tax-related disputes. Mr. Taylor's practice and experience is geared towards advising clients in the most high-stakes, complex and valuable disputes. He has developed particular expertise advising on investment protection and investment dispute settlements in high-risk jurisdictions, the enforcement of fiscal and legislative stabilisation clauses, production sharing and shareholder/joint venture disputes and complex damages analysis. Mr. Taylor has advised and represented clients in disputes throughout the world, most frequently in Africa, Eastern Europe, Russia and the CIS, and, increasingly, in Latin America. He has acted in arbitrations under the rules of ICSID, the LCIA, the ICC, UNCITRAL, the Stockholm Chamber of Commerce, the Nigerian Arbitration and Conciliation Act and the Milan Chamber of Arbitration.

Mr. Taylor is fluent in French and is proficient in Spanish. He is admitted to practice in England & Wales and Ireland, and is qualified as a solicitor-advocate (High Rights Civil).

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Frederick T. Davis is of counsel to the firm and a member of the International Dispute Resolution Group. His practice focuses on criminal, regulatory and civil litigation, and investigations involving U.S. and French laws. Mr. Davis is an experienced trial lawyer who has represented clients in high profile matters in both French and English language tribunals. He has represented major U.S., French and multinational companies in both domestic and international criminal investigations. He has also appeared as legal counsel in international arbitrations administered by the ICC, AAA and other institutions, and has served as an arbitrator in ICC arbitrations. The French government has named him a "Chevalier" of the National Order of Merit of France.

Mr. Davis is a former U.S. federal prosecutor. He is admitted to practice in New York and Paris.

Aimee-Jane Lee

Aimee-Jane Lee is an international counsel in the firm's International Dispute Resolution Group, whose practice focuses on international commercial arbitration and litigation, and public international law. Ms. Lee has advised private clients and states across multiple jurisdictions (notably in Asia, Africa and Eastern Europe) and a number of industries, including mining, construction, hospitality, advertising and, especially, energy. She also advises on the international protection of investments (notably under bilateral investment treaties, the Energy Charter Treaty and investor-state contracts) and represents clients in associated disputes.

In addition to her legal experience, Ms. Lee has passed Levels 1, 2 and 3 of the Chartered Financial Analyst (CFA) exams. She is therefore particularly proficient in assisting clients with quantum-related aspects of their dispute and liaising with quantum experts. Ms. Lee is admitted to practice in England & Wales.

Carl Micarelli

Carl Micarelli is a counsel in the International Dispute Resolution Group. His practice has included international and domestic commercial arbitration, international investment arbitration, economic sanctions compliance advice, litigation aspects of insurance regulation, class action defense and general commercial litigation. Mr. Micarelli regularly advises clients in connection with sanctions regulations administered by the Office of Foreign Assets Control (OFAC) in the U.S. Department of the Treasury. This work has included ongoing compliance advice, investigations of potentially noncompliant transactions, licensing matters and litigation. He also has significant experience with litigation regarding the enforceability of arbitration agreements and arbitral awards, and has assisted a number of life insurance companies on regulatory matters.

Mr. Micarelli is admitted to practice in New York.

Samantha J. Rowe

Samantha J. Rowe is an international counsel in the International Dispute Resolution Group whose practice focuses on international arbitration and public international law. Ms. Rowe has represented private clients and States across multiple jurisdictions (most notably, Latin America, Asia, the Middle East and Eastern Europe) in arbitrations governed by various substantive laws and conducted under the rules of the ICC, LCIA, ICSID, UNCITRAL and SIAC. She has experience across a broad range of industries and sectors, including energy, mining, construction, financial services and pharmaceuticals. She advises clients on a broad range of international law issues, including the international protection of investments, and represents her clients in associated disputes.

Ms. Rowe is fluent in French and Spanish, and proficient in Portuguese. She is admitted to practice in England & Wales and New York.

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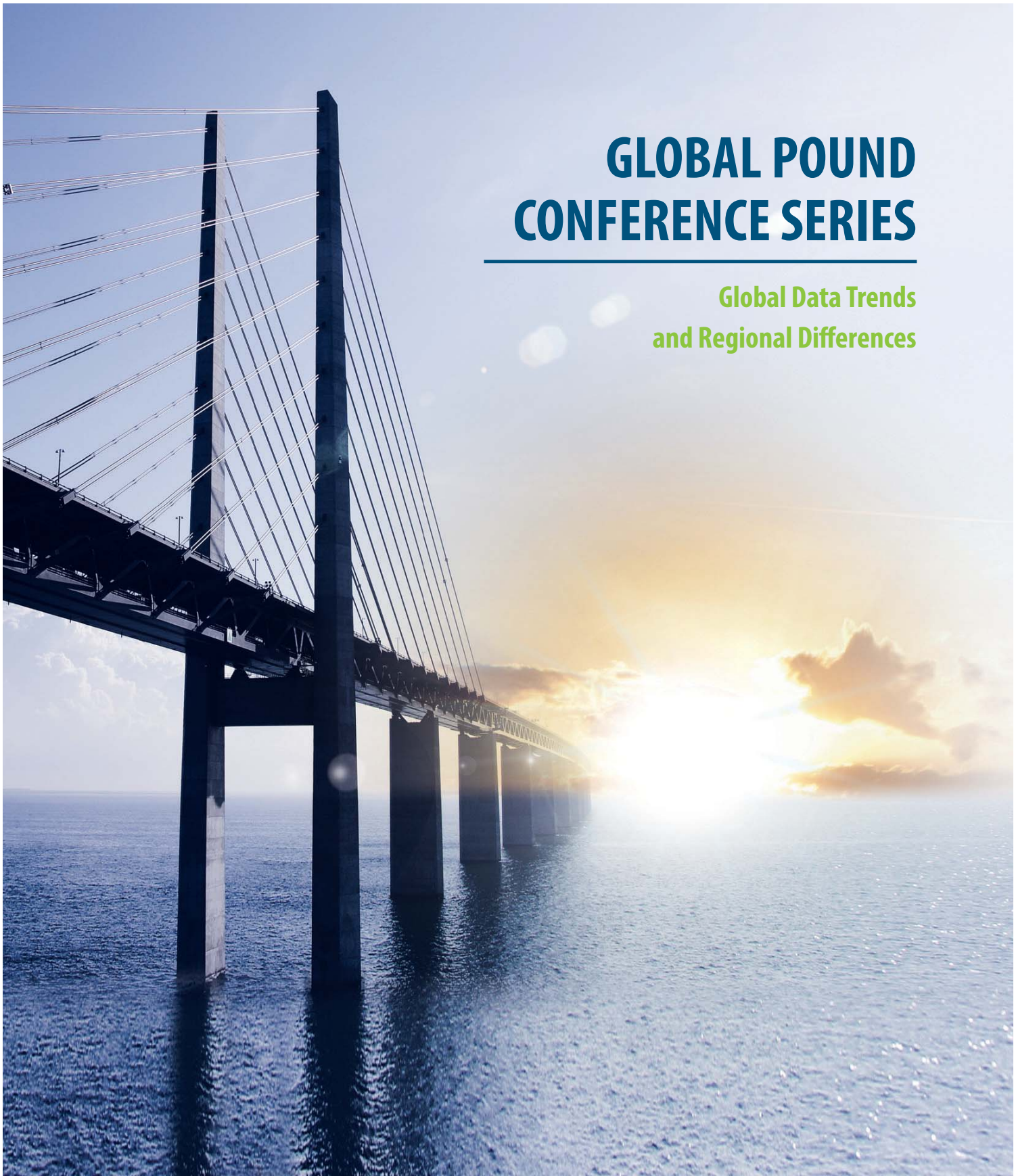

GLOBAL POUND CONFERENCE SERIES

Global Data Trends and Regional Differences

Contents

Chairman's Introduction

I am delighted to welcome you to this important report. It analyses, for the first time, the voting data captured at the Global Pound Conference (GPC) Series.

The GPC Series has been unique in terms of scale and ambition. The idea of surveying thousands of stakeholders engaged in dispute resolution in a standardised way at interactive conferences was conceived in 2014 by the International Mediation Institute (IMI). This was developed throughout 2015 and came to reality between March 2016 and July 2017 through 28 conferences at locations across the globe. The conferences were followed by an international online survey.

This project focuses on the needs of Users (both corporate and individual) of civil and commercial dispute resolution services. In doing so, it has prompted a much needed global conversation about how conflict can and should be managed in the 21st Century.

Pervasive disruptors like technology and globalisation have changed the business landscape almost beyond recognition. Yet dispute resolution processes have simply not caught up. This project has generated actionable data to question the status quo. It has armed us with a mandate for change and the outputs are already informing public policy making and private dispute resolution choices around the world.

The GPC Series has rebooted the discussion about dispute resolution and engaged all stakeholders to the debate. It is for this reason that the Global Pound Conference has evolved through its journey to become the Global Pound Conversation. A wealth of online resources continues to evolve to facilitate this ongoing conversation.

I hope you enjoy this report. As an in-house counsel responsible for managing a worldwide docket of disputes, I believe it provides new and practical insights. It is a springboard for more research and conversations over the years to come.

I urge you to visit the website at www.globalpound.org and join the Global Pound Conversation.

Michael McIlwrath
GPC Series Chair
Global Chief Litigation Counsel,
Litigation, GE Oil & Gas, Director of IMI

Executive Summary

The GPC Series convened more than 4,000 people at 28 conferences in 24 countries across the globe in 2016 and 2017. Those delegates – and hundreds more who contributed data online – voted on a series of 20 Core Questions to gather data to inform the future of dispute resolution. This report summarises the results of the first analysis of the global data, and identifies four Key Global Themes and four notable Regional Differences[1]. The GPC provides an opportunity for extensive research in the years to come and conversations between stakeholders. These early insights show the potential of the GPC data to inform those studies and discussions.

The **four Key Global Themes** we identify are:

Efficiency is the key priority of Parties[1] in choice of dispute resolution processes

Efficiency means different things to different stakeholders but this throws down a challenge to the way in which traditional dispute resolution processes meet the needs of the Parties seeking dispute resolution services. Finding the most efficient way to resolve a dispute may not always be the fastest or cheapest but it requires thought and engagement to bring appropriate resolution in acceptable timeframes and at realistic costs.

Parties expect greater collaboration from Advisors in dispute resolution

Parties using dispute resolution services seek greater collaboration from their external lawyers when interacting with them and their opponents. This represents a potential challenge to traditional notions of how lawyers should represent clients in disputes.

Global interest in the use of pre-dispute protocols and mixed-mode dispute resolution (combining adjudicative and non-adjudicative processes)

As global understanding of and interest in non-adjudicative dispute resolution processes grows, there is near universal recognition that Parties to disputes should be encouraged to consider processes like mediation before they commence adjudicative dispute resolution proceedings and that non-adjudicative processes like mediation or conciliation can work effectively in combination with litigation or arbitration.

In-house counsel are the agents to facilitate organisational change. External lawyers are the primary obstacles to change

The data shows a broad consensus that in-house counsel should encourage their organisations to consider their dispute resolution options more carefully, including using non-adjudicative processes like mediation and conciliation. External lawyers are reported to be – and perceive themselves to be – resistant to change, but a new generation of in-house counsel will challenge this resistance.

1 See page 6 for definitions

2 The raw data for these votes as provided by the technology provider, PowerVote, can be found here: http://globalpound.org/wp-content/uploads/2017/11/2017-09-18-Final-GPC-Series-Results-Cumulated-Votes-from-the-GPC-App-Mar.-2016-Sep.-2017.pdf

The **four Regional Differences** we identify are:

Desire for increased regulation in Asia

Stakeholders in the Asian jurisdictions voted consistently in ways that highlighted the role of legislation or international conventions to promote the enforcement and recognition of settlements. Since practical experience rarely reveals difficulties with enforcement, this regional trend may be an indicator that a more developed regulatory framework would assist acceptance and use of non-adjudicative dispute resolution processes like mediation and conciliation.

Efficiency the priority – except in Asia

When the global data was segmented by regions it was clear that efficiency was the key priority in all regions except Asia, where the key priority was the certainty and enforceability of outcomes. This may indicate an important underlying difference about how stakeholders in Asia perceive non-adjudicative dispute resolution processes.

Continental Europe marches to a different beat

Delegates at the Continental European conferences voted differently to all other regions when it came to the relationship between in-house counsel and external lawyers in changing dispute resolution habits. This revealed a conundrum in Continental Europe where delegates indicated that in-house counsel were looking to drive change in corporate attitudes to conflict prevention while battling with a lack of knowledge of dispute resolution options to effect that change. There was less emphasis on collaboration in this region too.

The legacy of the Woolf Reforms – visible in the UK

Lord Woolf's ground-breaking reforms to the civil justice system in England and Wales in the late 1990s embedded the role of ADR in the case management of civil litigation. Nearly 20 years on, the data from the London GPC Series finale reveals well-informed in-house counsel familiar with dispute resolution processes, focused on collaboration and efficient dispute resolution using non-adjudicative processes in pre-action protocols and mixed-mode dispute resolution.

About the GPC Series

The GPC Series takes its name from the original Pound Conference in St Paul, Minnesota, USA in 1976. Named in honour of Roscoe Pound, the reforming Dean of Harvard Law School in the 1920s and 30s, the theme was "Agenda for 2000 AD – The Need for Systematic Anticipation". This event led to many changes in the US justice system, including the creation of the 'multi-door courthouse' and the advent of alternative dispute resolution processes like mediation.

Forty years on from the original 1976 Pound Conference, dispute resolution has reached an impasse. The stakeholders in the dispute resolution field around the world are fragmented and there is a lack of reliable, comparative and actionable data to enable the supply side of the dispute resolution market to fully meet Parties' needs, both locally and transnationally. The GPC Series represented a timely opportunity to reassess the dispute resolution landscape and ask stakeholders all across the world what they think needs to change.

The entire dispute resolution industry was represented at the conferences including commercial parties, lawyers, experts, chambers of commerce, academics, judges, arbitrators, mediators, conciliators, policy makers and government officials. Using a bespoke voting and feedback App, including multiple choice and open text questions, delegates gave their views on what Users of dispute resolution need and want locally and globally. The series generated considerable data and created an opportunity to identify trends and preferences in a way that has not been possible previously.

The GPC Series was conceived and led by the International Mediation Institute (IMI), a non-profit public interest initiative which seeks to promote and improve the use of mediation worldwide. The GPC Series' Founding Diamond Global sponsors were Herbert Smith Freehills and the Singapore International Dispute Resolution Academy (SIDRA). PwC was a Global Platinum sponsor, with JAMS a Global Gold sponsor, and AkzoNobel, the American Arbitration Association/ICDR, the Beijing Arbitration Commission (BAC), the China International Economic and Trade Arbitration Commission (CIETAC) and Shell all Global Silver sponsors. They were joined by 54 Global Partners and over 100 organisations who supported the GPC Series locally.

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Delegates, the Core Questions and Voting

While the GPC Series was about much more than data gathering, the heart of each conference was the delegates voting on 20 multiple choice Core Questions. These were developed with the assistance of the GPC Academic Committee (see Appendix 1 for its members).

Voting was on a weighted multiple choice basis – most questions offered delegates five or six options and delegates selected up to three choices with their first choice scoring 3 points, their second choice 2 points and their third choice 1 point. As a result, the voting results were expressed as a percentage of the total number of points available to a given answer.

A response with a score of 100% equates to every voting delegate choosing that option as their first choice. In reality, no response achieved this score; the most important responses achieved a score of 60% or more, with a variance of 10% between responses marking a significant difference in opinion across stakeholder groups.

Before voting, delegates were required to identify themselves as coming from one of five stakeholder groups so that their primary professional focus could be captured in the voting preferences.

The five stakeholder groups were:

1) Parties
end-users of dispute resolution, generally in-house counsel and executives

2) Advisors
private practice lawyers and other external consultants

3) Adjudicative Providers
judges, arbitrators and their supporting institutions

4) Non-Adjudicative Providers
mediators, conciliators and their supporting institutions

5) Influencers
academics, government officers, policy makers

Each conference was organised around four interactive sessions looking at both the demand and supply sides of the dispute resolution market. The sessions provided the structure for the voting on the Core Questions and discussion of the results. They were:

- **Access to Justice & Dispute Resolution Systems: What do Parties want, need and expect?**
- **How is the market currently addressing parties' wants, needs and expectations?**
- **How can dispute resolution be improved? Overcoming obstacles and challenges.**
- **Promoting better access to justice: What action items should be considered and by whom?**

The delegates at conferences were self-selecting in that they chose to participate in person or online. As a consequence, the data gathering was never intended to replicate the conditions for the gathering of academic data. Nevertheless, the voting population was truly global, covering all continents, common and civil law systems, jurisdictions well known for highly developed dispute resolution systems, and jurisdictions which are developing ADR procedures to complement existing mechanisms. It provides a fascinating and unique global insight into dispute resolution today.

The voting took place at each conference live among the delegates using the App [3]. The questions were also opened up to online voting after the last event in London in July 2017, until 31 August 2017. In addition to the voting on the Core Questions, a wealth of additional data was collected at each event through:

- Delegate registration questionnaires.
- Responses (via the App) on a series of open text questions in each session, which were discussed by the panels and delegates during the events.
- Input into four Word Clouds which sought to capture the key words reflecting delegates' views. (Selected Word Clouds are highlighted later in this report to give a sense of the differing views and priorities around the world).
- Questions and comments collected in the App as each session unfolded, which other delegates could "like", thus ranking by popularity with other delegates.

Consequently, GPC collected a great deal of data on the thoughts, wishes and perspectives of the delegates. The focus of this report is to review and interpret the key responses that emerge from the multiple choice Core Questions only. There remains a huge body of material still awaiting analysis. It is available for further investigation and research in discussion with IMI and the Academic Committee. Please feel free to contact Jeremy Lack or Barney Jordaan in the first instance to discuss.

3 For France, India, the Netherlands and Spain (Barcelona), there was was some variation in the voting procedure.

"The scale of the GPC is unique and valuable, and the insights it offers merit further analysis and discussion. In terms of geographical reach and scale, there are no comparable academic or other studies in the field of dispute resolution.

Of course, while all care was taken to ensure the integrity of the data gathering process and rigour in the formulation of the survey questions and analysis of data, the project was not intended to be primarily an academic project, nor does the data gathering process represent a pure data collection environment. Any use of the GPC data must therefore be undertaken with this in mind.

Nevertheless, the preliminary analysis of the Core Questions provided by this report shows global trends that offer immediate insights and scope for further detailed local, regional and international analysis. The complete data set is available online on the GPC's website, and all academics and researchers are welcome to analyse, critique and comment on it.

In addition to the quantitative voting data, the qualitative discussion data captured at the events is a further rich source waiting to be mined by academics and others in years to come. We have at this stage only scratched the surface of the research potential of GPC. It has the ability to help shape the future of dispute resolution at both local and international levels."

Prof. Barney Jordaan
GPC Academic Committee Chair
Professor of Management Practice,
Vlerick Business School, Belgium

Global Voting Data – Key Themes and Observations

The global voting data provides a wide range of insights into the topics raised in the Core Questions. Herbert Smith Freehills, PwC and IMI and have analysed the data to draw out some key themes, which can be split into two groups: Key Global Themes emerging from the voting data; and observations on Regional Differences.

Key Global Themes

Efficiency is the key priority of Parties in choice of dispute resolution processes.

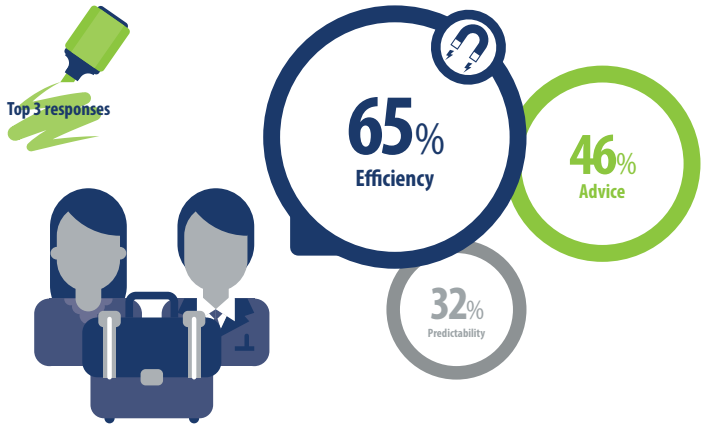
Parties expect greater collaboration from Advisors in dispute resolution.

Global interest in the use of pre-dispute protocols and mixed-mode dispute resolution (combining adjudicative and non-adjudicative processes).

In-house counsel are the agents to facilitate organisational change. External lawyers are the primary obstacles to change.

1. Efficiency is the key priority of Parties in choice of dispute resolution processes

Q1.2 When parties involved in commercial disputes are choosing the type(s) of dispute resolution process(es) to use, which of the following has the most influence?[4]



Additional responses

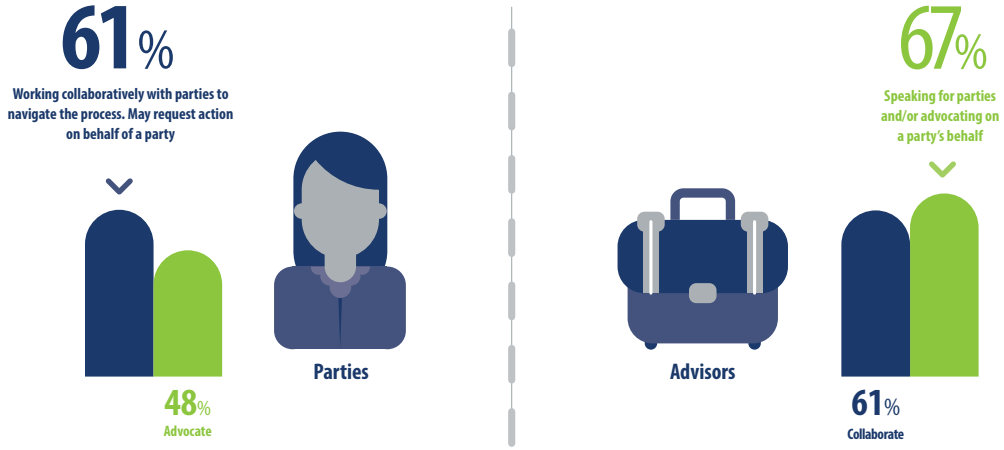
24%	Relationships
19%	Confidentiality
13%	Industry Practices
1%	Other

- This represents a challenge to traditional adversarial dispute resolution models, whether public (domestic courts) or private (institutional and ad hoc arbitration). Parties are looking not just for justice and resolution of their disputes, but an efficient journey to resolution.
- Efficiency in the resolution of commercial disputes will not always be as simple as the quickest and cheapest route to resolution (although cost and speed will always be important). Inherent to efficiency is the avoidance of waste, be that time, money, effort or other factors – and avoiding waste requires thought and flexibility among the dispute resolution stakeholders.
- Understanding what efficiency really means in terms of changing the behaviour of stakeholders requires further discussion:
  - Parties may need to communicate their priorities, expectations and underlying interests to Advisors and other stakeholders more clearly.
  - Advisors can challenge themselves to focus relentlessly on their clients' interests, being prepared to initiate or facilitate non-traditional dispute resolution with combinations of adjudicative and non-adjudicative processes.
  - Providers (neutrals) may reflect that arbitration rules and mediation procedures are not ends in themselves but exist among a range of tools to assist parties in resolving disputes. Flexibility, pragmatism and listening to Parties will likely translate to sustainable success. Providers can take more of a role in helping Parties and Advisors to consider routes allowing greater efficiencies.
  - Influencers can acknowledge that the resolution of commercial disputes is a commercial endeavour in which each stakeholder seeks to prosper and exercise (where possible) choice about forum and process to further the ends of Parties. A greater range of issues can also be considered in each case, beyond the merits of the case, the time to outcome or the costs of the process.
- Technology can drive efficiency. This is not limited to electronic discovery and electronic filing in litigation. Dispute management tools and online dispute resolution (ODR) have the capacity to change fundamentally the way disputes are resolved over the next decade. We are already seeing how artificial intelligence (AI) can automate the work of lawyers and adjudicators, paving the way for decision-making robots.

4 Based on the votes of Parties only.

2. Parties expect greater collaboration from Advisors in dispute resolution

Q1.5 What role do parties involved in commercial disputes typically want lawyers (ie in-house or external lawyers) to take in the dispute resolution process?



- One of the key discrepancies to emerge in the voting data was between how Parties said they wanted their lawyers to behave in dispute resolution processes and how those lawyers, the Advisors, saw their own role.
- The key difference in the voting was that Parties indicated that they wanted to see greater collaboration from their Advisors in dispute resolution processes, whereas Advisors consistently reported that they saw their role as advocates for their clients.
- Are these positions inconsistent? Are lawyers out of step with their clients' needs? These are complex issues but some initial perspectives on these data are:
  - The GPC Parties were a sophisticated group of delegates. GPC Parties are more likely than the average disputant to know what they want, and be more familiar with and skilled in the use of ADR processes – all of which informs the expectations and approach of their legal advisors.
  - The Advisors who attended GPC events are, similarly, likely to be a more sophisticated group in terms of ADR knowledge and usage than their peers. But even taking this into account, why were the GPC Advisors' votes so clearly out of step with the GPC Parties' votes? The answer may lie in the fact that most Advisors will have clients reflecting a spectrum of experience, from the most sophisticated to relatively unsophisticated clients who are only rarely involved in disputes and therefore rely heavily on advice from their lawyers as to process choice, behaviour towards counterparties and strategy.
  - Whether or not these differences reflect different experiences between Parties and Advisors, there is a clear challenge to the legal community to listen to clients and discuss whether collaboration is wanted and what that really means in a given situation (particularly when disputes are acrimonious or thought to be unmeritorious). This may be a genuine challenge to the traditional notion of zealous advocacy where every point and position is argued on behalf of the client.
  - Parties will need to speak up and reassure lawyers that they wish them to try a different approach. A rigorous attention to the law, of course, but also an approach to dispute resolution that is flexible and open to using different processes. One that acknowledges risks where they exist and is focused on efficient outcomes, not unnecessarily expensive or drawn out journeys to resolution. If Parties wish to promote efficiency in dispute resolution they may need to encourage their lawyers to focus on the core issues and discourage fighting points for their own sake.

"Greater emphasis on collaboration between in-house and external lawyers, and between disputing parties, will lead the way for more efficient resolution of commercial disputes. Most dispute resolution still has as its frame of reference an adversarial process based on asserted legal rights. But this can be inconsistent with the aspirations of the parties for quick, consensual resolution.

An early case assessment is a good example of how closer collaboration can increase efficiency, with in-house counsel and external lawyers working together to review the wider interests and risks. The results can in turn help inform a more resolution-focused approach with counterparties.

Technology also has a role to play. Social tools and online platforms are making it easier than ever for lawyers to work more closely with each other and with their clients. Advancement in data analysis enables advisors and legal teams to review and investigate large amounts of data quickly and assess risk in more sophisticated ways. Conventional views on the role of confidentiality are being challenged. This should facilitate the earlier use of consensual processes like mediation, in advance of, or in parallel with, or even integrated into litigation or arbitration. The global data indicates a mandate for change in attitudes and approach."

Alexander Oddy
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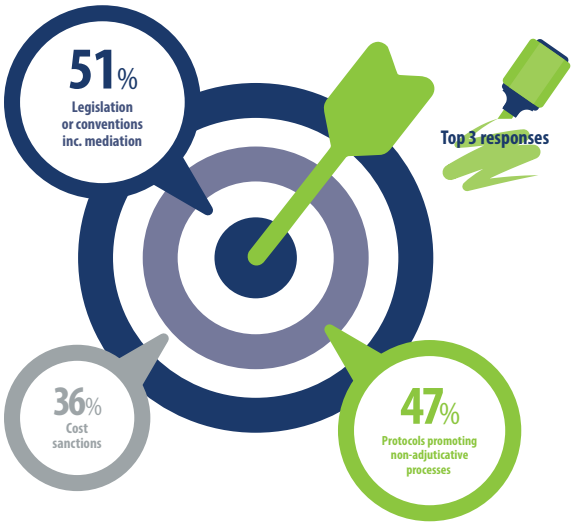
3. Global interest in the use of pre-dispute protocols and mixed-mode dispute resolution (combining adjudicative and non-adjudicative processes)

Q3.2 To improve the future of commercial dispute resolution, which of the following processes and tools should be prioritised?

- One of the striking areas of congruence across the GPC events and all stakeholder groups was the interest in two closely linked phenomena. First, the use of protocols to encourage the use of non-adjudicative dispute resolution processes like mediation or conciliation before adjudicative processes such as litigation or arbitration. Second, the use of non-adjudicative processes in combination with adjudicative processes, whether this is at the encouragement of a court or arbitration body/ tribunal or by agreement of the parties. Such "mixed-modes" of dispute resolution can be done sequentially, in parallel, or integrated with one another.

Q3.3 Which of the following areas would most improve commercial dispute resolution?



Additional responses

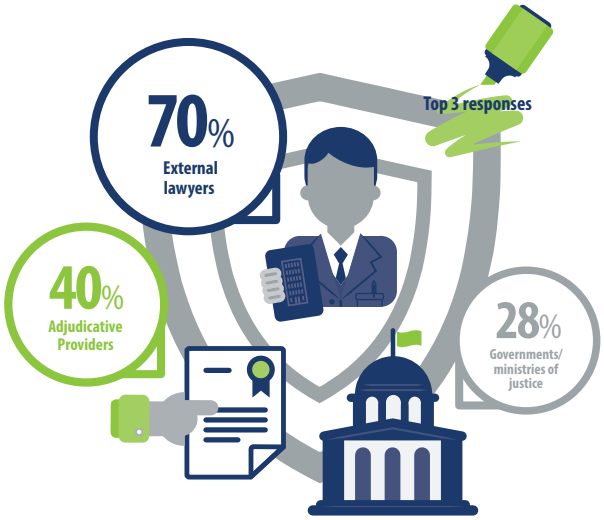
29%	Accreditation or certification systems
28%	Quality control and complaint mechanisms
5%	Third party funding rules
3%	Other

- There seems to be near universal recognition that before parties embark on adjudicative processes – which are typically expensive undertakings of significant duration – they should be at least encouraged (and potentially compelled) to explore less costly non-adjudicative options. This could be achieved through the development of pre-action protocols to be followed before court proceedings can be commenced (save where limitation or tolling periods are required or a particular remedy like an injunction is needed), or through arbitration clauses and rules encouraging parties to consider alternatives before a tribunal is constituted.
- Adjudicative processes also need to provide occasions and opportunities for the disputing parties to step away from the heat of the battle and engage with each other in a different manner (through mediation or another non-adjudicative process). This can be achieved through judicial case management or through changes to domestic rules of civil procedure or to arbitration rules where referrals to non-adjudicative processes exist on an opt-out basis.
- There seems to be a clear consensus that combining processes, or mixed-mode dispute resolution, is the way forward. The challenge is to find ways to achieve this efficiently and quickly, recognising that there will inevitably be resistance to change in many quarters. It is critical in this development that Parties are vocal in their demands and that Advisors, Providers of all types and Influencers are open-minded. Self-interest, familiarity and the comfort zone need to give way to a relentless focus on efficiency, supported by collaboration[5].

5 IMI, the College of Commercial Arbitrators (CCA) and the Straus Institute for Dispute Resolution at Pepperdine School of Law have responded to this data by initiating a tri-partite Mixed-Mode ADR taskforce, involving six different working groups. For more information about this taskforce or to join one of its working groups, see: http://www.imimediation.org/about-imi/who-are-imi/mixed-mode-task-force/.

4. In-house counsel are recognised as the agents to facilitate organisational change. External lawyers are the primary obstacles to change

Q3.4 Which stakeholders are likely to be the most resistant to change in commercial dispute resolution practice?

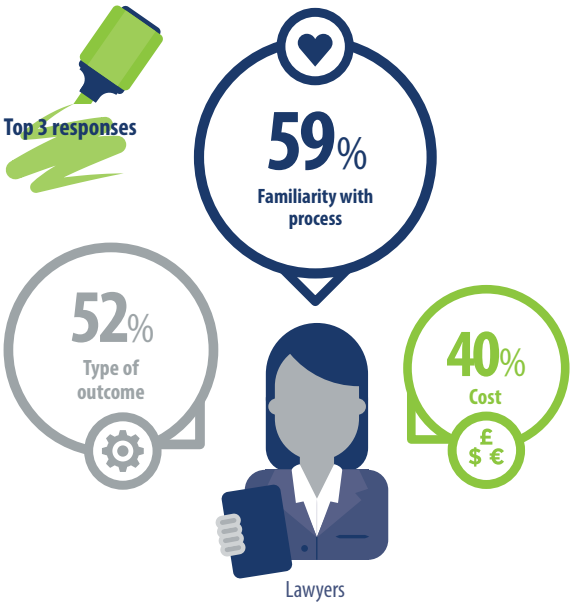


Additional responses

27% In-house lawyers
25% Parties
8% Non-adjudicative Providers
1% Other

- Recognising that the GPC data and experience throws down a challenge to all stakeholder groups to listen and respond, the voting data reveals some stark messages about the obstacles to and agents of change.
- All stakeholder groups identify Advisors (predominately private practice lawyers) as the primary obstacle to change in commercial dispute resolution practice. The lawyers showed the self-awareness to also identify themselves as the group most resistant to change.
- But why should that be the case? The Core Questions explored whether Advisors might be making recommendations for dispute resolution process choice based on the potential to earn (or not to earn) fees. But the voting data [Session 1, Q3 – see over] suggested that this was not a major factor – or at least it was far less significant than factors like the type of outcome required or familiarity with a dispute resolution process.

Q1.3 When lawyers (whether in-house or external) make recommendations to parties about procedural options for resolving commercial disputes, which of the following has the most influence?

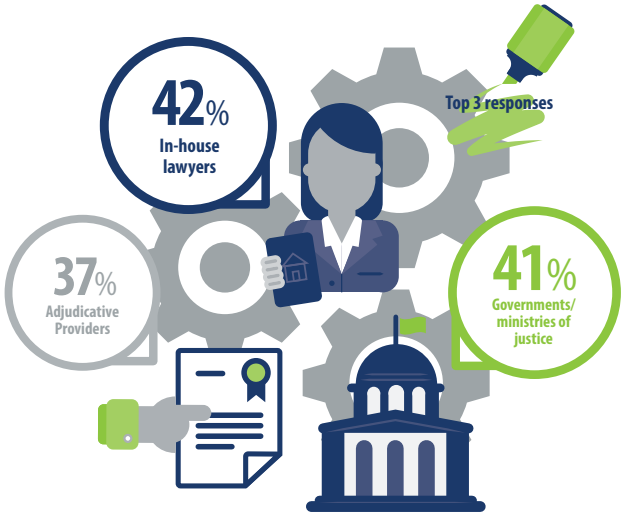


Additional responses

25%	Relationships
25%	Industry Practice
2%	Other

- Rather than rehearsing tired arguments about lawyers not promoting ADR for fear of its impact on their revenues, the data suggests that the underlying issue is more closely linked to something beyond training and education – familiarity. Have law schools and professional training regimes prepared today's dispute resolution lawyers adequately for the role that Parties wish them to perform? Are Providers and Influencers creating sufficient incentives for lawyers to gain real mediation or conciliation experience post qualifying? More fundamentally, what are the cultural expectations around what it is to be a lawyer, advocating for a client?
- This circles back to the discussion about the challenge to traditional notions of the zealous advocate, fighting her client's corner tenaciously. The 21st Century dispute resolution lawyer needs to deliver (or to work with others to deliver) what Parties want: dispute resolution process design, collaboration to pursue efficient outcomes, as well as traditional tough representation when called for.

Q3.5 Which stakeholders have the potential to be most influential in bringing about change in commercial dispute resolution practice?[6]



Additional responses

33% External lawyers
27% Parties
20% Non-adjudicative Providers
1% Other

- Who can facilitate and drive change? Parties are clear that they have a key role to play, identifying in-house lawyers as the group with the potential to be most influential in bringing about change in commercial dispute resolution practice. The stakeholder groups overall are less clear in identifying this opportunity, yet when asked what innovations and trends are going to have the most significant influence on the future of commercial dispute resolution, they are quick to recognise changes in corporate attitudes to conflict prevention.
- How might such changes be effected? An emphasis on the critical role of in-house counsel seems like a sound place to start and research from long before the GPC provides insights into how organisations can change, and the critical role in-house counsel have in driving that change[7].
- Of course many parties to commercial disputes will not have the benefit of in-house legal resources, so they will need to rely on a new generation of lawyers to assist them, trained in the right skills as law school syllabuses evolve. With the lawyers of generation Y, millennials and generation Z growing into positions of influence within corporates and throughout the dispute resolution community, the concept of collaboration in a way that would have been unthinkable to litigators of a generation ago may already be an accessible reality to a community grown up on crowd-funded solutions and sharing through social media.
- For example, traditional notions of confidentiality that underpinned arbitration and ADR processes may have far less significance for generations that have grown up professionally and personally with a technology-driven information-sharing culture. The willingness to engage in formal dispute resolution processes over periods of years (particularly in jurisdictions based on extensive discovery/disclosure) may be challenged by decision-makers who are used to proceeding with business and life at an ever faster pace.

6 Based on the votes of Parties only.

7 "The Inside Track – How blue chips are using ADR", Herbert Smith (legacy), 2007, available at http://hsfnotes.com/adr/key-adr-publications.

"The GPC Series was a fantastic opportunity for us to gather truly global perspectives on what changes need to be made to improve dispute resolution. One of conclusions is that while the need for change is recognised, most people think someone else has to make the change happen. So who is going to make the change happen?

In my view, In-house counsel is best placed to facilitate this change, as they own the problem. Disputes are generally not an academic exercise but are about protecting corporate value. In-house counsel has the right to demand change as custodian of this value and they also have the ability to drive change as they hold the purse strings. They represent a key link between the legal world and the commercial one, balancing the need for effective dispute resolution with the hard-earned experience of how best to get results.

As in-house counsel rethink how they resolve disputes, there is an opportunity to embrace the acceptance that collaboration brings results. That means drawing on the skills, experience and perspectives of different people to design optimal solutions. It also means considering alternative resolution approaches rather than the traditional adversarial one.

Our expectation is that a new generation of lawyers who have grown up in an information sharing culture will embrace such an approach and that dispute resolution will become more cost effective, flexible, faster and fairer."

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Regional Differences

The cumulative global voting data on the Core Questions has already revealed some surprising insights and perspectives. However, the great potential of the GPC has always been to dig deeper into the data and seek to understand whether views are genuinely homogeneous on a global basis or, as intuition might suggest, subject to regional variations.

We identified some regional groupings to see if any trends emerged. Our initial data analysis shows some fascinating differences which provides the platform for more detailed investigations.

The **regional groupings** analysed were:

North America
USA (Baltimore, Austin, Los Angeles, Miami, New York, San Francisco) and Canada (Toronto)

Asia
Singapore, Hong Kong, Thailand (Bangkok) and India (Chandigarh)

UK
London[7]

Oceania
Australia (Sydney) and New Zealand (Auckland)

Continental Europe
France (Paris), Germany (Berlin), Italy (Florence), Netherlands (Amsterdam), Poland (Warsaw), Spain (Barcelona and Madrid) and Switzerland (Geneva)

Africa/ Middle East
Nigeria (Lagos), South Africa (Johannesburg), UAE (Dubai)

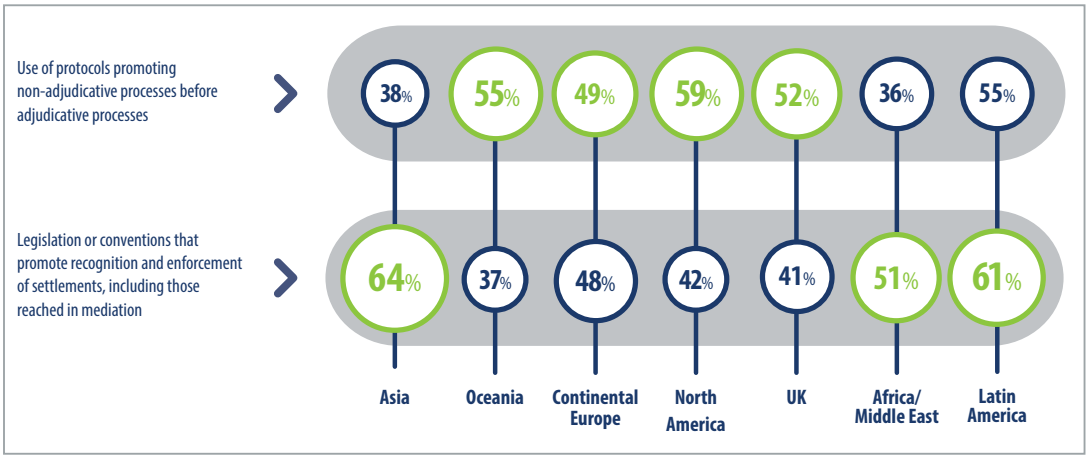
Latin America
Brazil (Sao Paulo), Guatemala (Guatemala City), Mexico (Mexico City)

7 The UK sits in a unique position as a pro-ADR common law jurisdiction yet (currently) part of the EU and exposed to civil law influences.

1. Desire for increased regulation in Asia

Delegates were asked about the areas which would most improve commercial dispute resolution. Globally, the two top choices (with virtually identically weighted votes) were (i) the use of legislation or conventions that promote recognition and enforcement of settlements, including those reached in mediation and (ii) the use of protocols promoting non-adjudicative processes before adjudicative processes.

Q3.3 Which of the following areas would most improve commercial dispute resolution?



- However, when the voting data was segmented along regional lines, some significant differences emerged. The votes in Asia were massively concentrated in favour of legislation or conventions, scoring far higher than the use of protocols promoting non-adjudicative processes. Africa/Middle East and Latin America seemed to also prefer legislation to promote enforcement, but less strikingly. The remaining regions show a starkly different picture, with the use of protocols strongly preferred to legislation (save in Continental Europe, where the votes were about equal).
- This triggers some interesting questions, not least because the near universal experience in practice is that agreements reached at mediation are only exceptionally not performed. If that is the case, why would Asian delegates be in favour of legislation and the need for enforcement of mediated settlements? A possible answer is that the data reveals more about attitudes to ADR, particularly non-adjudicative processes, in Asia, than it does about issues of enforcement. While there have been significant initiatives to promote ADR usage in the region with Hong Kong's Practice Direction 31 of 2010, and major investments in Singapore to develop domestic and international mediation bodies, there may be an underlying question about whether non-adjudicative ADR like mediation has yet become a sufficiently robust way of resolving disputes. That enforcement of mediated settlement agreements could help optically to evidence the status and value of mediation, is perhaps the key point.

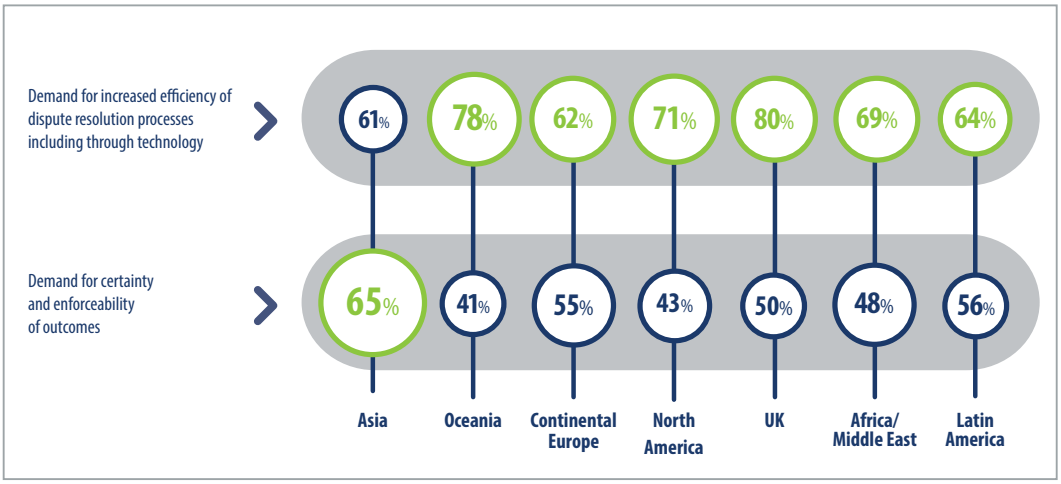
8 ADR in Asia Pacific series (Herbert Smith Freehills 2015-2017) https://www.herbertsmithfreehills.com/latest-thinking/adr-in-asia-pacific-spotlight-series. These explore, through interviews and market surveys, the developing trends in Hong Kong, Singapore and Indonesia.

2. Is efficiency the priority everywhere?

Delegates were asked which of a range of underlying demands will have the most significant impact on future policy-making in commercial dispute resolution.

- On the cumulative global results, there was a clear winner – the demand for increased efficiency of dispute resolution processes including through technology. Yet when the results were sorted regionally, a major difference of priorities emerged. All regions except Asia chose efficiency as their top demand and by a significant margin. This included the common law regions (UK, North America, Oceania) and the civil law region of Continental Europe.
- In Asia, the leading choice was again the demand for certainty and enforceability of outcomes. Is this a reflection of the regional desire for legislation and a convention on enforcement of settlements, identified above? Or is the demand for legislation and a convention a reflection of a deeper regional (and perhaps cultural) preference for a dispute resolution process that gives a clear answer? Do negotiation-based processes like mediation pose particular challenges in Asia where decision-making hierarchies and the desire not to lose 'face' make it culturally and practically more difficult to engage with the flexibility of mediation?
- In reality, consensual processes like mediation and conciliation are commonplace in civil law Asian countries, and they are supported in Asia's key common law jurisdictions too. The premium on enforceability may go more to the credibility and robustness of the process. UNCITRAL's proposed convention on the enforceability of mediated settlement agreements will, it seems, be welcomed in Asia. Systems that recognise outcomes internationally reassure parties embroiled in cross-border disputes that the outcome will be simple to enforce. This is being put in ever sharper focus as China's Belt and Road Initiative gathers pace, where one proposal on the table is for disputes arising under the initiative to be mediated first, before proceeding to arbitration.

Q4.4 Which of the following will have the most significant impact on future policy-making in commercial dispute resolution?



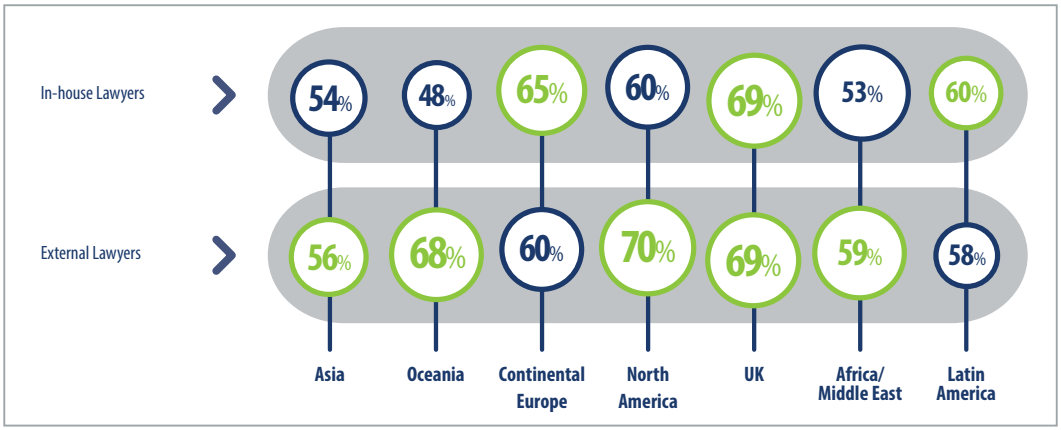
3. Awareness and Attitudes in Continental Europe

A regional analysis of a series of related questions indicate an interesting potential divergence in attitudes to conflict resolution in Continental Europe as compared with other regions.

- Delegates in Continental Europe identified that the stakeholders primarily responsible for ensuring parties involved in commercial disputes understand their dispute resolution process options are in-house lawyers.

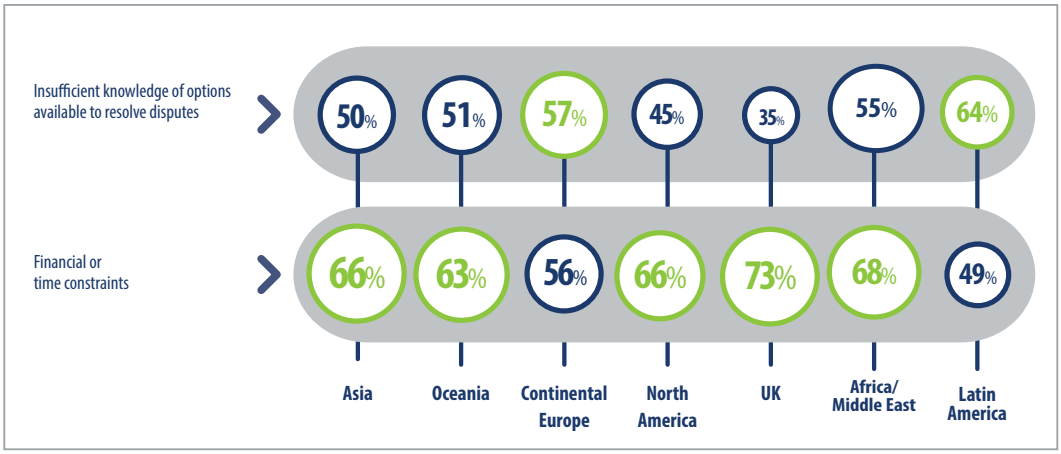
In all other regions, save for Latin America which is also a civil law region, delegates identified external lawyers as equally or more responsible for this critical role.

Q2.4 Who is primarily responsible for ensuring parties involved in commercial disputes understand their process options, and the possible consequences of each process before deciding which one to use?



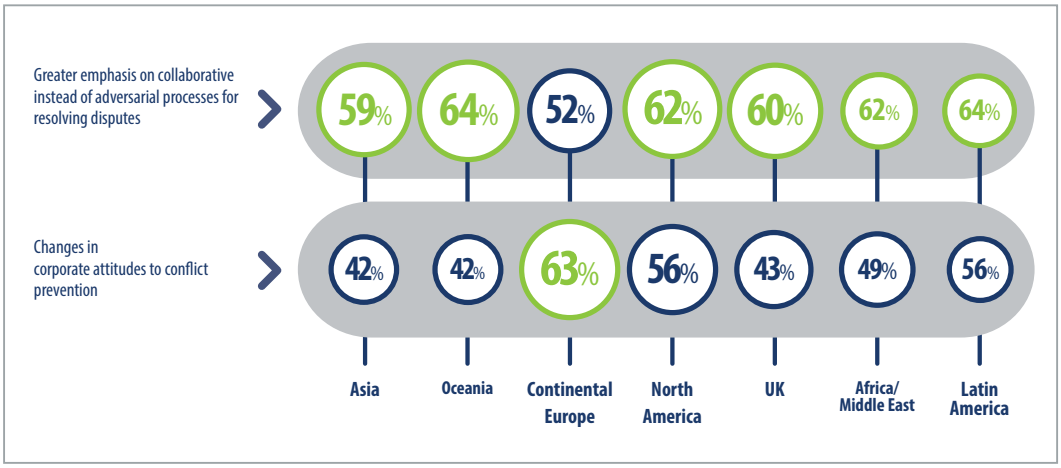
- Building on this, when in **Session 3, Q1** delegates were asked about the main challenges or obstacles parties face when seeking to resolve commercial disputes, the delegates in Continental Europe and Latin America again stood out. They identified insufficient knowledge of options available to resolve disputes as the most significant challenge, where delegates in all other regions were clear that financial or time constraints were the main obstacles. This may reflect the fact that adjudicative dispute resolution in the public courts of civil law jurisdictions is relatively less expensive than in many other jurisdictions (certainly common law jurisdictions).

Q3.1 What are the main obstacles or challenges parties face when seeking to resolve commercial disputes?



- When the delegate responses to **Session 4, Q5** are analysed, (what innovation/trends are going to have the most significant influence on the future of commercial dispute resolution?) the Continental European delegates again stand out. In all regions other than Continental Europe the message is clear: a greater emphasis on collaboration rather than adversarial processes is required. In Continental Europe, however, by far the most significant innovation is identified as changes in corporate attitudes to conflict prevention. The fact that Latin America voted differently to Continental Europe suggests that this is not a civil law versus common law issue.

Q4.5 What innovations/trends are going to have the most significant influence on the future of commercial dispute resolution?



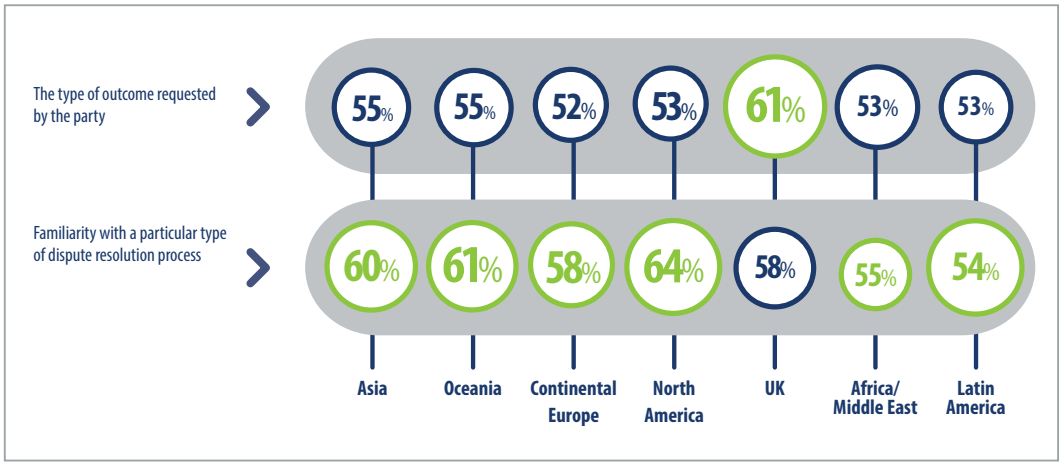
- Pulling these points together, a picture emerges of Continental Europe marching to a different beat to other regions. It seems to be looking for in-house lawyers to drive change in corporate attitudes to conflict prevention. Yet these lawyers are simultaneously battling with a lack of knowledge of dispute resolution process options to effect that change. All the while the global drive for more collaboration seems to be at its weakest in Continental Europe. The experience of relatively cheap (but often slow) litigation in the public courts of civil law jurisdictions in Continental Europe may have driven delegates away from voting for efficiency and collaboration. It may also be a reflection on the different weight given to legal departments in some civil law jurisdictions, where greater emphasis is placed on the difference between jurists and external lawyers.

Perspectives in the UK – the legacy of the Woolf Reforms?

A series of questions showed that the delegates at the GPC series finale in London in July 2017 held some significantly progressive views. It may be that as the 20th anniversary of Lord Woolf's sweeping reforms to the English civil justice system arrives, the effects of a generation of Parties brought up with ADR embedded in the fabric of commercial dispute resolution are in evidence.

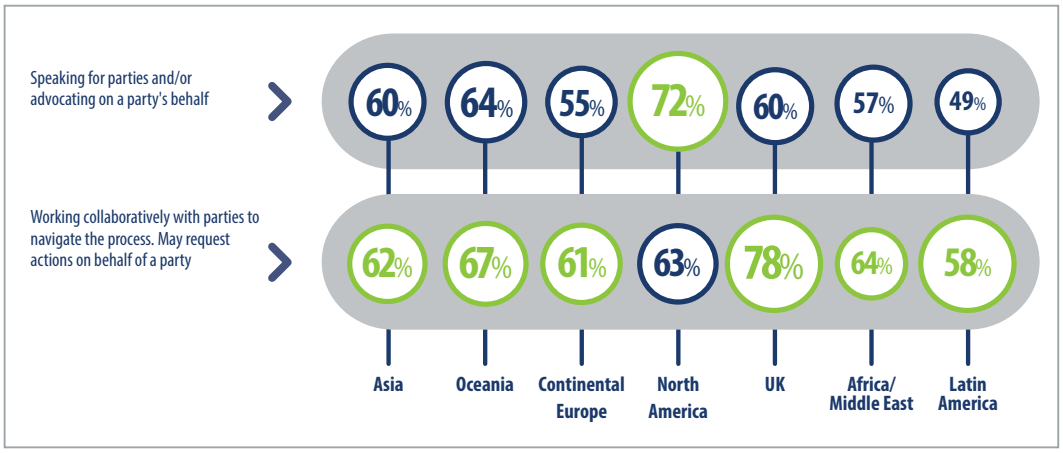
- When lawyers recommend dispute resolution procedural options to parties [Session 1, Q3], London delegates found the type of outcome requested by the party most influential, unlike all other regions which reported familiarity with a particular type of process as the most influential factor.

Q1.3 When lawyers (whether in-house or external) make recommendations to parties about procedural options for resolving commercial disputes, which of the following has the most influence?



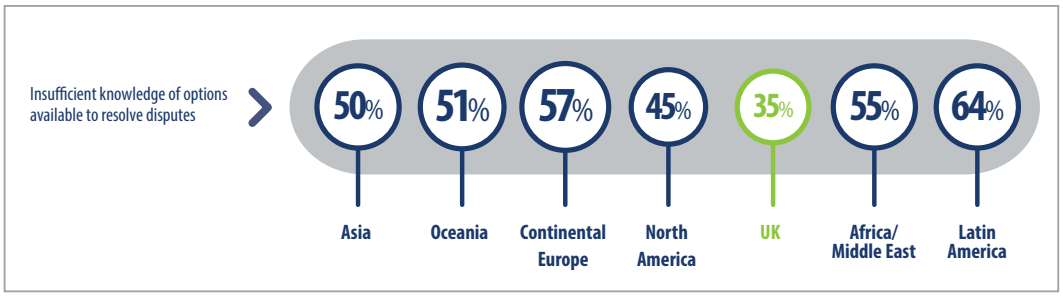
- Delegates in London were by far the clearest in identifying that the parties to commercial disputes typically want lawyers to work collaboratively with parties to navigate the dispute resolution process [Session 1, Q5]. In other regions delegates viewed the role of lawyers as advocates as being of broadly equivalent significance, except for North America where the tradition of zealous advocacy on behalf of clients was readily apparent in the preference for lawyers advocating on behalf of clients.

Q1.5 What role do parties involved in commercial disputes typically want lawyers (i.e., in-house or external lawyers) to take in the dispute resolution process?



- When delegates were asked about the main obstacles or challenges parties face when seeking to resolve commercial disputes, insufficient knowledge of the options available was far lower in the UK than in other regions

Q3.1 What are the main obstacles or challenges parties face when seeking to resolve commercial disputes?

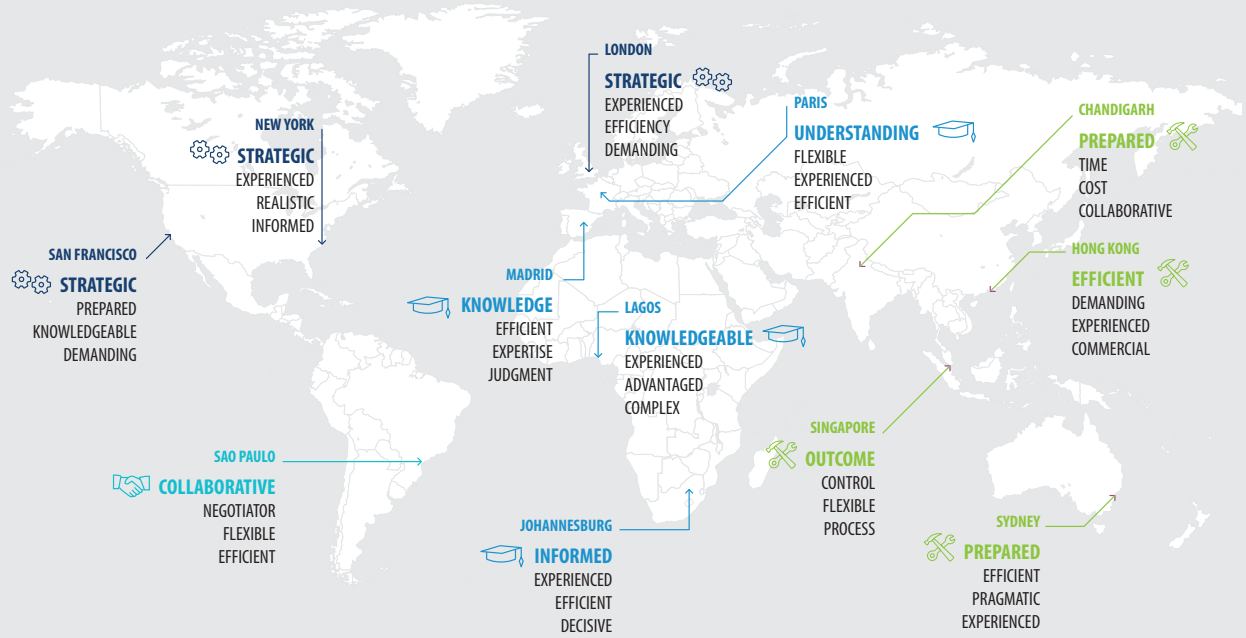


- While the Woolf Reforms have been widely celebrated as an enlightened step forward in the administration of civil justice, it seems the GPC data may be providing some real evidence of how changes in civil procedure to promote ADR can bring about progressive attitudes among a generation of Parties.

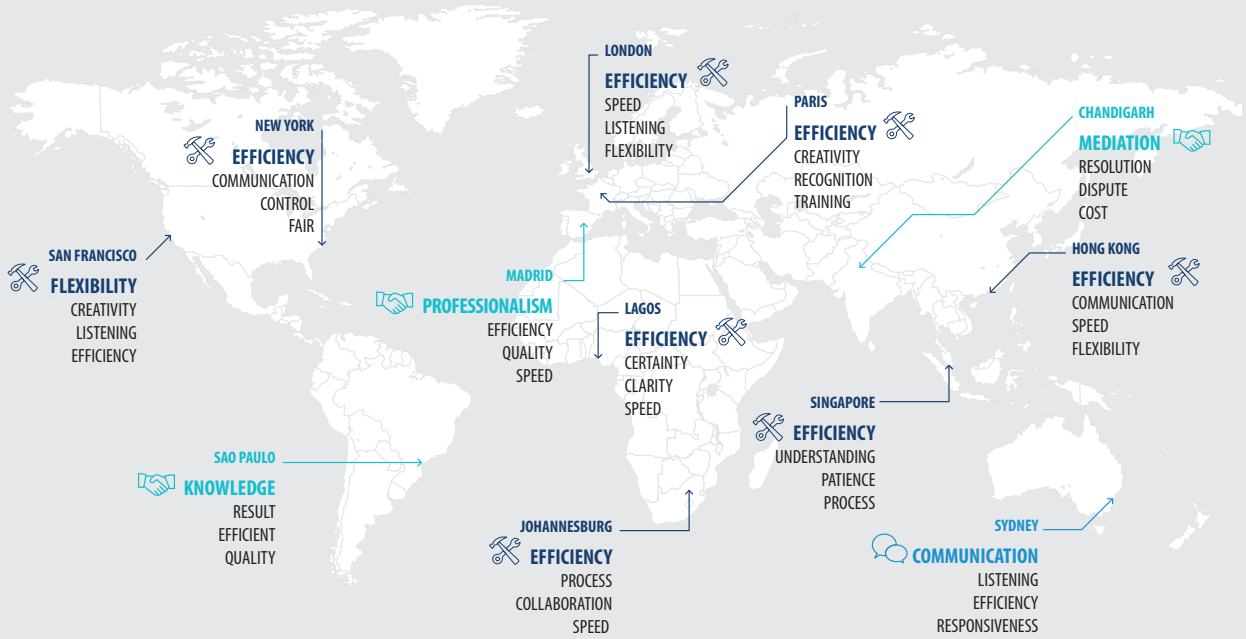
Word Clouds from around the Globe

An analysis of the word clouds generated at selected GPC events gives a sense of the different priorities and moods of the delegates.

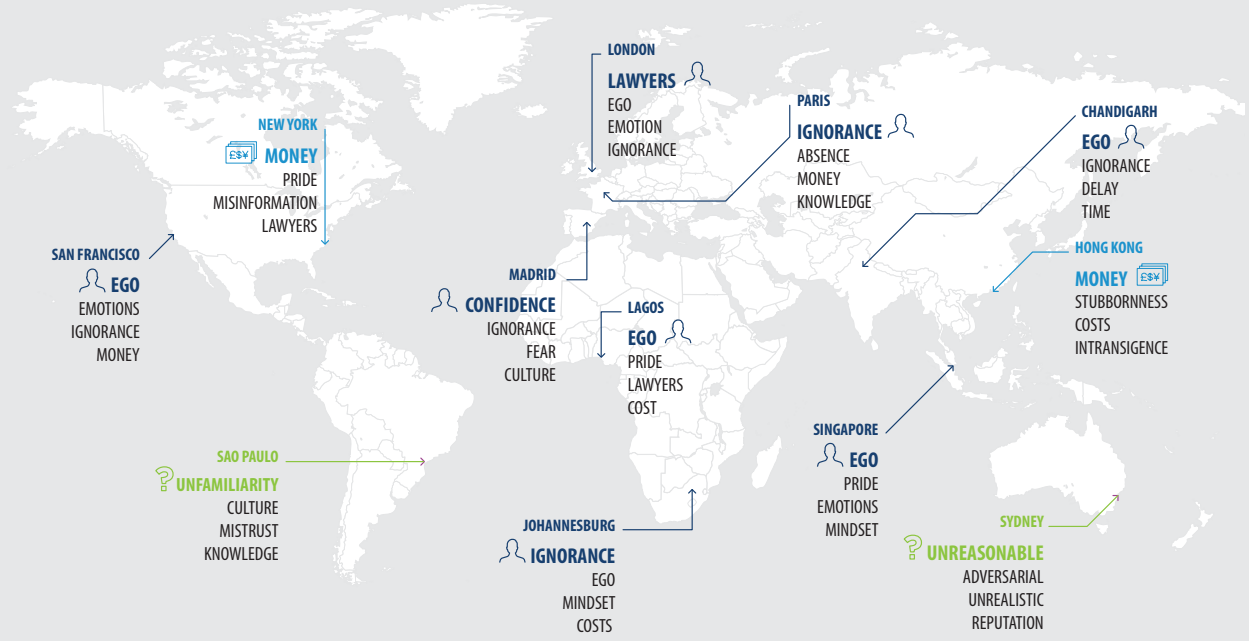
Session 1: What words would you use to describe a sophisticated commercial party?



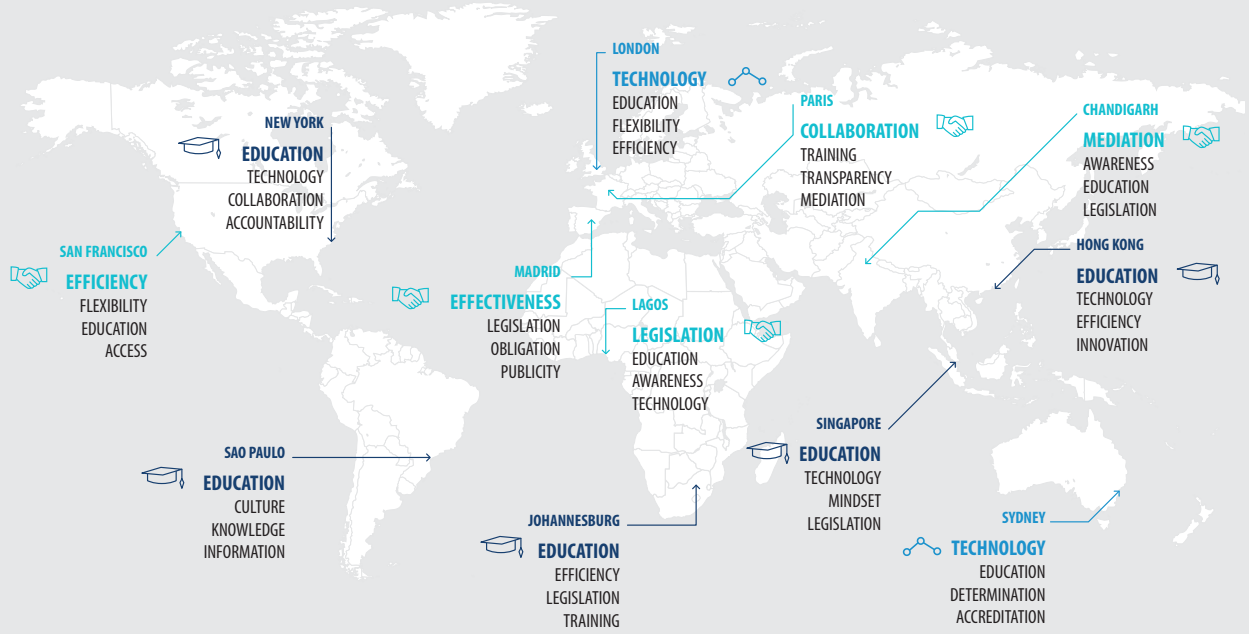
Session 2: What words would you use to describe what can be done to exceed parties' expectations?



Session 3: What words would you use to describe the most common impediments that keep parties from resolving their disputes?



Session 4: What words would you use to describe the changes to focus on in the future?



Appendix 1

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Dr. Dalma R. Demeter (Australia)

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Dr. Remy Gerbay (UK & USA)

Dr. Geneviève Helleringer (France & UK)

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Prof. Joel Lee/Lee Tye Beng (Singapore)

Ms. Emma-May Litchfield (Australia)

Prof. Amel Kamel (Oman)

Prof. Lela Love (USA)

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, GROWTH OF THE FIELD (CHALLENGES, NEW SECTORS, ETC.) (HTTP://MEDIATIONBLOG.KLUWERARBITRATION.COM/CATEGORY/GROWTH-OF-THE-FIELD-CHALLENGES-NEW-SECTORS-ETC/), RESEARCH (HTTP://MEDIATIONBLOG.KLUWERARBITRATION.COM/CATEGORY/RESEARCH/)

What Have We Learned From The Global Pound Conferences? (http://mediationblog.kluwerarbitration.com/2017/11/27/learned-global-pound-conferences/)

Thomas J. Stipanowich (http://mediationblog.kluwerarbitration.com/author/thomasstipanowich/) (Pepperdine University School of Law (http://law.pepperdine.edu/)) / November 27, 2017 (http://mediationblog.kluwerarbitration.com/2017/11/27/learned-global-pound-conferences/) / 3 Comments (http://mediationblog.kluwerarbitration.com/2017/11/27/learned-global-pound-conferences/#comments)

In the forty years since new visions and challenges for the administration of American justice were offered at the 1976 Pound Conference, a Quiet Revolution has altered the landscape of public and private dispute resolution around the world. (**See Living the Dream of ADR (http://ssrn.com/abstract=2920848)**).

Recently, a series of day-long meetings styled as the Global Pound Conferences, conducted in cities worldwide, offered diverse stakeholders an opportunity to register perspectives on the current state and future of commercial dispute resolution. Each gathering brought together in-house lawyers and clients, external lawyers and consultants, providers of dispute resolution services, educators, government servants and others in order to elicit perspectives and encourage dialogue on dispute resolution, public and private.

The prime artefacts of the “Global Pound” are recorded perceptions of 2,878 individuals polled during conferences at one of twenty-eight venues, or who responded to an online poll. These individuals were mainly dispute resolution professionals, outside counsel, consultants, educators and other individuals who derive a livelihood from the resolution of conflict. However, fifteen percent identified as “parties”—commercial users of dispute resolution services; in reality, they were primarily in-house counsel. Though business clients and corporate counsel are notoriously difficult to convene or poll, their perspectives as users and consumers of dispute resolution services are naturally of exceptional value.

In the interest of efficiency and simplicity, the organizers took some shortcuts in polling. Participants were lumped into five broad groupings, which meant that the responses of public judges were lumped together along with those of private arbitrators and representatives of provider organizations under the umbrella of "adjudicative providers." Those playing multiple roles, including dispute resolution professionals or institutions engaged in adjudicative as well as non-adjudicative activities, were required to self-identify by a single primary activity.

Some of the questions and answers were subject to multiple interpretations, or so broadly framed as to embrace a range of possible circumstances. Respondents were limited to ranking their top three choices among a range of answers, and to rank those choices in order of priority; it was not possible to accord equal rank to selected responses.

Despite these limitations, the Global Pound Conference poll leaves us with a number of general impressions about current dispute resolution practice, and raises several tantalizing prospects for future evolution. As you read the following summary, please be aware that in tabulating results for each question, respondents' top-ranked answers were accorded 3 points, their second-ranked answers were given 2 points, and third choices were given 1 point. The published data for each question lists answers in order of the total number of points they received. In addition, each answer received a "percentage ranking" based on the percent of the total possible points that a particular answer received.

1. Efficiency and cost-effectiveness are a primary concern in commercial dispute resolution, and will drive future policy-making.

According to Pound participants, efficiency—that is, the time and cost entailed in resolving a dispute outcome—was the most influential factor in choosing among dispute resolution processes (with a 61% ranking for the entire group, and 65% for "parties" (mainly in-house counsel). Financial or time constraints were the primary obstacle or challenge faced by parties in the resolution of disputes (with a 59% ranking). In addition, reduced costs and expenses (with a 50% ranking among all respondents and 49% for commercial parties) ranked first among the perceived achievements of mediation or conciliation.

Participants expected demand for increased efficiency of dispute resolution processes, including through technology, to have the most significant impact on future policy-making in commercial dispute resolution. This factor received a 64% ranking among all participants and 65% among parties. (However, reflecting an abiding tension among the priorities of commercial parties, 52% of those polled saw the demand for certainly and enforceability of outcomes as a key influencer in the future.)

2. Party control is a priority.

Next to reducing costs and expenses, permitting parties to retain control over the outcome was viewed as the important result of mediation and conciliation (as reflected in the votes of 46% of all participants, and 38% of business parties / in-house counsel). Control over process and outcome is a common theme of comments by corporate counsel.

3. Improved or restored relationships are often a goal.

Although the poll indicated that parties tend to come to dispute resolution wanting damages or or injunctive relief, a sizable minority (a 28% of all participants, and 33% of parties) indicated that parties may be looking to mend or end a relationship. Relational concerns were sometimes an important factor in selecting dispute resolution processes; thirty-nine percent of participants thought improved or restored relationships were among the most likely achievements of mediation or conciliation.

4. Advice from counsel, guidance from dispute resolution providers and educational programs are all potential sources of information on process choices.

Insufficient knowledge of available options for the resolution of commercial disputes is another primary obstacle or challenge for participants (with a 52% ranking among all those polled). Lawyers, external and in-house, were most often viewed as having responsibility to ensure parties understand process options and their potential consequences; external lawyers received a 59% ranking, in-house lawyers 55%. "Lawyer advice" was also a key factor in the selection of dispute resolution options, with a 58% ranking among all participants, and 46% among parties. More cynically, the group identified the impact on costs and fees lawyers can charge as among the top three influences on lawyer advice-giving (with a 40% ranking). The view that the primary role of lawyers was "working collaboratively with parties to navigate the process" predominated with a 60% ranking.

When asked what role parties involved in commercial disputes envisioned for providers of dispute resolution services, sixty-one percent of participants indicated that parties prefer to "seek guidance from the providers regarding optimal ways of resolving their dispute." The question lacks clarity, however, and the "guidance" referred to might refer to mediators' affirmative directions on dispute resolution options, a "fleshing out" of arbitration procedures facilitated by arbitrators, or even menus of procedural options on websites of institutional providers.

When asked which methods would be most effective in improving parties' understanding of their options for resolving commercial disputes, most participants (64%) pointed to educational programs in business or law schools or the broader business community.

5. Outcomes reflect an interplay between rule of law, consensus/party interests, and general concepts of fairness.

Participants indicated that the top three factors determining the outcome of a commercial dispute were consensus (based on the parties' subjective interests) (63% ranking), findings of fact and legal or other norms (58% ranking), and general principles of fairness (49% ranking). These diverse determinants arguably reflect, or explain the common resort to, approaches in which parties move back and forth between adjudication and negotiation during the course of resolving a dispute—exemplified by Mark Galanter's term "litigotiation."

6. The most effective approaches may rely on multiple processes.

Pound participants viewed combinations of adjudicative and non-adjudicative processes, such as mediation and arbitration or mediation and litigation, as the most effective process option. (It was ranked by 49% of participants and 50% of parties). This is perhaps a reflection of the common practice of negotiating (with or without a mediator) against the backdrop of adjudication. Combinations of approaches were also perceived as one of the highest priorities for the future by 50 percent of commercial parties and 45% of all participants.

7. Pre-dispute or pre-escalation processes, collaboration and conflict prevention are emerging trends in managing commercial conflict.

Along with combinations of adjudicative and non-adjudicative processes, business parties viewed "pre-dispute or pre-escalation processes to prevent disputes" as the most effective process for addressing commercial disputes. (50% of parties identified each approach.) Commercial parties saw these approaches as the top priority for the future (55%), as did participants generally (51%).

Participants expected "greater emphasis on collaborative instead of adversarial processes" and "changes in corporate attitudes to conflict prevention" to be the most significant influences on the future of commercial conflict resolution (with rankings of 57% and 51%, respectively).

8. Governments and ministries of justice have the greatest potential to influence change; outside counsel are most resistant to change.

Participants viewed governments and ministries of justice as most likely to influence change in commercial dispute resolution (41% ranking)—a logical choice given the importance the leading role governments and court systems have played in promoting mediation. Although commercial parties / in-house counsel, outside counsel and adjudicative providers each ranked themselves as potentially the most influential stakeholders, it should be noted that corporate counsel are often in a particularly advantageous position to influence process choices (including consensual private approaches) on the company and transactional level.

Participants perceived external lawyers (67%) and adjudicators (judges and arbitrators) (39%) as most resistant to change.

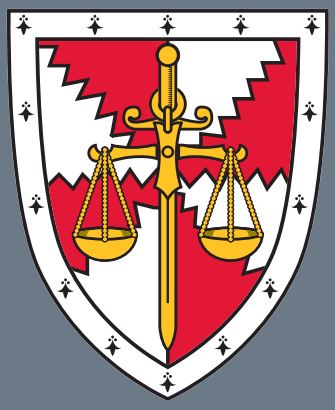
Conclusion

It remains to be seen how much influence the Global Pound Conferences will have on the pace or direction of change. However, the extant data from GPC polling offer considerable fodder for discussion and debate regarding trends in conflict management.

(http://mediationblog.kluwerarbitration.com/2017/11/27/learned-global-pound-conferences/?print=pdf)

(http://mediationblog.kluwerarbitration.com/2017/11/27/learned-global-pound-conferences/?print=print)

Electronic Discovery



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Protocol for E-Disclosure in Arbitration

1

Purpose of CIArb Protocol for E-disclosure in Arbitration

This Protocol is for use in those cases (not all) in which potentially disclosable documents are in electronic form and in which the time and cost for giving disclosure may be an issue. It is intended:

- to achieve early consideration of disclosure of documents in electronic form ("e-disclosure") in those cases in which early consideration is necessary and appropriate for the avoidance of unnecessary cost and delay;
- to focus the parties and the Tribunal on e-disclosure issues for consideration, including the scope and conduct of e-disclosure (if any); and
- to address e-disclosure issues by allowing parties to adopt this Protocol as part of their agreement to arbitrate a potential or existing dispute.

Early consideration

1 In any arbitration in which issues relating to e-disclosure are likely to arise the parties should confer at the earliest opportunity regarding the preservation and disclosure of electronically stored documents and seek to agree the scope and methods of production.

2 The Tribunal shall raise with the parties the question of whether e-disclosure may arise for consideration in the circumstances of the dispute(s) at the earliest opportunity and in any event no later than the preliminary meeting.

3 The matters for early consideration include:

(i) whether documents in electronic form are likely to be the subject of a request for disclosure (if any) during the course of the proceedings, and if so;

(ii) what types of electronic documents are within each party's power or control, and what are the computer systems, electronic devices, storage systems and media on which they are held;

(iii) what (if any) steps may be appropriate for the retention and preservation of electronic documents, having regard to a party's electronic document management system and data retention policy and practice, provided that it is unreasonable to expect a party to take every conceivable step to preserve every potentially relevant electronic document;

(iv) what rules and practice apply to the scope and extent of disclosure of electronic documents in the arbitration, whether under the agreed arbitration rules, the applicable arbitral law, any agreed rules of evidence (for example, the IBA Rules on the Taking of Evidence in International Commercial Arbitration), this Protocol or otherwise;

(v) whether the parties have made, or wish to make, an agreement to limit the scope and extent of electronic disclosure of documents;

(vi) what tools and techniques may be usefully considered to reduce the burden and cost of e-disclosure (if any), including:

(a) limiting disclosure of documents or certain categories of documents to particular date ranges or to particular custodians of documents;

(b) the use of agreed search terms;

(c) the use of agreed software tools;

(d) the use of data sampling; and

(e) the format and methods of e-disclosure;

(vii) whether any special arrangements with regard to data privacy obligations, privilege or waiver of privilege in respect of electronic documents disclosed may be agreed; and

(viii) whether any party and/or the Tribunal may benefit from professional guidance on IT issues relating to e-disclosure having regard to the requirements of the case.

Request for disclosure of electronic documents

4 Any request for the disclosure of electronic documents shall contain:

(i) a description of the document or of a narrow and specific requested category of documents;

(ii) a description of how the documents requested are relevant and material to the outcome of the case;

(iii) a statement that the documents are not in the possession or control of the party requesting the documents; and

(iv) a statement of the reason why the documents are assumed to be in the possession or control of the other party.

Order or direction for disclosure of electronic documents

5 In making any order or direction for e-disclosure, or for the retention and preservation of electronic documents, the Tribunal shall have regard to the appropriate scope and extent of disclosure of electronic documents in the arbitration, whether under the agreed arbitration rules, the applicable

arbitral law, any agreed rules of evidence (for example, the IBA Rules on the Taking of Evidence in International Commercial Arbitration) and this Protocol. The Tribunal shall have due regard to any agreement between the parties to limit the scope and extent of disclosure of documents.

6 In making any order or direction for e-disclosure the Tribunal shall have regard to considerations of:

(i) reasonableness and proportionality;

(ii) fairness and equality of treatment of the parties; and

(iii) ensuring that each party has a reasonable opportunity to present its case

by reference to the cost and burden of complying with the same. This shall include balancing considerations of the amount and nature of the dispute and the likely relevance and materiality of the documents requested against the cost and burden of giving e-disclosure.

7 The primary source of disclosure of electronic documents should be reasonably accessible data; namely, active data, near-line data or offline data on disks. In the absence of particular justification it will normally not be appropriate to order the restoration of back-up tapes; erased, damaged or fragmented data; archived data or data routinely deleted in the normal course of business operations. A party requesting disclosure of such electronic documents shall be required to demonstrate that the relevance and materiality outweigh the costs and burdens of retrieving and producing the same.

Production of electronic documents

8 Production of electronic documents ordered to be disclosed shall normally be made in the format in which the information is ordinarily maintained or in a reasonably usable form. The requesting party may request that the electronic documents be produced in some other form. In the absence of agreement between the parties the Tribunal shall decide whether production of electronic documents ordered to be disclosed should be in native format or otherwise.

9 A party requesting disclosure of metadata in respect of electronic documents shall be required to demonstrate that the relevance and materiality of the requested metadata outweigh the costs and burdens of producing the same, unless the documents will otherwise be produced in a form that includes the requested metadata.

10 The Tribunal shall consider the appropriate allocation of costs in making an order or direction for e-disclosure.

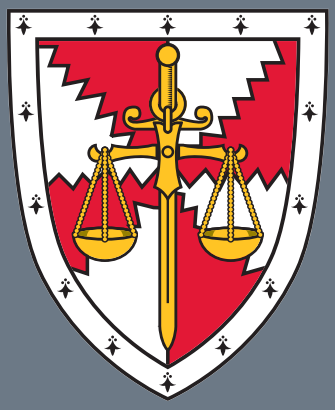
11 The Tribunal shall establish a clear and efficient procedure for the disclosure of electronic documents, including an appropriate timetable for the submission of and compliance with requests for e-disclosure.

12 The Tribunal shall require that a producing party give advance notice to the requesting party of the electronic tools and processes that it intends to use in complying with any order for disclosure of electronic documents.

13 The Tribunal may, after discussion with the parties, obtain technical guidance on e-disclosure issues. Such discussion shall include the question of who is to be instructed to provide technical guidance and the costs expected to be incurred. The costs of this shall be included in the costs of the arbitration.

14 In the event that a party fails to provide disclosure of electronic documents ordered to be disclosed or fails to comply with this Protocol after its use has been agreed by the parties and the Tribunal or ordered by the Tribunal, the Tribunal shall be entitled to draw such inferences as it considers appropriate when determining the substance of the dispute or any award of costs or other relief.

The Chartered Institute of Arbitrators takes no responsibility for damage or loss suffered by any user of this Protocol.



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Best Practices as to Initial Steps to be Taken by Arbitrators with Respect to Discovery as to Electronically Stored Information (ESI)

Charles J. Moxley, Jr.

It appears to be a contemporary Best Practice to proactively address the issue of ESI at the preliminary hearing, in an effort to avoid the likelihood of having some aspect of ESI production coming back later as a problem area in the case.

Provisions along the following lines in the first scheduling order would also appear to be potentially useful, following discussion of such matters at the preliminary hearing:

Electronic Discovery

1. To the extent electronic documents are to be the subject of discovery in this case, such production, subject to agreement by the Parties to the contrary, should generally comply with the following:

- Electronic documents need only be produced 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 electronic 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 Arbitrator will consider limiting or denying production of such materials 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.

2. The Parties' schedule with respect to electronic documents shall be the same as with respect to documents generally.

3. By _____, the Parties will discuss the parameters of electronic discovery, if any, in this case, addressing such matters as the following:

- potential search terms;

- the possible testing of search terms so as to assure that no more than a reasonable number of hits are obtained;
- custodians;
- time periods for searches;
- hit counts as to custodians and time periods;
- formatting in which such documents will be produced;
- the production, if any, of metadata; and
- where appropriate, cost considerations and issues as to proportionality.

* * * *

4. Counsel are directed to report back to the Tribunal by _____ as to any issues or concerns in this regard.

***

Another topic that is worth consideration in appropriate cases is computer assisted searches.

In appropriate cases, it will also make sense to make an “arbitration speech” at the beginning of the preliminary hearing in connection with ESI, as well as regular discovery, to the effect that discovery is supposed to be more limited in arbitration, etc., etc.

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Commentary

"Hard" Tools For Controlling Discovery Burdens In Arbitration

By
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[Editor's Note: Steven C. Bennett is a partner with the law firm of Park Jensen Bennett LLP (New York City). His practice focuses on complex domestic and international commercial litigation and arbitration. Mr. Bennett teaches Ediscovery Procedure as an Adjunct Professor at Hofstra Law School. He also serves as an arbitrator and mediator with the American Arbitration Association. Any commentary or opinions do not reflect the opinions of Park Jensen Bennett LLP or its clients, or LexisNexis®, Mealey Publications™. Copyright © 2018 by Steven C. Bennett. Responses are welcome.]

Arbitration (and American arbitration in particular)[1] has received increasing criticism,[2] based largely on the contention that arbitration too closely resembles conventional litigation, producing undue burden and costs.[3] Chief among the criticisms is the view that discovery (particularly discovery of electronic information, or "ediscovery") is largely uncontrolled, undermining efforts to promote arbitration as a speedy and economical alternative to litigation.[4] Solutions, in response to the criticisms, abound. One popular view is that better education of neutrals about the demands of modern discovery, and entreaties to neutrals to manage discovery processes more closely, can solve this problem,[5] through a system where arbitrators work with the parties to "right-size" the proceedings, and closely monitor developments in the case, to avoid a "runaway" process,[6] sometimes referred to as "muscular arbitration."[7] This approach largely mirrors the "active case manager" model recommended for judges facing similar problems of discovery control.[8]

Central to the active case management approach is a concern for "proportionality," i.e., that the scope and form of discovery should be "proportional to the stakes and issues involved in the case[.]"[9] That proportionality concern is already a central focus of arbitration-sponsoring institutions.[10] Yet, budgeting for ediscovery projects is notoriously elusive,[11] and the ability of parties to determine, in advance, precisely what information they have that may be relevant to the dispute means that a "case manager" (arbitrator or judge) may have difficulty doing much more than encouraging parties to consider their obligation to engage in "proportionate" discovery,[12] and (when and if a party complains about the burdens of discovery) adopting specific case management techniques to control undue burdens.[13] Proportionality, moreover, is a rather old, but ill-defined concept, which has often eluded parties in the heat of battle.[14]

The admonition that arbitrators should pay attention to proportionality is generally "soft" on the parties (and their counsel), meaning that the case manager arbitrator does not place any immediate limitations on discovery,[15] until the parties have had a chance to "meet and confer," and the arbitrator generally does not constrain the discovery process unless one of the parties specifically requests assistance.[16] By contrast, there are "hard" tools for limiting discovery, which can be imposed, from the outset of a case, without extensive input from the parties, and on a basis that does not depend on a detailed assessment of proportionality issues. In the arbitration context, these hard tools may be particularly useful. This Article briefly outlines some of the "hard" tools for discovery management, and suggests some reasons why such tools may be useful in arbitration.

The essential notion of these "hard" tools is that parties may choose, in their arbitration clause, or by virtue of the choice of arbitration-sponsoring organization, or

at the outset of the arbitration process itself, to focus and streamline discovery processes, through the adoption of one or more of these tools. The tools thus become a default framework that will apply, unless the parties thereafter agree to modifications, or the arbitrator finds good cause for a change. The use of such tools could increase the predictability of discovery obligations in arbitration, and reduce disputes about the application of proportionality rules.

Differentiated Case Management

Many court systems (especially in the state courts) have adopted forms of "differentiated case management," wherein cases are assigned "tracks" (based largely on the size of the claims in dispute).[17] These tracks, in turn, determine the presumptive scope of discovery (often, by limiting the number of document requests, the period for discovery, or the availability of other discovery processes, such as depositions). In the arbitration context, the Institute for Conflict Prevention and Resolution (CPR) issued its Protocol on Disclosure of Documents & Presentation of Witnesses in Commercial Arbitration, which employs differentiated case management.[18] The CPR Protocol offers an array of "modes of disclosure," ranging from the most basic (no disclosure of documents, other than disclosure, prior to the evidentiary hearings, of documents that each side will present in support of its case), through three more modes, with increasingly expanded discovery in each mode.[19] This concept (categorization of cases, and application of different discovery rules to different sizes of cases) commonly appears in other arbitration systems.[20]

A differentiated case management system could be combined with many of the other "hard" tools for discovery control listed below (that is, once a case has been categorized, an array of automatic discovery limitations would apply).[21] The categorization process, moreover, need not automatically depend on the monetary size of claims. Many systems allow parties to "opt in" to a particular category, to object to a categorization (and reassign the case), and to submit information to administrators regarding the size and complexity of the case that is not confined to the dollar value of the claims at issue.[22]

Discovery Deadlines

According to the now-famous "Parkinson's Law," work generally "expands so as to fill the time available for its completion."[23] The corollary to that "law," that the more time a project takes, the more it costs, is also true.[24] That adage seems particularly true in the context of discovery.[25] Setting reasonable, but short, deadlines for the completion of discovery, and holding firm to those deadlines (in the absence of compelling need) may be one of the most effective methods of focusing the parties on the discovery processes that actually need to be undertaken.[26] Time limits for discovery may be automatically linked to the size of the case; presumptively, a smaller case should require less time for the completion of discovery than a larger, more complex dispute.[27] Time limits, however, could always be modified at the direction of the tribunal,[28] and failure to observe time limits should not risk vacatur of any award.[29]

Cost Allocation

Especially in "asymmetrical" disputes (where one side has a large volume of information, and the other relatively little), the temptation to "shoot for the moon" may be strong.[30] A party may demand broad categories of information, in hopes of imposing burdens that encourage settlement, or that (at very least) will greatly complicate the other side's preparation of the case. One obvious solution is to apply a financial disincentive, in the form of allocation of costs for discovery.[31] Perhaps the most radical allocation of costs rule would reverse the presumption that the party responding to discovery requests pays its own costs for producing the information, even if it prevails in the dispute.[32] A more limited rule might provide for a presumption that the requesting party will pay the costs of any discovery requested, or (at least) that the requesting party will pay if (ultimately) it loses the case,[33] or where the results in the case are not in line with the costs of the proceedings.[34] Another version of the rule might provide that, whenever a party requests information outside the scope of discovery applicable to its "track" (after case categorization), the presumption of "requesting party pays" would apply.[35] The tribunal would perhaps retain discretion not to apply the presumption (for good cause) as part of its award, but the *in terrorem* risk that unbridled discovery requests could come back to haunt the requesting party might well focus discovery processes on the highest-priority items.[36] The value of this "hard" approach is that it is self-implementing, as opposed to a system where a decision-maker must attempt (in determining whether a discovery request is proportional) to estimate the value of the claims at

issue, the cost of the requested discovery, and the likelihood that the requested information will serve some purpose in resolving the dispute.[37]

Limiting Categories Of Information

Information managers generally differentiate between "active," online and "near-line" information (generally the easiest information to retrieve) and backup information (stored for disaster recovery, rather than as a record-keeping practice), and deleted information (often, the hardest information to retrieve).[38] Requests for the latter categories of information tend to produce undue burden and cost (compared to preservation and search of the easier categories). Thus, a discovery protocol could exclude the backup/deleted information categories altogether, or provide that requests for such information should only be granted if some heightened showing of need is provided (and, perhaps, if the requesting party pays the cost of such efforts).[39] Additional specific categories of information might be excluded, or at least subject to a presumption of exclusion,[40] subject to a high standard for showing clear relevance and materiality, versus the costs and burden of discovery.[41] Presumptively, moreover, sources of information excluded from search and production obligations would also be freed from a party's correlate obligation to preserve the information.[42]

Related to this approach is the use of "staged" discovery, wherein parties may be required to focus on one set of information (considered clearly relevant to the dispute) before they move on to less relevant sources or categories of information, or categories that are more burdensome to obtain, and search.[43] In general, the "staged" discovery approach is a "soft" tool, in that it requires assessment of the specifics of the case to determine which categories of information should be produced first.[44] But, a "hard" form could be established. Thus, for example, if specified categories of information were presumptively the first source of information in a dispute (see "Specified Categories of Information," below), the staging of discovery might depend upon a mandatory exchange of certain categories of information, before any further discovery would occur.[45] In the international arbitration context, the service of document requests might be delayed until after initial memorials of the parties (together with documents supportive of the memorials) have been exchanged.[46] In substance, using such techniques, the question becomes not so much how to limit expensive, burdensome discovery, but when (in the course of proceedings) to consider using such techniques.[47]

Limiting Preservation Obligations

The duty to preserve evidence for use in litigation (or arbitration) generally derives from a common obligation to avoid "spoliation" of evidence.[48] That obligation generally applies in arbitration, as it does in litigation.[49] Determining when the duty to preserve attaches, the scope of document preservation, and the form of continued compliance obligations of attorneys and their clients is among the most difficult aspects of the discovery process.[50] The costs of preservation can be substantial, and parties and counsel often "over-preserve," as a result of concern that they may guess wrong as to the scope of their obligations.[51]

Perhaps the most extreme solution to this problem would be a flat rule that parties have no obligation to preserve evidence absent a specific written request from another party.[52] A more modest, but still firm, rule would provide that, except on a showing of bad faith, a party's use of its ordinary methods of record-keeping and archiving could not form the basis for a claim of spoliation. And arbitral rules might clarify that (absent bad faith), the ordinary form of remedy for failure to preserve information would be a (permissible, but not mandatory) "adverse inference" regarding the character of the information not preserved.[53]

Specified Categories Of Information

It is possible to designate specific categories of information that must (at least presumptively) be produced in a case. This is the approach embodied in Rule 26(a) of the Federal Rules of Civil Procedure.[54] The Rule 26(a) items are generic, meaning that they do not depend on the nature of the specific case. It is possible, however, to specify categories of information, for particular types of cases, that constitute the "core" of any disclosure, and which presumptively should be produced before parties undertake more detailed (and more expensive) discovery.[55] The Federal Circuit Advisory Council, for example, has prepared a "Model E-Discovery Order," for use in patent cases, which requires parties to exchange "core documentation" concerning "the patent, the accused product, the prior art, and the finances" of the patent and accused product before making any requests for emails.[56] The Model order also places presumptive limits on the number of custodians for which email must be searched, and limits on the number of email

search terms. Requesting parties presumptively bear "all reasonable costs" for discovery in excess of these limits.

At the other end of the spectrum (in terms of claim amounts at issue, and sophistication of the parties), certain forms of cases may be channeled into strictly limited categories and volumes of discovery. Under a Local Rule in the Southern District of New York, for example, prisoner *pro se* cases are subject to a set of "standard" discovery requests, which the *pro se* plaintiff must use, absent "good cause."[57] Standard requests also exist for use in employment cases.[58]

A similar process for specification of information subject to discovery could be used in arbitration. A survey of disputes in a particular area might confirm that certain categories of documents and information routinely constitute the "core" of discovery in a particular field.[59] For example, construction disputes almost always involve: the principal contract and amendments, plans and specifications, change orders, records of job-site meetings and the like. Arbitrators might enhance the certainty of parties and counsel by stating, at the outset of proceedings, that these core documents should presumptively be exchanged between the parties.[60] In theory, moreover, the "core" list could be made mandatory (and restrictive), subject only to "good cause" exceptions.[61]

Streamlined Search

As discussed above, the search for discovery materials could be confined to a fixed number of custodians, and a fixed number of locations (or types of media).[62] Beyond that, on the assumption that a responding party generally best knows its own technological capabilities, a tribunal may defer to the responding party's reasonable choices of search methods.[63] To avoid later disputes about the adequacy of search, however, the tribunal may mandate testing of search methodologies, to help facilitate agreement between the parties.[64] Further, a tribunal may require that a party claiming excessive results from too-broad search terms provide the requesting party with relatively detailed information about the search results.[65] The tribunal, in turn, may require that the parties "meet and confer" to discuss the results of the sample search, and attempt to agree on a more efficient search protocol.[66]

In addition, certain forms of software features have become increasingly common in ediscovery. One common feature, for example, is the use of de-duplication (and near-duplication) filters (which remove extra copies of the same document from a search population), and email "threading" (which eliminates the multiple copies of underlying emails, allowing review of only the "final" form of an email chain).[67] Many of these features could be authorized as presumptive elements of a search protocol.[68]

Limiting Use Of Depositions

Pre-hearing depositions are relatively rare in international arbitration, and some suggest that they have no place at all in arbitration.[69] And out-of-control deposition discovery could seriously undermine the efficiency of an arbitration process.[70] But an extreme no-deposition practice could have unintended consequences (lengthening a hearing where counsel confront a witness for whom they have no relevant documents or statements, to predict what they may say, and prepare for cross-examination).[71]

One alternative to depositions, used extensively in international arbitration, involves the preparation of witness statements, not just for experts, but for fact witnesses (at least to the extent that they are within the control of a party).[72] The rules of domestic arbitration-sponsoring organizations permit testimony in that form.[73] Use of the witness statement system can save hearing time, by limiting (if not eliminating) direct testimony of witnesses,[74] and by helping focus cross-examination on the witness' statement.[75] Because the witness statement confines the scope of the witness' testimony,[76] moreover, discovery (in the form of a witness deposition) may not be necessary.[77]

There are circumstances where some witnesses are not available to provide written statements, although they are available for hearing testimony, or where the "live" direct testimony of a witness may be essential (as where there are complicated facts to be explained to the tribunal); thus, an arbitrator should not require written statements where counsel elect not to use them.[78] But an arbitrator could (at least) require that parties consider (and "meet and confer" regarding) the use of witness statements. And an arbitrator could provide (at least presumptively) that any witness who provided a written statement would not be subject to deposition. Less formal methods of information-gathering, such as witness interviews, might also substitute for depositions.[79]

Additional methods of streamlining depositions include time limitations,[80] or the use of videoconferencing (to avoid travel costs, and increase scheduling flexibility),[81] and "staging" of depositions, to depose the most knowledgeable person first, or the conduct of a Rule 30(b)(6) representative deposition[82] (with the aim of determining whether, after limited depositions, there remains any reasonable need for additional deposition examination).[83] Here, again, an arbitrator (or an institution, as part of its guidelines) might require that parties at least consider imposing these kinds of limitations, even if such limitations are not expressly included in the parties' arbitration agreement.[84]

Preclusion For Delay

A common remedy for failure to disclose requested information is an order of preclusion, to the effect that related information may not later be offered as evidence in a hearing.[85] The remedy, however, is often softened by a "harmless error" rule, allowing late production and use of evidence.[86] In the arbitration context, where speed and efficiency are at a premium, a harder version of the rule might obtain better results. Thus, for example, a party that failed to produce requested documents within the time periods set by the tribunal might simply be precluded from presenting such evidence.[87] Such preclusion, however, should be tied specifically to an order of the tribunal directing discovery, to avoid claims that the tribunal has somehow unfairly prohibited a party from making its case in arbitration.[88] Alternatively, as explained above, arbitrators might inform a recalcitrant party that the tribunal may apply an adverse inference, or allocate costs, if the party does not produce information as specifically directed by the tribunal.[89]

Limited Privilege Review

Costs associated with review of documents for privilege, and the generation of related privilege logs, can be substantial.[90] The establishment, at the outset of a case, of less burdensome forms of privilege review and logging can help ensure that parties do not "over-designate" documents to be withheld from production, on grounds of privilege.[91] Further, the creation of presumptive (or mandatory) protocols for privilege review and logging can reduce the uncertainty parties may face in determining what their privilege protection obligations may be.[92]

Examples of protective orders and privilege protocols abound.[93] An arbitration sponsoring organization might offer one or more "standard" forms of protective orders. As a means to reduce the risks of inadvertent production of privileged information (and thus reduce the incentive to over-designate privileged documents), a standard form might incorporate a "claw-back" provision, such that no privilege waiver would occur from inadvertent production.[94] In addition, a standard form of privilege protection order might presumptively approve less burdensome forms of privilege logs, including "categorical" privilege listings, wherein categories of documents may be grouped, and privilege asserted on a group basis;[95] and email thread logging, where each uninterrupted email chain would constitute a single entry (versus individual logging of every part of a lengthy email chain).[96]

Mandatory Cooperation

The efficiency value of cooperation in discovery cannot be overstated.[97] When parties (and their counsel) cooperate, they may avoid mistakes in the production of information, more easily focus on information that matters most to resolution of the dispute, and (in many instances) reduce the cost of information exchange, through shared protocols and platforms for information processing.[98] As a "soft" tool, arbitrators certainly should encourage parties to cooperate in the discovery process. But backing up that approach, "hard" tools for enforcing an ethos of cooperation exist. One obvious requirement is an obligation to "meet and confer" (preferably, in advance of the first pre-hearing conference with the tribunal), to address topics related to the conduct of disclosure.[99] The obligation may be made even more specific. Parties may be required to fill out a form, confirming that they have discussed specific topics, and outlining the terms on which they have agreed, and what topics remain to be resolved by the tribunal. They might also be required to exchange initial discovery requests (as part of the "meet and confer" process), in order to facilitate discussion of discovery issues in the dispute.[100]

Further, when discovery disputes arise, during the course of pre-hearing proceedings, the tribunal again may require that parties "meet and confer" in an attempt to resolve the dispute, before raising the issue with the tribunal. Specification of an efficient process (such as short letters explaining the issue, followed by a swift telephone with the tribunal) may further reduce costs (as many disputes can be resolved quickly, with a minimum of submissions to the tribunal).[101]

Finally, in allocating the costs of arbitration, the degree of good faith cooperation of the parties may be an appropriate consideration. In egregious circumstances, sanctions for bad faith practices may be imposed.[102] The expectation of cooperation, and the potential consequences for parties and their counsel, should be clearly stated (for maximum *in terrorem* effect) from the outset of the arbitration process.

Single Arbitrator For Discovery Management

Three-arbitrator tribunals are expensive; and when all three arbitrators must participate in resolving any discovery dispute, the cost of discovery can be inflated.[103] As a response, in three-arbitrator cases, the designation of the tribunal Chair (or another of the individual arbitrators) to rule on discovery disputes may be a simple, efficient method for reducing discovery costs.[104]

Conclusion: Implementing "Hard" Discovery Controls

Arbitration is a "creature of contract;" the existence of an obligation to arbitrate, the scope of the matters to be arbitrated, and the procedures for arbitration—all are generally determined by agreement of the parties (and, often, by their choice of rules from an arbitration-sponsoring organization).[105] In advance of any dispute, at the time of entry into a transaction (which may include negotiation of dispute-resolution provisions) parties may be in the best position to discuss "hard" discovery control methods. After arbitration begins, parties may resist implementation of stringent discovery controls,[106] especially in circumstances where one party perceives an advantage from more lenient discovery rules.[107] Arbitrators, moreover, may hesitate to impose significant restraints,[108] for fear (unfounded or not)[109] of later claims that the award may be challenged on due process grounds.[110] And, in any event, arbitrators differ widely in their views of what an "ideal" form of arbitration should encompass.[111]

Yet, arbitration clauses are often silent on the question of discovery, and if they do speak to discovery issues, generally they invoke only a specific limit (such as a prohibition against interrogatories, or a limitation on the number of depositions allowed).[112] Indeed, in some instances, arbitration clauses go in the opposite direction, for example by adopting wholesale the Federal Rules of Civil Procedure (at least with regard to discovery).[113] Targeted, effective (and fair) forms of pre-litigation discovery cost control procedures are more than feasible.—they already exist.[114] Arbitration-sponsoring institutions could make such forms more widely available for use in arbitration by offering them as "model clauses" on their web-sites.[115] Sponsoring institutions and bar groups, moreover, could more widely promote such forms, through continuing education and other outreach programs.[116]

The model clause solution, however, cannot suffice to spark substantial change in the field of discovery efficiency improvements in arbitration.[117] Instead, real change requires arbitration-sponsoring institutions to modify their rules, to establish a presumption that cost-control measures will apply, absent express agreement of the parties, or ruling by the presiding tribunal for good cause.[118] One example of such a system appears in the ICDR Guidelines for Arbitrators Concerning Exchanges of Information.[119] The Guidelines, by their terms, became effective in "all international cases administered by the ICDR commenced after May 31, 2008," with the proviso that they would be incorporated into the next revision of the ICDR's International Arbitration Rules. The Guidelines further provided that they could be "adopted in arbitration clauses or by agreement at any time in any other arbitration administered by the AAA," the domestic sister to the ICDR.[120] The Guidelines stated that "[t]he parties may provide the tribunal with their views on the appropriate level of information exchange for each case," and that "[a]rbitrators should be receptive to creative solutions for achieving exchanges of information in ways that avoid costs and delay," but that "the tribunal retains final authority" to apply the Guidelines.

This form of guidance, committing the arbitration-sponsoring organization to the use of efficiency principles,[121] ensures that the organization's principles are not routinely derailed by parties and arbitrators that refuse to adopt efficiency protocols "recommended" (but not required) by the organization.[122] Further, careful drafting and review of the organization's principles may help ensure that the organization's rules are fair, and will withstand challenges on grounds of due process limitations,[123] or the inability of a party to present its case.[124]

For arbitration-sponsoring institutions that choose not to make "hard" tools for discovery efficiency a mandatory element of their rules, there remains the option of treating the discovery limitations as "presumptively"

applicable (unless the parties expressly "opt out" of their application).[125] Alternatively, an institution might provide a general direction (broadly used in many of the protocols referenced in this Article), that arbitrators conduct proceedings in an efficient fashion, coupled with the recommendation that arbitrators and parties at least "consider" use of tools outlined in a guideline document.[126] Even with this non-mandatory form, a "hard" tool is available. Parties might stipulate (in their arbitration agreement), or the sponsoring organization might require (in its rules), that, as part of the development of a pre-hearing order (and preferably in advance of the first conference with the tribunal), that the parties must "meet and confer" to discuss the issues outlined in the discovery guideline formulated by the organization, and must report to the tribunal on whether they will voluntarily "opt in" to one or more of the guideline tools. In effect, that form of guideline would mirror the Rule 26(f) requirements of the Federal Rules of Civil Procedure,[127] and build upon the preliminary hearing requirement common in many arbitration proceedings.[128] Sponsoring organizations might provide a checklist of discovery issues for discussion between the parties,[129] and with the tribunal, in connection with a preliminary conference.[130]

Whether the guidelines of a specific arbitration-sponsoring organization will include all of the elements outlined in this Article is very much a matter for discussion between all the constituents affected by rules changes (parties, counsel, arbitrators and the sponsoring organization itself). As with most matters of rules changes in arbitration, the process is likely to be iterative, as organizations experiment with specific changes, and gather feedback from their constituents. At a minimum, the development of proposed rule changes should spark dialogue, and may (at least) lead to heightened awareness of the importance of developing sound practices to balance fairness with efficiency in the arbitration process.

Endnotes

1. In the international arena, much of the criticism of discovery excesses relates to what has been called the "Americanization" of the international arbitration process. See Elena V. Helmer, International Commercial Arbitration: Americanized, "Civilized," Or Harmonized?, 19 Ohio St. J. on Dispute Resol. 35 (2003). This Article largely focuses on the domestic (American) context, but draws (in part) on experiences, rules and protocols in the international arbitration field.

2. Some have gone as far as to suggest that "arbitration is often not cheaper, faster or more predictable than litigation," and that arbitration is "often an inefficient method of dispute resolution." Aaron Foldenauer, Big Risks And Disadvantages Of Arbitration vs. Litigation, Corp. Counsel Mag. (July 29, 2014), available at www.alm.com. There are also strong voices to the contrary. See Noah J. Hanft, In Arbitration, Judge Thyself, Not The Process, Corp. Counsel Mag. (Oct. 3, 2014), available at www.alm.com (suggesting that Foldenauer "arrives at the wrong conclusion," as litigation is also subject to "misuse and abuse," and noting that parties can "avoid a runaway process" by "shap[ing] a process that meets their needs"); see also William A. Dreier, Alternative Dispute Resolution: Achieving The Promise Of Arbitration (May 331, 2011), available at www.ccbjournal.com (suggesting that the substance of criticisms of arbitration costs and discovery abuses is "often anecdotal, and the problems at times magnified in the retelling," but "perceptions can be as damaging as reality in how parties approach the arbitration option"); Christopher Drahozal & Quentin R. Wittrock, Is There A Flight From Arbitration?, 37 Hofstra L. Rev. 71, 73 (2008) ("reports—of dissatisfaction with the arbitration process leading to a 'flight from arbitration'—are not based on any systematic study;" the "evidence of flight consists largely of anecdotes").

3. There are conflicting views on whether arbitration costs and burdens are justified by the need for a fair, accurate and flexible process, especially as arbitration has grown to encompass all manner of (often complex) disputes. See, e.g., Robert A. Merring, Into The Briar Patch: Discovery In Arbitration, The Resolver at 18 (Winter 2017), available at www.fedbar.org (noting "explosive growth" of arbitration in "big stakes" matters, and suggesting that, "in such highly sophisticated fields as patent and reinsurance matters," it "borders on the absurd" to arbitrate unless there is "some modicum of prehearing discovery"); Jennifer Kirby, Efficiency In International Arbitration: Whose Duty Is It?, 32 J. of Int'l Arb. 689, 691 (2015) (noting that "efficiency" in arbitration is not simply about time

and cost, but about the quality of the process and results); Harout Jack Samra, Is Arbitration All It's Cracked Up To Be?, Presentation at ABA Section of Litigation Annual Conference (Apr. 2012), available at www.americanbar.org (noting that arbitration values, including flexibility, cost efficiency, speedy outcomes, and fairness "are not entirely in line with one another, and in some cases may actually be inversely correlated. [T]o the extent that the parties determine that flexibility is a key value they seek from the arbitration process, they may sacrifice efficiency and suffer additional delays."); William W. Park, Arbitrators And Accuracy, 1 J. of Int'l Dispute Settlement 25, 53 (2010) (suggesting that accuracy in arbitration awards should not be sacrificed for the sake of efficiency); Thomas J. Stipanowich, Arbitration: The "New Litigation", 2010 U. Ill. L. Rev. 1, 6 ("as arbitration has been called upon to assume the burden of resolving virtually every kind of civil dispute, it has taken on more and more features of a court trial").

4. See Brian S. Harvey, Speech (On "Making The Most Of Your Arbitration Process"), 8 J. Bus. & Tech. L 385, 388 (2013) (noting criticism that arbitration "all too often features full-blown discovery" that may become "too much like court litigation"); William K. Slate, All Hands On Deck, Keynote Address to Orlando Neutrals Conference, Nov. 5, 2010, available at www.yumpu.com (noting the reality of "creeping litigation" practices in arbitration, including uncontrolled discovery); NYSBA, Report by the Arbitration Committee of the Dispute Resolution Section, Arbitration Discovery In Domestic Commercial Cases (Apr. 2009) (hereinafter cited as "NYSBA Report"), available at www.nysba.org (noting "trend to inject into arbitration expensive elements that had traditionally been reserved for litigation," with discovery that has "spiraled out of control").

5. See Albert Bates, Jr., Controlling Time And Cost In Arbitration: Actively Managing The Process And "Right-Sizing" Discovery, 67 Dispute Resol. J. 313, 341 (2012) ("arbitrators have the authority and the obligation to be active managers of the arbitration process;" suggesting that "[w]hen the procedures requested by the parties threaten the efficient and cost-effective resolution of the matters to be decided in arbitration, arbitrators should intercede"); New York State Bar Association, Guidelines For The Arbitrator's Conduct Of The Pre-Hearing Phase of Domestic Commercial Arbitrations at 6 (2010) (hereinafter cited as the "NYSBA Guidelines"), available at www.nysba.org (suggesting that the "key element" in arbitration management is the "good judgment of the arbitrator," because there is "no set of objective rules which, if followed, would result in one 'correct' approach"); John M. Barkett, E-Discovery For Arbitrators, 1 Dispute Resol. Int'l 129, 168 (2007) ("A thoughtful tribunal may need no rules; common sense and a good sense of fairness might be enough to manage production of electronic documents that is going to be permitted by the tribunal.").

6. See College of Commercial Arbitrators, Protocols for Expeditious, Cost-Effective Commercial Arbitration at 72 (2010) (hereinafter cited as "CCA Protocols"), available at www.thecca.net (suggesting that arbitrators should "work with counsel" to find ways to "limit or streamline discovery in a manner appropriate to the circumstances;" that they should "keep a close eye on the progress of discovery;" and "stay on top of the case"); Richard Chernick, Arbitral Power: Confessions Of A "Managerial" Arbitrator (2011), available at www.americanbar.org (referring to "managerial" arbitrator as one who will "collaborate with the parties in process design and assume the primary responsibility for managing the chosen process in order to achieve the parties' goal of an effective and efficient proceeding").

7. See Mitchell Marinello & Robert Matlin, Muscular Arbitration And Arbitrators' Self-Management Can Make Arbitration Faster And More Economical, 67 Disp. Resol. J. 69 (Nov. 2012-Jan. 2013); Harvey J. Kirsh, Muscular Arbitration (Dec. 20, 2011), available at www.jamsadr.com (noting need for arbitrators to "exert control over the parties to keep the process moving," through a "disciplined, 'muscular' process").

8. See Federal Judicial Center, Benchbook for U.S. District Court Judges at 189 (2013) (hereinafter cited as "FJC Benchbook"), available at www.fjc.gov (noting that judge should be an "active case manager," to help avoid "disproportionate or unnecessary costs").

9. See Ronald J. Hedges, Barbara J. Rothstein & Elizabeth C. Wiggins, Managing Discovery Of Electronic Information at 19 (2017) (hereinafter cited as "Hedges, Rothstein & Wiggins"), available at www.fjc.gov (noting factors affecting proportionality); see generally The

Sedona Conference Commentary On Proportionality In Electronic Discovery, 14 Sedona Conf. J. 155 (2013) (hereinafter cited as the "Sedona Proportionality Commentary"), available at www.thesedonaconference.org (outlining principles for consideration in assessing proportionality of discovery).

10. See, e.g., AAA Commercial Rules, R-22(b)(iv) (giving arbitrator authority to "balance the need for production" of electronically stored information against "the cost of locating and producing" such information); R-23(b)-(c) (giving arbitrator authority to impose "reasonable search parameters" if parties are unable to agree, and to "allocate[e] costs of producing documentation").

11. See Steven C. Bennett, E-Discovery: Reasonable Search, Proportionality, Cooperation, And Advancing Technology, 30 J. Marshall J. Info. Tech. & Privacy L. 433, 439 & n.25 (2014) ("precise budgeting for [ediscovery] projects may be elusive, especially at the outset of litigation") (citing authorities); Hedges, Rothstein & Wiggins at 26 n.23 (noting variations in estimates of ediscovery costs, and the "need for a comprehensive empirical examination of the cost of e-discovery").

12. Craig B. Shaffer, The "Burdens" Of Applying Proportionality, 16 Sedona Conf. J. 52, 122 (2015) (hereinafter cited as "Shaffer") ("disingenuous" to suggest that proportionality factors can be "easily applied in every case, particularly at the outset of the litigation").

13. See FJC Benchbook, Sec. 6.01 ("The parties exercise first-level control and are the principal managers of their cases[.]"). Assessment of proportionality factors, moreover, is far from an exact science. See Sedona Proportionality Commentary at 155 ("proportionate discovery is not defined by a 'perfect fit' and cannot be reduced to a simple quantitative formula"); id. at 163 (noting that it is often "difficult to evaluate the importance of the requested information until it is actually produced").

14. See Lee H. Rosenthal & Steven Gensler, From Rule Text To Reality: Achieving Proportionality In Practice, 99 Judicature 43, 44 (2015) ("Lawyers and judges have had proportionality obligations since [Federal Rules changes in] 1983, but few lawyers or judges made proportionality a focus of discovery, and fewer still expressly invoked or applied the proportionality limits. Some academics and thoughtful judges have questioned whether proportionality is sufficiently defined or understood to achieve the stated goals."); Martha Dawson & Bree Kelly, The Next Generation: Upgrading Proportionality For A New Paradigm, 82 Def. Counsel J. 434, 435, 437 (2015) (hereinafter cited as "Dawson & Kelly") (noting that "the principle of proportionality has long existed in the rules," but noting the "historical failure of proportionality to address the problems of discovery").

15. There is another sense in which general guidelines on cost control are part of the "soft law" of arbitration. See Thomas J. Stipanowich, Soft Law In The Organization And General Conduct Of Commercial Arbitration Proceedings, Chapter II in Lawrence W. Newman & Michael J. Radine (eds.), Soft Law In International Arbitration (2014) (hereinafter cited as "Stipanowich") (noting that procedural "[s]oft law plays an increasingly prominent role in evolving standards for organizing and conducting commercial arbitration proceedings").

16. See Dawson & Kelly at 445 ("A major component of the historical failure of courts to take proportionality into account rests upon the failure of parties to proactively employ and invoke the principle. . . . The assessment of proportionality in discovery should not be merely a reactionary process."). Even under recently revised Federal Rules of Civil Procedure, "[u]nless specific questions about proportionality are raised by a party or the judge, there is no need for the requesting party to make a showing of or about proportionality." Duke Law School Center for Judicial Studies, Guidelines And Practices For Implementing The 2015 Discovery Amendments To Achieve Proportionality, 99 Judicature 50 (Winter 2015) (hereinafter cited as the "Duke Guidelines").

17. See Steven C. Bennett, Tiered Discovery: An Efficient Proportionality Solution?, ABA Pretrial Practice & Discovery Newsletter (2018), available at www.apps.americanbar.org.

18. See www.cpradr.org/resource-center (hereinafter cited as the "CPR Protocol").

19. CPR also offers a model form of "Economical Litigation Agreement," meant to be incorporated into contracts between business partners, suppliers and others,

at the start of a business relationship. See CPR Economical Litigation Agreement (2009) (hereinafter cited as the "CPR ELA"), available at www.cpradr.org. This form of model agreement, like the CPR Protocol for arbitration, divides cases into various tracks (based on the size of the claims at issue), and applies varied discovery limitations to the specific tracks.

20. See, e.g., AAA Construction Industry Arbitration Rules (2015), available at www.adr.org (differentiating between "Fast Track" procedures (cases under $100,000); "Standard Track" procedures; and "Large, Complex" procedures (cases over $1,000,000)); AAA, Commercial Arbitration Rules and Mediation Procedures (2013), available at www.adr.org (differentiating between Expedited Procedures, which may include no discovery and a documents-only hearing, versus rules for Standard and Large, Complex disputes); JAMS Streamlined Arbitration Rules & Procedures (2014) (hereinafter cited as the "JAMS Streamlined Rules"), available at www.jamsadr.org (discovery in cases involving claims smaller than $250,000 to be completed within two weeks after all pleadings exchanged).

21. Presumably, the cases for which absolutely no discovery would be appropriate would be relatively confined. See Thorpe at 5 ("[A]lthough it is important to limit discovery in a way to make the arbitration hearing cost-effective—in the end the most important goal is to have a fair hearing, and the achievement of that goal often requires some discovery tailored to the particular case.").

22. See JAMS Arbitration Discovery Protocols (2010) (hereinafter cited as "JAMS Protocols"), available at www.jamsadr.com (Exhibit A, listing "relevant factors" to be considered in determining the appropriate scope of discovery, including "amount in controversy," "complexity of the factual issues," "number of parties and diversity of their interests," and more); see also Duke Guidelines at 51 (noting that an amount-in-controversy calculation "can change as the case progresses, the claims and defenses evolve, and the parties and judge learn more about the damages or the value of the equitable relief at issue).

23. C. Northcote Parkinson, Parkinson's Law: Or, The Pursuit of Progress, The Economist (Nov. 19, 1955), available at www.economist.com/node/14116121.

24. See R. Wayne Thorpe, Case Management And Cost Control For Commercial Arbitration at 3 (2012) (hereinafter cited as "Thorpe"), available at www.jamsadr.com ("[A]s goes your home construction project, so goes your litigated dispute (whether in arbitration or the courts): **the longer it takes the more it costs**.") (emphasis in original).

25. See Sedona Proportionality Commentary at 159 ("Setting deadlines for substantial completion of discovery (or certain phases of discovery) can reduce incentives for a party to manipulate or inappropriately prolong the discovery process with burdensome requests or inappropriate objections."); FJC Benchbook at 197 ("Empirical data show that setting a firm trial date and sticking to it when possible is one of the best ways to ensure that the case moves forward without undue cost or delay.").

26. See CPR Protocol (rejecting the "leave no stone unturned" approach to discovery); CCA Protocols (encouraging arbitrators to "enforce contractual deadlines and timetables" in arbitration agreements); NYSBA Report (recommending that arbitrator "sets ambitious hearing dates and aggressive interim deadlines, which, the parties are told, will be strictly enforced"); see also Michael A. Doornweerd & Andrew F. Merrick, Strategies For Controlling Discovery Costs In Commercial Arbitration, 12 ABA Commercial & Bus. Litig. 4 (2011) (suggesting that arbitrators set "a final hearing date as soon as possible," with "tight deadlines for completing discovery" and a requirement that "the parties strictly adhere to the deadlines").

27. See JAMS Streamlined Rules (setting very brief period for information exchange in smaller cases).

28. Such extensions, however, should not be routinely granted. See Neil M. Eiseman, John E. Bulman & R. Thomas Dunn, A Tale Of Two Lawyers: How Arbitrators And Advocates Can Avoid The Dangerous Convergence Of Arbitration And Litigation, 14 Cardozo J. of Conflict Resol. 1, 25 (2013) ("productivity is achieved by making certain that the dates [set for a discovery cutoff, and other limitations] are firm and will *not* be modified absent authorization by the arbitrator, even in the event of an agreement to extend by the parties") (emphasis in original); id. at n.71 (arbitrators should enforce deadlines except in

circumstances "clearly beyond the contemplation of the parties when the time limits were established") (quotation omitted).

29. See John H. Wilkinson, Arbitration Contract Clauses (2010), available at www.americanbar.org (contract should include a provision that arbitrators are empowered to modify limitations "upon a clear and compelling showing of good cause," and that failure to meet deadlines will not render an award invalid, but arbitrators "may impose appropriate sanctions and draw appropriate adverse inferences against the party primarily responsible for the failure to meet any such deadlines").

30. See Alison A. Grounds & Kenneth C. Gibbs, An Arbitrator's Guide To Successfully Resolving eDiscovery Disputes at 2 (Spr. 2013) (hereinafter cited as "Grounds & Gibbs"), available at www.americanbar.org ("Most eDiscovery disputes arise in asymmetrical cases where one party has more ESI than the other."); John M. Barkett, More On The Ethics Of E-Discovery: Predictive Coding And Other Forms Of Computer-Assisted Review at 35 n.83 (2013), available at www.judicialstudies.duke.edu (noting that discovery disputes may arise in "the asymmetric case ([with] a data-poor party against a data-rich party trying to take advantage of the disparity)," or in "the disproportionate case (where, irrespective of data, the amount or issues in controversy are too small in relation to e-discovery costs").

31. See John M. Barkett, What Are The Best Ways To Control The Cost Of Arbitration Without Compromising The Fairness Of The Process? in Arbitration: Hot Questions, Cool Answers (2015) available at www.americanbar.org ("Arbitrators can also use allocation of costs to encourage efficiency in the conduct of proceedings and to control inappropriate conduct."); John J. Jablonski & Alexander R. Dahl, The 2015 Amendments To The Federal Rules Of Civil Procedure: Guide To Proportionality In Discovery And Implementing A Safe Harbor For Preservation, 82 Def. Counsel J. 411 (Oct. 2015) ("allocation of costs is a key mechanism by which courts and lawyers can focus discovery on information that is most important to the parties' claims and defenses"); see also McPeek v. Ashcroft, 202 F.R.D. 31, 34 (D.D.C. 2001) (noting that, where party requesting burdensome information must pay the costs of discovery "the requesting party literally gets what it pays for").

32. See generally Steven C. Bennett, An Update On Recovery Of E-Discovery Costs By A Prevailing Party, 30:4 Computer & Internet Lawyer 26 (2013); Steven C. Bennett, Are E-Discovery Costs Recoverable By A Prevailing Party?, 20:3 Albany Law J. of Sci. & Technol. 537 (2010).

33. See International Chamber of Commerce, Techniques For Managing Electronic Document Production When It Is Permitted Or Required In International Arbitration (2012) (hereinafter cited as "ICC Techniques"), available at www.library.iccwbo.org (suggesting that cost shifting should be reserved for "extraordinary circumstances and imposed only after a weighing of the relevant factors").

34. See Nicolas Ulmer, Some Cost Consensus, (May 5, 2011), www.arbitrationblog.kluwerarbitration.com (noting use of "instant cost" orders and "sealed offer" cost allocations—wherein costs are taxed if a sealed offer in settlement exceeds the result obtained—as means to discourage "unnecessary applications, disclosure requests or plain violations of the rules in arbitration").

35. See CPR Protocol ("If extraordinary circumstances justify production of [information disproportionate to the dispute], the tribunal shall condition disclosure on the requesting party's paying to the requested party the reasonable costs of a disclosure."); ICDR Guidelines For Arbitrators Concerning Exchanges Of Information, available at www.adr.org (tribunal may "condition granting" of a request on "the payment of part or all of the cost by the party seeking the information," and may "allocate the costs of providing information among the parties, either in an interim order or in an award"); Chartered Institute of Arbitrators, Protocol For E-Disclosure In Arbitration (2008) (hereinafter cited as "Chartered Institute Protocol"), available at www.ciarb.org ("The Tribunal shall consider the appropriate allocation of costs in making an order or direction for e-disclosure.").

36. See Doug Jones, Using Costs Orders To Control The Expense Of International Commercial Arbitration, Roebuck Lecture (June 9, 2016), available at www.ciarb.org (suggesting that parties and the tribunal should discuss, at an "early" case management conference, the basis on which cost orders will be made, with the aim of sending a "deterrent" message,

such that parties and counsel will "think twice" about process excesses, and the tribunal may encourage "sensibly efficient party conduct which will, by extension, minimize the time and cost of an arbitration"); David Howell, Developments In Electronic Disclosure In International Arbitration, 3 Disp. Resol. In'tl 151 (2009) (suggesting "judicious used of cost shifting" as an "effective means of controlling requests for electronic disclosure," with "the ultimate decision on where such costs will ultimately lie being reserved for the final award on costs").

37. See, e.g., Oracle America, Inc. v. Google Inc., 2015 U.S. Dist. LEXIS 163956, 2015 WL 7775243 (N.D. Cal. Dec. 3, 2015) (both parties failed to provide sufficient information, such that court was required to apply its "best judgment based on limited information" about the proportionality of discovery requests).

38. See generally The Sedona Conference Glossary: E-Discovery & Digital Information Management (4th ed. 2014), available at www.thesedonaconference.org.

39. See CPR Protocol ("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."); Chartered Institute Protocol ("The primary source of disclosure of electronic documents should be reasonably accessible data; namely, active data, near-line data or offline data on disks. In the absence of particular justification it will normally not be appropriate to order the restoration of back-up tapes; erased, damaged or fragmented data; archived data or data routinely deleted in the normal course of business operations."); NYSBA Report (recommending that discovery be produced "only from sources used in the ordinary course of business"); see also Duke Guidelines at 54 (giving examples of discovery sources that may be too burdensome to search, including: "information stored using outdate or 'legacy' technology, or information stored for disaster recovery rather than archival purposes that would not be searchable or even usable without significant effort").

40. See CPR ELA (excluding from search and production "backup tapes," "legacy data from obsolete systems," "[m]etadata or slack space," "[e]lectronic information residing on PDAs, Smartphones and instant messaging systems," and "[v]oicemail systems").

41. See Elizabeth J. Shampnoi, The Promise Of The Process: Ways To Capture The Promised Benefits Of Arbitration (Spring 2014), available at www.aaau.org ("setting forth a high standard by which the arbitrator may grant additional discovery should suffice to allay" concerns about restrictions on discovery imposed "prior to knowing the specifics of the dispute").

42. See Sedona Proportionality Commentary at 151 (noting that "aggressive preservation efforts can be extremely costly, and parties (including government parties) may have limited staff and resources to devote to those efforts") (quotation omitted).

43. See Hedges, Rothstein & Wiggins at 21 (suggesting that judge "encourage the lawyers to stage the discovery by first searching for the ESI associated with the most critical or key players, examining the results of that search, and using those results to refine subsequent searches;" and suggesting that parties "first sort through the information that can be obtained from easily accessed sources and then determine whether it is necessary to search the less accessible sources"); Sedona Proportionality Commentary at 157 (same); Duke Guidelines at 57 (suggesting focus of discovery initially on "the subjects and sources that are most clearly proportional to the needs of the cases," and using the results of that discovery to "guide decisions about further discovery"); see also Thorpe at 6 (suggesting arbitration process where parties "exchange significant documents, perhaps answer a few interrogatories and take one or two party depositions—and then STOP, take another deep breath, and then evaluate carefully what remains to be done").

44. Parties might agree, and the decision-maker might direct, that initial discovery be directed to information essential to aid the process of settlement, or mediation. See Shaffer at 117.

45. A related method is "tiering," in which the scope of discovery varies, depending on the source of information. See Laporte & Redgrave at 50 n.110 (suggesting, as an example, that discovery from "key player" custodians might be broader in scope than from other sources). Also related is the concept of sampling,

wherein parties conduct limited searching, to determine the likely size and cost of a more complete form of search. See Jeff Johnson, The Proportionality Triangle: A Strategic Model For Negotiating E-Discovery, 4 ABA E-Discovery & Dig. Evid. Comte. J. 4 (Winter 2013) (suggesting that parties should make only "phased commitments," in circumstances where they lack "solid experience," to assess how many documents they would have to review in a complete search, before actually agreeing to produce the documents).

46. See ICC Techniques (suggesting that, with such a system, "[r]equests [for documents] can be confined to specific factual issues that are raised in the memorials and on which there are gaps in the documentary evidence already submitted").

47. See Scott A. Moss, Litigation Discovery Cannot Be Optimal, But Could Be Better, 58 Duke L.J. 889 (2009) (explaining value of sequencing techniques in improved efficiency).

48. See generally Sedona Conference Commentary On Legal Holds: The Trigger And The Process, 11 Sedona Conf. J. 265 (2010).

49. See generally Steven A. Hammond, Spoliation In International Arbitration: Is It Time To Reconsider The "Dirty Wars" Of The International Arbitral Process?, 3 Dispute Resol. Int'l 5 (2009) (noting that the integrity of the arbitration process depends on preservation of essential evidence).

50. See Rick H. Rosenblum & McLean Jordan, Electronic Discovery And Reinsurance Arbitration: An Update, 15 Arias Quarterly 1 (2008).

51. See Rand/Institute For Civil Justice, Where The Money Goes: Understanding Litigant Expenditures For Producing Electronic Discovery at 91 (2012) (hereinafter cited as the "Rand Study"), available at www.rand.org (noting that, with "few reliable benchmarks" for "assessing the risk of employing a particular preservation strategy," company representatives often take a "relatively conservative" approach to preservation); Sherman Kahn, E-Discovery Demystified For Arbitrators—Tips For How To Manage E-Discovery For Efficient Proceedings, 5 NYSBA New York Dispute Resol. L. 32, 34 (Spring 2012) ("One of the main drivers of increased e-discovery cost in litigation is fear by parties and their counsel that they will be accused of spoliation.").

52. Jay Brudz & Jonathan M. Redgrave, Using Contract Terms To Get Ahead Of Prospective eDiscovery Costs And Burdens In Commercial Litigation, 18 Richmond J. of L. & Tech. 13, Paras. 11-12 (2012) (hereinafter cited as "Brudz & Redgrave") (provision "has the obvious benefit of eliminating the guesswork surrounding the trigger of preservation duties").

53. See IBA Rules On The Taking Of Evidence In International Arbitration (2010), available at www.ibanet.org (Article 9.5: "IF a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of the Party."); Chartered Institute Protocol (Article 14: permitting adverse inference from failure to produce evidence); UNCITRAL Notes On Organizing Arbitral Proceedings, Para. 51 (2012) ("The arbitral tribunal may wish to establish time-limits for the production of documents. The parties might be reminded that, if the requested party duly invited to produce documentary evidence fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal is free to draw its conclusions from the failure and may make the award on the evidence before it.").

54. See Fed. R. Civ. P. 26(a) (requiring disclosure of identifying information for each individual "likely to have discoverable information" that the disclosing party "may use to supports its claims or defenses;" copies "or a description by category and location" of "all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support is claims or defenses, unless the use would be solely for impeachment;" and computations of damages and insurance information).

55. See Elizabeth D. Laporte & Jonathan M. Redgrave, A Practical Guide To Achieving Proportionality Under New Federal Rule Of Civil Procedure 26, 9 Fed. Cts. L. Rev. 19, 50 n.110 (2015) (hereinafter cited as "Laporte & Redgrave") ("Core discovery will virtually always be proportional.").

56. See Federal Circuit Advisory Council, Model E-Discovery Order, available at www.cafc.uscourts.gov.

57. See Local Civil Rules for the Southern District of New York, Rule 32.2, available at www.nysd.uscourts.gov.

58. See Federal Judicial Center, Report On Pilot Project Regarding Initial Discovery Protocols For Employment Cases Alleging Adverse Action (2011), available at www.fjc.gov (intent of employment protocols is to "encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery").

59. See Ariana Tadler, APB To Requesting Parties: Prepare For Proportionality, Practical Law at 31 (Dec. 2015/Jan. 2016) ("Perhaps, in time, protocols for certain early core discovery, such as those used in employment cases, will become the norm in most types of cases; however, these consensus-driven protocols do not currently exist."); Duke Guidelines at 58 (noting employment discovery protocols "used effectively in courts around the country," and suggesting that "[i]t is expected that work will be undertaken to develop similar subject-specific discovery protocols for other practice areas").

60. See generally Michael E. Schneider, A Civil Law Perspective: "Forget E-Discovery", Chapter 2 in David. J. Howell (ed.) Electronic Disclosure In International Arbitration (2008) ("In contractual disputes, the primary evidence is the contract and the exchanges between the parties. Normally, both parties to the contract will have this evidence in their possession and will not need discovery orders by a court or arbitral tribunal.").

61. The standard for exceptions, beyond "core" materials, could be made even more restrictive. See M. Scott Donahey, Get Back—Return Arbitration To Its Roots, 32 Alt. High Cost Litig. 117, 118 (2014) (noting that the "return on the investment" of discovery is often "very small," and suggesting that arbitration discovery could be limited, in some cases, to materials "that can be shown to be 'absolutely essential to the presentation of a party's case'"); JAMS Efficiency Guidelines For The Pre-Hearing Phase Of International Arbitrations (Feb. 1, 2011), available at www.jamsinternational.com (suggesting that document requests "should be limited to documents that are directly relevant to significant issues in the case, or to the case's outcome").

62. To a large extent, the cost of retrieval and review may depend upon the number of custodian accounts reviewed, and the volume of information in those accounts. See generally Rand Study (noting that "typical" ediscovery matter costs approximately $18,000 per Gigabyte retrieved and reviewed, and each custodian typically has 5-20 Gigabytes of information subject to review). Any effort to reduce the scope of accounts searched could yield cost savings. See NYSBA Guidelines at 31 ("Narrowing the time fields, search terms and files to be searched, as well as testing for burden are some of the tools for controlling e-discovery that should be considered.").

63. See Sedona Proportionality Commentary at 174-75.

64. See id. at 175 (preliminary searches "may help the parties agree on cooperative discovery efforts and potentially yield savings by, for example, eliminating the need for some searches or date ranges, identifying custodians, or refining search terms to more effectively target and retrieve relevant information"); see also Irene C. Warshauer, Electronic Discovery, 2 FINRA Neutral Corner 1 (2011) (suggesting that parties should "test the search terms and time frames" of proposed searches to avoid unnecessary cost to repeat or conduct additional searches); Deborah Rothman & Thomas J. Brewer, ADR Technology Survey Indicates Case Management Issues And Arbitration E-Discovery Problems Are Spreading, Growing More Expensive (2009), available at www.nadn.org ("sampling" of results of searches has "particular merit" as means to "test the utility of replicating the limited sample searches more broadly").

65. See Sedona Proportionality Commentary at 167-68 ("[I]f a party claims that a search would result in too many documents, the party should run the search and be prepared to provide the opposing party with the number of hits and any other applicable qualitative metrics. If the party claims that the search results in too many irrelevant hits, the party may consider providing a description or examples of irrelevant documents captured by the search. Quantitative metrics in support of a burden and expense argument may include the projected volume of potentially responsive documents. It may also encompass the costs associated

with processing, performing data analytics, and review, taking into consideration the anticipated rate of review and reviewer costs, based upon reasonable fees and expenses.").

66. See Vasudevan Software, Inc. v. MicroStrategy, Inc., 2012 U.S. Dist. LEXIS 163654, 2012 WL 5637611 (N.D. Cal. Nov. 15, 2012) (requiring parties to confer regarding search term hit counts for each custodian and term used in sample search).

67. See Sedona Conference Commentary On Defense Of Process: Principles And Guidelines For Developing And Implementing A Sound E-Discovery Process (2016), available at www.thesedonaconference.org (describing ediscovery "culling" techniques).

68. A variety of additional practices could be established as presumptively reasonable elements of ediscovery. See, e.g., NYSBA Report at 17 ("In practice, it is common for parties to produce certain ESI in native file format along with image files (such as TIFF or PDF) and searchable text, along with searchable metadata fields. For example, metadata relating to the date, the author, the recipient, and other aspects of the information may be produced by both parties.").

69. See Albert Bates, Jr. & R. Zachary Torres-Fowler, Expectations And Practices Concerning Examinations In International Arbitration, Legal Intelligencer (Jan. 15, 2018) (hereinafter cited as "Bates & Torres-Fowler"), available at www.law.com (describing depositions as a "peculiar U.S.-centric discovery device that rarely assists the tribunal").

70. See NYSBA Guidelines at 14 ("If not carefully regulated, deposition discovery in arbitration can get out of control and become extremely expensive, wasteful and time-consuming.").

71. See Thorpe at 5 ("[I]t is not productive to eliminate all discovery, and then double or triple the length of the final hearing while counsel inefficiently bumble through deposition-like questioning of witnesses they have never seen or heard from before."); Richard Chernick & Zela Claiborne, Reimagining Arbitration, 37 Litigation 1 (Summer 2011) ("Taking some depositions may save hearing time. Experienced arbitrators know that listening to an attorney examine a witness extensively can be a poor use of hearing time."); NYSBA Guidelines at 14 ("[A]t times, 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. So too, a limited deposition in advance of document requests might serve to focus and restrict the scope of document discovery and/or reduce the risk that the other party is hiding relevant evidence.").

72. See Raymond G. Bender, Presenting Witness Testimony In U.S. *Domestic* Arbitration: Should Written Witness Statements Become The Norm?, 69 Dispute Resol. J. 39 (2014) (hereinafter cited as "Bender") ("The direct testimony of fact witnesses in international arbitration is routinely presented in written rather than oral form.").

73. See JAMS Rules, R-22(e) ("The arbitrator may in his discretion consider witnesses affidavits or other recorded testimony even if the other Parties have not had the opportunity to cross-examine, but will give that evidence only such weight as he or she deems appropriate."); AAA Rules, R-35(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 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.").

74. See Bates & Torres-Fowler (as used in international arbitration, where a witness has given a written statement, "direct examinations are exceedingly rare," and generally consist of introducing the witness, confirming the authenticity of the statement, and responding to any new factual developments; such direct examinations "typically last only a few minutes").

75. See Bender at 49 ("Knowing what a witness' testimony will be in advance of the hearing obviously provides an opportunity to prepare effectively for cross-examination. Witness statements avoid surprise at the hearing and eliminate requests for more time to prepare for cross-examination, or to review the transcript for that purpose, again creating efficiencies in the hearing.").

76. See Oleg Rivkin, Contrasting U.S. Litigation And International Arbitration, 40 Litigation 59, 62 (2013) ("As a rule, an arbitral tribunal will not admit into evidence any testimony of witnesses under the control of a party that was not contained in a witness statement and submitted as one of the sequential memorials.").

77. See Nathan O'Malley, Are Depositions Incompatible With International Arbitration (Nov. 19, 2012), available at www.arbitrationblog.kluwerarbitration.com ("Considering the predominant practice in international arbitration of using written witness statements, and the exchange of rebuttal witness statements, the need to conduct a pre-hearing cross-examination of a witness in order to establish his or her testimony is arguably absent."); Bender at 50 ("[A] written witness statement can be an important fact-finding tool which, to some extent, can serve as a substitute for a deposition if exchanged early enough in the proceedings."); Nicolas Ulmer, The Witness Statement As Disclosure (Dec. 2014), available at www.mediate.com (witness statements are a means of "disclosure to adverse counsel and the Tribunal of what the witness knows and has to say about the issues in the case").

78. See Bender at 55. A separate problem arises where a witness provides a written statement, and then becomes unavailable for cross-examination at a hearing. In such circumstances, the tribunal will typically ignore the written statement, absent a valid reason for absence (such as severe illness). See Ragnar Harbst, Disregarding Witness Statements? Why Arbitrators Cannot Unring The Bell (July 6, 2015), available at www.globalarbitrationnews.com.

79. See Philip E. Cutler, I Am Your Arbitrator: Here Is What To Expect From Me . . . And What I Expect From You, 70 Disp. Resol. J. 15, 26 (2015) (suggesting use of interviews, in lieu of depositions, "when appropriate"); James Hope, Witness Statements: The Cost Of Gilding The Lily (June 17, 2014), available at www.cdr-news.com (suggesting use of "witness summaries," instead of witness statements, as a mean to save the cost of full statements).

80. See Josh Leavitt et al., Drafting An Arbitration Clause That Works (Oct. 2015), available at www.americanbar.org (suggesting need to establish "clear boundaries regarding the number and duration of depositions" to avoid a "time-consuming, expensive and unpleasant discovery process").

81. See Robert J. Jossen, Matthew L. Mazur & Michael J. Sullivan, Taking A Targeted Approach To Arbitration Discovery, N.Y.L.J., Nov. 28, 2016, available at www.alm.com.

82. Under Rule 30(b)(6) of the Federal Rules of Civil Procedure, a party in federal litigation may name a corporation or other institution as the deponent, and state with "reasonable particularity," the subjects on which a person, designated by the institution or corporation, will be required to testify. That process could be adapted to the arbitration context.

83. See Stephen J. O'Neil, Managing Depositions In Arbitration To Minimize Cost And Maximize Value, 69 Disp. Resol. J. 15, 20-22 (2014).

84. Other means of persuasion may also exist. See William A. Dreier, Interview, A Firm Exponent Of ADR (July/Aug. 2013), available at www.ccbjournal.com (suggesting process where, when counsel refuses to reduce use of depositions, arbitrator requests a "written statement from the client to the effect that the arbitrator is willing to proceed with fewer depositions to hold down the cost, but that the client wishes his attorney to engage more witnesses and depositions;" noting that "[s]ometimes attorneys back down").

85. See Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information . . . the party is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless."); see also Advisory Committee Notes ("This automatic sanction provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence[.]").

86. See Southern Union Co. v. Southwest Gas Corp., 150 F. Supp.2d 1021 (D. Ariz. 2002) (harmless error where production could take place months before trial, movant had time to re-depose experts, and respondent ordered to pay movant's costs).

87. See CPR Protocol ("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 information otherwise requested to be disclosed on the basis that the documents will be used by it for the impeachment of another party's witnesses.").

88. See Glen Rauch Sec., Inc. v. Weinraub, 768 N.Y.S.2d 611 (1st Dep't 2003) (arbitrators properly sanction party for failure to comply with their order directing production of documents by precluding the testimony of a witness and the introduction of evidence to which the undisclosed documents related).

89. See National Cas. Co. v. First State Ins. Grp., 430 F.3d 492, 497 (1st Cir. 2005) (party was "offered a choice between producing documents or having to contend with an adverse inference about their content;" this choice was "within the arbitrator's power to offer"); NYSBA Guidelines at 12 (suggesting that "tools" to ensure cooperation in discovery include "making of adverse factual inferences against a party that has refused to come forward with required evidentiary materials on an important issue, the preclusion of proof, and/or the allocation of costs").

90. See Grounds & Gibbs at 5; see also Gideon Mark, Federal Discovery Stays, 45 U. Mich. J.L. Reform 405, 420 (2012) ("Attorney review for privilege and the preparation of privilege logs constitute the single most costly steps in the e-discovery process."); John M. Barkett, Practice Focus: The Duty Of Candor, Inadvertent Production Of Documents, And Your Arbitration Work, 36 Alt. to the High Cost of Litig. 51 (Apr. 2018) (outlining burdens of privilege protection in the context of arbitration).

91. See Robert Owen & Greg Kaufman, Managing the Risks of eDiscovery: A Q&A with Bob Owen and Greg Kaufman, Partnering Perspectives (Fall 2011) ("One of the most distressing aspects of eDiscovery is that there are really no bright-line tests to establish whether a document is privileged or not. The economics of document review requires that reviews be done by junior people. You are not going to pay $600 an hour for a partner to be doing privilege review-at least as a first pass-and the junior people are not at all motivated to take chances in their designations so they will inevitably over-designate."); Philip J. Favro, Inviting Scrutiny: How Technologies Are Eroding The Attorney-Client Privilege, 20 Richmond J.L. & Tech. 2, Para. 151 (2013) (listing methods to reduce privilege log burdens).

92. See Kyle C. Bisceglie, LexisNexis Practice Guide: New York e-Discovery And Evidence Sec. 8.21 (2014) (hereinafter cited as "Bisceglie") (codifying privilege review practices avoids problems where parties have "conflicting views" on how privilege issues should be handled).

93. See, e.g., ARIAS U.S., Sample Form 3.3: Confidentiality Agreement, available at www.arias-us.org.

94. See Federal Circuit Advisory Council, Model E-Discovery Order, available at www.cafc.uscourts.gov (providing that, "[p]ursuant to Federal Rule of Evidence 502(d), the inadvertent production of privileged or work product protected ESI is not a waiver in the pending case or in any other federal or state proceeding."). Rule 502(d) of the Federal Rules of Evidence does not apply in arbitration proceedings, where there is no federal judge to order the privilege protection, but (at very least) an arbitrator-approved protective order, including a claw-back provision, would confirm the intention of parties to avoid privilege waiver due to inadvertent disclosures. See Irene C. Warshauer, Electronic Discovery In Arbitration: Privilege Issues And Spoliation Of Evidence, 61 Disp. Resol. J. 1, 3 (Jan. 2007) (suggesting that, "[s]hould the question arise in a subsequent proceeding, the decision maker, whether another arbitration panel or a court, is much more likely to respect the privilege if the arbitration panel has entered an order approving a claw-back agreement"); see generally The Sedona Principles On Protection Of Privileged ESI, 17 Sedona Conf. J. 99 (2016) (Principle 2 on use of claw-back orders).

95. See John Facciola & Jonathan Redgrave, Asserting And Challenging Privilege Claims In Modern Litigation: The Facciola-Redgrave Framework, 4 Fed. Ct. L. Rev. 19, 53 (2010) ("By limiting the documents that must be indexed or logged, by using categories to organize the information, and by using detailed logs only when necessary, the cost of claiming and adjudicating privilege claims can be greatly reduced."); FJC Benchbook at 196 ("By reducing the risk of waiver, the [clawback] order removes one reason parties conduct exhaustive and expensive preproduction [privilege] review.").

96. See Bisceglie (noting New York Commercial Division Rule 11-b, providing for single entry log of email chain).

97. See Dawson & Kelly at 446 ("Cooperation to establish an appropriate scope of discovery *by agreement* is the gold standard for ensuring proportional discovery in any case.") (emphasis in original).

98. See generally The Sedona Conference Cooperation Proclamation (2008), available at www.thesedonaconference.org; David J. Waxse, Cooperation—What Is It And Why Do It?, XVIII Richmond J. of L. & Tech. 8 (2012).

99. See NYSBA Guidelines at 7 (suggesting that parties meet, "[i]f at all possible," for an "early, formative discussion about discovery"). This "meet and confer" process is required under the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 26(f) (outlining topics to be discussed prior to first pre-trial conference with the court); see also Chartered Institute Protocol (providing that "parties should confer at the earliest opportunity regarding the preservation and disclosure of electronically stored information and seek to agree the scope and methods of production"); id. (listing additional matters for "early consideration").

100. See Sedona Proportionality Commentary at 160 (noting new Rule 26(d)(2) of the Federal Rules of Civil Procedure, which permits parties to propound document requests, before their initial meeting, which "allows time for meaningful good faith discussions regarding discovery and facilitates discussion of the proportionality factors" in the case). One value of the "meet and confer" process is to ensure that counsel educate themselves about their client's information storage practices and capabilities, in order to facilitate formulation of proportional discovery requests, and (where necessary) to inform the decision-maker of the contours of any discovery disagreements presented for resolution. See Richard Posell, E-Discovery In Arbitration (May 2010), available at www.mediate.com (noting that, at early stages of an arbitration, counsel often lack a detailed understanding of their clients' systems and technical problems inherent in responding to discovery requests, and suggesting that an arbitrator order counsel to "meet and confer").

101. See JAMS Protocols ("Lengthy briefs on discovery matters should be avoided. In most cases, a prompt discussion or submission of brief letters will sufficiently inform the arbitrator with regard to the issues to be decided."); CCA Protocols (arbitrators should be available on "fairly short notice" to hold a conference call with the parties to resolve procedural, process or scheduling issues); see also Duke Guidelines at 56 (suggesting establishment of procedures "to enable the parties to engage the judge promptly and efficiently when necessary" to resolve discovery disputes); id. at 59 ("A live pre-motion conference is often an effective way to promptly, efficiently, and fairly resolve a discovery dispute.").

102. See Steven C. Bennett, Who Is Responsible For Ethical Behavior By Counsel In Arbitration?, Chapter 25 in AAA Handbook On Arbitration Practice (2010); see also CPR ELA (in ruling on attorney's fee associated with discovery disputes, arbitration "shall consider whether any counsel engaged in lack of civility or professional courtesy").

103. See Streamlined Three-Arbitrator Panel Option For Large Complex Cases, available at www.go.adr.org ("The AAA has found that a three-arbitrator panel can actually cost five times as much as a single arbitrator. By maximizing the use of a *single* arbitrator, the parties will be able to capitalize on the cost savings provided by a single arbitrator, while still preserving their right to have the case ultimately decided by a panel of three arbitrators.") (explaining options under new program, to use single arbitrator for preliminary and discovery phases of a case).

104. See NYSBA Report (choice of single arbitrator to decide discovery issues can "avert scheduling difficulties and avoid the expense and delay of three people separately engaging in the laborious tasks related to resolving discovery issues").

105. See George E. Lieberman, Discovery In An Arbitration Proceeding And Appealing An Award Under The Federal Arbitration Act, 56 Fed. Lawyer 54, 55 (May 2009) ("[A]rbitration is a matter of contract. Consequently, the parties may contract to provide for expansive discovery (written discovery and depositions), limited discovery (restricted written discovery and depositions, or no discovery. . . . When drafting an arbitration agreement, it would be wise to determine what discovery your client wants or needs and then employ the appropriate language in

the agreement."); see generally Steven C. Bennett, Conflicts Between Arbitration Agreements And Arbitration Rules, 15 Cardozo J. of Confl. Resol. 221 (2013).

106. Joerg Risse, Ten Drastic Proposals For Saving Time And Costs In Abitral Proceedings, 29 Arb. Int'l 453, 454 (2013) (noting the often "overwhelming" fear that "if the case is ultimately lost, there will be complaints that not everything has been tried to win the case at hand," resulting in "insistence on a full-fledged arbitration"); David W. Rivkin & Samantha J. Rowe, The Role Of The Tribunal In Controlling Arbitral Costs, 81 Arbitration 116, 123 (2015) (suggesting that parties are often "their own worst enemies" in agreeing to cost-saving procedures once an arbitration has been filed; "[n]either party wants to make 'concessions' to the other, even where a proposed procedure may seem both reasonable and efficient").

107. See Stipanowich ("[F]or a number of reasons users do not or cannot avail themselves of the choices available in arbitration. . . . Standard institutional arbitration procedures, designed to be flexible enough for a wide spectrum of disputes, often tend to afford considerable wiggle room for tactical delay and disruption by recalcitrant parties and counsel."); Jonathan W. Fitch, The Limitations On American-Style Discovery In International Arbitration, Chapter 6 in Strategies For International Arbitration (2012) (hereinafter cited as "Fitch") ("If the parties to a commercial agreement postpone consideration of the issue of permissible discovery until the international arbitration case is filed and its dimensions are known, they may well then disagree as to what mechanisms best suit their needs."); see also Nicholas J. Boyle & Richard A. Olderman, Securing The Benefits Of Arbitration: Thoughtful Drafting Of Arbitration Clauses, 139 Corp. L. & Accountability Rep. 1 (July 20, 2016), available at www.wc.com (noting importance of parties agreeing to discovery limits in advance of arbitration).

108. See Cher Seat Devey, Electronic Discovery/Disclosure: From Litigation To International Commercial Arbitration, 74 Arbitration 369, 382 (2009) (hereineafter cited as "Devey") ("Arbitrators are reluctant to use the broad authority vested by almost all arbitration rules, in particular to regulate and conduct the proceeding efficiently.").

109. See Tracey B. Frisch, Death By Discovery, Delay, And Disempowerment: Legal Authority For Arbitrators To Provide A Cost-Effective And Expeditious Process, 17 Cardozo J. of Confl. Resol. 155, 156 (2015) ("Courts have confirmed awards so long as the arbitratos' refusal to hear evidence or deny discovery requests did not deprive them of a fundamentally fair hearing."); David E. Robbins, Calling All Arbitrators: Reclaim Control Of The Arbitration Process—The Courts Let You, 60 Dispute Resol. J. 9 (2005) (suggesting that some arbitrators need a "backbone transplant," and summarizing case law for the proposition that the fear of vacatur due to streamlined arbitration proceedings is "unfounded"); NYSBA Guidelines at 11 ("Some arbitrators tend to grant extensive discovery out of concern that any other approach might lead to a vacated award under Section 10 [of the FAA].") (disagreeing with view that discovery limits risk vacatur, as "greatly overstated").

110. See Tom Aldrich, Arbitration's E-Discovery Conundrum (Dec. 16, 2008), available at www.cpradr.org ("Recent experience . . . has shown that arbitrators are reluctant to deny or limit discovery when confronted with trial counsel used to the breadth of discovery under Rule 26 [of the Federal Rules]. Moreover, the threat of overturning an award or not being selected for a future case weighs heavily and has resulted in many arbitrators expanding the scope of prehearing discovery to more closely resemble that prevalent in the federal courts."); Fitch, Chapter 6 ("In the worst case scenario, a party that is aggrieved by the outcome of a discovery dispute might contest the enforcement of the arbitral award, arguing that the discovery mechanism used in the arbitration was unfair and did not allow for a full and just presentation of its case.").

111. See George Gluck, Great Expectations: Meeting The Challenge Of A New Arbitration Paradigm, 23 Am. Rev. of Int'l Arb. 231, 232-33 (2012) (noting that "there is no universally recognized arbitral model" among arbitrators, and that "encouraging arbitrators simply to be more assertive and to focus primarily on 'time and costs,' without more," may compound the problem, by "touting efficiency without presenting a clear alternative procedural model").

112. See Gilda R. Turitz, Managing Discovery In Arbitration (Winter 2013), available at www.americanbar.org.

113. See Charles Moxley, Jr., Discovery In Commercial Arbitration: How Arbitrators Think, 63 Dispute Resol. J. 1 (Aug./Oct. 2008) ("Occasionally the parties provide in their arbitration clause that the federal or state rules of procedure shall apply to discovery in arbitration, resulting in pseudo-litigation before a private judge."); Kenneth C. Gibbs & Barbara Reeves Neal, It's Time To Fix Arbitration Discovery, 32 L.A. Lawyer 48 (Jan. 2010) (recommending strongly against the practice of adopting court rules of procedure in an arbitration clause); John Wilkinson, Arbitration Discovery: Getting It Right, 21 Dispute Resol. Mag. 4, 5 (Fall 2014) ("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. . . . I recommend that the arbitrator make a concerted effort to dissuade the parties from following the Federal Rules[.]").

114. See Brudz & Redgrave at Para. 3 (suggesting that "much of the uncertainty, excess costs, and burdens related to electronic discovery in the world of commercial litigation can be obviated through the mutual adoption and ratification of terms conscribing the scope of discovery in the event of a dispute that would be the subject of arbitration or litigation"); id. at Para. 51 (providing sample contract terms); see also CPR Economical Litigation Agreement, available at www.cpradr.org; Donald R. Philbin, Jr., Litigators Needed To Advise Transaction Lawyers On Litigation Prenups, 56 The Advocate 36 (Fall 2011) ("Choosing arbitration is no longer the end of the inquiry. . . . [P]arties can tailor procedures to business goals and priorities—almost like choosing lunch items off of a menu. Contract drafters now have the option of how much discovery they want[.]").

115. See Thomas J. Stipanowich, Arbitration And Choice: Taking Charge Of The "New Litigation" (Symposium Keynote Presentation), 7 DePaul Bus. & Comm. L.J. 383, 386 (2009) ("[P]rocess choice is an illusion in the absence of appropriate alternative models from arbitration provider institutions. 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 that develop and administer the procedures upon which they rely.").

116. See 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. & Comm. L.J. 499, 517 (2009) (hereinafter cited as "von Kann") (calling for "education of transactional attorneys and business persons concerning the adverse consequences of not detailing [the arbitration process], before disputes arise").

117. See Kent B. Scott & Adam T. Mow, Creating An Economical And Efficient Arbitration Process Is Everyone's Business, 67 Dispute Resol. J. 36, 39 (Aug./Oct. 2012) (noting that "businesses too often give little or no thought to the dispute resolution provisions they put in their contracts," such that the provisions are "often considered to be mere boilerplate," and may be "copied from one agreement and pasted at the end of another").

118. Hiro N. Aragaki, Arbitration: Creature Of Contract, Pillar Of Procedure, 8 Yearbook on Arb. & Med. 2, 20 & n.62 (2016) (suggesting that "nudging" by arbitration-sponsoring organizations, in the form of "procedural models or templates" might produce "better informed, more effective, and therefore more desirable outcomes than what the parties could orchestrate on their own"); Edna Sussman, Why Arbitrate? The Benefits And Savings, NYSBAJ 20, 22 (Oct. 2009), available at www.transnational-dispute-management.com ("The selection of appropriate governing rules can make all the difference and can set up the time limits and other procedures desired.").

119. The ICDR Guidelines are available at www.apps.adr.org.

120. The norm, in international arbitration, is that there will be "far less pre-hearing disclosure" than is "typically" encountered in domestic (American) arbitration. NYSBA Guidelines at 23. In particular, beyond the exchange of documents on which the parties intend to rely, "there is a strong presumption against Pre-Hearing Disclosure which in any way approaches the scope of discovery which one might expect in a case which is litigation in a U.S. court." Id. at 24.

121. Consistent with the use of "expedited," "standard" and "complex" distinctions, increasingly offered in

arbitration rules (and discussed above), the application of efficiency principles could vary, depending on the "track" assigned to a case. See von Kann at 517-19 ("At a minimum three templates should be available: one providing for a very expansive arbitration process, one for a very restrictive process, and one for something in between.").

122. See Roger Haydock, Making Arbitration Work: The Keys To Efficient Resolution Of Complex Civil Case, Corp. Counsel Bus. J. (June 1, 2007), available at www.ccbjournal.com ("[P]arties need not draft discovery parameters from scratch in their arbitration provisions. The better approach is to invoke arbitration rules that impose reasonable limitations on discovery.").

123. For a useful comparison, consider the American Arbitration Association "Consumer Due Process Protocol Statement Of Principles," available at www.adr.org, the product of extensive study, developed in cooperation with "representatives from government agencies, consumer interest groups, education institutions, and business," designed to ensure "evenhandedness in the administration of consumer-disputes resolution." See id.

124. See John Beechey, The ICDR Guidelines For Information Exchanges In International Arbitration: An Important Addition To The Arbitral Toolkit, Chapter 21 in AAA/ICDR Handbook On International Arbitration Practice (2010) ("These procedures are intended to avoid objections and challenges based upon an alleged failure to respect due process[.]").

125. See Giacomo Rojas Elgueta, Understanding Discovery In International Commercial Arbitration Through Behavioral Law And Economics: A Journey Inside The Minds Of Parties And Arbitrators, 16 Harv. Negot. L. Rev. 165, 188 (2011) (suggesting that "opt-in" approach to discovery limitations "has been shown to be ineffective," and that an "opt-out" strategy would "better serve the effectiveness and economy of arbitration," by providing that, "in the absence of any agreement to the contrary, these rules would be mandatory for both the parties and the tribunal").

126. See Thomas J. Stipanowich & Zachary P. Ulrich, Commercial Arbitration And Settlement: Empirical Insights Into The Roles Arbitrators Play, 6 Penn State Yearbook on Arb. & Med. 1, 12 (2014) (noting that ICC and CCA guidelines on cost-effective arbitration have "resonated with many arbitrators and users of arbitration,"' and have "influenced evolving practices"). Such guideline documents, at a minimum, help to decrease the uncertainty parties face, in determining their disclosure obligations in arbitration. See generally Angela Eubanks Galloway, Comparing International Arbitration Rules: A Movement Towards Delocalization Of Evidentiary Procedure, 16 Int'l Law Q. 1, 27 (Fall 2000) (suggesting that it is "imperative" that there exist "some uniform standard" for rules related to discovery and evidence).

127. Rule 26(f) of the Federal Rules provides that parties "must" confer, in advance of the first conference with the court, and develop a "discovery plan," which states the views of the parties on a host of specific issues, including: "the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues[.]" The Rule includes a requirement that the parties (and counsel) attempt, "in good faith," to agree on a discovery plan.

128. See, e.g., AAA Commercial Rule P-1 ("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."); Rule P-2 (providing a "checklist" of suggested subjects that the parties and arbitrator should address at the preliminary hearing, including "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," and "whether to establish any additional procedures to obtain information that is relevant and material to the outcome of disputed issues"); JAMS Comprehensive Rules, R-16 (providing for preliminary conferences, at the request of a party, or at the direction of the arbitrator, to discuss, among other things: "exchange of information," and a "schedule for discovery").

129. See Irene Welser & Giovanni De Berti, Best Practices In Arbitration: A Selection Of Established And Possible Future Best Practices at 79, in Klausegger et al.,

eds, Austrian Arbitration Yearbook (2010) (best practice guidelines, can "serve as a form of 'checklist' for parties of what to expect from efficient proceedings," and may thus "increase the predictability of arbitration").

130. An organization might also develop a form of "model" discovery order, including potential terms that the parties and counsel could review, as part of their "meet and confer" process, with the aim of producing an order form that could be submitted to the tribunal for approval, during or after the initial conference with the tribunal. Alternatively, an organization might make reference to a checklist, or set of guidelines, of another organization. See Devey at 377-78 (suggesting use of preliminary hearings, at least in "complex" arbitrations, and referencing UNCITRAL document on organizing arbitral proceedings, as well as guidance from the Sedona Conference on principles for the conduct of efficient discovery). ■

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Commentary

Use Of Experts In Arbitration: Alternatives For Improved Efficiency

By
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Complex, technical disputes in arbitration often require expert analysis, to assist an arbitration tribunal in understanding the issues to be resolved, and to answer specific questions required for a fair and accurate resolution of a dispute. The expense, burden and time commitment required for expert analysis, however, represent potential limits on the efficiency of the arbitration process. This Article addresses some of the alternatives available to parties, their counsel, and the tribunal, in structuring expert analysis to maximize efficiency.[1]

Goals In Expert Analysis

An arbitral tribunal (individual arbitrator or arbitrator panel) often needs help in understanding technical issues in a case (accounting, engineering, valuation and more, depending on the case). The tribunal's mission is to decide the matter, fairly and efficiently. The role of an expert thus generally is not to opine on the ultimate issues in the case (that is the tribunal's function), but to address subsidiary questions (such as the proper accounting for certain transactions; the engineering implications of a particular design; the alternative potential valuations for a particular asset—again depending on the needs of the case). An expert may also perform specific functions (such as review of voluminous data sources, and on-site or laboratory testing of conditions) that are beyond the ken of the tribunal, or otherwise not suited to conventional evidentiary submissions. Experts may also be called upon to explain complex technical issues, or to summarize points of foreign law.[2]

Experts, even if engaged by the parties (or, more often, their counsel) are generally assumed to act with professionalism and independence, for the benefit of the tribunal. An expert opinion that is pure advocacy, with experts in substance serving as mere mouthpieces for the party (or counsel) that hired them, may undermine the search for fair and efficient resolution, in that, with "dueling" experts, a tribunal may be well-informed as to alternative theories, but not necessarily well-equipped to choose one theory over another. The question thus becomes: are there methods that a tribunal can use to discourage a pure clash of expert advocates, or (at very least) to focus the clash on only the points that matter most to a fair and efficient resolution?

An additional element of efficiency in the process of expert submissions concerns the form and timing of such submissions. Lengthy proceedings strain the ability of a tribunal to evaluate expert evidence fairly and completely. Reducing the time required for expert testimony, and focusing such testimony on the most important matters, that are actually in dispute, can enhance the ability of the tribunal to reach a just and accurate result. Further, ensuring that complete expert submissions are provided the tribunal, prior to the close of hearings, avoids the risk that the arbitrators must speculate, due to an incomplete record, or direct post-hearing submissions on open issues, thus extending the time and expense of the hearing process.

Efficiency is a "bang for the buck" question. More time spent in receiving expert submissions does not necessarily yield more useful information (or understanding) for the tribunal. Shaping the process to serve a fair and effective search for truth is the true goal. The tribunal, working with the input of the parties and counsel, must direct the form and manner of expert submissions to accomplish that goal, within the resource limitations (time, expense and burden) that attend to the particular case.

Contrasting Common Law And Civil Law Models

Historically, the practices of arbitrators and advocates, with regard to the use of experts, have tended to mirror the procedures adopted by the national court systems with which they are most familiar. The use of party-appointed experts is common in American civil litigation (and in many other common law jurisdictions). In parallel, American arbitration rules generally provide for the possibility of expert submissions, subject to the control of the tribunal.[3] American arbitration practices generally do not contemplate (although they do not exclude) the appointment, by the tribunal itself, of an expert to aid the tribunal.

By contrast, outside the United States, the appointment by an arbitration tribunal of an independent expert, to produce an expert report on issues identified by the tribunal, is a relatively frequent occurrence. Thus, although it is widely accepted in international arbitration that parties maintain rights to call their own experts in support of their positions,[4] international arbitration rules and norms also generally permit a tribunal (after consultation with the parties), to select its own expert, and to give the expert directions.[5]

These contrasting models essentially represent the differences between a Common Law approach to dispute resolution (party-appointed experts, in support of the advocacy of the parties, with the clash in positions ultimately resolved by the decision-maker) versus a Civil Law model (tribunal-appointed experts, in support of an inquisitorial investigation by the ultimate decision-maker).[6] Taking these two positions as polar opposites (although they are not, *per se*, opposite in all respects), the question becomes whether it is possible to describe circumstances where one or the other model is most efficient, and whether there are circumstances where a "blending" of the two models most serves the cause of fair and efficient dispute resolution. The remainder of this Article addresses those questions.

Party-Appointed Experts

The American system of party-appointed experts embodies, as a principal advantage, relatively little work for the tribunal. The parties decide whether they will proffer experts. They decide what subjects the experts will address. They (often) decide on the forms, and the timing, of disclosures regarding expert opinions (subject to applicable arbitral rules, contract terms—if any—regarding experts, and the direction of the tribunal). And, ultimately, the parties generally decide whether and how they will present their experts' opinions to the tribunal. Since strict rules of evidence (such as the Daubert expert qualification standard)[7] do not usually apply, the role of the tribunal can, in broad terms, be described as passive recipient of whatever the parties choose to present. And, given the possibility (even if distant) of vacatur of an award for refusal to hear evidence,[8] arbitrators may have an incentive to "take the evidence for what it's worth," even where there are serious questions about its provenance or usefulness.[9]

But, to loosely quote a famous phrase: a tribunal is "not a potted plant."[10] It is the task of the arbitration tribunal to exercise its "discretion," to conduct proceedings "with a view toward expediting the resolution of the dispute[.]"[11] A tribunal may direct the order of proof in a proceeding, and may exclude evidence "deemed by the arbitrator to be cumulative or irrelevant."[12] Thus, even though the parties and their counsel may hire and direct the experts in the matter, a tribunal may channel the process, to improve the efficiency of the proceedings.

One simple form of tribunal direction is a request that the parties "focus their presentations on issues the decision of which could dispose of all or part of the case."[13] Such a direction essentially asks that the party-appointed experts answer specific questions, or address specific issues, that the tribunal deems most relevant to a full understanding of the dispute. The tribunal may also give direction on the form of the reports to be provided by experts.[14] The earlier such direction can be given, the more efficient the process. Thus, for example, a tribunal might give directions at a pre-hearing conference, after review of the pleadings in the case. More likely, the tribunal might give directions after review of the expert reports (if produced in advance of the hearings). During the course of the hearings, the tribunal may pose specific questions

to experts, and (if the answer cannot be given immediately), ask that the experts provide additional submissions on the specific issue, prior to the close of hearings.

If the experts are asked to provide additional submissions late in the hearing process, however, the schedule for hearings may need to be extended, to preserve the right of the parties to conduct cross-examination of the witnesses. One solution to that problem might be the conduct of limited cross-examination (if not waived altogether by the parties), through the use of video or telephone conferencing.[15] The tribunal, having already heard the experts testify in live sessions, may have less concern about the ability to gauge the credibility of the experts through live interaction. Alternatively, the parties might waive any further oral testimony of the experts, and have the experts submit responses to the tribunal's questions in the form of written statements, with an opportunity for reply.[16]

Another simple method to improve the efficiency of expert presentations is an agreement (or direction) that the experts' written reports will stand as their direct testimony at the hearing, and that, in effect, their live testimony at the hearing will begin with cross-examination.[17] That solution is not perfect, however, in that issues may arise (between the completion of the report and the conduct of the hearing) that require supplementation of the expert report. A tribunal could permit written supplementation of expert reports, or replies to the main reports of opposing experts, on an agreed schedule; or, the tribunal might permit brief supplementation at the outset of a witness' live appearance to address any last-minute questions. The report-first, then cross-examination method, moreover, generally requires that the tribunal invest some time, in advance of the hearings, to become familiar with the submissions of the experts. In a very complicated case, with many exhibits and experts on multiple subjects, that preparation may be burdensome, and not particularly productive (as tribunal members may have difficulty absorbing the full meaning of complex expert analysis from written submissions). Thus, the parties may agree, or the tribunal may direct, that each expert give some brief overview testimony (essentially summarizing the expert's report) before cross-examination begins. The parties, in consultation with the tribunal, can best determine whether anything in excess of the expert reports is required.

Joint Expert Presentations

Hybrid (blended) forms of expert analysis may proceed from the fundamental Common Law assumption that parties determine when and how experts will be chosen and directed, but with a recognition that the needs of the tribunal can often be best served through modifications of the schedule of expert presentations, and through cooperation between the experts. These hybrid techniques may improve efficiency by reducing hearing time, and focusing expert submissions on the most significant points in dispute.

The simplest hybrid form involves little more than a scheduling modification. Conventional approaches to the presentation of expert witnesses can produce a disconnect, as one set of witnesses and evidence is presented by the claimant, and then days, weeks or even months later, another set is presented by the respondent. The tribunal must attempt to recall the substance of the claimant's earlier expert testimony, and compare it with respondent's expert submission. One increasingly common solution is to set aside an "expert day" (or days), where experts for each side testify, *seriatim*, providing the tribunal an opportunity to compare their methods and conclusions in close temporal proximity. In some instances, the expert portion of the hearings may be conducted at the very end of the process, when the tribunal has heard testimony from lay witnesses, has received other evidence, and is prepared to consider the technical issues in the case. Where there has been some bifurcation of the proceedings (e.g., liability and damages), the process might include essentially two (or more) mini-hearings, capped in each instance by expert testimony.

One potential advantage of this *seriatim* approach to expert testimony is in efficient scheduling of expert testimony. Experts are often busy people, and squeezing them into a hearing calendar may be difficult, especially where the hearings are expected to be lengthy, and the vicissitudes of travel and business conflicts may make the availability of experts uncertain. Setting a specific day (or days) when the experts will testify, *seriatim*, means that the experts can plan to be available and dedicated to the hearing appearance, for that specified period. The expert day(s), moreover, need not necessarily be contiguous with days of hearing lay testimony. Indeed, some separation of time between the main hearing and the expert hearing may avoid the scramble of last-minute adjustment of presentations,

to address unexpected developments during the factual presentations of the hearing. For a concentrated, set period of time, the experts may dedicate themselves to giving testimony, answering questions and responding to each other's opinions.[18]

Another increasingly common form of interaction between expert witnesses is a meet-and-confer process (often called a "conclave"), in advance of the hearings, to determine points on which the experts agree, and to identify actual issues in dispute. Such conclaves could be conducted before the experts prepare their reports, but, most commonly, occur thereafter. The general purpose of a conclave is to have the experts compare their views on the expert issues in the case, with an aim toward reducing the need for duplicative presentations regarding issues on which the experts agree. Such a conclave may be conducted "without prejudice," meaning that communications between the experts during the conclave cannot be used as evidence during any hearings (thus freeing the experts to engage in more candid discussions).[19] The conclave may also be conducted out of the presence of counsel (again, lessening the incentive toward posturing, pure advocacy, or obfuscation).[20] The net result of the conclave, typically, is a form of "joint" report of the experts, noting areas of agreement between them, and (often) outlining the specific issues on which they disagree.[21]

The hoped-for result of the conclave process is a reduction in hearing time, as agreed-points need not be addressed in detail (and certainly not repeated by each expert), and the tribunal can more carefully focus, during the hearings, on the essential disagreements between the experts (and the bases for those differences). At a minimum, the conclave process may avoid the "ships passing in the night" problem, where experts talk past each other, never fairly meeting each other's positions, to the consternation of the tribunal.[22]

Perhaps the most unique form of joint expert presentation is "concurrent expert evidence" (colloquially known as "hot-tubbing").[23] The procedure has been embraced in Australian courts,[24] but is not generally used in the United States.[25] International arbitration service providers and sponsoring associations have begun to experiment with this technique.[26] The essence of the process (which may be combined with the "conclave" process in advance of hearings) is that experts for each side are called to give evidence at the same time; they are sworn in together; they may give explanation of their own opinions, but they may also ask each other questions, may comment on each other's opinions, and may concurrently answer questions from the tribunal. The right of the parties' counsel to conduct cross-examination is preserved, but the focus of the process is interaction between the experts, to highlight areas of agreement, and the bases for any significant disagreements.

Proponents of the hot tub process suggest that it can improve efficiency in a variety of ways.[27] Like the conclave process, it can reduce the need for duplicative testimony on non-controversial points. It can focus the testimony given on points of actual (and significant) disagreement.[28] It can permit the tribunal to hear answers to critical questions contemporaneously, making it possible for the tribunal to compare, in real time (versus through recall or review of transcripts) the conflicting positions of the experts. In writing an award, moreover, the tribunal will have expert testimony available for review in a relatively condensed form.

Critics caution that the hot tub process may take control away from party counsel (who may be best placed to question experts, having extensively prepared for hearings), and that an ill-prepared or inarticulate expert may appear unconvincing (even though the expert's opinion is sound), or that the process may be hijacked by the more aggressive expert (actually re-introducing, and perhaps even increasing, the adversarial bias that may detract from the value of genuinely independent expert analysis). Because the process requires closer control by the tribunal, moreover, some of the efficiency saved in decreased hearing time may be offset by the need for the tribunal to spend substantial time, in advance of hearings, preparing for management of expert testimony.[29] One solution to these kinds of concerns involves a modified form of hot-tubbing, in which the experts provide their direct testimony (either through expert reports or live), and are subject to cross-examination; thereafter, the experts appear jointly for the tribunal to ask any clarifying questions that may have developed from the main presentations of the experts.

Whatever the overall merits (and specific method) of the hot tub process, proponents and critics generally agree that it is a procedure best addressed to more complex, technical disputes, especially those with multiple areas of

expert testimony (such as construction projects, or matters involving sophisticated economic analysis). The increased use of the process, and the increased attention it has gained in dispute resolution literature, however, suggest that hot tubbing remains a viable tool for efficiency enhancement, at least in some cases.[30]

Tribunal-Appointed Experts

On its face, the use of a tribunal-appointed expert may appear inefficient (duplicative), at least in circumstances where party-appointed experts are also to be used.[31] Yet, there is room for a tribunal-appointed expert to perform discrete functions that can enhance the efficiency of the process, even where other experts will appear. And there are occasions where parties and their counsel may recognize that a single, tribunal-appointed expert may most effectively help resolve specific issues in a proceeding.

One role for an expert involves service as a mediator/facilitator, to help the parties work through issues related to the conduct of the arbitration. An expert mediator, for example, might assist the parties in resolving disputes regarding disclosure matters, especially in large-document-volume cases, or in cases where difficult privilege or confidentiality issues might arise. The mediator would be available to guide discussions between the parties, suggest solutions, and encourage cooperation.[32] Discussions with the mediator would be "without prejudice;" and ultimate control of the disclosure process would be at the direction of the tribunal.

The role of the mediator might also involve guiding the conclave process between subject matter experts.[33] Again, on a "without prejudice" basis, the mediator might assist the experts in coming to agreement on issues not in dispute, and in determining the most efficient form for presentation of the experts' analyses. If assumptions are to be built into expert models (algorithms), for example, the tribunal would probably most benefit from a shared list of assumptions, applied by each of the experts, to make comparison of their results more accurate. The mediator might also encourage experts to provide "sensitivity" analyses, making clear how changes in specific assumptions might affect the outcome of the experts' analysis.[34] Where access to specific information is essential to fair and accurate expert reports on all sides, moreover, the mediator's role in guiding the disclosure process could overlap with the facilitation of expert discussions. Ensuring that each expert has access to information may help prevent disruption to the hearing process, if it were to become apparent during the hearing that some additional (previously-undisclosed) information is vital to meaningful expert analysis.

The appointment of a single expert (with no individual party experts), to address a particular task, could save the parties and the tribunal considerable time and burden. Discrete tasks might include: valuation of a specific asset, opinion on a particular issue of foreign law (not otherwise known to the tribunal), site inspection or forensic testing, and many others.

The efficiency of a single tribunal-appointed expert need not be adversely affected by the fact that the parties may have their own experts, even on related issues. Thus, for example, the valuation of a specific asset (by the tribunal expert) might be incorporated into the economic analyses (of the party experts), and that hybrid process could avoid overlap and inefficiency. Alternatively, such as on an issue of foreign law, the parties might determine that, since there probably is just one "right answer" to the specific legal question, there is no need for overlapping party-appointed experts on the same point. The parties, moreover, generally retain the right to pose questions to a tribunal-appointed expert at an evidentiary hearing;[35] thus, if an expert's analysis requires some further explanation or context, the parties may have it, without the need to engage their own experts.

Other Forms Of Expert Analysis

At the far end of the adversarial-inquisitorial spectrum we find systems where the expert effectively becomes a decision-maker in the dispute. One of the more controversial, though highly efficient, processes involves the appointment of an individual arbitrator (or individual member of a three-member arbitral tribunal) with specific expertise in an area relevant to the dispute. At its core, the notion is simple—parties often choose arbitration (at least in part) in order to obtain access to expert decision-makers who do not require tutorials or other background education to understand the context of a specific case. Specialty arbitration-sponsoring institutions (such as the WIPO Arbitration and Mediation Center, or the AIDA Reinsurance and Arbitration Society), offer rosters of specially-trained arbitrators, with extensive background knowledge of issues

and common practices in their industry. So, too, many of the major arbitration centers offer specialty rosters of arbitrators familiar with construction, labor and other particular types of disputes. An arbitrator steeped in the background of a particular industry or professional field may much more quickly absorb the facts of a particular dispute, and may more quickly appreciate the significance of the technical issues presented by the dispute, as compared to a relative novice. In that sense (and more) the expert arbitrator may be highly efficient.[36]

But what of arbitrators who might do more than simply apply their background knowledge related to the dispute? What if an arbitrator applies knowledge, not developed within the confines of the arbitration process, to reject the submissions of one party or another? What if an arbitrator concludes that both parties have failed to adduce essential evidence, and the arbitrator proceeds to conduct an independent investigation (e.g., by visiting a construction site, or consulting professional literature to obtain the "correct" answer)?

In the context of court proceedings, it is generally understood that a judge should not investigate the facts of a case, and that a judge must give parties notice if the judge wishes to take "judicial notice" of a particular fact.[37] So, too, in the context of arbitration. An arbitrator is not necessarily considered "partial" or "prejudiced" by having acquired some knowledge of "the parties, the applicable law or the customs and practices of the business involved" in the dispute.[38] Nor does an arbitrator violate the obligation of impartiality merely by "hav[ing] views on certain general issues likely to arise in the arbitration," so long as the arbitrator does not "prejudge[e] any of the specific factual or legal determinations" to be addressed by arbitration.[39] But an arbitrator may risk the validity of an award by conducting independent factual research, without the knowledge or input of the parties.[40] In broad terms, the obligation of arbitrators to conduct proceedings in a manner "fair to all," affording all parties the "right to be heard," and a "fair opportunity to present evidence,"[41] suggests that, when an arbitrator believes that more information is required to decide the case, the arbitrator may ask questions, or call for additional witness testimony or other evidence, but must do so on notice to the parties.[42]

The arbitration process might, by agreement of the parties, become almost entirely inquisitorial. On consent of the parties, arbitrators may engage in abbreviated forms of dispute resolution.[43] Such abbreviated forms may include paper-only submissions and on-line methods of dispute resolution.[44] More extreme forms of cost-savings might be obtained through the use of expert arbitrators, to review the specific (and limited) forms of information required to resolve a particular matter fairly. In certain trade goods disputes, for example, parties may select an arbitrator with specialized knowledge, providing the arbitrator with background documents (chiefly, on the specifications applicable to the goods) and the arbitrator may inspect the goods (in a process called "look-sniff" or simply "quality" arbitration) in the absence of the parties.[45] The expert arbitrator renders an award, without any further evidentiary hearing.[46] Although such a process surely is an extremely limited form of arbitration,[47] it does at least provide for some input by the parties, and thus might appropriately be termed a form of arbitration.[48] And the process might be expanded, to address other forms of technical disputes that require rapid, cost-effective resolution.[49]

At some extreme point, however, an expert resolution of an issue must lose its potential status as arbitration.[50] Under New York law, for example, an agreement that a "question of valuation, appraisal or other issue or controversy be determined by a person named or to be selected" by parties, may be enforced,[51] but such a process does not have the status of arbitration, and a determination, pursuant to such a process, cannot be enforced as an arbitration award.[52]

Yet, even at this extreme, one can imagine methods to foster the efficiencies of expert determination, and nevertheless maintain the benefits of an arbitration award.[53] Thus, for example, a dispute might be submitted to an expert for resolution (through an inquisitorial process), but subject to potential review by an arbitrator. If the parties were satisfied with the expert's determination, the result might be memorialized in the form of a "consent" arbitration award (by a "backup" arbitrator, appointed for such a purpose).[54] If the parties were in conflict as to the expert determination, then the backup arbitrator could be employed to perform some review of that determination, with the input of the parties. Alternatively, the parties might each appoint experts to examine the particular issue; if the experts agreed, then again a consent award would be entered. If they did not agree, then some further

arbitration process would ensue. The precise form of an expert determination (with or without elements of arbitration) is as flexible as the needs of the parties.[55]

Conclusion

The arbitration world does not divide neatly into Common Law and Civil Law camps. Arbitration, by virtue of its contractual basis, is subject to a wide array of variations, to suit the needs of the parties. Arbitrators, advocates and academics who originate in one or the other camp may benefit greatly from considering alternate procedures derived from other traditions. In the area of expert analysis (often one of the costliest elements of arbitration proceedings) the use of hybrid techniques may greatly enhance the efficiency of proceedings, while maintaining the essential elements of justice prized in both Common Law and Civil Law systems.

Endnotes

1. For additional suggestions (not confined to experts) regarding cost and time-saving procedures in arbitration, see generally Albert Jan van den Berg, Note-Time And Costs: Issues And Initiatives From An Arbitrator's Perspective, 28 ICSID Rev. 218 (2013).

2. See generally Bernd Ehle, Practical Aspects Of Using Expert Evidence In International Arbitration, 2 Y.B. on Int'l Arb. 75 (2012) (summarizing potential uses of experts in arbitration, and procedures for obtaining expert evidence and assistance); Michael Feutrill & Noah Rubins, The Preparation Of Expert Evidence In International Commercial Arbitration: Practical Aspects, 2009 Int'l Bus. L.J. 307 (2009) (same).

3. See, e.g., AAA Commercial Arbitration Rules, P-2(a)(xi) (suggesting subjects for discussion at a preliminary conference with the tribunal to include "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"); R-34(a) (parties may offer evidence as is "relevant and material" to the dispute; conformity to "legal rules of evidence shall not be necessary"); R-34(b) (arbitrator shall determine admissibility, relevance and materiality of evidence offered, and may exclude evidence deemed to be cumulative or irrelevant); JAMS Comprehensive Arbitration Rules & Procedures, R-17(c) (as they become aware of new documents or information, parties are obligated to provide documents and "supplement their identification of witnesses and experts"); R-20(a) (pre-hearing submissions to include "a list of witnesses" to be called, "including any experts"); R-22(d) ("Strict conformity to the rules of evidence is not required[.]").

4. See Chartered Institute of Arbitrators, International Arbitration Practice Guideline: Party-Appointed And Tribunal-Appointed Experts, Art. 1, Cmts. (2016), available at http://www.ciarb.org.

5. See, e.g., UNCITRAL Arbitration Rules, Art. 29 (tribunal may appoint expert to report on specific issues determined by tribunal); ICDR International Arb. Rules, Art. 25 (same); JAMS International Arb. Rules, Art. 27.7 (same); ICC Arb. Rules, Art. 25 (tribunal may hear experts appointed by the parties, and tribunal may appoint one or more experts, define their terms of reference and receive their reports); IBA Rules on Taking of Evidence in International Arbitration, Arts. 5-6 (same).

6. See generally Michael McIlwrath & Henri Alvarez, Common And Civil Law Approaches To Procedure: Party And Arbitrator Perspectives, in Paul E. Mason & Horacio A. Gregera Naron (eds.), International Arbitration: 21st Century Perspectives, Chap. 2 (2010); Ruth Fenton, A Civil Matter For A Common Expert: How Should Parties And Tribunals Use Experts In International Commercial Arbitration, 6 Pepperdine Disp. Resol. L.J. 279, 289 (2006) (summarizing differences between civil law and common law traditions regarding dispute resolution).

7. See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

8. See George Ruttinger, Joe Meadows & April Ham, Using Experts In Arbitration, Chapter 31 in AAA Handbook On Arbitration Practice (2d ed. 2016) (noting that counsel have flexibility in presenting experts as "failure to admit relevant evidence may be a ground for reversal or modification").

9. Ronald W. Haughton, Running The Hearing, in Arnold Zack (ed), Arbitration In Practice 44 (1994)

(suggesting arbitrator may use the "for what it's worth" ruling on evidence, and that arbitrator should apply "common sense" and remind the parties that the goal of arbitration is to "let the parties have their problem heard and resolved without excessive technicalities").

10. See Iran-Contra Hearings: Note Of Braggadocio Resounds At Hearing, N.Y. Times, July 10, 1987, available at https://www.nytimes.com (quoting lawyer Brendan Sullivan, attorney for Colonel Oliver North, on the attorney's right and obligation to object).

11. AAA Rules, R-32(b); see generally Patricia D. Galloway, Using Experts Effectively & Efficiently In Arbitration, 67 Dispute Resol. J. at 2 (2012) (suggesting that arbitration rules generally give a tribunal "flexibility in handling the proceeding, but the overriding goal is efficiency and lower costs").

12. AAA Rules, R-34(b).

13. AAA Rules, R-32(b).

14. The form may also be specified in the arbitration agreement, or the arbitral rules chosen by the parties. See, e.g., International Bar Association, Rules On The Taking Of Evidence In International Arbitration (2010), Art. 5.2 (listing required contents of expert reports).

15. See AAA Rules, R-32(c) (alternative means of presenting evidence 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").

16. See AAA Rules, R-35(c) (parties may agree, or arbitrator may direct that documents or other evidence be submitted "after the hearing," but "[a]ll parties shall be afforded an opportunity to examine and respond to such documents or other evidence").

17. See AAA Rules, R-35(a) (permitting written witness statements, subject to tribunal's right to "disregard" the statement if the witness does not appear at the hearing, to be questioned).

18. The parties and tribunal may also consider imposing a "chess clock" limitation on expert presentations, to ensure that the time spent is equally allocated between the experts. See Raymond A. Garcia, Nicole Liguori Micklich, & Michael V. Pepe, Chess Clock Arbitration, June 22, 2011, www.americanbar.org.

19. See Bell Gully, Expert Witness Conferencing—How Can We Get The Best Outcomes?, Nov. 1, 2012, available at www.lexology.com (suggesting that experts may seek the ability to communicate with their clients and counsel, so that they "should not worry about drafting precise wording" in any joint statement that may come from the witness conclave).

20. A more elaborate form of conclave would involve the use of a neutral facilitator, who might put the experts at ease during the process, and serve to encourage agreement between the experts. See infra, footnotes 34-35 and accompanying text.

21. The joint report of the experts may be drafted by the experts themselves, or may be drafted with the assistance of counsel.

22. See Issues For Arbitrators To Consider Regarding Experts, Vol. 21 No. 1 ICC International Court of Arbitration Bulletin (2009), available at www.iccwbo.org (noting risk that "experts may differ in the structure of their respective work product, their basic underlying date, or their methodology," which can be "particularly challenging for the tribunal to resolve where the tribunal cannot find flaws in the experts' methodologies or findings that would enable the tribunal to conclude that one expert's conclusions are more likely to be correct than the other's").

23. The image of the "hot tub," where professional colleagues can discuss a subject in an informal, collegial manner, addresses the central impetus for this procedure: to encourage experts to agree on non-controversial points, and to permit a give-and-take process that allows the tribunal to examine the points of difference between the experts with greater understanding and efficiency. See generally Francis P. Kao et al., Into The Hot Tub . . . A Practical Guide To Alternative Witness Procedures In International Arbitration, 44 Int'l Lawyer 1035 (2010).

24. See Hon. Rachel Pepper, 'Hot-Tubbing': The Use Of Concurrent Expert Evidence In The Land And Environment Court Of New South Wales And Beyond (2015), available at www.lec.justice.nsw.gov.au.

25. See Adam Elliott Butt, Concurrent Expert Evidence In U.S. Toxic Harms Cases And Civil Cases More Generally: Is There A Proper Role For Hot Tubbing, 40 Houston J. Int'l Law 1 (2017).

26. See, e.g., International Bar Association, Rules On The Taking Of Evidence In International Arbitration (2010), Art. 8.3(f) (tribunal may "vary" the order of proceeding, "including the arrangement of testimony by particular issues or in such a manner that witnesses may be questioned at the same time and in confrontation with each other (witness conferencing)"); Chartered Institute of Arbitrators, Protocol For The Use Of Party-Appointed Expert Witnesses In International Arbitration (2007), Art. 7.1 ("The manner in which an expert gives testimony shall be as directed by the Arbitral Tribunal. The expert's testimony shall be given with the purpose of assisting the Arbitral Tribunal to narrow the issues between the experts and to understand and efficiently to use the expert evidence."), Art. 7.2 ("The Arbitral Tribunal may at any time, up to and during the hearing, direct the experts to confer further and to provide further written reports to the Arbitral Tribunal either jointly or separately.").

27. See generally Kabir Singh, The "Additional Weapon:" Practical Tips For Effective Expert Conferencing In Arbitration, Mar. 28, 2016, available at www.arbitrationblog.kluwerarbitration.com (suggesting that hot tubbing may produce an "increase in the speed of the proceedings," and lead to "substantial savings for the parties," as well as "[m]ore clarity" on technical issues, and may lead to a "higher likelihood that the matter will be settled") (citing authorities).

28. Proponents also suggest that hot-tubbing may help mitigate the problem of "partisan" experts. See David Sonenshein & Charles Fitzpatrick, The Problem Of Partisan Experts And The Potential For Reform Through Concurrent Evidence, 32 Rev. Litig. 1 (2013).

29. See Jeffrey H. Dasteel, Experts In Arbitration (2013), available at www.lacba.org (suggesting that, in witness conferencing, "advocacy may overtake any real attempt to reach agreement," and "counsel may appoint experts based on the expert's willingness to understand and advocate" the party's position; and hot tubbing "may extend the hearing time and make it difficult for counsel to control the examination").

30. See ICC Court of Arbitration Bulletin, Issues For Arbitrators To Consider Regarding Experts (2010), available at www.library.iccwbo.org (witness conferencing method is "increasingly used to resolve the differences between conflicting expert opinions, but requires the tribunal's active participation and supervision" to maintain order at the hearing).

31. Where one of the parties is reluctant to authorize a tribunal-appointed expert, moreover, delays and other uncertainties may adversely affect the usefulness of the process. See Robert Horne & John Mullen, The Expert Witness In Construction, Chapter 4 (2013) (describing uses and limitations of tribunal-appointed experts).

32. See generally Steven C. Bennett, Mediation As A Means To Improve Cooperation In E-Discovery, 24 Albany Law J. of Sci. & Tech. 251 (2014).

33. See Eugene Romaniuk, Bruce Smith & Miiko Kumar, The New Default: Expert Witness Conclaves (June 24, 2016), available at www.lawyersweekly.com (summarizing results of a survey (in Australia), suggesting that the "overwhelming majority" of expert conclaves achieve "sensible results," with the cost of a facilitator for a conclave "more than saved by the efficiency of the process"); but see Karen Stott, Expert Witness Conclaves For Joint Report-5 Tips And Observations By a Facilitator, Apr. 8, 2018, available at www.linkedin.com (cautioning that conclave process can be "extremely" labor intensive, and noting that the process may require "a number of conclaves if the issues are lengthy and complicated").

34. See Richard Boulton, Joe Skilton & Amit Arora, The Function And Role Of Damages Experts, Chapter 2 in John A. Trenor (ed.), The Guide To Damages In International Arbitration (2017) (sensitivity analysis useful in allowing the tribunal to establish which of the experts' assumptions or areas of disagreement have a material effect on the damages calculation).

35. See, e.g., International Centre for Dispute Resolution, International Dispute Resolution Procedures, Art. 25.4 ("At the request of any party, the tribunal shall give the parties an opportunity to question the [tribunal-appointed] expert at a hearing."); IBA Rules, Art. 6.6 ("At the request of a Party or of the Arbitral Tribunal, the Tribunal-Appointed Expert shall be present at an Evidentiary Hearing. The Arbitral Tribunal

may question the Tribunal-Appointed Expert, and he or she may be question by the Parties or by any Party-Appointed Expert").

36. For an argument for the appointment of an economist expert as an arbitrator, in cases involving complicated damages analyses, see J. Gregory Sidak, Economists As Arbitrators, 30 Emory Int'l L. Rev. 2105, 2111, (2016) (suggesting that economist arbitrator may "hold the party economic experts to a higher standard of economic rigor," and more easily detect "error and bias in the economic testimony").

37. See ABA Model Code of Judicial Conduct, Rule 2.9(c) (judge "shall not investigate facts in a matter independently and shall consider only the evidence presented and any facts that may properly be judicially noticed"); Fed. R. Evid. 201 (allowing court to take judicial notice of facts "not subject to reasonable dispute," but recognizing that "a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed"). There is some controversy (at least within the judiciary) as to the authority of judges to conduct independent factual "background" research (and as to what "background" research includes). See Edward K. Cheng, Should Judges Do Independent Research On Scientific Issues? 90 Judicature 58, 61 (2006) ("Judges are deeply divided about the issue of independent research[.] To many judges, doing independent research when confronted with new and unfamiliar material seems the most responsible and natural thing to do. To others, it represents the worst kind of overreaching and a threat to long-cherished adversarial value.").

38. AAA/ABA Code Of Ethics For Arbitrators In Commercial Disputes, Canon I, Cmt. 1 ("Arbitrators may also have special experience or expertise in the areas of business, commerce or technology which are involved in the arbitration.").

39. See id.

40. See Quesada v. City of Tampa, 96 So.3d 924 (Fla. Dist. Ct. App. 2012) (award vacated where arbitrator conducted independent research on diet supplement at issue in proceedings, by reviewing manufacturer's website and contacting a dietician). There is some controversy about the ability of an arbitrator to conduct legal research without the knowledge or approval of the arbitration parties. Compare Paul Bennett Marrow, Can An Arbitrator Conduct Independent Legal Research? If Not, Why Not? N.Y.S.B.A.J. 24 (May 2013) (suggesting that there are "good reasons" for an arbitrator to refrain from "unauthorized" legal research) with M. Ross Shulmister, Attorney Arbitrators Should Research Law: Permission Of The Parties To Do So Is Not Required, 68 Disp. Resol. J. 29 (2013) (responding to, and criticizing, Marrow position; suggesting that attorney arbitrators are "actually under at least a moral obligation" to conduct independent legal research where necessary; yet, suggesting that it is "wise (although not required)" that an arbitrator advise parties of the results of any independent research, and "allow them to respond" to those findings).

41. See AAA/ABA Code of Ethics, Canons I(D) and IV(B).

42. Id., Canon IV(E); see generally Thomas Sonneborn, Conducting Independent Research: Should An Arbitrator Look Beyond The Record Or The Law?, 32 Ill. Pub. Emp. Rel. Rep. Nos. 3-4 (2015).

43. Judge Richard Posner famously stated: "short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract." Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994). The precise obligations of arbitrators to pursue a "decision-making process founded on a search for an accurate portrayal of the facts and the law," however, is a matter of some considerable academic debate. See William W. Park, Rectitude In International Arbitration, 27 Arb. Int'l 473, 521 (2011).

44. See Beth Trent & Colin Rule, Moving Arbitration Online: The Next Frontier, Apr. 3, 2013, N.Y.L.J., available at www.cpradr.org.

45. See Sundra Rajoo, Trade Disputes Solving Mechanisms (2009), available at www.sundrarajoo.com (noting use of look-sniff system by commodity exchange organizations).

46. See Sarika Tyagi, International Commercial Arbitration: An Ultimate Remedy In Commercial Obligation, With

Special Reference To India (PhD dissertation, Feb. 2, 2015), available at http://shodhganga.inflibnet.ac.in.

47. See Myles Stilwell, One Law For All, 8 ADR Bull. No. 8, Art. 5 (2006) (noting the "broad gulf" between look-sniff arbitration and more "court-based processes" in conventional arbitration, but noting possibility, "in the hands of agreeing parties," for "lessening" of the scope of procedural steps in arbitration).

48. The liberal provisions of the London Court of International Arbitration Rules (2014), available at www.lcia.org, provide something of a road map for such an extremely abbreviated arbitration. The Rules provide each party a right to an oral hearing, "unless the parties have agreed in writing upon a documents-only arbitration[.]" Rule 19.1. An arbitral tribunal, moreover, has the power "to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties' dispute[.]" Rule 22.1(iii). The parties may agree on methods for the conduct of the arbitration, Rule 14.2, and it is the obligation of the tribunal to "adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute[.]" Rule 14.4(ii). And, in the pursuit of these and other general duties, the tribunal "shall have the widest discretion to discharge these general duties[.]" Rule 14.5.

49. See Tying Up Loose Ends, And Dispute Resolution, In ICT Contracts: Quicker, Simpler And Better Solutions? (2004), available at www.wigleylaw.com (presentation to New Zealand Computer Society And Technology Law Society) (suggesting use of similar procedure for resolution of "urgent decisions" on technology projects, "particularly those that are complex and expensive"); but see Adham Kotb, Alternative Dispute Resolution: Arbitration Remains A Better 'Final And Binding' Alternative Than Expert Determination, 8 Queen Mary L.J. 125 (2017) (suggesting that "simplified arbitration can achieve the perceived cost and time benefits of expert determination without the need to jeopardize justice and fairness").

50. See Tomas Kennedy-Grant, Expert Determination And The Enforceability Of ADR Generally (Aug. 2010), available at www.aminz.org.nz (noting distinction between arbitration, as a "more or less formal adjudication," where a court may exercise "a degree of supervision," and an expert determination with "no such safeguards," and the expert deciding "solely by the use of his eyes, his knowledge and his skill") (quotation omitted); see also Frydman v. Cosmair, Inc., 1995 WL 404841 (S.D.N.Y. July 6, 1995) (rejecting enforcement of "award" in French price appraisal, where procedure, rather than resolving a dispute, provided missing term in contract).

51. Such a process is commonly used to resolve questions of business valuation, profit shares and capital account balances. See Daniel Djanogly, Expert Determination: An Attractive ADR Solution For Business Disputes, Oct. 11, 2016, available at www.linkedin.com.

52. See N.Y. Civ. Prac. Law & Rules Sec. 7601; see also Steven H. Reisberg, What Is Expert Determination? The Secret Alternative To Arbitration, Dec. 13, 2013, available at www. NYLJ.com (New York provision "was enacted in order to provide for judicial enforcement of expert determinations as separate and distinct from arbitration;" in an expert determination, "there are very significant differences in procedure," including the fact that "procedural restrictions do not automatically apply" in an expert determination).

53. At the domestic level, an arbitration award can easily be turned into a court judgment, making collection on the award a less difficult process. See Federal Arbitration Act, Section 9. At the international level, one of the principal benefits of an arbitration award is broad enforceability, by virtue of multilateral treaties, such as the New York Arbitration Convention. See Marcin Tustin, Do Awards From Expert Determination And Other Private Summary Dispute Resolution Mechanisms Fall Within The New York Arbitration Convention? (2013), available at www.nysbar.com/blogs.

54. See, e.g., AAA Commercial Rules, R-48 (provision for "consent award" if parties settle their dispute during the course of arbitration).

55. See generally John Kendall, Expert Determination, Introduction (3rd ed. 2001) (noting the "infinitely flexible" nature of expert determination processes). ■

COMMISSION ON ARBITRATION AND ADR | LEADING DISPUTE RESOLUTION WORLDWIDE

ICC COMMISSION REPORT

MANAGING E-DOCUMENT PRODUCTION

ICC INTERNATIONAL CHAMBER OF COMMERCE

The views and recommendations contained in this publication originate from a Task Force created within ICC's Commission on Arbitration and ADR. They should not be thought to represent views and recommendations of the ICC International Court of Arbitration, nor are they in any way binding on the International Court of Arbitration.

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Contents

Techniques for Managing Electronic Document Production When it is Permitted or Required in International Arbitration

Techniques for Managing Electronic Document Production When it is Permitted or Required in International Arbitration

Report of the ICC Commission on Arbitration and ADR Task Force on the Production of Electronic Documents in International Arbitration

There is no automatic duty to disclose documents, or right to request or obtain document production, in international arbitration, and the advent of electronic documents should not lead to any expansion of the traditional and prevailing approach to document production. Thus, requests for the production of electronic documents, like requests for the production of paper documents—to the extent they are deemed necessary and appropriate in any given arbitration—should remain limited, tailored to the specific circumstances of the case and subject to the general document production principles of specificity, relevance, materiality and proportionality. Without endorsing any particular practice or scope of document production, this Report and the accompanying Appendices identify several techniques that arbitrators and parties may wish to consider using in order to manage, in a fair and efficient manner, any issues that may arise when production of electronic documents is permitted or required and, importantly, to ensure that international arbitration does not fall prey to the inefficiencies of electronic document production that have plagued litigation in certain national court jurisdictions like the United States.

1. INTRODUCTION

1.1 Mindful of the need constantly to monitor the effectiveness of international arbitration in delivering fair and efficient dispute resolution, the ICC Commission on Arbitration (as it was then known) constituted a Task Force on the Production of Electronic Documents in International Arbitration. The Task Force was co-chaired by Loretta Malintoppi and Robert Smit and comprised international arbitration users, practitioners, academics and technical experts from around the world. The Task Force analysed the issues raised by the production of electronic documents in international arbitration and prepared this Report with the aim of providing information of practical utility to parties and arbitrators who may be confronted with those issues.

1.2 A characteristic of international business disputes is the importance of documentary evidence. With the advent of the electronic age, communications and other information that used to be recorded in paper documents are now often created and stored in electronic form ("electronic documents"). Accordingly, much of the documentary evidence now produced in business disputes consists of electronic documents. The move from paper to electronic documentation has been accompanied by an exponential increase in the volume of material that is recorded in a permanent fashion.

1.3 Documentary evidence may be introduced into dispute resolution proceedings in broadly two ways. First, a party will typically submit documentary evidence in support of its own case. Secondly, depending on the procedural framework under which the dispute is being resolved, a party may also be able to obtain the production of such evidence in the possession or control of its opponent. The scope and efficiency of any document production process can affect the efficiency of the entire proceedings.

1.4 The extent to which a party to court litigation may obtain documents in the possession or control of its opponent differs considerably between jurisdictions. In some jurisdictions in which there is a general right to disclosure or discovery of documentary evidence in the hands of an opponent, the advent of electronic documents, and the increase in the volume of material, have given rise to challenges to the efficiency of the litigation process. This has been well documented in the United States, where document discovery is particularly wide-ranging. Other common law jurisdictions which provide for the disclosure of documents as a standard feature of litigation have also had to consider how to adapt those processes to the advent of electronic documents, and have sought to avoid the problems experienced in the United States. Conversely, most civil law jurisdictions do not consider extensive production of documents by the opponent to be a necessary or even appropriate tool to further procedural

fairness. Indeed, for cultural, historic and constitutional reasons, there is a deeply-seated resistance in many such jurisdictions to requiring a party to legal proceedings to assist the other side in gathering information that might be used against the producing party in court.

1.5 As noted above, in international arbitration, each party is responsible for submitting the documentary evidence on which it intends to rely to support its case and there is no automatic right to the production of documentary evidence in the possession or control of another party. Moreover, when a party is ordered to produce documents, the prevailing practice is that the scope of such production should be limited to specifically identified documents or to narrow and specific categories of relevant and material documents. Accordingly, the move from paper to electronic documentation in international arbitration has not generally occasioned the same difficulties as have been experienced in court litigation in those jurisdictions in which broad document discovery or disclosure is a standard feature.

2. EXECUTIVE SUMMARY

2.1 Under the ICC Rules of Arbitration (the "ICC Rules") arbitral tribunals have the power to decide whether or not to order the production of documentary evidence, including electronic documents, and to manage any such process in a fair and efficient way. In addition, the framework for the production of documents set out in the IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules of Evidence") is a valuable resource to help parties and arbitrators deal with the issue of document production, and expressly encompasses the production of electronic documents. As reflected in the IBA Rules of Evidence, the same principles of specificity, relevance, materiality and proportionality apply to the production of both paper and electronic documents.

2.2 It does not seem necessary to prescribe specific "rules" or "guidelines" applicable specifically to the production of electronic documents. Furthermore, it may be undesirable to do so to the extent that such rules or guidelines may compromise the parties' and arbitrators' flexibility to address issues in light of the particular circumstances of each case. In particular, the production of electronic documents, if any, should not jeopardize the efficient and cost-effective use of arbitration and thus its attractiveness as a method of dispute resolution.

2.3 Typical practice in international arbitration, and a widely-shared concern of users, is that requests for the production of documents by an opponent, when available at all, should be limited to specifically identified documents or to narrow and specific categories of relevant and material documents. Moreover, an arbitral tribunal should also consider the proportionality of ordering any requested production: it should weigh the relevance and materiality of a document or category of documents against the likely burden of searching for, retrieving, reviewing and producing it.

2.4 In deciding whether to allow, and in managing, the production of electronic documents, parties and arbitrators should take account of particular features of such documents that give rise to additional or different practical considerations from those that arise in connection with paper documents. In so doing, it is essential not to discourage businesses from having recourse to arbitration by proposing approaches that are likely to increase the expense of the proceedings and the disruption to their business activities.

2.5 This Report describes the key features of electronic documents and how they may be managed, which is facilitated by a co-operative approach by the parties, by a focus on avoiding steps that will occasion unnecessary cost or delay, and by active case management by the arbitral tribunal. However, the advent of electronic documents should not lead to any expansion of the traditional and prevailing approach to document production, if any, in arbitration. Requests for the production of electronic documents, like requests for the production of paper documents, to the extent that they are necessary at all, should be limited and tailored to the specific circumstances of the case. The key to maintaining the efficiency of international arbitration, and avoiding the problems occasioned in some jurisdictions by the advent of electronic documents, is for parties and arbitral tribunals to continue to adhere to these general principles of specificity, relevance, materiality and proportionality.

2.6 Two Appendices accompany this Report. Appendix I provides a Primer—for the benefit of parties and arbitrators less knowledgeable about information technology—which contains a description of some of the differences between paper documents and electronic documents and explains how the latter are created, stored, searched, transmitted and deleted. This basic information about electronic documents is intended to assist parties and arbitrators in dealing with some of the practical considerations that may arise when addressing questions relating to electronic documents and to help them manage any production of such documents in a fair and efficient manner. Appendix II contains a Glossary of relevant terms relating to electronic documents.

3. EXISTING INTERNATIONAL ARBITRATION RULES

A. ICC Rules

3.1 As noted in the preface to the ICC Commission on Arbitration and ADR's Report on "Techniques for Controlling Time and Costs in Arbitration" ("Controlling Time and Costs"), a salient characteristic of arbitration is that "rules of arbitration themselves present a framework for arbitration proceedings but rarely set out detailed procedures for the conduct of the arbitration". This facilitates the flexibility of arbitration as a method of dispute resolution, and allows the parties and (where they cannot agree) the tribunal to decide the specific procedures for a particular dispute.

3.2 This general characteristic of arbitration applies equally to the production of documents (whether paper or electronic). The ICC Rules contain no specific provision governing the production of documents, and ICC tribunals enjoy wide discretion in managing the proceedings under the Rules. The most pertinent provisions are Articles 19, 22 and 25 of the ICC Rules in force as of 1 January 2012.

(a) Under Article 19, arbitral proceedings are governed by the ICC Rules and, where the Rules are silent, by any rules which the parties or, failing party agreement, the arbitral tribunal shall deem appropriate. Article 19 also explicitly states that parties and arbitrators need not apply the rules of procedure of any national law, subject to the need to take account of any applicable mandatory arbitral procedures prescribed by the national arbitration law in force at the place of arbitration.

(b) Article 22(4) of the Rules requires that the arbitral tribunal "shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case".

(c) Article 25(1) further provides that the arbitral tribunal "shall proceed within as short a time as possible to establish the facts of the case by all appropriate means".

(d) Article 25(5) provides that "[a]t any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence".

3.3 Accordingly, under the ICC Rules, issues such as whether and how much production of either paper or electronic documents will occur—i.e. whether document production is an appropriate means to establish the facts of the case—are left up to the parties and the arbitrators, provided that the parties are treated fairly and impartially and that each party has a reasonable opportunity to present its case.

3.4 Importantly, and unlike the practice before courts in some jurisdictions, under the ICC Rules there is no general duty on a party to disclose paper or electronic documents to its opponent; nor is there any automatic right for a party to request such documents from an opponent. Furthermore, and again unlike the case in litigation before some courts, a party is not placed under a duty to preserve paper or electronic documents, or other evidence, for the purposes of the arbitration. These features of the ICC Rules reflect the general practice in international arbitration.

B. IBA Rules of Evidence

3.5 The IBA Rules of Evidence, originally adopted in 1999 and revised by a resolution of the IBA Council of 29 May 2010, are intended to provide a resource to parties and to arbitrators for the efficient, economical and fair taking of evidence in international arbitration, particularly when the parties come from different legal backgrounds and cultures. They provide a detailed framework for addressing the production of documents in arbitration, including the production of electronic documents. While the IBA Rules of Evidence are not themselves binding, parties and/or arbitral tribunals may agree to adopt them, or use them as guidelines, in their entirety or in part, for the conduct of arbitral proceedings.

3.6 The IBA Rules of Evidence have always applied to both paper and electronic documents: "document", as defined in the 1999 version of these rules, meant "a writing of any kind" and expressly included writing recorded by "electronic means". The 2010 version of the IBA Rules of Evidence contains a new definition of a document which also encompasses electronic documents: "a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means". Accordingly, the principles governing the production of paper documents under the IBA Rules of Evidence apply equally to the production of electronic documents in order to ensure an efficient and economical document production process.

3.7 The IBA Rules of Evidence provide for:

(a) The production by each party, within the time ordered by the arbitral tribunal, of all documents on which it intends to rely to support its case (Article 3(1)); and

(b) A party's right to request, and the arbitral tribunal's authority to order, the production of either a specifically identified document, or "a narrow and specific requested category of Documents that are reasonably believed to exist", provided that they are not in the possession, custody and control of the requesting party, the "Documents requested are relevant to the case and material to its outcome", and production is not objectionable under Article 9(2) (Articles 3(3) and 3(7)). Article 9(2) instructs the arbitral tribunal to "exclude from evidence or production any Document" on relevance, materiality, burden, privilege, fairness and other listed grounds, such as compelling grounds of commercial confidentiality.

3.8 The IBA Rules of Evidence leave it to parties and arbitrators to determine what documents are "relevant and material" in an individual case, and, assuming that document production takes place at all, when it takes place—i.e. before, concurrent with or after the parties submit written memorials.

3.9 The IBA Rules of Evidence also leave it to the parties and arbitrators in individual cases to determine what constitutes a "narrow and specific" category of documents for the purpose of those document requests that are not limited to specific documents. With respect to electronic documents, Article 3(3) of the IBA Rules of Evidence adds only that: "In the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner". This provision was inserted as part of the 2010 revision of the rules.

3.10 Article 9(5) of the IBA Rules of Evidence provides that an arbitral tribunal may infer that a document would have been adverse to the interests of a party that, without satisfactory explanation, fails to produce it after being ordered to so. However, no provision is made for a duty to preserve documents (including electronic documents) or other evidence. Amongst the grounds for refusing production of a document, Article 9(2)(d) lists the "loss or destruction of the Document that has been shown with reasonable likelihood to have occurred".

C. General principles

3.11 As noted above, the IBA Rules of Evidence apply to both paper and electronic documents, and subject requests for the production of documents in both categories to the same principles. This reflects prevailing practice in international arbitration. There is and there should be no difference in principle between the production of paper documents and the production of electronic documents in arbitration. The mere fact that relevant and material information is or may be stored electronically rather than on paper (or may be stored in both formats) is not, in itself, a reason to grant or deny production of that information. The move from predominantly paper-based to predominantly electronic storage of information within businesses therefore requires no general reconsideration of the principles of document production in international arbitration. Application, however, of the principle of proportionality—i.e. that the burdens of production be proportionate to, and not outweigh, the likely benefits of production—may dictate different conclusions in particular cases with respect to the production of paper documents and electronic documents in light of practical challenges and opportunities presented by the way electronic documents are created, stored, searched, retrieved and produced. Arbitrators have sufficient powers under the ICC Rules and/or IBA Rules of Evidence to address those practical considerations and manage the production of either kind of document in a fair and efficient manner.

3.12 In determining the scope and means of document production (whether it concerns paper or electronic documents), parties and arbitrators should be guided by the basic principles of specificity, relevance, materiality and proportionality. First, only adequately identified, relevant and material documents (whether electronic or paper documents) should be subject to production. If the arbitrators are satisfied that the document or category of documents sought is sufficiently identified, relevant and material and all other applicable criteria for the production of documents are met (in particular, pursuant to the IBA Rules of Evidence or generally accepted "best practices"), they should then consider whether the requested production would be likely to impose an unreasonable burden on the producing party.

3.13 This process requires arbitrators to consider the balance between the likely benefits of production to parties and arbitrators and the potential costs, delay and other burdens that the production exercise may entail. It requires consideration of the specific circumstances of the case at hand. Parties and arbitral tribunals therefore require a degree of flexibility in this respect. The ICC Rules (as supplemented from time to time in the practice of arbitral tribunals by the IBA Rules of Evidence or generally accepted best practices) recognize as much and provide for an appropriate degree of flexibility. This might be lost if detailed new rules or guidelines were introduced.

4. CHARACTERISTICS OF ELECTRONIC DOCUMENTS

4.1 In applying the general principles discussed above, parties and arbitral tribunals need to take account of a number of features of electronic documents which can give rise to practical considerations different from or additional to those that arise in relation to paper documents. This section sets out the key features of electronic documents and the practical considerations.

A. Increased volume of material

4.2 Computers have made it possible for individuals and businesses to generate, accumulate and disseminate vastly greater quantities of information in electronic form than was the case when the principal means of written communication and record-keeping was in a physical, paper format. The simplicity and ubiquity of email invites voluminous, written records of information that previously would not have been recorded or communicated in written form.

4.3 The following practical considerations arise:

(a) Emails, and electronic documents generally, may provide additional contemporaneous written evidence which may assist a tribunal in identifying the facts of a dispute and reduce the extent to which it must rely on the recollection of witnesses.

(b) However, if a party is placed under an obligation to produce documents framed in broad terms, the retrieval, review and production of electronic documents in accordance with that obligation may give rise to considerable expense and delay. This has, indeed, been the experience in litigation in the United States, where parties are placed under particularly wide-ranging document discovery obligations.

(c) The volume of electronic documents may also mean that searching for a particular document held electronically in response to a document request—to the extent such document requests are allowed—is a more extensive process than it might have been when documents were predominantly paper-based.

(d) While parties of course review their own documents to some extent to prepare for or during the course of an arbitration, given the vast scope of and numerous sources for potential electronic documents, they often do not review the entire universe of documents that may have some relevance to the arbitration. Thus, such internal review typically does not suffice in case of extensive disclosure requests by the opposing party. As a consequence, the often costly and disruptive consequences of broad document requests cannot necessarily be avoided merely because a party has already undertaken some internal review of its own documents.

B. Dispersal

4.4 Electronic documents relating to a transaction or event may be dispersed more widely than the relevant paper documents. Whereas paper documents relating to a transaction or event may typically be stored in a limited number of physical locations (e.g. a number of files, boxes, drawers, a warehouse), electronic documents may reside simultaneously in several different locations (mainframe computers, network servers, personal desktop or laptop computers, BlackBerries or other hand-held devices, electronic back-up or disaster recovery systems).

4.5 The following practical considerations arise:

(a) The dispersal of electronic documents may lead to the retention of evidence that is relevant and material to a dispute when physical paper documents are no longer available.

(b) However, there may be a greater number of potential places to search for electronic documents in response to a document request than is the case for paper documents. This may increase the burden of any search ordered by an arbitral tribunal. It also requires the requesting party to show that the documents requested are not in its own possession or under its own control or at least not reasonably accessible.

(c) Electronic documents are often more accessible in some locations than in others. Electronic documents that are in everyday use will typically be readily accessible, although potentially voluminous. Electronic documents held for back-up or disaster recovery purposes will often be relatively inaccessible, and retrieving data from such a source may require the restoration of a large volume of material which may then have to be processed and searched. Each party's system is different; for example, the accessibility of archived electronic documents may vary depending on how well organized a party's archive is. The time and cost of retrieving electronic documents may vary considerably depending on how accessible they are.

(d) There may be significant duplication of electronic documents across a party's computer system. Several electronic copies of the same document may exist in various repositories within a party's system or network.

C. Durability and fragility

4.6 Electronic documents are both more durable and more fragile than paper documents.

(a) Even after they are "deleted" and even if no copies exist, emails and other electronic documents may nevertheless continue to exist and remain potentially recoverable. (A "deleted" electronic document is often simply moved to another location in a computer system, the space which it occupied is designated as available for storage of new data, and the document may only be lost as and when the system overwrites it with new data.) Such "deleted" material may not, however, be easily accessible and may be incomplete (i.e. an electronic document may only be recoverable in part). Recovery of such electronic documents may only be possible with the assistance of forensic specialists and attendant costs.

(b) Unlike paper documents, electronic documents are easily edited, modified or over-written, sometimes automatically without any human intervention (e.g. as with "auto-delete" functions). Everyday use of a system (e.g. accessing, copying or printing an electronic document) may result in changes to electronic documents (particularly metadata, as to which, see below). As a result, electronic documents are more vulnerable to being changed inadvertently or for improper purposes. Preserving an electronic document in the precise state it is in on a given date will typically require active steps, such as taking copies or forensically "imaging" it. Forensically preserving any large volume of electronic documents will typically involve significant costs and cause disruption to a party's ongoing business.

D. Use of hardware and software

4.7 Computer hardware and software is used to create, read and render an electronic document in a form that is viewable and printable.

(a) Most of the electronic documents created by a business are likely to be created and stored using well-known commercially available and reasonably standard hardware and software, to which other parties, counsel and arbitrators also have access.

(b) However, many electronic documents may not be readily accessible by others. They may be created and/or stored on specialized or even bespoke or obsolete hardware or software. Another party to a dispute, counsel and/or arbitrators may not have access to the hardware or software needed to view or print such electronic documents. A similar situation may arise with respect to documents created with standard commercial software that is not or not yet in use by that party or person (such as a different email system or a new version of a standard software product). It may be possible to convert such documents into another, more accessible format. For example, many of the major software providers enable new software releases to be "backward compatible" (i.e. able to access documents produced on earlier versions of the software) to a point. However, the time and costs involved to undertake such a conversion can vary depending on the nature of the electronic documents in question.

E. Metadata

4.8 "Metadata" is, literally, data about (electronically stored) data. Documents or files created on a computer will typically contain embedded information that is not readily apparent on the screen view of a file or in a printed version of the document or file. This secondary "metadata" is information about the electronic document or file that describes its characteristics, origins, or usage. There are three basic categories of metadata:

(i) "Substantive" (or "application") metadata is created by the software used to create the document, and reflects (among other things) editing changes or comments made to the document over time. Substantive metadata is embedded in the document it describes—and therefore remains with, and arguably part of, the document when it is copied, moved or produced—and may be useful in showing the genesis of a document and the history of proposed and/or accepted revisions to the document.

(ii) "Systems" metadata reflects automatically generated information about the creation or revision of a document, such as the document's author or the date and time of its creation, modification or delivery. Systems metadata is not necessarily embedded in the document but can be generated by the computer system on which the document was created, and can be relevant if a document's authenticity is at issue or there are issues as to who received a document (including blind copy recipients that do not appear on the face of a document) or when it was received.

(iii) "Embedded" metadata is inputted into a document by its creator or users but cannot be seen in the document's display, and commonly includes the formulas used to create spreadsheets, hidden columns, references, fields or linked files. Embedded metadata can be critical to understanding complex spreadsheets (such as those often used, for example, in construction projects) which on their face do not explain the mathematical formulas underlying or relating to the various rows or columns of information that are displayed on a computer screen or printed version of the spreadsheet.

4.9 "Visible" metadata should be distinguished from "hidden" metadata. Visible metadata is commonly displayed on screen and/or in print-outs and hidden metadata is not. In the case of an email, strictly speaking, all its constituent fields are metadata. Examples of visible metadata include the to/from/cc/date/title fields. Examples of hidden metadata would include the route the email took over the internet and the IP address from which it was sent. Most of the metadata mentioned in sub-paragraphs (i) to (iii) above is hidden metadata.

4.10 The following practical considerations arise:

(a) Visible metadata (e.g. the visible fields of an email mentioned above) and embedded metadata (e.g. the formulas used in a spreadsheet) will often be necessary to understand the data in an electronic document.

(b) Where there is a suspicion of fraud, forgery or deliberate tampering with evidence, hidden metadata may be valuable evidence. However, in most cases hidden metadata will not be relevant or material to the issues in dispute.

(c) Metadata is particularly vulnerable to inadvertent modification. Metadata may also be lost if an electronic document is converted from one format to another. It may be possible to preserve metadata forensically, but at a cost.

(d) If an electronic document is produced in "native" format (i.e. the format in which it was originally created), or something close to native format (e.g. a format created by review software which approximates the native format but allows it to be searched and handled more easily), the substantive and embedded metadata will normally be included in it. Typically, a document produced in such a format will be searchable by the receiving party to the same extent as it was by the producing party (provided the receiving party has similar software available to it). It may be possible to remove substantive or embedded metadata from an electronic "document", either by using software which strips out (some of)

the metadata, or by converting the document into another format. Doing so is likely to incur a cost for the producing party, and (depending on the alternative format into which the document is converted) may reduce the searchability of the document in the hands of the receiving party, thus increasing the costs of review for the receiving party.

(e) In connection with US-style e-discovery, the review of hidden metadata involves significant attendant costs. Although millions of pages of documents are frequently produced in a US commercial lawsuit, the number of documents containing hidden metadata material to the case is typically very small. To avoid the costs of review, parties in US litigation frequently agree not to produce most of their documents in their native format, but instead to produce them in a format that allows the documents to be searched but which does not include hidden metadata, and which therefore avoids the review of a significant volume of irrelevant hidden metadata by lawyers. Other jurisdictions that require disclosure of documents in litigation have taken a different approach to this. For example, in England and Wales, the presumption is that documents should be produced in native or near-native format, but that the hidden metadata (other than the date of creation of the document) is likely to be irrelevant and therefore need not be preserved or reviewed.

F. Electronic search and review tools and techniques

4.11 Computer technology offers a number of tools that may assist the process of searching for, organizing and producing electronic documents. Electronic tools may allow for the automatic searching and ordering of volumes of material for documents which satisfy certain parameters, based for example on key words, date ranges, file types, custodian or location on a computer system. Electronic tools may also allow the automatic de-duplication of documents.

4.12 The following practical considerations arise:

(a) A party may have access to some electronic tools as part of its computer system which it uses as part of its everyday business, and which it and counsel may use in identifying evidence in support of its case or to respond to a document request. However, the sophistication of such tools may vary widely. Specialist tools are available, but at a cost. Some counsel in international arbitration may have access to such specialist tools. In other cases, external experts would need to be engaged at additional cost. The most sophisticated specialist tools may be expected to be needed only to respond to broad document requests, of the kind that is generally inappropriate in international arbitration.

(b) All electronic search tools have their limitations. For example, date restrictions may be easier to implement in relation to emails than for other types of electronic documents. The effectiveness of key word searching depends upon the ability to identify search terms that are likely to feature in relevant material and unlikely to feature in irrelevant material. Where electronic documents are stored in multiple languages, care should be taken to identify appropriate key words in each language.

(c) Electronic tools may assist in identifying electronic documents that are potentially responsive to a document request. However, they can rarely, if ever, replace a manual review by counsel of at least some documents. The related costs have to be considered when such a document production request is submitted.

(d) The technique of data sampling entails the retrieval, review and production of only a portion of the repositories potentially containing relevant and material documents in order to assess whether the benefits of further review and production justify the costs and burdens of such review and production.

5. TECHNIQUES FOR MANAGING PRODUCTION OF ELECTRONIC DOCUMENTS, IF ANY

5.1 If international arbitration is to remain an attractive method of dispute resolution, it must avoid the problems to which electronic documents have given rise in court litigation in some jurisdictions. The production of electronic documents does not usually give use to particular difficulties in international arbitration, due (among other reasons) to the disciplined scope of document production in most international arbitrations and the arbitrators' management of the arbitral process. If and to the extent electronic document production issues arise, however, this section discusses techniques and approaches that parties and tribunals may adopt to address those issues in a fair and efficient manner. Nothing in this Report, however, should be interpreted as an endorsement of any particular technique, approach or practice, which remain the exclusive province of parties and arbitrators to decide in light of the particular circumstances of each case.

5.2 Parties are generally free to produce whatever evidence they wish to rely upon. Although some issues concerning the production of electronic documents (such as the format in which a document is produced) apply equally to documents on which a party relies and to requests for documents, most of the issues considered in this section relate only to the latter.

*A. Electronic document production in context

5.3 The production of electronic documents is simply an aspect of document production. Since most documents today are created electronically, and many are stored electronically, almost every time a tribunal may be called upon to consider the production of documentary evidence, it will be considering the production of electronic documents.

5.4 Document production is but one of many procedural matters to be addressed by arbitrators as part of their task of managing the arbitral proceedings. As a general rule, parties and arbitrators should heed the two fundamental principles set forth in the introduction to Controlling Time and Costs, namely (i) that they should, wherever possible, make a conscious and deliberate choice early in the proceedings about the specific procedures suitable for the case, and (ii) that the arbitral tribunal should work proactively with the parties to manage the procedure from the start.

In addition, further guidance may be found in Appendix IV to the 2012 ICC Rules, which include case management techniques available to arbitral tribunals and parties to manage document production, paper and electronic alike.

5.5 In light of these principles, parties and arbitral tribunals may consider taking the following steps:

(a) Parties or tribunals may consider expressly adopting the IBA Rules of Evidence, either in whole or in part and either directly or by way of general guidance, to govern the production of documents, including electronic documents, in the arbitration. Logical junctures at which to consider this include at the time the arbitration agreement is drafted, at the time of adoption of the Terms of Reference, and/or in an early procedural order.

(b) Tribunals should encourage the parties to consider document production issues (including the production of electronic documents) as early as possible in the proceedings. Controlling Time and Costs and the ICC Rules recommend that an early case-management conference be convened, either at the time the Terms of Reference are finalized or (if later) once the parties have set out their cases in sufficient detail. The production of documents (including electronic documents) may be included on the agenda for such a conference.

(c) The parties and tribunal should consider whether any questions relating to document production can be resolved at the case-management conference. For example, it may be possible to devise a system for the organization of documents, agree on the format in which electronic documents are to be produced (either by a party in support of its own case or in response to document requests, if there are to be any), and/or agree on the time at which each party is to produce the documents on which it relies. Depending upon the extent to which the issues in dispute are sufficiently clear, it may also be possible at the case-management conference to consider issues of principle relating to document requests, such as whether there are to be any document requests at all and, if so, what procedure is to be followed (see Controlling Time and Costs and Appendix IV to the ICC Rules).

(d) Tribunals should be wary of imposing on parties detailed technical requirements relating to the production of electronic documents, and should only do so after obtaining a clear understanding of the time and costs involved in complying with those requirements. Tribunals should encourage parties to reach agreement regarding such requirements wherever possible, but should be willing to engage with the technical detail in order to resolve disputes. Parties should ensure that they have a clear understanding of the implications of technical requirements (and obtain advice if necessary) before agreeing to them. Parties and tribunals should demonstrate flexibility and be willing to reconsider technical requirements if necessary as an arbitration progresses.

B. Scope of production

5.6 The advent of electronic documents should not lead to any expansion of the traditional and prevailing approach to document production in arbitration. Under the IBA Rules of Evidence, for example, requests for the production of electronic documents, like requests for the production of paper documents, should remain limited to specific documents or narrow categories of documents relevant and material to the issues in dispute in the arbitration. The primary solution to the question of how to avoid the problems caused by the advent of electronic documents in some jurisdictions lies in parties and tribunals adhering to the existing prevailing practice in international arbitration as to the appropriate scope of document production. Parties and arbitrators should bear in mind the following general considerations:

(a) There is no automatic right in international arbitration to obtain documents from an opponent. Parties and tribunals should consider whether document requests are necessary or desirable in the context of the case at hand.

(b) Where document requests are allowed, parties and arbitrators should ensure that they are narrowly drawn in the manner envisaged in the IBA Rules of Evidence, that only documents relevant and material to the outcome of the case are requested and ordered to be produced, and that the benefits and burdens of production are properly assessed before production is ordered. "Fishing expeditions" should be avoided.

(c) Most of the burden, in terms of time and cost, of responding to a document request is often associated with searching for the responsive document or documents (including retrieving electronic documents from a party's computer system and reviewing them for responsiveness and privilege). Parties and tribunals should therefore consider not only the volume of documents that a responding party is being asked to produce, but also, and more importantly, the process it may be expected to undertake to locate and identify those documents if they are not readily available.

(d) Tribunals should avoid broad, US-style discovery, which is inappropriate in international arbitration, unless the parties have specifically agreed that they wish to adopt such an approach.

(e) Finally, parties may view and address electronic documents—their production, dissemination and storage—in very different ways, depending on various factors, including their legal culture, the frequency with which they take part in litigation or arbitration, regulatory requirements to which they are subject, and their size, resources and relative IT sophistication. For example, a party which regularly conducts litigation under rules which impose broad obligations to produce documents may have standard procedures in place designed to facilitate this, whereas a party that does not have such experience is unlikely to have such resources. In some cases, this may mean that a document production requirement which, on its face, applies equally to all parties to an arbitration is in practice more difficult for one party to comply with than for another party. At the same time, however, differences between the parties' relative sophistication in such matters should not be used to justify unfairly disproportionate obligations. Arbitrators should consider whether such factors affect the reasonableness of the proposed scope of production in a particular case and ensure that document production requirements are fair to all parties.

5.7 In implementing these general considerations, parties and tribunals should consider the following practical steps and issues to maintain the fairness and efficiency of the proceedings:

(i) Timing, number and focus of requests

5.8 The scope of document (including electronic document) production may be restricted by limiting the number of document requests a party may make and by permitting requests only in respect of documents relevant and material to particular issues in dispute. Delaying the submission of document requests until after the parties have submitted their memorials and the documents on which they wish to rely may facilitate more focused document requests. Requests can be confined to specific factual issues that are raised in the memorials and on which there are gaps in the documentary evidence already submitted. In general, in view of the requirements of relevance, materiality and proportionality, a tribunal will usually be in a better position to make an informed decision on requests for document production after at least a first round of submissions on the merits.

(ii) Specificity of requests

5.9 Generally speaking, the broader the scope of document requests allowed, the greater will be the cost and burden of production. Document requests should therefore identify, with the greatest specificity practicable, the specific document or specific and narrow category of documents sought. As envisaged in Article 3(3) of the IBA Rules of Evidence, the specificity of a request relating to electronic documents may be enhanced by identifying and/or limiting the scope of what is sought or ordered by reference to various characteristics of the electronic documents requested.

(a) The starting point should be to limit a document request by reference to what is sought (e.g. an email, a report, minutes of a meeting). Requests for specifically identified documents, whether paper or electronic, will ordinarily entail the least burden on the producing party.

(b) Where a specific and narrow category of documents is requested, limits may also be imposed by reference to a limited number of specific custodians who are expected to be in possession of the electronic documents in question, the sources of electronic documents to be reviewed, date restrictions and, if appropriate, the use of specific search terms to assist in locating relevant and material documents.

(c) As the party responding to a document request will typically be more familiar with its internal IT infrastructure and would therefore be in a better position to decide where and how to search for responsive electronic documents, it may be appropriate for the responding party to identify first the parameters of any search for responsive documents it intends to conduct, and then provide an opportunity for the requesting party to comment on the proposed parameters.

(iii) Accessibility of sources

5.10 The relevance and materiality of the electronic documents requested should be carefully weighed against the burden on the requested party of searching for, retrieving, reviewing and producing them. An important factor in this balance is the relative accessibility of the potential sources of the electronic documents requested. Electronic documents are most easily accessed from a party's office, personal computers, network servers and other computers on databases that are in active use during the ordinary course of a party's business operations. They are less readily accessible from removable storage media such as CDs, DVDs or USB drives, Blackberries or Palm Pilots, home office computers or off-site internet storage, which are not sources accessed in the ordinary course of a party's business or may simply be duplicative of other more readily accessible sources. Electronic documents are least accessible when they have been deleted and/or are located only on off-site or back-up storage data (such as back-up tapes) not used in a party's ordinary course of business.

(a) A tribunal should avoid ordering a party to search a less accessible source if a copy of a relevant and material electronic document is likely to be available from a more easily accessible source. A party should consider structuring any search for documents (whether for documents on which it wishes to rely, or in response to a document request) by searching the most accessible sources first, and only searching less accessible sources if it does not find the documents sought and the burden of extending the search is proportionate to the likely evidential value of the documents if they are found.

(b) In most cases, it should be sufficient to limit searches to sources of electronic documents used by a party in its ordinary business operations. If a document is likely only to be available from a less accessible source, a tribunal should consider carefully whether its likely relevance and materiality justify the inconvenience, cost and potential delay involved in retrieving it. Tribunals should ordinarily not order the production of electronic documents in back-up, deleted or archived files that are not readily accessible, unless the requesting party establishes a degree of relevance and materiality that outweighs the burden and costs involved.

(c) Article 3(12)(c) of the IBA Rules of Evidence provides that a party is not obligated to produce multiple copies of documents that are essentially identical unless the tribunal decides otherwise. This presumption against requiring production of multiple copies contributes to the efficiency of the process. A tribunal should generally avoid ordering a party to search for duplicate copies of a document in more than one location, even if they are all easily accessible. An exception to this might occur where identifying the location of copies of a document is itself of evidentiary value (for example, because it identifies which individuals had access to the document and this is of material importance in the arbitration).

(iv) Metadata

5.11 As explained above, whereas visible metadata will typically be required to understand an electronic document that is being produced, hidden metadata will usually be irrelevant to the dispute and it will therefore be unnecessary to produce them. Even where metadata is potentially relevant, the burdens of production may outweigh its potential evidentiary value. Tribunals should consider applying a presumption against requiring the production of hidden metadata associated with a document that is to be produced, unless the requesting party establishes a degree of relevance and materiality that outweighs the burden and costs involved.

5.12 Some of the relevant factors in addressing requests for production of hidden metadata, in addition to the general factors relevant to any document request, include: (a) the importance of the particular type of metadata requested to facilitating the parties' review, production and understanding of the documents to which the metadata relates; (b) the accessibility of the metadata sought; (c) the timing of the request for metadata; and (d) the ease and efficiency with which the metadata can be produced and used.

(v) Use of electronic tools and search methods

5.13 Parties should be encouraged to use technology where this can reduce the burden associated with document production, but parties and tribunals should be aware and take account of the limitations of and costs involved in using the available electronic tools. Computer technology enables parties to search large volumes of electronic documents for specific relevant words, names, subjects or phrases, which may pertain to the particular dispute concerned. This can be both more efficient and more accurate than human document review of paper documents. Although not all electronic documents are searchable in their native form, they may be convertible into a searchable format. However, the processes available to render electronic documents word-searchable may be expensive, and parties and tribunals will need to consider and weigh the extent to which such techniques are appropriate in the context of the circumstances of each individual case.

5.14 In addition to the use of simple key word searches—which risks either identifying too large a universe of responsive documents or missing relevant and material documents that do not include the key word—parties may consider using the ever-expanding array of more sophisticated search technologies (e.g. "Boolean"" searches, "fuzzy" searches, algebraic searches, probabilistic searches) designed to enhance the accuracy of electronic document searches. A manual review of at least some of the electronic documents identified by a key word or other automated search will invariably be required, but the volume of electronic documents that needs to be reviewed by the parties' lawyers should be much less than otherwise. This may, therefore, lead to a significant cost saving.

5.15 Key word searches can be used in different ways to enhance the efficiency of electronic document production. The requesting or responding party may choose, or be required to identify, with its request for production or response, search terms to be used to locate responsive relevant and material electronic documents. Absent objection, use of those search terms may be deemed to satisfy the responding party's obligation to search for and produce responsive electronic documents in good faith. It will often be desirable for the parties to agree on (or the tribunal to order) the relevant key words to be used before searches are undertaken, in order to avoid a search having to be repeated if there is a dispute about the adequacy of the search terms used. When electronic documents are stored in different languages, care should be taken to identify appropriate key words in each language.

5.16 Where relevant and material responsive information may potentially be located in several, or in voluminous, electronic document repositories, parties and arbitrators may wish to consider the technique of data sampling. Data sampling entails the retrieval, review and production of only a portion of the electronic document repositories potentially containing relevant and material information in order to assess whether the benefits of further review and production justify the cost and burden of such review and production. As with electronic document search terms, in appropriate

circumstances, a responding party may be deemed to have satisfied its good faith obligation to produce responsive electronic documents by conducting such data sampling.

5.17 The use of the foregoing electronic search tools should be limited to those particular cases involving a large volume of electronic documents, or different sources of electronic documents, in which the parties and arbitrators conclude that the benefits of such electronic searches outweigh their costs and burdens. In no event should the mere availability of those electronic search tools to search potentially large volumes of electronic documents justify inappropriately broad electronic document requests.

C. IT expertise

5.18 An understanding of a party's IT system will be important to the efficient management of any document production exercise. In most cases, a party's in-house IT staff is likely to be able to provide the necessary expertise to that party, in conjunction with counsel. In particularly complex or high-value disputes, a party may also seek advice from external experts.

5.19 In all but the most exceptional cases, parties, with the assistance of their advisers, should provide (and should be able to provide) the tribunal with sufficient information on their IT systems for the tribunal to manage the process. In the exceptional case, ICC tribunals have the authority to appoint their own IT expert under Article 25(4) of the ICC Rules. In deciding whether and how to appoint such an IT expert, tribunals should consider the guidelines for tribunal-appointed experts set forth in the report of the ICC Commission on Arbitration Task Force on Guidelines for ICC Expertise Proceedings entitled "Issues for Arbitrators to Consider Regarding Experts", published in the *ICC International Court of Arbitration Bulletin* Vol. 21 No. 1 (2010) 31. A tribunal-appointed IT expert, however, should be reserved for the rare case in light of the additional expense, delay and intrusion into the party's IT systems that a tribunal-appointed IT expert may entail.

D. Cost shifting

5.20 Normally, the production of both paper and e-documents, if ordered at all by a tribunal, should be contained and should not give rise to large volumes of documents produced and exchanged. In the rare and very exceptional cases where the volume of electronic documents to be searched and produced is large and/or review and production from less accessible sources of electronic documents is warranted, parties and arbitrators may wish to consider requests for electronic documents only on the condition that some or all of the costs of searching for, retrieving and/or producing those electronic documents is shifted from the responding party to the requesting party. The requesting party, for example, may be required either to (a) pay to the responding party the costs of extraordinary electronic document search and retrieval techniques, or of production in a particular electronic format, as such costs are incurred during or following the electronic document production process; (b) advance those costs to the responding party during the production process, subject to reallocation in the arbitration award in light of the results of the production process and/or the final outcome of the case; or (c) pay those costs once the arbitration award is rendered pursuant to the allocation of arbitration costs set forth in the award.

5.21 However, arbitrators should be mindful of a number of factors which may militate against cost shifting: (i) cost shifting does not reduce the overall cost of the arbitration; (ii) it may become a substitute for disciplined limitations on the scope of document production generally permitted in international arbitration; (iii) it does not give rise to the perceived ability of a party to "purchase" greater access to electronic document production than would otherwise be available; and (iv) it may become a tool for abuse between parties of unequal financial means.

5.22 More generally, arbitrators should be mindful that, like electronic discovery generally in the United States, the standards and practices of US courts with respect to the shifting of costs for the search and production of electronic documents are not generally relevant or appropriate in international arbitration due to the stark differences between US litigation and international arbitration practices with respect to document production and costs. In US litigation, the scope of document discovery is broad and parties ordinarily bear their own costs. In international arbitration, by contrast, the scope of document production is tailored and limited, and arbitrators (as under Article 37(4) of the ICC Rules) are empowered to allocate the costs of the arbitration (including the parties' reasonable attorney fees and other costs) between the parties and in the proportions the arbitrators deem appropriate. In allocating the arbitration costs of the parties, arbitrators may take account of the reasonableness with which a party has conducted the case as well as the outcome of the arbitration.

5.23 Cost shifting should therefore ordinarily be reserved for extraordinary circumstances and imposed only after a weighing of the relevant factors such as, for instance, the volume and accessibility of electronic documents to be reviewed, which party bears the burden of proof and persuasion in the case, the relative financial resources of the parties, and the amounts at stake in the arbitration.

E. Form of production

5.24 The form in which electronic documents are produced by a party in support of its case or in response to a document request may impact their utility to the other party and the arbitrators receiving the documents. Parties

and arbitrators should therefore address at an early stage of the proceedings the form in which electronic documents should be produced. As noted above, this may be done at the case-management conference.

5.25 Electronic documents generally should be produced in the most expeditious, cost-effective and efficient form appropriate in the circumstances.

(a) Parties and arbitral tribunals should note that requiring electronic documents to be converted into a particular format for production may increase costs (possibly significantly so), unless that format is carefully chosen. A producing party may incur conversion costs, only for the requesting party to incur further costs converting the documents into another format. For example, a producing party may incur costs upon converting electronic documents to paper form and filing such paper documents, only for the other party to then incur the additional and unnecessary cost of scanning the documents produced in paper form back into an electronic form with keyword-searchable or other electronic functionalities.

(b) Article 3(12)(b) of the IBA Rules of Evidence provide that, absent specific agreement by the parties or directions by the tribunal, documents in electronic form should be submitted or produced by the party that maintains them "in the form most convenient or economical to it that is reasonably usable by the recipients". This is helpful guidance. In order to avoid unnecessary discussions and potential disruption of the arbitration timetable, in case of doubt about accessibility, the producing party should discuss the format with the receiving party before production and endeavour to reach agreement about such format. In some cases, it may be sensible to convert the electronic documents to a searchable format which all parties and the tribunal are able to access. Conversion may result in the loss of metadata but, unless the lost metadata is likely to be relevant (e.g. visible metadata necessary to understand the document or, exceptionally, hidden metadata if there are doubts as to the authenticity of the document), this is likely to be acceptable, and may save time and costs if the parties otherwise would have reviewed that metadata. However, since the parties in any case should be discouraged from spending time and costs on reviewing irrelevant material, an alternative is for the parties to produce the documents in native format but not to review the hidden metadata, thus also avoiding conversion costs.

(c) Parties may also consider using a web-based repository to which both sides have access as a means of producing electronic documents.

5.26 If the receiving party objects to the producing party's proposed form of production, and the parties are unable to resolve the objection by agreement, arbitrators may consider requiring the receiving party to show that the need for an electronic document in the form it prefers outweighs the burden and cost of providing production in that form.

F. Privilege

5.27 As noted above, documents, including electronic documents, may be withheld from production in international arbitration on grounds of privilege.

5.28 Production of a document to which privilege attaches may amount, in certain jurisdictions, to an inadvertent waiver of that privilege. In cases in which a large volume of electronic documents must be searched and produced (perhaps using automated techniques) inadvertent waiver of privilege is a real concern for parties. The following techniques may be used in an effort to avoid this:

(a) *Privilege search term.* One technique is to apply appropriate search terms to the electronic documents identified in response to a document request, including for the surnames of known lawyers whose names may appear on emails or other documents associated with the gathered material, and for other key words that may appear on documents like "privileged" or "confidential". Documents containing these search terms may then be segregated from the larger set of responsive information and manually reviewed for any applicable privilege. Like all key-word searching, however, this has limitations: for example, many organizations have adopted the practice of incorporating "privileged" and "confidential" notations on all email communications, reducing the efficacy of such search terms.

(b) *"Claw-back"* agreements. Another technique is the use of "claw-back" agreements. A claw-back agreement provides ground rules in advance of production for each producing party to be able to retrieve inadvertently produced privileged documents without risk of waiver. A party may not feel the need to review all documents for privilege before it produces them if such a "claw back" agreement is made. However, the potential drawbacks of claw-back agreements include: (i) they may encourage swamping one's opponent with irrelevant documents, which is entirely inappropriate in international arbitration; (ii) they may not avoid the risk of waiver of privilege with respect to third parties in all jurisdictions; and (iii) they may not effectively protect the inadvertently produced privileged information since the receiving party will have seen the privileged material and may be able to take advantage of that information without actually using the document.

5.29 Use of these techniques should be reserved for extraordinary cases in light of the limited and tailored scope of document production generally available in international arbitration. Moreover, the availability of these techniques should not be used to justify an unduly broad scope of document production.

G. Preservation of and failure to produce electronic documents

5.30 As explained above, electronic documents (in particular, metadata) may easily be altered or destroyed inadvertently, for example by the operation of routine day-to-day computer network functions (including any "auto-delete" functions). Freezing, disabling or deactivating such functions may cause serious inconvenience to a party. In US litigation, procedures are often put in place to preserve and retrieve electronic documents forensically because the mere act of accessing or copying an electronic document will cause changes to be made to its metadata. This is an important factor which greatly contributes to the cost of discovery in US litigation.

5.31 As noted above, international arbitration operates under a very different regime. Tribunals should avoid importing from other systems notions with regard to the preservation of evidence that may give rise to unnecessary inconvenience or expense. While a party's intentional efforts to thwart disclosure of relevant and material evidence by destroying or altering an electronic document may warrant appropriate sanctions (such as an adverse inference contemplated by Article 9(5) of the IBA Rules of Evidence), inadvertent destruction or alteration of an electronic document as a result of routine operation of that party's computer network does not ordinarily reflect any culpable conduct or warrant any such sanctions. Moreover, whilst a party may wish, for its own benefit, to take steps to preserve relevant evidence, it is under no automatic duty to do so. Nor should a tribunal consider imposing such a duty absent a specific reason to do so, such as credible allegations of fraud, forgery or deliberate tampering with evidence.

5.32 If a party wishes to preserve evidence in its possession and control, it should focus its efforts on the most likely sources of relevant and material evidence and avoid taking steps that are likely to give rise to unnecessary inconvenience and expense.

(a) For example, attempting to freeze day-to-day functions across an entire computer network is likely to give rise to severe disruption and costs. Likewise, unless the circumstances of the particular case indicate that hidden metadata may be relevant and material to the dispute, a party should not be expected or required by the tribunal to incur the cost of obtaining a forensic snapshot of all or even a subset of its electronic documents.

(b) On the other hand, a party may consider taking a copy of a limited number of electronic documents from reasonably accessible sources and focused by reference to appropriate parameters (such as key custodians and/or particular electronic folders in which relevant transaction documents are held), and to put that copy to one side or entrust it to counsel for safekeeping. The electronic documents so preserved may provide a resource upon which the party may draw for evidence in support of its own case. It may also provide a convenient starting point for a search for documents in response to a document request.

5.33 Finally, in light of the fragility of electronic documents, if there is a dispute regarding their destruction or alteration, parties and arbitrators should consider placing the burden on the requesting party to show that the responding party has acted wrongfully, rather than on the responding party to show that its actions or inactions were reasonable and in good faith.

6. CONCLUSION

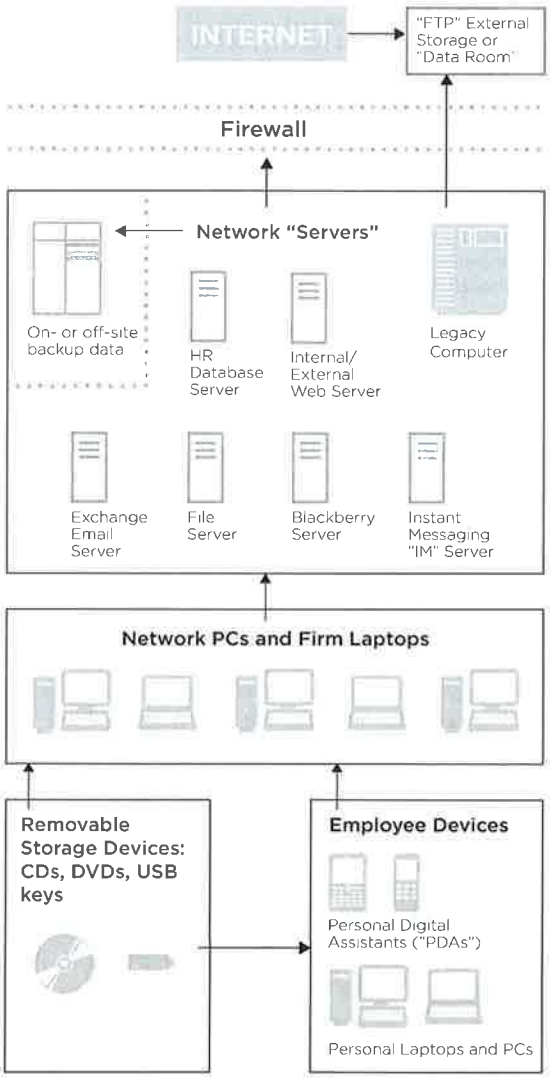
6.1 While each party is of course free to submit any documents in support of its claim or defence, absent a specific agreement between the parties to a case, or an order of the tribunal, there is no obligation to produce documents, including electronic documents, in international arbitration. In deciding whether to order electronic document production, tribunals should be guided by the principles of specificity, relevance, materiality and proportionality.

6.2 Keeping in mind this important framework, it is hoped that this Report will offer concrete assistance to tribunals and parties on how to address and manage as efficiently as possible any electronic document issues that arise, and control any costs and delays that may result when electronic document production is permitted or required in international arbitration.

Appendix I

A Primer on Electronic Documents

DIAGRAM OF A TYPICAL OFFICE COMPUTER NETWORK



1. This Appendix provides an overview of how electronic documents are created, managed and stored, and identifies some of the questions, challenges and opportunities that arise in the production of electronic documents as a result of its unique characteristics.

2. To address electronic document production issues that may arise, it is useful to have a basic understanding of how a typical office computer network works and where electronic documents responsive to a document request may potentially be located and retrieved. Electronic documents may potentially be located either in relatively accessible "active" sources or in less accessible "inactive" back-up, fragmented or deleted sources.

3. "Active" electronic documents—which ordinarily should be the sole source of production of any electronic documents in international arbitration—are generally stored in a readily usable format and are relatively easy to access. "Inactive" electronic documents are generally harder and more expensive to access and produce. The diagram opposite illustrates a simplified office computer network and the hardware components that may be used to create, manage and store electronic documents, and the sections that follow describe the "active" and "inactive" sources of electronic documents, as well as the data about electronic documents known as "metadata"

A. "Active" electronic documents

4. Personal computers: At a basic level, when a human being (a "user" or document "custodian") sits down at his or her "workstation" or desk and writes an email, drafts a word-processing document, populates an electronic spreadsheet (i.e. creates, stores or manipulates electronic documents), he/she does so on a "personal computer" (or "PC")—either a "desktop" or "laptop" computer. The PC will typically have a "local" hard drive where electronic documents created on that PC may be electronically located, stored and accessible only through that specific computer. The kinds of electronic

documents that may exist on the local hard drive of a personal computer include virtually any variety of document or file a person can create using today's vast array of computer software "applications". In a business context, these will most commonly include word-processing files, emails, spreadsheets, slide presentations—the familiar array of files that most office PCs are equipped to create.

5. Electronic documents created on any given user's PC may also be located wherever else those electronic documents may have been sent by the user, or otherwise automatically stored. For example, when a user sends an email, it will typically be recorded in the sender's "sent" box; it will also appear in the "in" box of one or many recipients. The email's recipients in turn may have forwarded the same email to other recipients. On a network, a copy of the email may reside on the PC hard drives of the sender and/or one or more recipients. As described below, it may also be recorded on a shared server, as well as a "personal digital assistant" ("PDA") device such as a Blackberry, which replicates each user's email remotely. The user's PC becomes an input and viewing device for electronic documents located on a server elsewhere.

6. Shared servers: To maximize computer efficiency and to promote office interconnectedness, each user/custodian's PC located at his or her desk will typically be part of a "network" of many such workstation PCs. A network of individual PCs will usually be constructed around a number of shared "server" computers, which constitute a second potential source of "active" electronic documents. A "server" computer is a separate computer from the PC computer located on each user's desk, located and operated centrally, that contains software to perform specific functions for all of the PCs (or "clients") in the network that are interconnected by the server. One example would be a shared email server. Office computer networks will typically have one or more servers that do nothing but "serve" the network's email needs for all of the users in the network. Thus, instead of users each having their own emails created, sent, received and stored on their individual PCs at their desks, all of the emails created, sent, received and stored by all users in the network will reside on one or more shared server computers that do nothing but process emails. The result is that a particular user's email, which they access from their PC, may not actually be located on their individual PC, but instead may be located entirely or in large part on a shared server computer, physically located somewhere else, to which their PC is connected, and which centrally provides email for all network users whose PCs are connected to that email server.

7. The shared functions within an office computer network that may be performed by servers rather than by each individual user's PC can be just about anything. Servers may be dedicated to providing network user access to the Internet, providing internal kinds of messaging applications separate from email, managing the printing of all documents in the office, managing and storing electronic documents created by Blackberry or other handheld devices, or maintaining other kinds of network electronic documents, like all word-processing files or all accounting or staff personnel files in a centrally accessible location. Having dedicated "servers" perform different aspects of a company's business on behalf of all PCs in a network enables centralization and administrative control over a company's electronic documents, whereby a company's "Information Technology" ("IT") officer or department can monitor use, or assign or withhold different user access rights, for instance by limiting the number of users/custodians who may access the server containing the company's staff personnel files or other sensitive need-to-know data.

8. When shared servers are used to create an office network, electronic documents generated by an individual network user at his or her PC may actually be stored in a shared server computer located somewhere else, which that individual user's PC accesses for the particular kind of electronic documents involved—email, word-processing, accounting data, and so on—rather than located on the hard drive of the individual user's desktop or laptop PC. Consequently, a file created by one user in the network may be equally accessible to all or several other users in the network, who can equally access, copy, modify, delete, overwrite or send a particular document or file that was created by another user on the shared server.

9. "Legacy computers": Sometimes a company's network of computers may include "legacy computers", i.e. outdated computer hardware containing antiquated software or data that is still necessary to perform certain aspects of the company's business. For example, a company may have an antiquated or custom-designed accounting system, which resides on a specific computer that can still support the accounting application the company has been using for many years. The speed at which new hardware and software is introduced on the market to replace, supplement or update a company's existing computer systems may often result in piecemeal changes and updates to an existing computer network, requiring phased integration of old and new hardware and software over an extended period of time. Electronic documents created and stored on legacy computers may only be located on one or more specific legacy computers in the network and may not be accessible or readable on any of the company's other computers since other forms of hardware do not support the data concerned. Such legacy electronic documents may be difficult to retrieve and produce in an accessible format if the outdated hardware or software used to create those documents is required to read and use them. Many of the

major software providers enable new software releases to be "backward-compatible" (i.e. able to access electronic documents produced on earlier versions of the software) to a point. However, this is not always the case, for example if a company is operating a bespoke system.

10. PDAs: In addition to serving individual PC and laptop workstations connected within the office network, specific servers may also serve other kinds of client computers, such as personal digital assistants—an ever-expanding array of portable handheld devices, including BlackBerries, smart phones and Palm Pilots—as well as remote PCs or laptops maintained by company employees at home or otherwise outside the office. All of these remote or wireless devices are capable of creating, managing and storing electronic documents in their own right, and remotely accessing, altering, deleting and exchanging electronic documents located on the office network servers via an Internet connection. PDAs will typically contain hard drives of their own where electronic documents may also be stored, in addition to accessing remotely electronic documents that are located on the office network. However, in many cases, any document received, created or sent by a PDA will be automatically synchronized back to a central server.

11. Third-party PCs, servers, and data rooms: Electronic documents may also be found on third-party servers or PCs, completely external to a company's network. For example, data and files may be sent to and then stored on a third-party's PC or network through a "file transfer protocol" ("FTP") client, which allows easy transfer of large amounts of data and files through the Internet. Electronic documents might also be found on an external server in a virtual "data room". Data rooms usually are password-protected, but are often accessible to multiple parties through the Internet. Data rooms may be maintained by the company or a third-party vendor that provides off-site data storage and management, and can contain data and files of both the company and third parties.

12. Removable media: Finally, "active" electronic documents can also be stored on removable media, such as CDs, DVDs, disks, tapes, and USB portable drives. These compact storage devices for electronic information can be used on any computer. They effectively provide a removable and portable hard drive, capable of storing any of the same kinds of electronic documents that a PC can generate, and may be located virtually anywhere—in the office, at home, in a car, in a briefcase, a pocket, with a third party, etc.

B. "Inactive" electronic documents

13. In addition to the foregoing components of a typical "active" computer network, business computer networks typically will also include "archived" or "inactive" electronic documents. Such inactive electronic documents can be located on the same clients and servers that are part of a company's active network, or on dedicated back-up servers or removable disks or tapes, which are maintained separately from the active network so as to protect and preserve electronic documents that can be vital to a business's survival in the event that a catastrophe compromises the company's active computer system and the electronic documents it contains. Depending on a company's business practices, archived electronic documents may be stored within an organized structure. In contrast, back-up servers or tapes will typically maintain a "snapshot" of all or specific portions of a company's active electronic documents, taken on a periodic basis to preserve the company's data in the event of catastrophic system failure, loss or damage such as may be caused by a fire, earthquake, virus contamination, or other core threats to a company's business. Back-up servers or tapes should not, therefore, be expected to provide a comprehensive set of all of a business's electronic documents. Furthermore, back-up electronic documents are typically not maintained in a format that is readily accessible or searchable, as they are intended only for disaster-recovery purposes. Typically, back-up tapes are not well structured. Therefore, it is usually necessary to restore the entire tape or collection of tapes (at considerable expense) in order to investigate only a small part that may be relevant to a particular dispute.

14. "Deleted" electronic documents: "Deleted" electronic documents are another form of inactive electronic documents. "Deleted" is a misnomer insofar as "deletion" of a document or file on a computer may serve only to move it from one location (e.g. an email inbox) to another (e.g. an email "trash" or "recycle" folder) where it remains and can readily be retrieved for some period of time. When an electronic document is then deleted from a trash or recycle file, that typically means only that the digital storage space required to maintain that particular electronic document has been designated as available for the storage of different information as and when the computer automatically determines that the same space is needed to store new or different information. But the deleted item continues to reside on the computer until it is overwritten with new and different information. This can result in "fragmented" files, as computers will move and divide data designated as deleted in order to efficiently make room for new data. However, computer forensic techniques exist even to retrieve a deleted electronic document long after it has been designated as such.

15. It is also worth noting that even when an electronic document is deleted from one location on one computer, PDA or storage device, an identical copy may continue to exist somewhere else on a company's computer system. For example, if the sender of an email deletes the email from his or her sent box at work, the email may continue to exist in a multitude of other email folders of other network users.

C. Metadata

16. "Metadata" is, literally, data about (electronically stored) data. Documents or files created on a computer will typically contain embedded information that is not readily apparent on the screen view of a file or in a printed version of the document or file. This secondary metadata is information about the electronic document or file that describes its characteristics, origins, or usage. There are three basic categories of metadata:

(i) "Substantive" (or "application") metadata is created by the software used to create the document, and reflects (among other things) editing changes or comments made to the document over time. Substantive metadata is embedded in the document it describes—and therefore remains with the document when it is copied, moved or produced—and may be useful in showing the genesis of a document and the history of proposed and/or accepted revisions to the document.

(ii) "Systems" metadata reflects automatically generated information about the creation or revision of a document, such as the document's author or the date and time of its creation, modification or delivery. Systems metadata is not necessarily embedded in the document but can be generated by the computer system on which the document was created, and can be relevant if a document's authenticity is at issue or there are issues as to who received a document (including blind copy recipients that do not appear on the face of a document) or when it was received.

(iii) "Embedded" metadata is inputted into a document by its creator or users but cannot be seen in the document's display, and commonly includes the formulas used to create spreadsheets, hidden columns, references, fields or linked files. Embedded metadata can be critical to understanding complex spreadsheets (such as those often used, for example, in construction projects) which on their face do not explain the mathematical formulas underlying or relating to the various rows or columns of information that are displayed on a computer screen or a printed version of the spreadsheet.

17. It should be noted that "visible" metadata should be distinguished from "hidden" metadata. Visible metadata is commonly displayed on screen and/or in print-outs and hidden metadata is not. In the case of an email, strictly speaking, all its constituent fields are metadata. Examples of visible metadata include the to/from/cc/date/title fields. Examples of hidden metadata would include the route the email took over the Internet and the IP address from which it was sent. Most of the metadata mentioned in sub-paragraphs (i) to (iii) above is hidden metadata.

18. Metadata is most commonly produced either in (a) a pdf or tagged image format (TIFF) with an accompanying "load file" which permits the recipient to search the document for the relevant metadata, or (b) in the "native" format in which the document being produced was created and which provides the recipient with all of the information available to the original user.

Appendix II

A Glossary of Electronic Document Terms

Note: Words in *Italics* refer to entries in this Glossary.

Archived Electronic Sources: means *Electronic Sources* that are stored for a shorter or longer term for the purpose of preservation. Storage for the purpose of archiving (preservation) means that a copy of the *Electronic Source* is made and stored on a *Data Carrier* to preserve it in the actual state without subsequent alterations of its substance. Normally, *Electronic Sources* are archived on dedicated *Data Carriers* which are logically and/or physically kept separate from electronic information that is in use. *Archived Electronic Sources* are a "snapshot" of the archived data in existence at the time the archive was created. Archived *Electronic Sources* may be a complete "snapshot" of this data or incremental. Incremental means that, if compared to the last *Back-up*, only new or changed data is archived.

Authenticity, of electronic document: Archiving or backing up electronic data is mostly done by using dedicated *Computer Programs* that allow the date and time of any modification to data included in the archive to be tracked. Some of these programs comply with national legal requirements for preserving the data integrity, i.e. *Authenticity*.

Authenticity of an Electronic Document is a non-technical attribute ascribed to it in a communication context, here a dispute. An *Electronic Document* is considered as being authentic if (i) the author or creator who figures as such in the context of the information displayed in the document or identified by somebody as being the author/creator really is or is determined by the arbitrators to be the "real" author/creator; (ii) that this author/creator did produce exactly this *Electronic Document* at the moment ascribed to it by him or a third party; and (iii) that the *Electronic Document* was not subsequently altered by anybody.

Back-up: means a copy of electronic data for the purposes of preservation. See also *Archived Electronic Sources*.

Client: refers to dedicated *Software* that is locally installed on a *Computer* linked to a *Network* within which a *Server* is accessed by the *Client*, to which it provides a service. For example, an *email Client* interacts with an *email Server*, such as MS Outlook with MS Exchange or a Lotus Domino *Server* with a Lotus Notes *Client*. Therefore, Network System architecture using *Servers* and *Clients* is referred to as *Server-Client*-architecture.

For the purpose of *eDocument* disclosure it is useful to know that a *Client* may, but need not always locally and permanently store copies of *ESD*, and that certain *Server-Client*-Systems may store *ESD* permanently only in a *Directory* of the *File System* pertaining to a *Server* (this may be increasingly the case where web-based services are employed in the relevant sphere of control, especially if *Cloud Computing* is used). This may be relevant for identifying *Custodians*.

Cloud Computing: is a catch-all term essentially referring to *Network* based computing systems within which *Software* applications are being provided to local computers by remote *Servers* as a service on demand. Furthermore, *Cloud Computing* is generally characterized by exclusive permanent storage of *ESI* in *Directories* of the *File Systems* pertaining to *Servers* in the so-called cloud. A further common feature of *Cloud Computing* is virtualization of *Servers*. Virtualization means that the *Server Software* is dissociated from the *Server*-computer (also called *Server*) hardware and may move from one computer location to another.

The same applies to *Directories* of the *File Systems* pertaining to the *Server Software*. Application service *Software* is often provided by third parties on the basis of complex service providing or outsourcing agreements. This may be relevant for identifying *Custodians* and/or the identification of the physical location of hardware means for *ESI* storage.

Typically, the *User* may access *Cloud Computing* services from any computer in the *Network* using a *User*-ID and password, if such computer is equipped with a web-front-end and *Software* pertaining thereto (e.g. a web-browser such as Mozilla Firefox, Safari, MS Explorer, Java-Runtime). The front-end *Software* may also be referred to as *Client*, which is rather general-purpose and not dedicated (specialized) *Software*. However, *Cloud Computing* may also require dedicated *Software* for certain services.

An example of *Cloud Computing* most people may know are the so called "web-mailers" for managing personal *email* accounts.

ESI, active: refers to *ESI* that is accessible to *Custodians* within a computer or a *Network* without any need to access *Back-up ESI*.

ESI, inactive: refers to *ESI* that is not accessible to *Custodians* within a computer or a *Network* and requires access to *Back up ESI*.

Extranet: see *Intranet*.

File: refers to a finite sequence of bytes representing information that are flagged as pertaining to this *File* when used in relation to computing. *Files* are normally stored for a certain duration on a storage medium. *Files* are part of the *File System*. Each *File* has an identifier (e.g. *File Name*) that must be unique within the *Directory* where it is located. The name is followed by a suffix describing the *File Format*.

Unless a *File* is "flagged" to restrict certain operations such as deletion, the operating system is enabled to carry out read/write, renaming and deletion or erase actions. Apart from *Files* incorporating executable program codes, the arrangement of the information in a *File* is defined for the *File* to be used by a program such as a word-processor or media player. The type of program to which the *File* pertains may in such case be seen from the suffix. Without the correct program, the information may not be extracted correctly from the *File* and information cannot be correctly written into the *File* without expert knowledge and special tools.

Although a *File* is treated within a computer system as single logical entity, this does not mean that it is stored as one single sequence on the storage medium. Depending on the way storage is organized on such a medium, a *File* may be stored in blocks of bytes at different logical locations on the storage medium. Logical flags and indices used by the operation *Software* manage these blocks (see *File Fragment*).

File, active: is not a technical term and refers to a *File* that is not archived and may be accessed by a *User* with the required rights during normal operations.

File, accessible: is not a technical term and refers to a *File* that is accessible to a *Custodian*. Unless there are legal impediments, *active Files* are accessible. *Deleted Files* are normally no longer accessible to programs, including *Search Tools*, or may only be accessible with unreasonable effort using dedicated recovery tools, since they have disappeared from the *File System*. *Erased Files* are inaccessible unless dedicated tools used by *Computer Forensics* can recover all or some fragments from a *Data Carrier*. The required effort may be unreasonable, especially if the purpose of the search is not defined. Finally, a *File* may be inaccessible to a certain person or entity because that person or entity no longer has physical access to or the legal right of access to the computer/system to which the *Data Carrier* on which the *File* is stored is related.

File, deleted / erased: see *Data Deletion, Data Erasure*.

File Format: refers to the *File* type represented by the suffix. The suffix indicates to *Users* the programs and what kind of programs should be enabled to properly extract, use/manipulate, visualize or make audible the information in the *File*, since the structure and arrangement of the bytes in the *File* have been defined by the programmer to be used by that specific program or kind of programs. Certain *File* types have been subject to considerable standardization efforts but others are proprietary. If a *User* knows the file extension he or she can search the corresponding program(s) on the Internet (see e.g. <http://www.file-extension.com>, <http://www.filext.com/>, <http://www.file-extensions.org>).

File Fragment: refers to a block of data pertaining to a *File*. When *Data Recovery* is carried out, *File* fragments are retrieved, identified and reassembled to the extent that this is technically possible (see *Computer Forensics*).

File Name: refers to a unique and arbitrary identifier for a *File* within a *Directory* of a *File System*. Depending on the operating system a *File Name* must comply with certain requirements. Certain applications, such as word-processors, allow *Users* to determine the prefix of the *File Name*. It is good practice to use a meaningful and systematic approach to naming *Files*. Automatically created *Files* are assigned prefixes consisting of strings in accordance with a programmed naming system. Today, the prefix is followed by a dot and a suffix (file extension/type) that is normally assigned automatically. This suffix indicates the *File Format*.

Active Files can easily be searched in a *File System* on the basis of their (truncated) *File Name* using available *Search Tools*.

File Repository: refers to a logical place, normally accessible via a *Network*, where *Files* are stored for retrieval. In most instances, the *User* accesses the *File Repository* through the interface of dedicated document management *Software* (DMS) that is either locally installed (in part) or via the web browser and allows *Files* to be uploaded, downloaded, visualized and processed, depending on *User* rights, which can often be defined down to the level of a particular *File*. The DMS normally comprises relational data *Software* allowing additional information to be associated with any *File* and versions and *User* access to be tracked. In most cases the *Files* in the *File Repository* are presented to the *User* in a hierarchical structure of folders that resembles the structure of the *File System*, even if the actual visual representation may be more sophisticated. The DMS usually allows complex search operations and can include functions such as optical character recognition (OCR).

File Repositories may be particularly useful for disclosure of *eDocuments* and/or electronic filing.

File System: refers to a defined system by which electronic data in *File Format* is organized for access, processing and storage. On a *PC* the *File System* may be visualized by icons that are mostly arranged in a hierarchical structure comprising *Directories*, sub-*Directories* and *Files*, which reside in physical *Data Carriers*.

However, there are also virtual *File Systems* that overlay more specific *File Systems*, each of which may have a different specification according to the interface provided by the virtual *File System*. Global *File Systems* are cluster-*File Systems* that comprise *Directories* and *Files* on a multitude of physical *Data Carriers* within a storage data area *Network*. *Network File Systems* support *File* sharing over a *Network*, mostly by using a *Server*.

Format, of submission for eDocument: refers to the *File Format* in which *eDocuments* are filed with the arbitral tribunal. *eDocuments* are often submitted to the arbitral tribunal as a print-out or, if provided in digital format, as a PDF copy, since it is reasonable to submit *eDocuments* in a format that any addressee (other parties, arbitrators) can open and read without needing to subscribe to special *Software*, which may not otherwise be easily available on acceptable conditions. However, this approach may sometimes not be useful due to the particular nature of the *eDocument* or because the original version of the *eDocument* includes relevant *Metadata* that would not be preserved if the *eDocument* is produced in a different easily accessible *Format*.

Format, of disclosure of eDocument: refers to the *File Format* in which *eDocuments* are disclosed to the other side. The *File Format* for disclosure may, but need not necessarily be the same format which is used for submissions to the arbitral tribunal. Sometimes it is suggested that *eDocuments* be disclosed in their original format, so that all *Metadata* included in the "original" *eDocument* is preserved. However, unless the recipients of disclosed *eDocuments* already have a licence to the *Software* to which the original format pertains, such party may have difficulty accessing the information in the *File* with reasonable effort.

Handheld Devices (Blackberry): refers to small data-processing units that are small enough to fit into a person's hand and are from time to time, or most of the time, connected to a *Network* (mobile telephone *Networks*, WLAN, Bluetooth, USB, etc.) for communication purposes. *Handheld Devices* are extensively used for text messaging, *email* or instant messaging (SMS). In- and outgoing messages are stored on the mobile device for a variable duration, depending on the *Data Carrier* that may be built into the device, or may be exchangeable (see *Archived Electronic Source, Custodian*).

Internet: refers to the global *Network* of computers consisting of a decentralized structure of *Networks*, comprising hard- and *Software* within which connected computers can exchange data, using the standard Internet protocol suite (TCP/IP). The *Internet* comprises various services/application types, such as the *World Wide Web*, *email*, *File* transfer (e.g. using FTP).

Intranet: refers to a *Network* that is used to communicate and share information in electronic format among a defined group of *Users* related to an organization, normally a company or a group of companies. However, persons or entities that do not belong to the organization but interact with it, such as suppliers and customers, may have certain rights to access information within the *Intranet*. An *Intranet* usually interfaces with the *Internet*. Sometimes a distinction is made between an *Intranet*, whose *Users* are attached to the organization, and an extranet, which includes the aforementioned external *Users*.

In any event, virtualization removes the need to distinguish between *Inter-* *Intra-*, and extranets, since what matters is the access to the *Networks* defined by the *User* ID, password, and rights of access to a secure environment (data encryption) that has been defined as a *Network*.

Laptop: refers to a kind of portable *Personal Computer*.

Legacy Hard- and Software: refers to older hard- and *Software* that has become obsolete due to technical progress and is not fully compatible with the system now used by the organization in question. Such outdated hard- or *Software* may be kept available within organizations for the purpose of accessing *Back-ups* or other *ESI*.

Local Means of Storage: local refers to system devices or computers that are located at the workplace of the *Custodian*, e.g. a *Laptop* or *Personal Computer*. Means of storage refers to *Electronic Means of Storing or Recording Information*.

Mainframe Computer: refers traditionally to high-performance central computers run by big organizations that were accessed via terminals. Today, *Mainframe Computers* operate in *Networks* using *Internet* protocols and may host *Network Servers*.

Metadata: refers to data that is related to other data, such as *Files*, and describes attributes thereof. Certain *Metadata* provides book-keeping information within *File Systems*, such as *File* creation, modification, storage dates, *File Format*, access permission settings, and can often be easily visualized. Other *Metadata* depends on the *File Format* and/or the application *Software* environment. *File Repositories*, case management *Software* and other applications use database *Software* for creating, managing and storing arbitrarily defined categories of *Metadata*.

Network: (also referred to as "Computer Network") may refer to the cables and devices by which computers and peripherals are connected and can exchange data. *Networks* can be classified as Local Area *Network* (LAN), Wide Area *Network* (WAN), Virtual Private *Network* (VPN), etc. However, the relevant hardware and *Network Software* constitute only the *Network* infrastructure, since the devices relate to a specific *Network* only because they were arbitrarily made to do so. For this purpose each device has a unique identifier and defined access rights within the *Network* to which the *User*'s rights correspond. A device that is not "flagged" as being part of the *Network* does not belong to it.

Network Server: refers to a *Server* that is linked to a specific *Network*.

Original, of Electronic Document: see *Authenticity, Copy, File*.

PDA: is the abbreviation for personal digital assistant and means a mobile *Handheld Device*. Technologically, PDA's merge into mobile communication devices such as smart phones like Blackberry's, iPhones and the like.

Personal Computer (PC): refers to "stand-alone" computers, such as desktop computers, *Laptops*, etc. These computers are characterized by consisting of hard- and *Software* that allows them to be used independently of a *Network* connection. Prior to the advent of *PCs*, *Mainframe Computers*, to which *Users* connected via terminals without local storage capacity, were used. Today, *PCs* are nearly all permanently or temporarily connected to *Networks*, and the *Software* they use is not always or not completely installed locally. More importantly, data processed on a *PC* may not be stored, or not permanently stored, on a local *Data Carrier*, but also be held on *Network* storage devices.

Search Tool: refers to *Software* for *Data Mining*. The technical sophistication of such tools for predictably reliable results is crucial, since the tool must allow complex (multi-criteria) search operations and be capable of using these on a maximum of *File Formats* or at least those formats in which the *ESD* that are searched will in all likelihood exist. It is important to know that while many *File Formats* contain information that is directly machine readable (i.e. using search words), bit map *File Formats* (digital photocopies) may not be searchable unless converted using optical character recognition (OCR).

However, the best *Search Tool* will provide only results of a quality that is determined by the quality of the search instructions. Thus, search methodology is crucial, and transparency in this regard is commendable.

Server: sometimes refers to a dedicated computer that is connected to a *Network* on which *Server* applications are running. However, the term essentially refers to *Computer Programs* providing services to other *Computer Programs*, usually in a *Network* by using *Network* protocols. *Server* programs may run on *Mainframe Computers*.

In the context of *eDisclosure* it is important to know that much data exchanged inside or outside an organization is managed by a *Server*. The storage media where such data is held may be directly connected to the computer on which the *Server* runs. However, the trend is to have *Servers* run in virtual operating system environments, i.e. in an environment where devices are logical and to a certain extent disconnected from the actual hardware, allowing processed and/or stored data to move around or to be stored in several physical locations. The metaphor for this delocalized existence is "cloud".

Shared Server: is a *Server*, normally a *Network Server*, hosting *ESI* for defined groups of *Users* having defined rights with regard to the hosted data.

Software: see *Computer Programs*.

User: is a logical entity possessing the access rights for using a computer or *Software* or accessing a *Network*. A *User* may have the right to carry out any operation (e.g. system administrator) or be assigned restricted rights (e.g. normal *User*) with regard to operations and/or access to *ESI* for which usage restrictions have been implemented. For managing *User*-rights, systems use *User*-names (*User*-ID) and access codes (e.g. passwords or biometrical data). A physical person possessing such access information will be treated by the system as the logical *User* with whom this set of data is associated and is also called *User*. Depending on the assigned rights, a person who is a *User* may be a *Custodian*.

Version History: refers to the different stages of "existence" of data, especially *Files*, such as creation or modification dates. Certain basic historic information is nearly always stored as *Metadata*. Depending on the *Format*, or the *Software* used, historic information may be more complete. *File Repositories* and other dedicated *Software* systems (e.g. case-management systems) may store data including the complete *Version History* of a *File* and, possibly, any different versions of such *File*.

WAN: is an acronym meaning Wide Area *Network* (see *Network, World Wide Web*).

World Wide Web: refers to the global *Network* of hypertext pages served through *Servers* via the *Internet* according to agreed standards and includes small *Software* programs and services that enable a vast array of operations via the *Internet*.

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PREFACE

I was invited to write the preface to this special Supplement to The Sedona Conference Journal® as a result of my participation in the Georgetown Data Deluge Summit in March, 2007, and concerns I expressed at the Summit about the legal system's capacity to handle the data deluge. The Sedona Conference® Cooperation Proclamation, and supporting document, The Case for Cooperation, suggest that if participants in the legal system act cooperatively in the fact-finding process, more cases will be able to be resolved on their merits more efficiently, and this will help ensure that the courts are not open only to the wealthy. I believe this to be a laudable goal, and hope that readers of this Journal will consider the articles carefully in connection with their efforts to try cases.

Associate Justice Stephen G. Breyer
Supreme Court of the United States
Washington, DC
October 9, 2009

The Sedona Conference® gratefully acknowledges the substantial contributions of its Conference faculties, Working Group Series Sustaining and Annual Sponsors, participants, members and observers, and our Advisory Board members, whose volunteer efforts and contributions make The Sedona Conference® a "thought-provoking and inspiring" experience providing content of immediate benefit to the Bench and Bar.

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TABLE OF CONTENTS

THE SEDONA CONFERENCE® COOPERATION PROCLAMATION

Author:
The Sedona Conference®

The Sedona Conference® launches a coordinated effort to promote cooperation by all parties to the discovery process to achieve the goal of a "just, speedy, and inexpensive determination of every action."

The costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system. This burden rises significantly in discovery of electronically stored information ("ESI"). In addition to rising monetary costs, courts have seen escalating motion practice, overreaching, obstruction, and extensive, but unproductive discovery disputes – in some cases precluding adjudication on the merits altogether – when parties treat the discovery process in an adversarial manner. Neither law nor logic compels these outcomes.

With this Proclamation, The Sedona Conference® launches a national drive to promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery. This Proclamation challenges the bar to achieve these goals and refocus litigation toward the substantive resolution of legal disputes.

Cooperation in Discovery is Consistent with Zealous Advocacy

Lawyers have twin duties of loyalty: While they are retained to be zealous advocates for their clients, they bear a professional obligation to conduct discovery in a diligent and candid manner. Their combined duty is to strive in the best interests of their clients to achieve the best results at a reasonable cost, with integrity and candor as officers of the court. Cooperation does not conflict with the advancement of their clients' interests - it enhances it. Only when lawyers confuse *advocacy* with *adversarial conduct* are these twin duties in conflict.

Lawyers preparing cases for trial need to focus on the full cost of their efforts – temporal, monetary, and human. Indeed, all stakeholders in the system – judges, lawyers, clients, and the general public – have an interest in establishing a culture of cooperation in the discovery process. Over-contentious discovery is a cost that has outstripped any advantage in the face of ESI and the data deluge. It is not in anyone's interest to waste resources on unnecessary disputes, and the legal system is strained by "gamesmanship" or "hiding the ball," to no practical effect.

The effort to change the culture of discovery from adversarial conduct to cooperation is not utopian.[1] It is, instead, an exercise in economy and logic. Establishing a culture of cooperation will channel valuable advocacy skills toward interpreting the facts and arguing the appropriate application of law.

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1 Gartner RAS Core Research Note G00148170, *Cost of eDiscovery Threatens to Skew Justice System*, ID# G00148170, (April 20, 2007), *available at* http://www.h5technologies.com/pdf/gartner0607.pdf (While noting that "several . . . disagreed with the suggestion [to collaborate in the discovery process] . . . calling it 'utopian,'" one of the "take-away's" from the program identified in the Gartner Report was to "[s]trive for a collaborative environment when it comes to eDiscovery, seeking to cooperate with adversaries as effectively as possible to share the value and reduce costs.")

Cooperative Discovery is Required by the Rules of Civil Procedure

When the first uniform civil procedure rules allowing discovery were adopted in the late 1930s, "discovery" was understood as an essentially cooperative, rule-based, party-driven process, designed to exchange relevant information. The goal was to avoid gamesmanship and surprise at trial. Over time, discovery has evolved into a complicated, lengthy procedure requiring tremendous expenditures of client funds, along with legal and judicial resources. These costs often overshadow efforts to resolve the matter itself. The 2006 amendments to the Federal Rules specifically focused on discovery of "electronically stored information" and emphasized early communication and cooperation in an effort to streamline information exchange, and avoid costly unproductive disputes.

Discovery rules frequently compel parties to meet and confer regarding data preservation, form of production, and assertions of privilege. Beyond this, parties wishing to litigate discovery disputes must certify their efforts to resolve their difficulties in good faith.

Courts see these rules as a mandate for counsel to act cooperatively.[2] Methods to accomplish this cooperation may include:

1. Utilizing internal ESI discovery "point persons" to assist counsel in preparing requests and responses;

2. Exchanging information on relevant data sources, including those not being searched, or scheduling early disclosures on the topic of Electronically Stored Information;

3. Jointly developing automated search and retrieval methodologies to cull relevant information;

4. Promoting early identification of form or forms of production;

5. Developing case-long discovery budgets based on proportionality principles; and

6. Considering court-appointed experts, volunteer mediators, or formal ADR programs to resolve discovery disputes.

The Road to Cooperation

It is unrealistic to expect a *sua sponte* outbreak of pre-trial discovery cooperation. Lawyers frequently treat discovery conferences as perfunctory obligations. They may fail to recognize or act on opportunities to make discovery easier, less costly, and more productive. New lawyers may not yet have developed cooperative advocacy skills, and senior lawyers may cling to a long-held "hide the ball" mentality. Lawyers who recognize the value of resources such as ADR and special masters may nevertheless overlook their application to discovery. And, there remain obstreperous counsel with no interest in cooperation, leaving even the best-intentioned to wonder if "playing fair" is worth it.

This "Cooperation Proclamation" calls for a paradigm shift for the discovery process; success will not be instant. The Sedona Conference® views this as a three-part process to be undertaken by The Sedona Conference® Working Group on Electronic Document Retention and Production (WG1):

> Part I: Awareness - Promoting awareness of the need and advantages of cooperation, coupled with a call to action. This process has been initiated by The Sedona Conference® Cooperation Proclamation.

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2 *See, e.g., Board of Regents of University of Nebraska v. BASF Corp.* No. 4 04-CV-3356, 2007 WL 3342423, at *5 (D. Neb. Nov. 5, 2007) ("The overriding theme of recent amendments to the discovery rules has been open and forthright sharing of information by all parties to a case with the aim of expediting case progress, minimizing burden and expense, and removing contentiousness as much as practicable. [citations omitted] If counsel fail in this responsibility—willfully or not—these principles of an open discovery process are undermined, coextensively inhibiting the courts' ability to objectively resolve their clients' disputes and the credibility of its resolution.")

Part II: Commitment - Developing a detailed understanding and full articulation of the issues and changes needed to obtain cooperative fact-finding. This will take the form of a "Case for Cooperation" which will reflect viewpoints of all legal system stakeholders. It will incorporate disciplines outside the law, aiming to understand the separate and sometimes conflicting interests and motivations of judges, mediators and arbitrators, plaintiff and defense counsel, individual and corporate clients, technical consultants and litigation support providers, and the public at large.

Part III: Tools - Developing and distributing practical "toolkits" to train and support lawyers, judges, other professionals, and students in techniques of discovery cooperation, collaboration, and transparency. Components will include training programs tailored to each stakeholder; a clearinghouse of practical resources, including form agreements, case management orders, discovery protocols, etc.; court-annexed e-discovery ADR with qualified counselors and mediators, available to assist parties of limited means; guides for judges faced with motions for sanctions; law school programs to train students in the technical, legal, and cooperative aspects of e-discovery; and programs to assist individuals and businesses with basic e-record management, in an effort to avoid discovery problems altogether.

Conclusion

It is time to build upon modern Rules amendments, state and federal, which address e-discovery. Using this springboard, the legal profession can engage in a comprehensive effort to promote pre-trial discovery cooperation. Our "officer of the court" duties demand no less. This project is not utopian; rather, it is a tailored effort to effectuate the mandate of court rules calling for a "just, speedy, and inexpensive determination of every action" and the fundamental ethical principles governing our profession.

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LTN Law Technology News

Arbitration's E-Discovery Conundrum[1]

Thomas L. Aldrich

The National Law Journal

12-16-2008

It's no secret that the recent expansion of document discovery in federal civil litigation has driven many corporations and their lawyers to eschew court battles for alternative dispute resolution.

Today, however, the experience of massive, uncontrolled document discovery, particularly with regard to electronic documents, has eviscerated most of the benefits of arbitration.

The broad scope of Federal Rule of Civil Procedure 26, which deals with discovery, as interpreted by the courts and exacerbated by electronic technology and creative trial counsel, has hugely increased litigation costs in terms of dollars, time to resolution and the burden on management. Thirty years ago, the specter of copying, storing and producing tens of millions of hard-copy documents caused many in-house and outside counsel to consider arbitration as a cheaper and faster alternative to litigation.

But as litigation discovery techniques have become more prevalent in arbitration, arbitration has become just as time-consuming, expensive and burdensome. Without the benefit of an appeal process for the losing party, the primary remaining benefit for binding arbitration -- privacy -- is often outweighed by the other negative factors.

Parties and their litigation counsel have pointed to runaway discovery as one major reason why they have abandoned arbitration in favor of mediation in the United States and even internationally.

How can the long-recognized benefits of arbitration -- speed and cost savings -- be restored? To regain favor among parties and their legal representatives, the process must address the needs and interests that led them to arbitration in the first place: to balance the need to discover those documents reasonably necessary for a party to prove its case with the cost, burden and time involved in producing such documents, while taking into account the need for fundamental fairness and to avoid surprise and trial by ambush.

Understanding the problem requires a look at the development of electronic discovery rules and what some arbitral institutions are doing to address the situation. This article will describe briefly how we got here.

The 1925 Federal Arbitration Act created a body of federal substantive law that recognized contracting parties' obligations to honor a private agreement to submit a dispute to arbitration.

Although the FAA authorized arbitrators to subpoena witnesses and documents for testimony at hearings, it did not specifically address the subject of prehearing discovery. Many commentators and court decisions have differed on whether prehearing discovery is permitted under the act. At a minimum, one can infer that no right to discovery exists without an express agreement by the parties to the contrary.

Recent experience, however, has shown that arbitrators are reluctant to deny or limit discovery when confronted with trial counsel used to the breadth of discovery under Rule 26. Moreover, the threat of overturning an award or not being selected for a future case weighs heavily and has resulted in many arbitrators expanding the scope of prehearing discovery to more closely resemble that prevalent in the federal courts.

In addition, parties have adopted the approach of spelling out in detail in their predispute arbitration agreement the scope of discovery preferred in the event that a dispute arises.

The 1955 Uniform Arbitration Act, which was adopted by virtually all of the states except New York, was silent with respect to discovery. It was modeled after Article 75 of the New York Civil Practice Law and Rules, which still governs arbitrations in that state.

The 2000 Revised Uniform Arbitration Act includes several explicit provisions dealing with discovery. Section 17(c) provides that arbitrators "may permit such discovery as [they] decide ... 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." The RUAA has been adopted by at least 12 states and the District of Columbia and is currently under consideration for adoption in New York.

Although the RUAA provides that the scope and breadth of permitted discovery remain within the discretion of the arbitrator, the various factors described above have resulted in arbitrators acceding to the wishes of one party, or both, to expand discovery in prehearing arbitration proceedings to closely resemble that permitted in the courts.

Thus, the original benefits of arbitration perceived by the FAA and by corporate and legal proponents of arbitration -- speed, efficiency, low cost and control -- have fallen victim to the e-discovery morass. And companies and their lawyers who used to seek arbitration over litigation are now choosing mediation over arbitration.

What can be done to save arbitration from the e-discovery morass? To address this compelling need, arbitral institutions have assumed a greater role to provide comprehensive guidelines for shaping discovery and resolving disputes.

THE DRAFT CPR PROTOCOL

The International Institute for Conflict Prevention and Resolution arbitration committee has proposed and will soon promulgate a protocol that seeks to alleviate the problems created by runaway discovery.

Underlying the protocol is the philosophy that arbitration must be expeditious, cost-effective and fundamentally fair. Section 1(a) of the protocol reads, "[a]rbitration is not for the litigator who will 'leave no stone unturned.' ... [Z]ealous advocacy must be tempered by an appreciation for the need for speed and efficiency ... .[D]isclosure should be granted only as to those items that are relevant and materials for which a party has a substantial, demonstrable need."

The guidelines provide that the disclosure of electronic documents shall follow the general principles of narrow focus and balancing cost, burden and accessibility with the need for disclosure. Production of e-materials from a wide range of users or custodians, which is both costly and burdensome, should not be permitted without a showing of extraordinary need.

The CPR guidelines present a cafeteria list of potential modes of disclosure from which the parties may select as a practical approach to the breadth of permitted discovery. Mode A, the narrowest scope, provides for no prehearing disclosure other than copies of printouts of e-documents to be presented in support of each party's case. Mode B provides that each side produce e-documents maintained by an agreed limited number of designated custodians, that the disclosure be limited to e-documents created from the date of signing the arbitration agreement to the date of filing the request for arbitration, and that production be limited to e-documents from primary storage facilities. In other words, no documents from backup servers, backup tapes, cell phones, personal digital assistants or voicemails will be produced. And no information obtained through forensic methods will be admitted in evidence.

Mode C provides for a larger number of specified custodians and a wider time period than Mode B, and also provides that the parties may agree to allow documents obtained through forensic methods to be admitted. Finally, Mode D provides for disclosure of electronic information regarding nonprivileged matters relevant to any party's claim or defense, subject to limitations of reasonableness, duplicativeness and undue burden. It is a broad level of disclosure similar to that required or permitted under FRCP Rule 26.

Other arbitral institutions are issuing e-discovery guidelines similar to those of CPR.

CHARTERED INSTITUTE PROTOCOL

For example, the Chartered Institute Protocol for E-Disclosure in Arbitration, newly promulgated in October, shares many of the same purposes and concepts, including early consideration of the scope and conduct of e-disclosure; avoidance of unnecessary cost and delay; reasonable and appropriate steps for the retention and preservation of e-documents; agreements by the parties to limit the scope and extent of production; reduction of the cost and burden of production; and placement of the ultimate burden of persuasion on the requesting party.

The CIP authorizes the parties to confer at the earliest opportunity regarding the preservation and disclosure of e-documents and the scope and methods of production.

Matters for early consideration include the types of electronic documents, computer systems, devices, storage systems and media involved. Early consideration matters also include appropriate steps for the retention and preservation of e-documents; the applicable rules of practice; an agreement to limit the scope and extent of disclosure; the tools and techniques to consider in reducing the burden and cost of e-disclosure; and whether any party or the tribunal may benefit from professional guidance on information technology issues.

The Chartered Institute's Protocol for E-Disclosure in Arbitration, like the CPR Protocol, is quite comprehensive. A particular strength is the detail regarding IT capabilities, media and the potential use of professional IT experts. A possible weakness is the lack of detailed choices regarding potential modes of production, as provided by the CPR Protocol.

THE ICDR

The International Centre for Dispute Resolution, the international arm of the American Arbitration Association, issued guidelines for arbitrators concerning the exchange of information, which became effective in May.

While the introduction to the ICDR guidelines provides a general statement that international commercial arbitration should offer a "simpler, less expensive and more expeditious form of dispute resolution than resort to national courts," the guidelines themselves offer only limited suggestions for dealing with runaway discovery, especially e-discovery.

To that end, the guidelines provide that "[t]he tribunal shall manage the exchange of information among the parties in advance of the hearings with a view to maintaining efficiency and economy ... [by] avoid[ing] 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."

Under the ICDR guidelines, the only documents required to be exchanged are those on which a party intends to rely. The sole provision dealing with e-documents speaks primarily to the form in which such documents shall be disclosed (the form in which they are maintained, absent a showing of compelling need by the requesting party for production in a different form). Finally, requests for e-documents "shall be narrowly focused and structured to make searching for them as economical as possible."

IBA RULES

Similarly, the International Bar Association Rules on the Taking of Evidence (1999) provide little guidance in addressing the problems of runaway e-discovery in arbitration proceedings.

Article 3, Section 2 provides that any party may submit to the tribunal a request to produce documents (including electronic documents), subject to exclusion on grounds of relevance or

materiality, legal impediment or privilege, unreasonable burden to produce, or considerations of fairness or equality that the tribunal determines compelling. Section 9.2.

Thus, while the IBA Rules offer few specifics, one gets the sense that arbitrators armed with these rules may feel relatively secure exercising their discretion to resist e-discovery fishing expeditions.

In sum, the application of the broad discovery standards in arbitration proceedings has led to parties forgoing arbitration altogether in favor of mediation.

New arbitration protocols and guidelines seek to change the e-discovery landscape by narrowing the focus, providing a balancing test and shifting the burden to the requesting party to demonstrate that the need for disclosure outweighs the cost and burden of disclosure.

Thus, the protocols seek to recapture the traditional benefits of arbitration -- speed, efficiency and cost saving -- while preserving fundamental fairness.

Ultimately, the success of these efforts to stem the tide of runaway e-discovery in arbitration rests upon the parties' agreements to use the protocols and the arbitrators' willingness to exercise their discretion to enforce such agreements.

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Arbitrators hold significant power over discovery

Robert B. Davidson and Margaret L. Shaw/Special to The National Law Journal
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The dominant form of business communication is now, and has been for some time, electronic in nature. E-mail servers and hard drives now contain the vast majority of business correspondence and information. Judicial rules of disclosure, at least in the United States, recognized this reality long before U.S. District Judge Shira A. Scheindlin focused the bar's attention in her *Zubulake* decisions. See *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422.

Indeed, electronic discovery has been with us a long time. While Rule 34(a) of the Federal Rules of Civil Procedure quaintly describes "designated documents" as including such things as "phonorecords, and other data compilations from which information can be obtained," local court rules have long made it clear that Rule 34 encompasses electronic material.

In recognition of the need for the federal rules to reflect the reality of electronic communication, the Judicial Conference of the United States approved a number of proposed amendments relating to electronic discovery. In April, the U.S. Supreme Court approved of these proposed amendments without comment or dissent. The new amendments, which come into force on Dec. 1, contain revisions and additions to several of the federal rules. These amendments and revisions reflect changes to Fed. R. Civ. P. 16, 26, 34, 37 and 45 as well as Form 35.

Among other things, the amendments broaden the definition of discoverable material to "electronically stored information," require early discussion of electronic discovery issues, provide for production of this information, incorporate a procedure to deal with the inadvertent production of privileged documents and provide a "safe harbor" against sanctions when data are destroyed or lost. The changes in the federal rules, many of which have been (or are in the process of being) mirrored in state procedural rules as well, play a role in litigation that unfolds fairly predictably in a courtroom.

But what do these changes bode for alternative dispute resolution? How do arbitrators, and the rules under which they operate, deal with electronic disclosure in a less formal setting that lacks many of the sanctioning tools available to a court? How do issues regarding electronic discovery play out in the context of a consensual process like mediation, and to what extent does the specter of such discovery drive settlement?

There are three ways in which arbitrators and the institutional rules under which they often operate deal-deliberately or incidentally-with electronic discovery. First, there are rules for demanding documents. Second, there are procedures by which arbitrators can order the production of missing material, through the exercise of subpoena power or otherwise. Third, institutional rules often authorize arbitrators to order sanctions against parties that fail to comply with disclosure obligations.

Of course, there is the unique reality in arbitration that the person who has ordered the disclosure is

the ultimate decision-maker who, in the absence of grounds to vacate an award-grounds that do not include the commission of mere errors of fact or law-will have the final word on the merits of the dispute.

The institutional provider rules

The rules of virtually all of the major arbitration providers in the United States attempt to assure, or at least permit, prehearing document discovery. The JAMS Comprehensive Arbitration Rules and Procedures, for example, require the parties to cooperate in good faith in the "voluntary, prompt and informal exchange of all non-privileged documents . . . relevant to the dispute immediately upon commencement of the Arbitration." JAMS Rule 17(a). The obligation to produce relevant documents is ongoing. Id., Rule 17(d). The parties can demand, and the arbitrator can order, additional disclosure. Id., Rule 17(e). JAMS also provides for one deposition for each side as of right. Id., Rule 17(c).

American Arbitration Association (AAA) Commercial Arbitration Rule R-21 contains similar provisions permitting a party, at the arbitrator's discretion, "consistent with the expedited nature of arbitration," to obtain documents from the other side. The AAA rules do not provide for depositions, but arbitrators may permit them. See, e.g., Rule L-4(d) of the AAA's large complex case procedures, which says that "the arbitrator(s) may order depositions of, or the propounding of interrogatories to, such persons who may possess information."

While the International Institute for Conflict Prevention & Resolution (CPR) rules do not mention the word "document"-speaking only in terms of "discovery"-it is clear that they, too, envision a document exchange as part of the process. CPR rules 11 and 12.3.

Neither the JAMS rules, the AAA commercial rules nor the CPR rules contain specific provisions related to the disclosure of electronically stored information (ESI). This is not to say that ESI is unavailable in arbitration-only that it is not treated differently than any other disclosure. In that regard, JAMS Rule 17(e) expressly permits the arbitrator to decide a discovery dispute and, if necessary, to "appoint a special master to assist in resolving a discovery dispute." This provision, which effectively shields the decision-maker from privileged documents, also provides a tool for managing complex discovery issues, such as those raised by ESI discovery. AAA Rule R-21(c) authorizes the arbitrator "to resolve any disputes concerning the exchange of information." There is no provision, however, for appointment of a special master.

Both the JAMS and the AAA rules give the arbitrator the authority to subpoena documents on his or her own initiative. See AAA Rule R-31(d) and JAMS Rule 21. CPR Rule 12.3 allows the tribunal to "require the parties to produce evidence in addition to that initially offered."

Sanctions

Here, of course, is where the rubber hits the road. Arbitrators are not judges and have no power of contempt. While the AAA rules do not provide expressly for sanctions, they permit an arbitrator to allocate specified costs in his or her award. AAA Rule R-43(c) permits the arbitrator to "assess [certain] fees, expenses and compensation" in that regard. JAMS Rule 24(f) permits an arbitrator to assess "Arbitrator fees, Arbitrator compensation and expenses [in the award] if provided by agreement of the Parties [or] allowed by applicable law." Both sets of rules limit the ability to award counsel fees. See, e.g., AAA Rule R-43(d)(ii).

Both JAMS and CPR explicitly provide for sanctions, including the default of a party for discovery or other abuses. JAMS Rule 29, entitled "Sanctions," provides that "The Arbitrator may order appropriate sanctions for failure of a Party to comply with its obligations under any of these Rules. These sanctions may include . . . in extreme cases ruling on an issue adversely to the Party who has failed to comply." CPR Rule 15, entitled "Failure To Comply With Rules," states in relevant part: "Whenever a party fails to comply with these Rules, or any order of the Tribunal pursuant to these Rules . . . the Tribunal may impose a remedy it deems just, including an award on default." While the AAA rules have no explicit provision dealing with sanctions, at least one court in Massachusetts (two justices dissenting) recently found such authority in the AAA rules when coupled with a broad arbitration clause. *Superadio L.P. v. Winstar Radio Productions LLC*, 446 Mass. 330, 844 N.E.2d 246 (2006), holding that a broad arbitration clause combined with AAA Rule 45(a) (providing that the

arbitrator can "grant any relief or remedy that the arbitrator deems just and equitable"), and Rule 23(c) (which authorizes the arbitrator "to resolve any disputes concerning the exchange of documents"), permits an AAA arbitrator to impose monetary sanctions.

Thus, at least theoretically, where e-discovery is concerned, a party under the JAMS or the CPR rules can be defaulted for a discovery abuse involving spoliation or the failure to disclose e-mails or other ESI. At least in Massachusetts, all three providers have the power to impose monetary sanctions for discovery abuses. To date, there does not appear to have been a case of an arbitrator defaulting a party for e-discovery abuses.

The real issue is whether an arbitrator will use his or her power to assess costs or to default a party when confronted with spoliation or a refusal to produce. Although training programs for arbitrators now emphasize the need to manage proceedings efficiently, arbitrators traditionally were trained to tolerate behavior that most courts would not. Arbitrators were encouraged to hear all of the evidence-even rank hearsay for what it might be worth. (The AAA still encourages short-form awards, largely to streamline the process and make it less expensive, and to insulate an award from subsequent attack. By contrast, CPR and JAMS provide for a reasoned award unless the parties agree otherwise. CPR Rule 14.2; JAMS Rule 24(g).)

The real difference in arbitration is found in the people who act as arbitrators and the fear of vacatur if an arbitrator exercises his or her sanctioning authority. A number of arbitrators are not judges or litigators. They have all the insecurities that accompany that inexperience and are reluctant to order sanctions. It is a challenge to the provider organizations to teach neutrals about the technical aspects of e-discovery and to educate them to use their coercive powers under the rules to assure that all parties receive a full and fair hearing. All three providers offer ongoing training for their neutrals. CPR has, at this moment, a committee discussing discovery guidelines. It also has a committee charged with addressing the challenges of e-discovery in CPR arbitrations.

One thing is certain, however. ESI is here to stay, and arbitrators now regularly deal with e-discovery and with some parties' reluctance or refusal to spend the time or money to comply with legitimate document requests. It is only a matter of time before sanctions become more common and case law gives arbitrators more guidance on how to react to abusive discovery practices.

Mediation

Both the burdens of e-discovery and uncertainties as to how arbitrators will handle these issues provide incentives for parties to consider mediation as an alternative. In mediation, parties sometimes can avoid e-discovery altogether, or at least greatly limit the kind of production required. While the specter of e-discovery often can promote settlement in mediation, one also sees creative solutions to the burdens of e-discovery worked out consensually between non-settling parties in a mediation context.

The potential cost of complying with discovery orders regarding electronic material sometimes approaches or exceeds the amount of potential damages at issue. This is particularly true in class actions, but may also be so in business, commercial and some kinds of employment cases in which documentary proof can be massive or expert investigation of backup tapes may be called for.

In some cases, parties may be able to reach resolution with the help of a mediator and avoid such production altogether. In a recent hotly contested sex discrimination and harassment case, for example, while the parties disagreed strongly about the facts of the case and the merits of the issues, they were able to reach agreement after 1 1/2 days of mediation. One of the prime motivating factors was the cost of the ESI discovery that otherwise would have been required. The settlement saved the cost, delay and aggravation of producing years of e-mails among brokers in an office, as well as reams of documents related to account distributions and other financial information.

It might appear at first blush that the specter of e-discovery in litigation or arbitration provides a club for plaintiffs-not only to induce the use of mediation, but also to secure favorable settlements. Not only can the costs of e-discovery be prohibitive for defendants, especially for smaller companies and institutions, but some companies may employ different document-retention policies in different business locations. Spoliation may be an issue, given the difficulties of complying with preservation

demands and ensuring that all employees understand the need for them, leading defendants to settle on terms more favorable to plaintiffs than they might otherwise have considered.

Plaintiffs, however, are not free of the perils posed by e-discovery in mediation's alternative forum. Plaintiffs may face discovery-related cost-shifting if the case goes to trial or arbitration. This may shift the settlement dynamic in a dispute, such as an employment case in which the plaintiff has lost her job and has minimal resources, even though she is paying her attorney on a contingency basis.

The potential burdens of e-discovery also can be managed creatively in the context of mediation. In one large class action, for example, the cost of production would have been many times any potential settlement. The parties agreed to mediate the case and do informal, confidential discovery through data sampling. They engaged the services of a neutral to help them resolve issues related to the sampling. The neutral was asked to help the parties negotiate their respective sampling recommendations and, if they could not come to agreement, to arbitrate the issue so that limited discovery could proceed. The parties agreed that if the entire case could not be resolved in a mediation context, no conclusions reached by way of the sampling process could be used in a subsequent litigation in the absence of a judicial order.

Given that electronic communication is now the dominant form of business communication, counsel are advised to understand the ways electronic discovery may be handled not just in litigation, but also in alternative dispute resolution. Arbitrators will become increasingly comfortable in using their coercive powers in this context. Mediators will become more adept in helping the parties resolve these issues consensually.

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Accounting for the Costs of Electronic Discovery

David Degnan*

I. INTRODUCTION

Experts estimate that conducting an electronic discovery (e-discovery) event may cost upwards of $30,000 per gigabyte.[1] Given the complexity of the subject and the amount of money involved, many lawyers, litigation support vendors, experts, consultants, and forensic accountants have found e-discovery to be quite lucrative.[2] However, few commentators have offered guidance to help courts, attorneys, and clients predict and plan[3] for litigation.[4] Despite the lack of research, the civil procedure[5] and evidence rule[6] committees, Congress,[7] and courts[8]

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1. Herbert L. Roitblat, *Search & Information Retrieval Science*, 8 SEDONA CONF. J. 192, 192 (Fall 2007).

2. *See, e.g.*, *In re* Fannie Mae Sec. Litig., 552 F.3d 814, 817 (D.C. Cir. 2009) (noting that Fannie Mae spent approximately 9% of its total annual budget of six million dollars on the production of electronically stored information for the litigation at issue).

3. FED. R. CIV. P. 26 advisory committee note (2006 Amendment) ("The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the case.").

4. *See* Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., 685 F. Supp. 2d 456, 472 n.56 (S.D.N.Y. 2010) (relying on how many hours it took to write the opinion to describe the cost of electronic discovery).

5. *See generally* FED. R. CIV. P. 26 advisory committee's note (1993 Amendment) ("[Parties should] discuss how discovery can be conducted most efficiently and economically"); FED. R. CIV. P. 26 advisory committee's note (2006 Amendment) ("[The 26(f) conference and plan] can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and by reducing the cost and burden of review by the producing party.").

6. FED. R. EVID. 502 initial advisory committee notes prepared by the Judicial Conference Advisory Committee on Evidence Rules (Revised

frequently address the cost of e-discovery. That said, the general consensus is that e-discovery is expensive, time-consuming, and risky.[9]

First, the discovery of electronic evidence is expensive for clients and the other parties involved. Few seriously debate this point; however, some argue that the costs of e-discovery are grossly exaggerated.[10] But to make such an accusation (of exaggerated costs), one must review the process as a whole[11] and analyze both the external costs of outsourcing and the internal costs that are borne by the client or insurer in administering and processing the e-discovery event. For instance, the client may hire an expert to help develop internal information management protocols, but it still has to train its employees on how to use the new email server or software program.[12] These steps require the time, talent, and expertise of the e-discovery team, which includes upper level management, in-house counsel, administrative staff, and information technology (IT) personnel.

Once the information management protocols are developed and implemented, employees must consistently use these

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11/28/2007), *available at* http://www.law.cornell.edu/rules/fre/ACRule502.htm ("[The purpose of the rule] is to respond[] to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern of that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery.").

7. Because FED. R. EVID. 502 had to go through Congress before passage, it is included in this list.

8. *See Pension*, 685 F. Supp. 2d at 472 n.56 (relying on how many hours it took to write the opinion to describe the cost of electronic discovery).

9. *See, e.g., id.* at 461 ("In an era where vast amounts of electronic information is [sic] available for review, discovery in certain cases has become increasingly complex and expensive.").

10. John B. v. Goetz, No. 3:98-0168, 2010 U.S. Dist LEXIS 8821 (M.D. Tenn. Jan 28, 2010); Spieker, et al. v. Quest Cherokee, LLC., No. 07-1225-EFM, 2009 WL 2168892 (D. Kan. July 21, 2009).

11. *See* Columbia Pictures v. Bunnell, No. CV 06-1093FMCJCX, 2007 WL 2080419, at *8 n.19 (C.D. Cal. May 29, 2007) (noting that the expert cost projections were not believable because the expert made assumptions about the process).

12. *Cf.* Arthur Andersen LLP v. United States, 544 U.S. 696, 700 n.4 (2005) (explaining that Arthur Anderson helped to train some of Enron's employees on proper document retention procedures when threatened with litigation, and outlining Arthur Andersen's document retention policy).

protocols until the company reasonably anticipates a lawsuit.[13] The company's counsel must then place a litigation hold on all relevant documents, suspend its document retention system and procedures, and monitor such hold until the proper documents are collected.[14] This process potentially involves every employee that worked on the litigated matter.[15]

After the litigants meet and develop the proper parameters of the electronic document search,[16] the data is collected and processed.[17] Data processing may involve the cost of retaining an outside vendor to erase duplicates and find documents responsive to the requests for production within a larger database of collected files.[18] The outside vendor(s) then charges to process, index, host, review, and finally produce the collected data in an agreed-upon format.[19]

Unprofessional discovery tactics may contribute to inflated estimates and costs. Litigation strategies have often utilized e-discovery to force settlement[20] or push opposing counsel into an unfavorable negotiating position.[21] This tactic is not new, and some refer to this practice as "blackmail."[22] Before the digital era, discovery may have consisted of thousands of unorganized paper documents produced in warehouses. The high cost and daunting task of organizing and reviewing all that material would often force a party into settlement.[23] Today, this practice

13. *See, e.g.*, Broccoli v. Echostar Commc'ns Corp., 229 F.R.D. 506, 511 (D. Md. 2005) ("[Defendant] plainly had a duty to preserve employment and termination documents when its management learned of Broccoli's potential Title VII claim that could result in litigation.").

14. Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 220 (S.D.N.Y. 2003).

15. *Id.* at 218.

16. FED R. CIV. P. 26(f).

17. FED R. CIV. P. 34(b).

18. Steven C. Bennett & Marla S.K. Bergman, *Managing E-Discovery Costs: Mission Possible*, 832 PLI/LIT 177, 180–81 (2010) (outlining the services that an e-discovery vendor should provide).

19. *Id.*

20. Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH & INTELL. PROP. 171, 182 (2006) ("Commentators posited that savvy requesting parties could force settlement of cases simply by threatening electronic discovery.").

21. Michael R. Arkfeld, ARKFELD ON ELECTRONIC DISCOVERY & EVIDENCE § 1.3(g) (2d ed. 2008).

22. Daniel B. Garrie & Matthew J. Armstrong, *Electronic Discovery and the Challenge Posed by the Sarbanes-Oxley Act*, 2005 UCLA J. L. & TECH. 2, 2 (2005).

23. *See, e.g.*, Howard L. Speight & Lisa C. Kelly, *Electronic Discovery: Not*

still exists, but now the material is data-dumped onto the requesting party.[24]

Second, metadata and other electronically stored information (ESI) take time to review and understand.[25] The data processing stage includes finding important records, redacting sensitive information, and coding relevant and privileged documents.[26] These tasks require months or even years, even with the help of software vendors, attorneys, and contract reviewers.[27] If protocols for preserving ESI are called into question, the time consumed by this peripheral litigation may mean additional months or years before the parties can complete discovery and focus on the merits of the case.

Third, e-discovery is risky.[28] Judges have tired of sophisticated corporations trying to disregard, skirt, or ignore their obligations to understand, address, and preserve ESI.[29] Courts readily impose sanctions when parties destroy information contained in email accounts.[30] However, having an adequate storage system in place before litigation begins can save time and money. Otherwise counsel *and the client* risk paying both the costs (1) to reactively produce discovery by

Your Father's Discovery, 37 ST. MARY'S L. J. 119, 134 n.49 (2005).

24. Withers, *supra* note 20.

25. FED. R. CIV. P. 26 advisory committee's note (2006 Amendment) (acknowledging delay that electronic discovery causes and proposing compromise as a way to move the case forward).

26. Bennett & Bergman, *supra* note 18.

27. *See generally* Bensel v. Allied Pilots Ass'n, 263 F.R.D. 150, 151 (D.N.J. Dec.17, 2009) (noting that this case has become known for its eight year legal war).

28. Jason Fliegal & Robert Entwisle, *Electronic Discovery in Large Organizations*, 15 RICH. J.L. & TECH 7 (2009), http://law.richmond.edu/jolt/v15i3/article7.pdf ("Access to all this information may be helpful to the truth-seeking function of the courts, but several problematic side effects result: enhanced discovery compliance costs, enhanced discovery burdens, and the need for lawyers and judges to apply the law to highly technical topics generally beyond the knowledge of laymen.").

29. *See, e.g.*, Order on Motion for Sanctions and Motion to Strike at 1, Maggette v. BL Dev. Corp., No. 2:07CV182-M-A, 2009 WL 4346062 at *1 n.1 (N.D. Miss. Nov. 24, 2009) ("The court has already imposed sanctions upon defendants for what it views as a casual, if not arrogant, rebuff to plaintiffs' repeated efforts to obtain information which is ordinarily easily produced in litigation.").

30. Courts will not, however, impose sanctions if destruction was the result of "mere negligence." Swofford v. Eslinger, 671 F. Supp. 2d 1274, 1280 (M.D. Fla. 2009).

court order[31] and (2) for the other side's attorney's fees to investigate abuses,[32] depose custodians,[33] inspect opposing counsel's computer systems,[34] and file motions related to the spoliation of data.[35]

This article endeavors to explain all the moving parts and assumptions necessary to reach a cost estimate proportional to the litigation. By appreciating the cost assumptions related to e-discovery, the parties, bench, and bar may find ways to implement and create new cost effective solutions to approach e-discovery. In the next section, this article addresses a short, but noteworthy case in which the court found the cost of preserving ESI was too great.[36] In the third section, this article explains what the costs of e-discovery are at each step.[37] In the fourth section, this article explains the many tools that each party has to reduce costs and advance the case forward.[38] And in the fifth section, this article will discuss ethical issues that may impact and increase the client's budget for e-discovery.[39]

II. COSTS BURDENS: *RODRIGUEZ-TORRES V. GOVERNMENT DEVELOPMENT BANK OF PUERTO RICO*

In 2006, the Federal Rules of Civil Procedure (FRCP) were

31. *See, e.g.*, *In re* Fannie Mae Sec. Litig., 552 F.3d 814, 817 (D.C. Cir. 2009).

32. *See, e.g.*, Capellupo v. FMC Corp., 126 F.R.D. 545, 553 (D. Minn. 1989) (ordering the defendant to pay the fees the plaintiff "incurred in investigating, researching, preparing, arguing and presenting all motions touching upon the issue of document destruction.").

33. *See, e.g.*, Arista Records, LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124, (S.D.N.Y. 2009) (finding that it is grossly negligent to send custodians to Europe to prevent them from being deposed).

34. *See, e.g.*, Eugene J. Strasser, M.D., P.A. v. Bose Yalamanchi, M.D., P.A., 669 So. 2d 1142, 1143–44 (Fla. Dist. Ct. App. 1996) (stating that discovery rules are broad enough to encompass plaintiff's request to enter defendant's computer system, but declining to allow access in this particular case). *See also* FED R. CIV. P. 34 (allowing for inspection of the opposing party's computer systems).

35. *E.g.*, TR Investors, LLC v. Genger, No. 3994-VCS, 2009 Del. Ch. LEXIS 203, at *63 (Del. Ch. Dec. 9, 2009) ("Finally, because Genger's misconduct has occasioned great expense, I award the Trump Group their reasonable attorneys' fees and expenses related to the motions for contempt and spoliation.").

36. *See infra* Part II.

37. *See infra* Part III.

38. *See infra* Part IV.

39. *See infra* Part V.

updated and specifically addressed the preservation and production of e-discovery.[40] Since that time, courts have broadly interpreted such rules to allow for expansive preservation and production of documents.[41] With that background, this section will analyze *Rodriguez-Torres v. Government Development Bank of Puerto Rico*, a noteworthy case where the court found that the costs and time necessary to produce ESI were too high—and, thus, prohibitive—making the emails and other ESI not reasonably accessible in the circumstances presented.[42] This case, therefore, serves as a good example of proportionality in the production of ESI.

Rodriguez-Torres is a case about an employment discrimination dispute where the plaintiff requested the following electronic materials in discovery:

> For each year 2007, 2008, 2009, produce in native electronic format with its original metadata all e-mail communications and calendar entries describing, relating or referring to plaintiff Vicky Rodriguez, both inbound and outbound from co-defendant GDB's messaging system servers. Particular attention to the following definition of extract key-words needs to be exercised: a) identification of Rodriguez by different variations of her name; b) designation of pejorative and derogatory terms typically used to demean persons according to their age and gender (including but not limited to phrases such as: vieja, nena, arrugas, años, edad, etc .); c) designation of phrases which could be referring to the current and past litigations, and which could suggest retaliatory animus or activities (including but not limited to phrases such as: demanda, caso, testigos, demandada, plaintiff, etc.); d) designation of record custodians to include all co-defendants, and other unnamed GDB employees known to tease, insult and taunt Rodriguez based on her physical appearance and age (a description of the process is further detailed in the ESI Specialist Report).[43]

Predictably, the defendant bank objected to the production request, suggesting that it was "irrelevant, overbroad and not reasonably calculated to lead to the discovery of admissible

40. *See, e.g.*, FED. R. CIV. P. 26 advisory committee's note (2006 Amendment) ("Electronic storage systems often make it easier to locate and retrieve information. . . . But some sources of electronically stored information can be accessed only with substantial burden and cost.").

41. *See, e.g.*, Columbia Pictures v. Bunnell, No. CV 06-1093FMCJCX, 2007 WL 2080419, at *13 (C.D. Cal. May 24, 2007) (according the Federal Rules of Civil Procedure broad applicability with regard to E-discovery after the 2006 amendments).

42. Rodriguez-Torres v. Gov't Dev. Bank of P.R., 265 F.R.D. 40, 43–44 (D. P.R. 2010).

43. *Rodriguez-Torres*, 265 F.R.D. at 43.

evidence."[44] Moreover, the defendant bank argued that the plaintiff's request would result in the production of thousands of documents that its counsel must review for responsiveness and privilege, resulting in costs that well exceed the matter in controversy.[45] The plaintiff responded by filing two motions, one to compel discovery and one for sanctions relating to the failure to preserve and produce ESI, including emails.[46] After these motions were filed, the court requested that both parties file a joint informative motion, detailing the cost of e-discovery and time needed for production.[47]

The parties' joint informative motion advised the court of the anticipated costs of the requested discovery.[48] Based on an IT consulting group that prepared a cost report, the itemized[49] expenses totaled $35,000 to retrieve the requested information.

Without divulging the amount in controversy, the court ruled that the requested ESI was "not reasonably accessible" under 26(b)(2)(B) because of the undue burden and cost.[50] The Court reasoned that "$35,000 is too high of a cost for the production of the requested ESI in this discrimination action."[51]

However, even if the data is not reasonably accessible, the requesting party may still be able to obtain the same information upon a showing of good cause.[52] To that end, the plaintiffs argued that based on three articles, they "expect to find more relevant information than that which they have found from the hard copies of documents requested in the initial request for production of documents."[53] Moreover, "[p]laintiffs anticipate finding communications showing discriminatory animus such as derogatory and demeaning references, exclusion from meetings, communications and work activities, and general disregard for Plaintiff Rodriguez's

44. *Id.*
45. *Id.*
46. *Id.* at 42.
47. *Id.*
48. *Id.* at 44.
49. *Id.* ("(1) $5,000.00 for the configuration and creation of the Concordance Database; (2) $20,000.00 to import the twenty-four Microsoft Outlook mailboxes that were requested by the plaintiffs; and (3) $10,000 for the database search and retrieval, and the final ESI report.").
50. *Id.*
51. *Id.*
52. FED. R. CIV. P. 26(b)(2)(B).
53. *Rodriguez-Torres*, 265 F.R.D. at 44.

abilities."[54] The court noted that the plaintiffs must "provide [the court] with the basis of their belief specifically because the Court wanted to prevent Plaintiffs from requesting the ESI for the sole purpose of conducting a fishing expedition."[55] Indeed, the plaintiffs failed to show good cause under Rule 26(b)(2)(B) of the FRCP to attain much of what they requested.[56]

Rodriguez is one of a few cases that discuss the undue cost of ESI under FRCP 26(B)(2)(B).[57] As such, this case reintroduces the cost consideration into the discovery of ESI. It also allows judges and producing parties to determine if the requested amount of discovery would be proportional to the matter in controversy or the novelty of the issues. Armed with such information, counsel can properly suggest that a request for ESI be denied when the matter is of low value or when the discovery requests seek to do more than fully understand the applicable claims or defenses.[58] Moreover, this case provides a nice introduction and a springboard to discuss the costs of retrieving and producing ESI.

III. ADDRESSING THE COST OF PRESERVING AND THEN PRODUCING ELECTRONICALLY STORED INFORMATION

Evaluating the cost of e-discovery is complex. Additionally, lawyers, consultants, and litigation support professionals can easily inflate or marginalize the same cost data to their benefit in an attempt to impress the client or the court.[59] The problem is that it is difficult to predict and understand how many documents are in a gigabyte of data, how fast the contract reviewers will review the documents, or

54. *Id.*

55. *Id.*

56. *See id.* (describing the plaintiffs' request for documents as no more than a fishing expedition, devoid of the requisite good cause).

57. FED. R. CIV. P. 26(b)(2)(B).

58. *Cf.* Aguilar v. Immigration & Customs Enforcement Div. of the U.S. Dep't of Homeland Sec., 255 F.R.D. 350, 356–57 (S.D.N.Y. 2008) (describing the test for requirement of metadata as consisting of two primary considerations: the need for and probative value of the metadata, and the extent to which the metadata will make the electronic information more useful).

59. *Cf.* Columbia Pictures v. Bunnell, No. CV 06-1093FMCJCX, 2007 WL 2080419, at *8 (C.D. Cal. May 29, 2007) (noting that one defendant's estimate of space required to store daily Server Log Data was "significantly overstated.").

how much information will be culled out. This section will serve as a starting point in understanding the costs of conducting e-discovery. As a result of this uncertainty, professionals and experts take advantage of this ignorance when producing inflated bids and estimates for e-discovery.[60] This next section breaks down the variables of producing ESI (before attorneys' fees) and explains how those variables may be adjusted to conduct ESI discovery in the most proportional way possible for all parties involved.

A. THE COSTS OF PRESERVING AND PRODUCING ELECTRONICALLY STORED INFORMATION

Litigation support is a lucrative industry.[61] Before the days of ESI, the client would rent and retrofit warehouses to store mass quantities of paper for litigation.[62] Now, everything may be stored on a mainframe, personal digital assistant (PDA), or other computer device.[63] Vendors' jobs, therefore, have changed to meet the need of this emerging niche.[64] A recent study suggested litigation support industry would be worth $4.5 billion by 2009.[65] This is not shocking, given the amount of

60. *See, e.g., id.* (noting that the defendants' cost projections were not believable); Oracle Corp. v. SAP AG, No. C-07-01658 PJH (EDL), 2008 U.S. Dist. LEXIS 88319, at *3–6 (N.D. Cal. 2008) (holding that an additional $5 million for electronic discovery on top of an existing cost of $11.5 million outweighs the benefits that additional discovery may provide, according to proportionality).

61. *See generally* Charles Skamser, *The Cost of eDiscovery*, THE EDISCOVERY PARADIGM SHIFT (Sept. 10, 2008, 9:49 AM), http://ediscoveryconsulting.blogspot.com/2008/09/cost-of-ediscovery.html (describing the changes to electronic discovery and the confusion in its application since the FRCP change in 2006, especially regarding the increase in commercial expenditures).

62. *Cf.* Withers, *supra* note 20, at 181–82 (noting that in the past, the main costs were storing and copying documents, while today those costs are non-factors as other considerations, such as inaccessibility and custodianship, have become the significant cost factors).

63. *Cf.* Garrie & Armstrong, *supra* note 22, at 16 ("Although courts have extrapolated traditional discovery principles from paper documents to digital ones, courts have also been challenged by production costs differences between paper and digital documents.").

64. *See generally* Skamser, *supra* note 61 (describing several vendors who have emerged to support demand for specialized electronic discovery services).

65. *See* George Socha & Thomas Gelbmann, *EDD Showcase: EDD Hits $2 Billion*, L. TECH. NEWS (Aug. 2007), http://sochaconsulting.com/2007_Socha-Gelbmann_ED_Survey_Public_Report.pdf (predicting growth in the electronic discovery market based on consumer and provider expectations).

information that must be screened and reviewed before trial.[66] This section discusses the variables of ESI discovery and explains how those variables may impact e-discovery cost calculations. For purposes of this article, the costs of e-discovery will be based on 100 gigabytes of information unless suggested otherwise. Speaking in terms of paper documents, 100 gigabytes is the equivalent to 100 truckloads of documents.[67] And when that much information is in play, the client should expect to pay for culling, organizing, and reviewing of the data, unless it has the capabilities and the know-how to conduct such services in-house.[68]

Aside from ESI and trial counsel's fees, there are several other outsourced processing costs to consider (see Table 1). Table 1 is particularly helpful because it shows where the money is spent in a hypothetical litigation scenario. Manual collection costs $250 to $500 per hour, depending on the complexity.[69] But with 94 percent of the ESI costs spent on processing and review, the processing and review costs receive most—if not all—the attention in literature and practice.[70] Bringing various elements of discovery in-house may save some of these costs, but the client must also factor in the time and opportunity cost when employees are performing e-discovery instead of their normal job duties.[71]

66. *Cf.* Craig Ball, *Worst Case Scenario*, L. TECH. NEWS (Oct. 1, 2006), http://www.law.com/jsp/lawtechnologynews/PubArticleLTNC.jsp?id=1202435547745 (describing how delegating electronic discovery to vendors and outside experts can blur the line between lawyer and service provider and can be both sensible due to the amount of information that must be reviewed and risky because it wrests control away from the lawyer and can adversely affect the client and the case).

67. *Cf.* E-DISCOVERY TEAM, www.e-discoveryteam.com (last visited July 5, 2010) (describing in a sidebar on the site's landing page that 1 gigabyte of data is equivalent to about 75,000 pages of documents, which would fill a pickup truck).

68. *See generally* Jason Krause, *Don't Try This at Home: Doing E-Discovery is Best Left to Outside Experts*, ABA J., Mar. 2005, at 59, 59–60 (describing one law firm that does in-house electronic discovery tasks, noting that it is a rarity and that for more complicated cases, the firm relies on outside consultants).

69. *See* Skamser, *supra* note 61.

70. *See, e.g.*, *Predictive Pricing Estimator*, ORANGE LEGAL TECH., http://orangelt.us/estimator/pricing1.html (last visited Mar. 11, 2010) (providing a cost estimator for electronic discovery services focusing on the cost to process and review the data).

71. Withers, *supra* note 20, at 182 ("Organizations without state-of-the-

Table 1: Expenses from E-Discovery for 25 Gigabytes (GB) of Information[72]

EDRM Stage	Total Dollar Cost (in thousands)	Share of Total
Collection	10	4%
Processing	94	36%
Review	153	58%
Production	4	2%
Total	261	100%
Total for Processing and Review	247	94%

B. WHERE IS THE MONEY GOING?

Client, counsel, and the court must understand the costs of e-discovery to make informed decisions about litigation support vendors and the scope of litigation. There are also several types of litigation support vendors to consider. Specifically, some vendors are helpful in front-end analysis and review; others are helpful copying, scanning, warehousing, or managing documents online in a document repository; and still others are helpful at cumulating and packaging all this information in a manner that will ensure the proper presentation of documents for deposition, witnesses, and trial.[73] By calculating the tangible cost of outsourcing segments of the review and accounting for the intangible costs of company employees' time, in-house counsel may evaluate the real costs associated with a typical review and make the appropriate staffing decisions. Using the industry averages outlined by others as baselines and reasonable ranges to articulate highs and lows, this article extrapolates those numbers to provide costs analysis for 100 gigabytes of data. Therefore, the following sections outline the variables that are used to calculate costs of document reviewers

art electronic information management programs in place, which classify information and routinely cull outdated or duplicative, data face enormous (often self-inflicted) costs and burdens.").

72. Will Uppington, *E-Discovery 911: Reducing Enterprise Electronic Discovery Costs in a Recession*, E-DISCOVERY 2.0, (Feb. 20, 2009, 4:40 PM), http://www.clearwellsystems.com/e-discovery-blog/2009/02/20/e-discovery-911-reducing-enterprise-electronic-discovery-costs-in-a-recession/.

73. While acknowledging that such companies exist, it is beyond the scope of this article to recommend any such vendor or service. The author will merely note that he has used several of these companies with success.

and litigation support vendors.

1. Litigation Support Vendor Services

Litigation support vendors help with data deduplication, culling, processing, and analyzing the information before the contract document reviewers see the documents.

Table 2: Expected Vendor Fees for 100 Gigabytes (GB) of Information[74]

	Total per GB (low)	Total per GB (average)	Total per GB (medium)	Total per GB (high)
Price per GB	$750	$1000	$1200	$1800
100 GB Total	$75,000.00	$100,000.00	$120,000.00	$180,000.00

The process of outsourcing to litigation support vendors to load and cull data in its proprietary software program ranges in cost from $350 to $500 per gigabyte.[75] The end cost of culling is typically $750 to $1800 per gigabyte for the vendor services, considering all the extra fees for hosting, software licensing, advanced culling, consulting services, and technical support.[76] Industry average is approximately $1000 per gigabyte for hosting and processing.[77]

74. There is information to support the industry average is $1000 per gigabyte. For the purposes of this study, it is reasonable to assume it would cost an additional $400 to $700 per gigabyte for vendor services at the low and medium range. With such information, the test parameters of $750, $1000, $1200, and $1,800 were developed. *See* Chris Egan & Glen Homer, *Achieve Savings By Predicting And Controlling Total Discovery Cost*, METROPOLITAN CORP. COUNS., (Dec. 1, 2008), http://www.metrocorpcounsel.com/pdf/2008/December/08.pdf; Eric Rosenberg, *Getting Smart About Analyzing ESI*, L. TECH. NEWS (Feb. 15, 2008), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=900005503372 ("On average, it costs $1,800 to process and prepare data for analysis, and $250 per hour to analyze and review it.").

75. *See Predictive Pricing Estimator*, *supra* note 70 (comparing its rate of $350 against the competition's rate of $500 for additional processing cost per gigabyte).

76. *See* Egan & Homer, *supra* note 74; Rosenberg, *supra* note 74.

77. Egan & Homer, *supra* note 74.

2. Costs of Contract Document Reviewers

The cost of contract document reviewers are dependent on the volume of information per gigabyte, the hourly rate of the reviewers, the speed of the reviewers, and the cull rate achieved. The below section attempts to define each of the necessary variables needed to predict the cost of hiring document reviewers.

Estimates, with respect to volume suggest that one gigabyte contains between 5000 to 25,000 documents.[78] However, 10,000 documents is the presumed number of documents per gigabyte.[79] A production with 5000 documents will have more files with attachments, graphics, or TIFF images, which take up more storage space. On the other hand, a production with 25,000 documents in a gigabyte will contain more short emails, word documents, or other files that do not take up much space. For example, a Microsoft Word document averages 9 pages per document, and an email averages 1.5 pages per document in length.[80] The chart below suggests, visually, how many documents there are in one gigabyte.

Table 3: Range of Estimates for Documents per Gigabyte (GB)

	Low Amount	Industry Standard	Medium	High
Amount of Docs in One GB	5000	10,000	15,000	25,000

The process of document review is often extremely expensive. The literature suggests that it costs $28 per hour to outsource the first-pass attorney review to another country (India) and upwards of $65 to do the same review in New

78. *See Clearwell E-Discovery Savings Calculator*, CLEARWELL SYSTEMS, INC., http://www.clearwellsystems.com/e-discovery-customers/eDiscovery-savings-calculator.php (last visited Mar. 11, 2010) (providing a range of 5,000–25,000 docs per gigabyte for calculating the cost of processing data) [hereinafter *Savings Calculator*]. *See also* Egan & Homer, *supra* note 74.

79. Egan & Homer, *supra* note 74.

80. How Many Pages are in a Gigabyte, LexisNexis Discovery Fact Sheet, http://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI_FS_PagesInAGigabyte.pdf (last visited Dec. 5, 2010).

York.[81] Additionally, one can hire in-house staff attorneys at the rate of $80,000 a year or $40 per hour, depending on the workload.[82] Using the same assumptions, one can calculate the costs of contract reviewers at $28, $40, $52.50, and $65 dollars per hour, assuming 2000 hours a year or 40 hours a week for 50 weeks. For a higher price, some staffing and litigation agencies combine document review with other services, this can be helpful given the reviewer's closeness to the documents and the facts of the underlying case.[83]

Table 4: Rates for Document Review Attorneys

Hourly Rate	$28 / hour	$40 / hour	$65 / hour	$52.50 / hour
Rate per Year	$56,000	$80,000	$130,000	$105,000

3. Speed of Document Review

Review speed is based on how many documents there are in a gigabyte, the number of document decisions that are required per document, and the speed of the document reviewers. The industry average is approximately 10,000 documents per gigabyte,[84] although this number can vary widely. The chart below compares the number of documents based on assumptions of 5000, 10,000, 15,000, and 25,000 documents per gigabyte. The review speed also depends on what tasks the reviewers are performing. Some reviewers only review for privilege; some review for privilege, mark hot documents, and make recommendations on sensitive information; and still other reviewers sample, run reports, and mark categories of documents. The diagram below shows the

81. Egan & Homer, *supra* note 74.

82. This also considers the prospect of hiring a contract worker at $30 per hour and adding in $10 per hour of overhead costs. *See* Gabe Acevedo, *All Play and No Work Made Lance a Disbarred Boy*, ABOVE THE LAW (June 2, 2010, 2:35 PM) (noting that a contract attorney is paid $30 per hour), http://abovethelaw.com/2010/06/all-play-and-no-work-made-lance-a-disbarred-boy/.

83. Uppington, *supra* note 72.

84. Egan & Homer, *supra* note 74.

review speed as constant and assumes that the reviewers are making many decisions per document and are doing more than simply looking for privileged documents, requiring a linear review.

Table 5: Rate of Document Review

	Low	Standard	Medium	High
Documents per day	5000	10,000	15,000	25,000
Hourly Rate Per Reviewer	400	400	400	400
Price per GB for Review	12.5	25	37.5	62.5

But the amount and type of documents reviewed also plays a significant role in how one calculates vendor rates and review speed.[85] Industry standards suggest that document reviewers can read, understand, and mark 50 documents per hour[86] or 400 documents per day.[87] If the reviewers work at a faster pace, they are likely not doing more than reading the subject line.[88] As a result, this variable should stay constant, although the parties, counsel, and the court should be made aware that review speed is subject to manipulation (and negotiation) in vendor cost projections.[89]

4. Cull Rate

In every collection, there is a certain amount of "junk" or irrelevant files that must be removed, or culled out, before the

85. Richard Stout, *In E-Discovery, It's Not About the Hourly Rate*, TRICOM DOC. MGMT. (Mar. 6, 2009), http://tricom.wordpress.com/2009/03/09/in-e-discovery-its-not-about-the-hourly-rate/.

86. *Id.* This article acknowledges analytic tools that are suggested to save time due to the focus of the review. However, those tools are not always appropriate depending on the type of decision that is being made, as an analytic tool focuses more on a single element, such as a privilege review.

87. Egan & Homer, *supra* note 74.

88. *See, e.g.*, Egan & Homer, *supra* note 74; Uppington, *supra* note 72 (discussing studies suggesting that the reviewers can review 100 documents in this time). Interestingly, pages and documents appear to be used interchangeably in the literature.

89. Perhaps the distinction that is being made is the number of document decisions per hour, meaning that one document may require several document decisions for privilege, relevance or necessary redactions.

contract reviewers see the files and the data is produced.[90] The percentage of information that is culled out is known as the cull rate, and that number will depend on how specific the collection is, the key-terms used, the search parameters, and the amount of risk that counsel is willing to take in defining the scope of the review and collection.[91] A broad collection will result in a high cull rate and the elimination of more documents. On the other hand, a narrow collection, using precise search terms, will cause more irrelevant files to be deleted before the review starts. For the ease of presentation, this paper suggests three standard review rates: 30% (low); 50% (medium) and 80% (high). The charts below attempt to show the impact that cull rates have on costs of a document review.

90. Withers, *supra* note 20, at 182.

91. Roland Bernier, *Avoiding an E-Discovery Odyssey*, 36 N. KY. L. REV. 491, 501 (2009) ("Culling rates are often used by vendors to define, or at least illustrate, success. . . . If you culled 60% of documents from a population, then that is, roughly, a 60% savings in attorney review time, with attendant reductions on certain costs associated with production and related processes.").

Table 6: 30% cull rate[92]

			Medium	High
	5000	10,000	15,000	25,000
	500,000	1,000,000	1,500,000	2,500,000
	30%	30%	30%	30%
	350,000	700,000	1,050,000	1,750,000
	400	400	400	400
	875	1750	2625	4375
	$28.00	$28.00	$28.00	$28.00
	$24,500.00	$49,000.00	$73,500.00	$122,500.00
	$40.00	$40.00	$40.00	$40.00
	$35,000.00	$70,000.00	$105,000.00	$175,000.00
	$65.00	$65.00	$65.00	$65.00
	$56,875.00	$112,750.00	$170,625.00	$284,375.00

92. *See Savings Calculator, supra* note 78 (Clearwell's calculator put this at the low end of the assumed cull rate).

Table 7: 50% cull rate

	5000	10,000	15,000	25,000
	500,000	1,000,000	1,500,000	2,500,000
	50%	50%	50%	50%
	250,000	500,000	750,000	1,250,000
	400	400	400	400
	625	1250	1875	3125
	$28.00	$28.00	$28.00	$28.00
	$17,500.00	$35,000.00	$52,500.00	$87,500.00
	$40.00	$40.00	$40.00	$40.00
	$25,000.00	$50,000.00	$75,000.00	$125,000.00
	$65.00	$65.00	$65.00	$65.00
	$40,625.00	$81,250.00	$121,875.00	$203,125.00

Table 8: 80% Cull Rate[93]

	5000	10,000	15,000	25,000
	500,000	1,000,000	1,500,000	2,500,000
	80%	80%	80%	80%
	100,000	200,000	300,000	500,000	
	400	400	400	400
	250	500	750	1250
	$28.00	$28.00	$28.00	$28.00
	$7,000.00	$14,000.00	$21,000.00	$35,000.00
	$40.00	$40.00	$40.00	$40.00
	$10,000.00	$20,000.00	$30,000.00	$50,000.00
	$65.00	$65.00	$65.00	$65.00
	$16,250.00	$32,500.00	$48,750.00	$81,250.00

In short, the cost range to review 100 gigabytes of information is between $7000 and $284,375, a difference of approximately $277,375.00, and the cost range to process 100 gigabytes of information is between $75,000 and $180,000, a difference of $105,000. The ranging assumptions that must be accounted for create nightmare scenarios for those who must

93. *Cf.* Skamser, *supra* note 61 (noting that litigation support vendors may change the assumptions to assert an exceptional cull rate—such as 90%).

plan a realistic litigation budget.[94] As a result, this is an area that needs further research and study to help counsel, the client and the court develop predictable solutions for the client.

C. ESTIMATING THE COSTS OF HIRING E-DISCOVERY COUNSEL

Hiring counsel is the primary expense in any e-discovery project. E-discovery counsel is needed to implement and set up a document retention program, hire and supervise a litigation support vendor, oversee document reviewers, review and categorize documents, and package the requested documents in a manner that is most helpful to trial counsel.[95] As a result, it is helpful that e-discovery counsel also be an experienced trial lawyer, so that she understands what type of documents to use and how to present them.[96] In short, counsel's job is to ensure e-discovery is executed in a timely, transparent, and defensible fashion.

Estimating the costs of hiring ESI counsel is difficult because attorneys from firms around the country command different salaries based on experience, skill, and prestige. E-discovery counsel must provide superior work product and constantly re-evaluate its processes to avoid sanction, which means the end costs to the client are in the thousands or millions of dollars.[97] Roughly speaking, the total cost of

94. Others have offered different reasoning for the varied costs outcomes. *Cf. Electronic Discovery: A View from the Front Lines*, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 18 (2008) ("[L]aw firms are afraid of looking incompetent by admitting to a lack of e-discovery knowledge or practice. In other cases, lawyers talk their clients into spending more than necessary on e-discovery, taking deliberate advantage of the client's lack of experience and knowledge in this area. Unfortunately, other commentators support Socha's conclusion.").

95. *Costs Associated with a Manual eDiscovery Strategy*, IRON MOUNTAIN, http://www.mimosasystems.com/html/ediscovery_worksheet.htm (last visited Mar. 11, 2010).

96. *Electronic Discovery: A View from the Front Lines*, *supra* note 94, at 18 ("For organizations that cannot staff an in-house team (as Verizon and other corporations have done), Patrick Oot recommends either hiring an outside boutique law firm that focuses exclusively on e-discovery or a larger firm with an e-discovery practice group headed by senior leadership. Oot says that a partner-level firm leader will have the credibility to direct the group competently and have the courage to give the best advice. Be wary, he says, of the law firm that assigns a junior associate to manage the discovery on any case.").

97. Ralph Losey, *The Multi-Model "Where's Waldo?" Approach to Search and My Mock Debate with Jason Baron*, E-DISCOVERY TEAM (Feb. 27, 2010),

discovery is suggested to be between $2.70 and $4.00 per document or $2.5 to $3.5 million to handle an e-discovery case.[98] However, prior articles discussing costs may present higher numbers than it actually costs in practice, given the amount of unknown variables.

D. UNDERSTANDING THE AVOIDABLE COSTS OF DISCOVERY: THE COSTS OF INVESTIGATIONS AND SANCTIONS

The other side of the cost equation is the cost of failing to preserve ESI. Courts have held that the failure to preserve and produce ESI is dishonest, inexcusable, or worse.[99] Such conduct is not limited to discovery. In an open records request case, the failure to produce native files may result in an order to produce and attorneys' fees awarded to the requesting party.[100] This section will briefly explore the costs of failing to preserve and produce ESI.

Courts will commonly impose monetary sanctions for the failure to preserve ESI. For example, in *Cache la Poudre*,[101] the court issued a $5000 sanction for failing to provide all available information to meet the requesting party's discovery request. Similarly, *in Phoenix Four, Inc. v. Strategic Res. Corp*,[102] the court gave a sanction of $30,000 for failing to take measures to provide ESI. As the discovery abuses become more distinct, so too does the amount of the monetary sanctions awarded.[103] For example, in *Qualcomm*, the court ordered the law firm and its client to pay over $8.5 million dollars in attorney's fees for the client's failure to preserve ESI.[104] Qualcomm's attorneys were

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http://e-discoveryteam.com/2010/02/27/the-multi-modal-wheres-waldo-approach-to-search-and-my-mock-debate-with-jason-baron/ (opining that the costs of an electronic discovery case is in the millions).

98. *Electronic Discovery: A View from the Front Lines*, *supra* note 94, at 5 ("If a 'midsize' case produces 500 gigabytes of data, this means organizations should expect to spend $2.5 to $3.5 million on processing, review, and production of ESI.").

99. Gamby v. First Nat'l Bank of Omaha, No. 06-11020, 2009 U.S. Dist. LEXIS 7687, at *14, 24 (E.D. Mich. Jan 20, 2009).

100. *See* Lake v. City of Phoenix, 218 P.3d 1004, 1008 (Ariz. 2009).

101. Cache La Poudre Feeds v. Land O'Lakes, Inc., 244 F.R.D. 614, 637 (D. Colo. 2007).

102. Phoenix Four, Inc. v. Strategic Resources Corp., No. 05 Civ. 4837(HB), 2006 WL 1409413, at *9 (S.D.N.Y. May 23, 2006).

103. *Id.*

104. Gregory D. Shelton, Qualcomm v. Broadcom*: Lessons for Counsel and a Road Map to E-Discovery Preparedness*, INT'L ASS'N OF DEF. COUNSEL, Feb. 2008.

also ordered to appear before the California State Disciplinary Board as a result of the failure to preserve.[105]

The differences between monetary sanctions and attorneys' fees are astronomical. It is incorrect for courts and commentators to refer to attorneys' fees as mild sanctions, as they are typically in the thousands or millions of dollars.[106] The costs of investigating, analyzing, and answering a sanctions motion is in many cases far more burdensome than most realize. Additionally, few cases ever reach trial in the first place, so a sanction of attorneys' fees might be the most effective sanction that does not punish the client for the attorney's conduct.

Moreover, the costs of sanctions extend well beyond monetary payments based on the severity of the abuse.[107] These punishments range from attorneys' fees, as discussed above, to adverse inferences, issue preclusion, and terminating sanctions.[108] The costs of losing one's case, or an important issue in one's case, because of the attorney's misconduct is unacceptable to most clients, but it is a remedy that the courts have employed.[109] Indeed, many of these more severe sanctions often accompany attorneys' fees and costs.[110]

Moreover, a brief discussion about insurance agencies is warranted. Insurance agencies must appropriately calculate and respond to malpractice claims and allocate the appropriate reserves. E-discovery is a very complex and risky area because minute details are often missed and opposing counsel frequently challenges production. All it takes for a decent protocol to be challenged is showing of unproduced emails, as was the case in *Zubulake I*.[111] As a result, insurance companies

105. *Id.*

106. *In re* Fannie Mae Sec. Litig., 552 F.3d 814, 817 (D.C. Cir. 2009) (Fannie Mae spent 6 million dollars to conduct discovery).

107. McDowell v. Gov't of Dist. of Columbia, 233 F.R.D. 192, 204 (D.D.C. 2006).

108. *See* Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs., 685 F. Supp. 2d 456, 469 (S.D.N.Y. 2010).

109. Columbia Pictures Inc. v. Bunnell, No. 2:06-cv-01093, 2007 WL 4877701, at *8 (C.D. Cal. 2007) (granting terminating sanctions).

110. *Id.*

111. *See generally* Zubulake v. UBS Warburg LLC (*Zubulake I*), 217 F.R.D. 309 (S.D.N.Y. 2003) (requiring the defendant to produce more than 450 emails and to restore 5 backup tapes based on a few emails that Ms. Zubulake had in her possession that defendant had not preserved).

should not hire just any malpractice attorney. Indeed, the absolute worst situation would be an insurance company hiring a malpractice attorney who is not competent in e-discovery matters, resulting in the malpractice attorney being sued for malpractice.

IV. CONTROLLING COSTS: THE KEY TO MANAGING E-DISCOVERY

Despite the ranging costs of e-discovery, there are ways to control the costs and to do so in a defensible and transparent manner. The key to controlling costs is to make sure the amount requested in discovery is proportional, reasonable, and appropriate for the matter in controversy.[112] Cost considerations have their origin in the FRCP, namely, Rule 26(b).[113] Within the Rule, ESI discovery will be required unless "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."[114] But, controlling costs is difficult to achieve because it requires some knowledge of mathematics, information technology, and statistics.

Courts, arbitrators, mediators, and special masters all strive to fashion a fair remedy. To reach such a remedy, each overseer needs to understand the tools available to limit costs and advance the case forward. In recent years, e-discovery has changed the idea of what is necessary to reach trial. This next section, therefore, addresses the tools that are necessary to lower the cost of litigation. With the framework provided by Rules 26(b)(1), 26(b)(2)(C), and the accompanying advisory committee's notes in mind, this article proposes four main tools to cut costs: sampling, gap testing, indexing, and cooperation.

A. SAMPLING

Sampling and quality control testing are among the most common and cost effective tools in e-discovery. Sampling allows the requesting parties to take a snap shot of the producing party's files and draw conclusions of the whole population

112. *See* Garrie & Armstrong, *supra* note 22 at 7–8.
113. FED. R. CIV. P. 26 advisory committee's note (1993 Amendment).
114. FED. R. CIV. P. 26(b)(2)(C).

based on those findings.[115] To do this, the sample must be random, must compare the same type of variables, must have a representative sample size,[116] and must use a statistically valid method that is planned beforehand.[117] In the same respect, sampling allows a party or the court to determine if expensive and costly discovery is likely to lead to relevant information or if the burdens outweigh the benefit.[118]

A sample cannot be extrapolated if is not statistically valid, because the margin of error would not produce results that are accurate with a high degree of certainty.[119] A court will likely overturn any such sampling protocol on due process grounds if the margin of error is too high.[120] For example, in *Bell*, the court noted that a 32 percent margin of error was too high.[121] In *Scottsdale Memorial Health Systems*,[122] a noteworthy statistical sampling case involving over 30,000 medical claims brought through a wide variety of circumstances, the court held that:

> [U]nder the principles of fairness and justice that underlie our Rules of Civil Procedure, the superior court may adopt statistical sampling and extrapolation as a case management tool only when the specific methodology to be used is tailored to produce a result at least as fair and accurate as would be produced by traditional particularistic fact-finding methods. In making this determination, the court must at a minimum consider the number of claims in the relevant universe, the number and nature of the variables present in those claims, the sample size and whether the sample is truly representative of the universe of claims. The court also must make detailed findings that permit the reviewing court a clear understanding of the entire

115. *Commentary on Achieving Quality in the E-Discovery Process*, SEDONA CONF., 24 (Mar. 2009), http://www.thesedonaconference.org/dltForm?did=Achieving_Quality.pdf; *Best Practices & Recommendations for Addressing Electronic Document Production*, SEDONA CONF. (June 2007), http://www.thesedonaconference.org/content/miscFiles/7_05TSP.pdf.

116. *See, e.g.*, Bell v. Farmers Ins. Exch., 9 Cal. Rptr. 3d 544, 575-78 (Cal. Ct. App. 2004).

117. *Commentary on Achieving Quality in the E-Discovery Process*, *supra* note 115 at 24–26.

118. Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003).

119. *Commentary on Achieving Quality in the E-Discovery Process*, *supra* note 115, at 24–26.

120. Bell v. Farmers Ins. Exch., 9 Cal. Rptr. 3d 544, 576–78 (Cal. Ct. App. 2004).

121. *Id.*

122. Scottsdale Mem. Health v. Maricopa Cnty., 228 P.3d 117 (Ariz. Ct. App. 2010).

methodology and its application.[123]

The court found that this case dealt with "thousands of individual factual issues" without an explanation about how each of those facts and issues could be extrapolated in any meaningful way.[124] The court reasoned that "[w]hile the use of extrapolation to reduce the number of claims [may be] permissible, there simply is no lawful substitute for detailed findings of fact and conclusions of law."[125]

As applied to e-discovery, sampling is a valuable tool to ensure proper litigation hold management, to review non-responsive and responsive documents, and to identify whether further review is necessary.[126] Similarly, sampling allows the quality control document reviewers to investigate non-responsive documents that were culled out by a software program to show good faith compliance with discovery protocols.[127] Finally, as will be discussed in other sections, sampling helps define what information and issues may need further investigation and analysis.[128]

More importantly perhaps, sampling provides insight into what the cost numbers for a project will be. After sampling a cross-section of the documents, the attorney can properly educate his client on how responsive the documents are, what the likely cull rate will be, and how many documents will likely be in the average gigabyte. By performing such samples, the client or the insurer will gain at least some predictability and can budget the case accordingly.

B. GAP TESTING

Gap testing—commonly referred to as sequenced discovery—is another important tool to move the case forward through the e-discovery process.[129] Similar to sampling, gap

123. *Id.* at 134.

124. *Id.* at 135.

125. *Id.* at 136.

126. *See, e.g.*, D'Onofrio v. SFX Sports Group, Inc., 256 F.R.D. 277, 278 (D.D.C. 2009) (determining whether a sampling of a 9,400 item privilege log was necessary).

127. *See, e.g., id.* at 279–80 (finding that courts will only interfere and determine what is discoverable when there is good cause that discovery of certain information is harmful to the proponent of a protective order).

128. *See, e.g.*, McPeek v. Ashcroft, 212 F.R.D. 33, 34 (D.D.C. 2006) (determining whether a second search of backup tapes will produce additional relevant data).

129. Jay E. Grenig & William C. Gleisner, *Saving Time and Money,*

testing involves using small searches and negotiating issues in controversy before undertaking a full and expensive discovery process.[130] Such a tool is recommended for preparing high volume cases or responding to a motion to dismiss.[131] Gap testing allows both sides to negotiate, advocate, and cooperate with each other and perhaps even reach the resolution of at least some of the pretrial or trial issues.[132]

But gap testing means more than merely allowing for some discovery at the front end of litigation. It forces the parties to agree on what is relevant and to focus on the most efficient and inexpensive way to obtain the most responsive information.[133] It does this by requiring the parties to gauge the responsiveness of the proposed search terms, which significantly reduces the number of documents in the original database. Gap testing also creates a recorded and reasoned position from which counsel can choose which documents are responsive.[134]

The whole idea of gap testing cannot be pigeonholed, however, into simply testing and negotiating the responsiveness of search terms. Counsel has an opportunity to openly discuss several topics, including the case, the witnesses, and the merits, to determine if the parties have enough information to proceed. Additionally, parties may identify what areas can be resolved without litigation, what areas would benefit from more 26(f) conferences, what areas of discovery are necessary, and what counsel can do to reach the merits while still "in the gap."[135] Drafting initial disclosure statements,

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EDISCOVERY & DIGITAL EVIDENCE § 7.3 (2010).

130. *See, e.g.*, William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 136 (S.D.N.Y. 2009) (resolving an argument as to the proper, narrowly-tailored search terms required to retrieve the relevant emails).

131. *Cf. id.* at 135 (determining that to allow a broad search would result in the unwarranted "production of the entire Hill email database . . . .").

132. Steven S. Gensler, *Bulls Eye View of Cooperation in Discovery*, 10 SEDONA CONF. J. 363, 369 (2009).

133. *See The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 SEDONA CONF. J. 189, 200–01 (2007).

134. *Cf.* Equity Analytics, LLC v. Lundin, 248 F.R.D. 331, 332–33 (D.D.C. 2008) (using an expert to certify search terms meant to indentify the relevant information on a computer, allowing for a more focused search).

135. *See The Sedona Principles: Second Edition*, SEDONA CONF., 21 (June 2007),

identifying and testing jury instructions, or presenting closing arguments, for example, would provide enormous benefit in determining if more expansive discovery is needed, and, if so, where any additional discovery should be focused.[136]

Although gap testing is different from sampling, its effectiveness as a means by which to calculate fees accomplishes a similar goal. By conducting limited and sequenced discovery and testing that discovery to see if one has enough information to prove its case, one can narrow and manipulate the cull rate by changing the parameters of the search. In so doing, counsel can achieve a higher cull rate and produce less irrelevant documents for the review stage. This will save the client money on hosting fees, reviewer fees, and quality control counsel's fees. More importantly, perhaps, this allows trial counsel to stay involved in the e-discovery process.

C. CRAWL SYSTEM

Indexing—commonly referred to as crawling—allows for otherwise inaccessible data to become accessible by mapping the files that are on a backup tape or computer system.[137] Crawling refers to a software program that will identify what documents are available and where those documents are located.[138] Technology, such as the crawl system, now enables backup tapes to be indexed so guessing which tape to sample is no longer a problem.[139] As a result, the otherwise inaccessible data outlined by *Zubulake I* would now be accessible due to the

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http://www.thesedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf.

136. *See, e.g.*, ARIZ. R. CIV. P. 26.1(a)(9) (requiring the prompt disclosure of electronically stored information and the date(s) that it will be "available for inspection, copying, testing or sampling").

137. Michael D. Berman, et al., *Has Indexing Technology Made* Zubulake *Less Relevant?*, INDEX ENGINES 1–2, 4, http://www.indexengines.com/download/Has%20Indexing%20Technogy%20Made%20Zubulake%20Less%20Relevant.pdf (last visited Oct. 25, 2010) ("As predicted by Mr. Rice's treatise, because of technological improvements, 'the currently inaccessible ('or difficult to access'), may become accessible,' and crawling and indexing technologies may change the technological analysis related to 'proportionality' and when ESI is 'not reasonably accessible because of undue burden or cost.'").

138. *Id.* at 4.

139. *Id.* ("The key concept of an 'enterprise solution' is that it is 'proactive' and deploys a re-usable search engine. Once the crawl is complete, the firm's data is indexed and repeatedly searchable without a new project-based expenditure.").

minimal burden in producing fewer relevant backup tapes.[140] Moreover, the cost of producing backup tapes has significantly declined in the past seven years, making the burden to produce such documents significantly lower.[141] As a result, crawling is a particularly useful new technology to obtain information without resort to blind statistical sampling.

Crawling and other such technologies, although in their infancy, have enormous potential to create predictability and transparency in e-discovery cost calculations.[142] If a software program can simply go through the database, report the size of the files searched, and discover the amount of documents per gigabyte, then counsel or the vendor may properly find the appropriate level on the chart in section III. Using crawling technologies allows insurance carriers and corporate counsel to achieve enormous benefits because they can withhold the proper amount of reserves to spend on vendors and consultants.

D. COOPERATION

Cooperation is the attorney's first and best line of defense to lower costs and get through an e-discovery event.[143] Cooperation is easy to write about in an academic context, but in practice can be most difficult to accomplish in an adversarial context. However, it is evident that courts routinely reward parties that cooperate and punish those who do not.[144] For instance, courts uphold ESI discovery agreements, including those agreeing not to produce certain information; courts allow for parties to stipulate evidentiary issues; and courts let parties define the format of production and the scope of the lawsuit, so

140. *Id.* at 3–4 ("The cost disparity between restoration and indexing, however, remains substantial and it is even more pronounced because of another cost that was required in 2003—the infrastructure to hold restored backup data—has been rendered insignificant due to indexing.").

141. *Id.* at 2 (comparing the $166,000 cost of making the 77 tapes in 2003 versus the $38,500 cost in 2009).

142. *Cf.* Fliegal & Entwisle, *supra* note 28, at 31 ("Advanced forms of technology are being explored that are intended to reduce costs while enhancing accuracy. While in its infancy, such methods show great promise.").

143. Gensler, *supra* note 132, at 370–71; *see also The Sedona Conference Cooperation Proclamation*, SEDONA CONF., 3 (July 2008), http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf.

144. *E.g.*, *In re* Seroquel Prods. Liab. Litig, 224 F.R.D. 650, 664–65 (M.D. Fla. 2007).

long as such agreements do not violate the FRCP.[145] Similarly, if the parties cooperate or at least attempt to cooperate, they appear more reasonable, even if judicial involvement becomes required.[146]

Moreover, cooperation is necessary. According to FRCP 26, parties that undertake a discovery plan must do so within the scope of the rule.[147] And the plan should articulate the following:

> (A) What changes should be made in the timing, form, or requirement for disclosure under Rule 26(a), including a statement of when initial disclosures were made or will be made; (B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular items; (C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced; (D) any issues about claims of privilege or of protection as trial-preparation materials including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in the order; (E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and (F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).[148]

Essentially, the rule makers are making it easier on the litigants, providing an outline of the important issues that must be addressed and contemplated before counsel may start reviewing documents.[149]

However, cooperation must exist between all members of the litigation team.[150] There is a need to coordinate efforts and tasks with in-house counsel to ensure that tasks are not duplicated and that the proper information is discovered.[151] *The Sedona Principles* recommend a team approach to ensure everyone is working together towards the final goal of reaching the merits of the case.[152] This article does not deviate substantially from that position, except to note that ESI

145. FED. R. CIV. P. 26 advisory committee's note (1993 Amendment).

146. *See, e.g.*, MICHAEL ARKFELD, ARKFELD'S BEST PRACTICES GUIDE FOR ELECTRONIC DISCOVERY AND EVIDENCE § 4.6(A) (2d ed. 2007) (outlining criteria for selecting an e-discovery service vendor to facilitate parties' cooperation).

147. FED. R. CIV. P. 26(f)(2).

148. FED. R. CIV. P. 26(f)(3).

149. *See* FED. R. CIV. P. 26(f) advisory committee's note (2006 Amendment).

150. *See The Sedona Principles: Second Edition*, *supra* note 135, at 19.

151. *Id.*

152. *Id.*

counsel and the client should be aware that they too, may be liable for discovery abuses; each is not insulated from e-discovery abuses by its position, even if she is not the counsel of record.[153]

Cooperation will reduce the risk and, thus, costs associated with e-discovery. By cooperating, counsel can decrease the amount of motion practice and "gotcha" tactics (e.g., mismarking five of twenty million documents) that typically happen when one is handling a large e-discovery case. In that respect, it is difficult to know what the other party wants—or needs—without a frank conversation of the issues and the type of discovery the opposing counsel is looking for. Therefore, counsel may agree to: narrow, limit, and define the search; define a set of protocols for resolving disputes before judicial involvement; and employ other such techniques to eliminate motion practice and to reach a resolution on the pending matters.

With all these tools, counsel can request a reasonable and proportional amount of discovery to fully develop the claims or defenses necessary to proceed forward to trial. Once the clients, bench, and bar appreciate the true costs of e-discovery, each may take steps to make discovery more predictable. Also, each party can make decisions based on known information, rather than "exaggeration." Judicial involvement (or the involvement of a special master) also ensures that the discovery disputes may be resolved and the case may proceed to the merits, as originally planned.[154] However, in the best case, the parties and their counsel will cooperate (without judicial involvement and the threat of sanctions) to reach agreements about the nature, scope and expense of the ESI discovery using the five tools discussed above.

E. TAXING COSTS: WE'RE NOT COPYING DOCUMENTS ANYMORE

If a party is willing to pay for exhaustive discovery, then it may seek a disproportional amount of discovery. Ordinarily,

153. Swofford v. Eslinger, 671 F. Supp. 2d 1274, 1279 (M.D. Fla. 2009).

154. *E.g.*, Newman v. Borders, 257 F.R.D. 1, 4 (D.D.C. 2009) (ending a bitter discovery dispute by drafting nine questions that the opposing party's expert had to answer); *see also* FED. R. CIV. P. 26 advisory committee's note (2006 Amendment) (noting that while court involvement in extrajudicial discovery is supposed to be kept at a minimum, the rule tightens judicial sanctions to unjustified impediments to discovery).

the non-requesting party covers the costs of meeting opposing counsel's discovery requests.[155] However, certain situations arise where the requesting party should pay. For example, the benefits of production compared to the costs or attempts to access otherwise inaccessible data are two reasons to share costs.[156] Indeed, while the above serves as a good introduction to sharing costs in the context of e-discovery, a full discussion of both state and federal court's cost sharing rules is beyond the scope of this article. Instead, this section seeks to identify the split between the courts on the type of costs that may be shared with the opposing party, because determining who pays for discovery may be of greater concern than how much discovery costs.

The concept of costs is much more unique in terms of what costs may be transferred to the other party in e-discovery disputes.[157] Some courts hold that the fees associated with collecting documents is "the modern day equivalent of 'exemplification and copies,'" and, therefore, consider these costs taxable under 42 U.S.C. § 1920.[158] On the other hand, other courts have held these costs to be non-recoverable because "assembling records for production is ordinarily a task done by attorneys and paralegals."[159] As a result, several judicial opinions have set the framework for what may not be taxed as costs.[160]

In *CBT Flint Partners, LLC v. Return Path, Inc.*, the court ordered nearly $230,000 in attorneys' fees and costs as sanctions for litigation misconduct.[161] The court reasoned that "[t]he services are highly technical" and that producing "in paper form . . . the 1.4 million documents plus 6 versions of source code would have cost far more than the fees sought for the e-discovery consultant."[162] The court also held that vendor

155. *Zubulake I*, 217 F.R.D. 309, 316 (S.D.N.Y. 2003).

156. Semroth v. City of Wichita, 239 F.R.D. 630, 637–38 (D. Kan. 2006).

157. *See generally* 28 U.S.C. § 1920 (2010) (the various fees the court may tax as costs).

158. CBT Flint Partners, LLC v. Return Path, Inc., 676 F. Supp. 2d 1376, 1381 (N.D. Ga. 2009).

159. *Id.*

160. This section hopes only to survey the legal landscape to give a brief overview of the split. It is not meant to be an exhaustive listing of such cases addressing the types of costs encountered in e-discovery, as the technology is still in its infancy.

161. *CBT Flint Partners*, 676 F. Supp. 2d at 1381.

162. *Id.*

services "are the 21st Century equivalent of making copies."[163] Therefore, the court allowed the taxation of costs under 28 U.S.C. § 1920.

Prevailing parties must show that e-discovery was necessary to share the costs. In *Kellogg Brown & Root International v. Altanmia Commercial Marketing Co.*, the court held that the prevailing party's consultants were not taxable.[164] Defining the limitations of costs under 28 U.S.C. §1920, the court held that data extraction and storage are not taxable as costs because they provide work similar to an attorney in responding to discovery requests.[165] Furthermore, in *Fells v. Virginia Department of Transportation*, the court did not allow the taxation of $15,000 to extract metadata.[166] Specifically, the court reasoned that taxable costs did not extend to include "processing records, extracting data, and converting files."[167]

The distinctions drawn between the courts have created an area where further discussion and negotiation is necessary. For example, if someone is sanctioned and required to pay costs, such punishments are meaningless if the producing party must still pay the vendor and consulting portions of the e-discovery bill, as addressed in Section III(A). Indeed, as the costs of discovery continue to be defined by courts and litigation support vendors, courts may better understand the importance of their decisions.[168]

V. ETHICAL CONCERNS THAT LIKELY RAISE THE COSTS OF ELECTRONIC DISCOVERY

Counsel has an obligation to represent his or her client competently under the Model Rules of Professional Conduct.[169] Model Rule 1.1 defines competent representation as the "legal knowledge, skill, thoroughness and preparation reasonably

163. *Id.*

164. Kellogg Brown & Root Int'l, Inc. v. Altanmia Commercial Mktg. Co., No. H-07-2684, 2009 WL 1457632, at *5 (S.D. Tex. May 26, 2009).

165. *Id.*

166. Fells v. Virginia Dep't of Transp., 605 F. Supp. 2d 740, 743 (E.D. Va. 2009).

167. *Id.*

168. *See* Withers, *supra* note 20, at 182 ("The costs for the producing side, however, have increased dramatically, in part as a function of volume, but more as a function of inaccessibility and the custodianship confusion.").

169. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2007).

necessary for the representation."[170] This section will address cost concerns impacted by one's ethical obligations. These ethical rules are helpful in diagnosing and understanding an e-discovery project. The rules also suggest that some shortcuts may not produce the savings that the client or his counsel originally hoped.

A. OUTSOURCING

Document review is the primary cost associated with an e-discovery event.[171] Due to the large amount of information, contract reviewers are often hired because it would take years for one attorney to review the millions of documents that are produced.[172] These contract attorneys and reviewers can perform document review from anywhere in the world.[173] Accordingly, outsourcing the review to other countries is common, but often implicates the unauthorized practice of law and other ethical concerns.[174]

Pursuant to Model Rule 5.5, "[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so."[175] Moreover, Model Rule 5.3(b) requires "a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."[176] In addition, ABA Formal Op. 08-451 suggests that even attorneys in foreign countries may need to be treated as

170. *Id.*

171. *See generally* Steven C. Bennett, *The Ethics of Legal Outsourcing*, 36 N. KY. L. REV. 479 (2010) ("Increasing costs for legal services, wider regulatory obligations . . . and the explosive growth of electronic discovery . . . have all driven businesses (and law firms) to consider outsourcing of certain functions as a means to reduce costs, while maintaining high-quality service.").

172. *See id.* at 480–81.

173. *See generally* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 08-451 (2008) (opining that there is nothing inherently wrong with outsourcing, in fact it is a salutary goal to reduce the end costs to the client).

174. *See generally id.* at 6 ("[T]he outsourcing lawyer must be mindful . . . to avoid assisting others to 'practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction . . . . Ordinarily, an individual who is not admitted to practice law in a particular jurisdiction may work for a lawyer who is so admitted, provided that the lawyer remains responsible for the work being performed and that the individual is not held out as being a duly admitted lawyer.").

175. MODEL RULES OF PROF'L CONDUCT R. 5.5 (2007).

176. MODEL RULES OF PROF'L CONDUCT R. 5.3(b) (2007).

nonlawyers, shifting the burden for their failures to local counsel and heightening local counsels' duty to supervise.[177]

Supervising nonlawyer work in another country raises concerns that impact the cost and quality of the review.[178] For example, counsel must overcome culture, language, confidentiality, quality control, and communication issues.[179] On the other hand, the cost saved by sending the discovery overseas may be worth the added headache. Some scholars have noted that outsourcing to India is expected to be a $4 billion dollar industry by 2015.[180] Additionally, to save costs, many very respectable firms open up satellite offices overseas, in countries such as India, where the cost of review is around $30 per hour.[181]

Adding to the already difficult ethical duties of a lawyer, the Indian legal system contains its own hurdles to outsourcing as well.[182] The 1961 Indian Advocates Act requires that only attorneys with Indian citizenship may work on matters in India.[183] Under this Act, corporations cannot outsource to India without meeting strict guidelines.[184] This Act, coupled with the

177. ABA Comm. on Ethics and Prof's Responsibility, Formal Op. 08-451 (2008) ("[I]t will be more important than ever for the outsourcing lawyer to scrutinize the work done by the foreign lawyers—perhaps viewing them as nonlawyers—before relying upon their work in rendering legal services to the client.").

178. *See id.* at 4–6.

179. *See generally id.* at 3–6 (discussing the issues in foreign outsourcing, including issues relating to a foreign country's legal education, professional regulatory scheme, and judicial system).

180. Anthony Lin, *Legal Outsourcing to India is Growing, but Still Confronts Fundamental Issues*, N.Y.L.J. at 1 (Jan. 23, 2008), *available at* http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1201169145823) (citing predictions that legal outsourcing to India may grow to $4 Billion level by 2015).

181. *Id.*

182. *See generally* Kian Ganz, *A New Writ Filed Against Entry of Foreign Firms in Madras HC*, LEGALLY INDIA (March 22, 2010, 8:01 PM), http://www.legallyindia.com/20100322609/Law-firms/a-new-writ-filed-against-entry-of-foreign-law-firms-in-madras-hc (stating that an advocate in India filed a writ petition against 30 foreign law firms to prohibit the firms from practicing any legal matter in the country).

183. *Id.*

184. *See generally id.* (stating that the Advocates Act 1961 requires an attorney to be an Indian citizen and possess a law degree from a university within the country in order to practice law in India).

local unauthorized practice of law concerns,[185] may be enough to steer counsel away from outsourcing.[186] As applied to e-discovery, nonlawyers practicing in India may run into several ethical problems that require counsel to consider its breakeven point on costs.[187] The client must determine whether the additional hours of supervision by local counsel[188] outweigh the $13 dollar per hour difference between local and foreign document reviewers.[189] The results of this decision will be crucial in determining if outsourcing is best for the client.

As an alternative to outsourcing, counsel should consider hiring other paralegals and law clerks to conduct a review in-house. In-house review must be done in a place where the review can be supervised and confidentiality can be assured.[190] When a review involves law clerks and paralegals within the United States, the unauthorized practice of law is less of a concern because courts have consistently allowed paralegals and law clerks to perform this type of work.[191] The author is unaware of any research or case law suggesting that using a paralegal to conduct document review amounts to the unauthorized practice of law. In addition, during in-house document review, it is likely that an attorney will be in the same building, enhancing the frequency and the level of communication between the attorney and her staff.

185. ABA Comm. on Ethics and Prof's Responsibility, Formal Op. 08-451 (2008) ("The challenge for an outsourcing lawyer is, therefore, to ensure that the tasks are delegated to individuals who are competent to perform them, and then to oversee the execution of the project adequately and appropriately.").

186. *Id.* at 3 ("[T]he professional regulatory system should be evaluated to determine whether members of the nation's legal profession have been inculcated with core ethical principles similar to those in the United States . . . .").

187. *See id.*

188. *See generally id.* (stating that attorneys must oversee the execution of the project, even when it is outsourced).

189. *See generally* Legal Process Outsourcing [LPO], *Document Review: The X-Files Revealed* (Aug. 16, 2009), http://lpowatch.blogspot.com/2010/01/document-review-x-files-revealed.html (stating that the average attorney in India is paid $10–$30 an hour for document review).

190. *See generally* MODEL RULE OF PROF'L CONDUCT R. 5.3 (2007)

191. *See generally* Covad Commc'n Co. v. Revonet, Inc., 254 F.R.D. 147, 151 (D.D.C. 2008) (requiring both parties to share the cost of a paralegal to conduct a privilege review).

B. COMPETENCE

Counsel is required to be competent.[192] According to Model Rule 1.1, "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[193] For example, an attorney unfamiliar with email technology should not supervise the collection of emails.[194] Moreover, a client pays not only for the attorney to be competent, but to ensure that other members of the review team are competent, including litigation support vendors.[195] The more steps counsel can take to understand the company's architecture and orchestrate a document retention program, the easier it will be to supervise the review.[196] Further, following these steps may result in less information that will be available to review and produce.[197] Competent counsel will take such steps necessary to ensure that as few irrelevant documents as possible make it to the review stage and effectively negotiate to such ends on behalf of the client.[198]

192. MODEL RULE OF PROF'L CONDUCT R. 1.1 (2007).

193. *Id.*

194. *C.f.* MODEL RULE OF PROF'L CONDUCT R. 1.1cmt 6 ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education").

195. *See* MODEL RULE OF PROF'L CONDUCT R. 5.3 (stating that lawyers who employ nonlawyers "shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer."); *See generally In re* A & M Fla. Prop. II, LLC v. GFI Acquisition, LLC, Bankr. No. 09-15173, 2010 WL 1418861, at *6 (Bankr. S.D.N.Y. Apr. 7, 2010) (reiterating the importance of a lawyer's obligations during document review, holding that "[w]hile the delays in discovery were not caused by any intentional behavior, GFI's counsel did not fulfill its obligation to find all sources of relevant documents in a timely manner. Counsel has an obligation to not just request documents of his client, but to search for sources of information.").

196. *See In re A & M Fla. Prop. II*, at *6 ("Counsel must communicate with the client, identify all sources of relevant information, and 'become fully familiar with [the] client's document retention policies, as well as [the] client's data retention architecture.'").

197. *See generally* Essential Discovery, *Best Practices Case Study: A Guide to Complex Document Review* (2009), http://www.essentialdiscovery.net/media/ed/Guide-to-Complex-Document-Review.pdf (last visited April 19, 2010).

198. *See generally* The Sedona Conference Working Group on Electronic Document Retention and Production, *The Sedona Conference Commentary on Email Management: Guidelines for the Selection of Retention Policy*, 8 SEDONA CONF. J. 239 (2007) (discussing the importance of establishing a set of email

Acquiring competence in this field is an intensive undertaking. However, often by cooperating, agreeing to the search terms,[199] establishing document destruction protocols,[200] developing advance searches,[201] and prohibiting document reviewers and vendors from seeing confidential data not associated with the case,[202] counsel can limit the number of documents available and avoid complications in the review where one's competence would be called into question.[203] Indeed, counsel has several tools to limit the review and decrease the cost for her client. Counsel needs to be competent enough to understand how to use these tools and/or obtain the necessary training to do so.

Competent counsel may also negotiate more favorably, or with a better end goal in mind. For example, one cannot accurately measure what a reasonable settlement or compromise is without understanding the tools of proportionality.[204] The result of hiring competent counsel includes having fewer documents to review, a greater command of what the documents say, and an ability to understand where the documents are going through each stage of the review.[205] Hiring competent counsel is preferable to exclusively trusting

management policies during the discovery phase of litigation and following these policies through the discovery review team).

199. *See* Thomas Y. Allman, *The Sedona Principles After the Federal Amendments: The Second Edition (2007)*, THE SEDONA CONF. (August 17, 2007), http://www.thesedonaconference.org/dltForm?did=2007SummaryofSedonaPrinciples2ndEditionAug17assentforWG1.pdf (discussing Principle 11).

200. *See generally* Arthur Andersen LLP v. United States, 544 U.S. 696, 704 (2005) ("'Document retention policies,' which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business.").

201. *See generally The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, *supra* note 133, at 206–07 (discussing the importance and efficiency of search terms).

202. FLA FORMAL OP. 07-02 (2007).

203. *See generally* Essential Discovery, *Best Practices Case Study: A Guide to Complex Document Review* (2009), http://www.essentialdiscovery.net/media/ed/Guide-to-Complex-Document-Review.pdf (last visited April 19, 2010) (discussing the importance of establishing well-organized and well managed discovery practices).

204. Kenneth J. Withers, *Ephemeral Data and the Duty to Preserve Discoverable Electronically Stored Information*, 37 U. BALT. L. REV. 349, 367–68 (2008).

205. *Id.*

vendors—primarily nonlawyers—with one's information. [206]

Simply put, an experienced ESI counsel will cost less in the long-run. Counsel will limit the review as much as possible, understand case law, and work with opposing counsel to reduce the costs of discovery, within the bounds of ethical and civil rules. By ensuring that counsel is well-versed in ESI, the client can decrease costs and effectively navigate through all the e-discovery traps that present themselves along the way.

C. CANDOR WITH THE COURT & TRANSPARENCY

Candor means that counsel cannot feign cooperation or trick the court into a position that will inhibit the full and fair adjudication of the pending matter.[207] The ethical rules[208] and the Civil Rules prohibit shuffling documents into an unusable form,[209] data dumping, hiding documents from trial counsel,[210] or failing to follow up on requests for production.[211] According to Model Rule 3.3, candor requires that "[a] lawyer shall not knowingly: (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."[212] Similarly, Model Rule 3.4 requires fairness, stating, "[a] lawyer shall not . . . unlawfully obstruct another party's access to the

206. *Id.*

207. FED. R. CIV. P. 26 advisory committee's note (1993 Amendment) ("litigants should not indulge in gamesmanship with respect to disclosure obligations"); *see generally* MODEL RULES OF PROF'L CONDUCT R. 3.3 (discussing a lawyer's ethical duty of candor to the court).

208. *See* MODEL RULES OF PROF'L CONDUCT R. 3.4 (discussing a lawyer's ethical duty of fairness to the opposing party and opposing counsel).

209. *See generally* FED. R. CIV. P. 26 (discussing the duties and obligations of lawyers during disclosure); *id.* at 1 (stating that the rules should "be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.").

210. *See generally* Qualcomm Inc. v. Broadcom Corp., No. 05cv1958-B (BLM), 2010 WL 1336937 at *4 (S.D. Cal. Apr. 2, 2010) (noting that the discovery failures by the attorneys were exacerbated by an "incredible lack of candor on the part of the" client, when employees failed to provide the attorneys with necessary information, resulting in six attorneys defending sanctions motions for over two years).

211. *See* Swofford, 671 F. Supp. 2d 1274, 1279 (M.D. Fla. 2009) ("[I]t is no defense to suggest . . . that particular employees were not on notice. . . . The obligation to retain discoverable materials is an affirmative one; it requires that . . . corporate officers having notice of discovery obligations communicate those obligations to employees in possession of discoverable materials.").

212. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2007).

evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value."[213]

Attorneys may think they are being tactical by resisting efforts to cooperate and ignoring their opportunity to engage in e-discovery at the initial 26(f) conference.[214] However, by failing to cooperate, the lawyer is only hurting their client's ability to economically resolve the dispute through cooperation.[215] Associate Justice Stephen Breyer exemplifies this point in his recent preface to the Sedona Conference Journal on Cooperation stating:

> The Case for Cooperation [articles] suggest that if participants in the legal system act cooperatively in the fact-finding process, more cases will be able to be resolved on their merits more efficiently, and this will help ensure that the courts are not open only to the wealthy. I believe this to be a laudable goal, and hope that readers of this Journal will consider the articles carefully in connection with their efforts to try cases.[216]

When parties cooperate and avoid gamesmanship, the courts become a place where justice may be reached by all, even large corporations that are sensitive to their litigation budgets and bottom lines.

Consistent with the original 1938 comments to the FRCP, counsel would be wise to put its advocacy hat aside during discovery, and cooperate with opposing counsel, attempt to meet with opposing counsel and, at the very least, agree to the scope of production.[217] Alternatively, counsel can agree to resolve the issues through arbitration, where the parties can decide on the level of discovery amongst themselves.

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213. MODEL RULES OF PROF'L CONDUCT R. 3.4 (2007).

214. *See* MODEL RULES OF PROF'L CONDUCT R.3.4 cmt.2 (2007) ("Documents and other items of evidence are often essential to establish a claim or defense . . . [t]he exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed.") Thus, by failing to place a litigation hold on documents, the documents are often destroyed without the user's knowledge, thereby implicating this rule.

215. *See* FED. R. CIV. P. 26 advisory committee's note (1993 Amendment) ("[I]t is desirable that the parties' proposals regarding discovery be developed through a process where they meet in person, informally explore the nature and basis of the issues, and discuss how discovery can be conducted most efficiently and economically.").

216. The Sedona Conference, *The Sedona Conference Journal Volume 10 Supplement*, 10 SEDONA CONF. L. J. at 1 (2009).

217. *See The Sedona Conference Cooperation Proclamation*, *supra* note 143.

VI. CONCLUSION

Technology has a major impact on our lives today. If individuals use technology on a daily basis, counsel must learn how to work with electronic material and understand the cost of doing so. However, until we remove the fear and mystery of calculating costs, we cannot fully understand the price of e-discovery or the implications of such sanctions received by counsel who did not represent their clients competently.

Demystifying eDiscovery for Arbitrators

June 20, 2016
Presented By
Sherman Kahn

MKW
Mauriel Kapouytian Woods LLP

eDiscovery Need Not be Terrifying

- Adding a small "e" before the word discovery has acquired the power to strike fear into the heart of even the most intrepid litigators.
- A bit of perspective on the problem and some technical knowledge can do much to dispel that fear and enable arbitrators to help the parties keep costs down while getting the information they really need

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Perspective on the Problem

- eDiscovery is just discovery of documents created and stored in electronic form – its really not that different than old-fashioned paper-based discovery
- What is different is that parties are retaining much more material now which may have to be reviewed and produced
- Production and review of all this stuff can be far more expensive than the economics of the arbitration justify
- The problem is how to reduce the volume of material to a cost-effective level
- We will provide advice regarding how to manage the process to minimize costs and avert disputes

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Basic Terminology

- **Native Form** – Electronic documents in native form are documents in the form in which they are created (i.e. Microsoft Word or Lotus Notes)
- **Imaged Documents** – Imaged documents are documents converted from native form to an image of the content of the document (often accompanied by a file (called a load-file or text-file) containing the text of the imaged document so that it can be searched.
  - **TIFF Images** – TIFF (which means "Tagged Image File Format") is an imaging format that is compatible with many litigation support software products
  - **PDF Images** – PDF (Portable Document Format) is an imaging format proprietary to Adobe Systems. PDF has a number of advantages over TIFF imaging but PDF images are incompatible with a number of document management systems

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Basic Terminology

- **Metadata** – metadata is data included in an electronic document that is used by the computer to perform operations on the document. Most metadata is completely uninteresting to human readers. Some metadata can be helpful, of interest, or even critical to resolving certain issues
- For example an Outlook email can have more than 150 associated metadata fields. Only a few of those fields are usually useful (i.e., "from" "to" "cc" "bcc" and "subject" can help with searching and categorizing)
  - Word processing documents may store previous changes in metadata fields
  - Spreadsheets often store formulas in metadata fields
- More often than not, however, the pursuit of metadata is an expensive and useless diversion

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Basic Terminology

- **Custodian** – Custodian is a term that has developed in the e-discovery field to describe a person who (or in some cases a computer server or system that) may have relevant documents
  - Limiting the number of "custodians" searched is a key cost-control tool
- **Keywords or Search Terms** – Another way of reducing the volume of production of electronic documents is for the parties to review only those documents the text of which contains a specified set of keywords

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Basic Terminology

- **Forensic Preservation** – Electronic documents are easily modified and often are subject to automatic destruction (e.g. autodeletion of email over a certain age). In court litigation parties are obliged to preserve documents from change or destruction. This can be extremely expensive.
- **Backups** – Often companies keep backups of data on tape or in secondary servers. This data, which is kept for emergencies, can be very expensive to recover.

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Basic Terminology

- **Predictive Coding** – Predictive coding refers to technology using which a computer sifts through documents to find relevant materials without human intervention
  - Useful and potentially more cost effective when there are very large volumes of documents
  - Typically based on a review of a sample set of documents by an experienced lawyer
  - Can be more accurate than human review

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Form of Production

- One important consideration is whether the parties will produce documents in native or imaged format
- Advantages of Production in Native Format
  - Production can be faster, simpler and less expensive
- Disadvantages of Production in Native Format
  - Produced documents are difficult to manage for both the producing and receiving party and the receiving party may not have necessary software
  - Documents will change every time they are used and there is no easy way to control against improper modifications
  - Produced documents will contain all metadata and that metadata is likely to be altered by of the document during the arbitration
  - Documents produced in native format are difficult to authenticate
  - Documents produced in native format are not readily searched across a production database
  - Email produced in native format is difficult to use

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Form of Production

- Advantages of production in imaged form
  - Imaged documents can be easily used by commercial document management systems
  - Imaged documents cannot easily be modified and are readily authenticated
  - Imaged documents can be searched across an entire production database
  - Imaged documents can be produced with only necessary metadata attached
- Disadvantages of production in imaged form
  - Imaging may require a third party document vendor and can be very expensive
  - Imaging can deprive certain documents (especially spreadsheets) of necessary or useful data

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Managing eDiscovery

- Before the initial scheduling conference ask the parties to jointly prepare a discovery plan consistent with the parties arbitration agreement while keeping the following considerations in mind:
  - Arbitration is not litigation and scorched earth discovery will not be tolerated
  - The parties should discuss whether to produce documents in imaged or native form
  - The presumption will be, assuming the parties decide to produce documents in imaged format that metadata (other than basic email metadata) will not be produced unless a party makes a showing of need as to a particular document
  - Document custodians should be limited to those persons most likely to have relevant documents
  - Searches of custodians should be limited to files that are reasonably likely to contain relevant documents
  - The parties should consider whether it is appropriate to agree on a set of keywords to reduce the volume of documents
  - Data from backups need not be produced without a showing of a particularized need

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Managing eDiscovery

- If the parties are cooperative, consider suggesting an agreement that the parties use reasonable efforts to search for appropriate documents in good faith without formal rules
- Ask the parties to agree on reasonable measures for document preservation
- Determine whether spoliation risk is a problem and, if it is not, seek agreement from the parties to eliminate steps that are designed only to address that risk
- Active management is a service to the parties and prevents mischief

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E-Discovery Demystified for Arbitrators—Tips for How to Manage e-Discovery for Efficient Proceedings

By Sherman Kahn

The use of electronic media for the creation, storage and transmission of information has substantially increased the volume of available document discovery. It has also substantially increased the cost of the discovery process. The process of obtaining documentary evidence stored electronically has come to be referred to as "e-discovery."[1]

The prospect of e-discovery has caused great trepidation in the arbitration community. While there is some merit to that trepidation, particularly where increased costs are concerned, the nervousness associated with e-discovery can be substantially reduced with the realization that e-discovery is nothing more than discovery of documents created and stored in electronic form.

"[A]rbitrators should at least familiarize themselves generally with the technological issues that arise in connection with electronic data."

Indeed, e-discovery is really not that different from old-fashioned paper-based discovery. And dealing with it is a necessity. Parties do not retain documentary evidence in hard copy form the way they used to and reference to electronically stored documents may be the only way to reach evidence relevant to a transaction. For example, the revision history of the contract at issue in the arbitration may be obtainable only from electronic documents. Likewise all communications during the negotiation of the contract may have been by email.

What does make e-discovery different from old-fashioned document discovery is that parties are retaining much more material now that may have to be reviewed and produced. The proliferation of electronic media has enabled parties to store massive amounts of information that previously would not have been stored. In addition, the change from communication that would previously have occurred over the telephone or in person to communication by email has created a documentary record of even the most casual of conversations; and often that record is repeated multiple times in multiple places due to extensive lists of recipients and copies.

As a result, production and review of such material can be far more expensive than the economics of even a reasonably large arbitration justify. Costs are further increased if the parties need to go to "vendors" to process and prepare electronic data for production, not to mention attorney review of the material to be produced.

The problem is how to reduce the volume of material to a manageable level without increasing costs and the burden on the parties to unacceptable levels. This article makes some suggestions regarding how to manage the process to minimize costs and avoid disputes.[2]

To be able appropriately to address issues pertaining to the mechanics of e-discovery, arbitrators should at least familiarize themselves generally with the technological issues that arise in connection with electronic data. Such issues include the electronic format in which documents are produced, and the availability and need (or lack thereof) for production of "metadata." A basic understanding by the arbitrator of e-discovery technology and terminology can help the arbitrator reduce discovery costs for the parties.

A short glossary of some important e-discovery terms follows:

- **Native Form**—Electronic documents in native form are documents in the form in which they are created (*i.e.*, Microsoft Word or Lotus Notes).
- **Imaged Documents**—Imaged documents are documents converted from native form to an image of the content of the document (often accompanied by a file (called a load-file or text-file) containing the text of the imaged document so that it can be searched.
  - **TIFF Images**—TIFF (which means "Tagged Image File Format") is an imaging format that is compatible with many litigation support software products.
  - **PDF Images**—PDF (Portable Document Format) is an imaging format proprietary to Adobe Systems. PDF has a number of advantages over TIFF imaging but PDF images are incompatible with a number of document management systems.
- **Metadata**—metadata is data included in an electronic document that is used by the computer to perform operations on the document. Most meta-

data is completely uninteresting to human readers. Some metadata can be helpful, of interest, or even critical to resolving certain issues.

- For example, an Outlook email can have more than 150 associated metadata fields. Only a few of those fields are usually useful (*i.e.*, "from" "to" "cc" "bcc" and "subject" can help with searching and categorizing).
- Word processing documents may store previous changes in metadata fields.
- Spreadsheets often store formulas in metadata fields.
- More often than not, however, the pursuit of metadata is an expensive and useless diversion.

- **Custodian**—Custodian is a term that has developed in the e-discovery field to describe a person who (or in some cases a computer server or system that) may have relevant documents.
  - Limiting the number of "custodians" searched is a key cost-control tool.
- **Keywords or Search Terms**—Another way of reducing the volume of production of electronic documents is for the parties to review only those documents the text of which contains a specified set of keywords which can be agreed upon by the parties.
- **Forensic Preservation**—Electronic documents are easily modified and often are subject to automatic destruction (*e.g.*, autodeletion of email over a certain age). In court litigation parties are obliged to preserve documents from change or destruction. This can be extremely expensive.
- **Backups**—Often companies keep backups of data on tape or in secondary servers. This data, which is kept for emergencies, can be very expensive to recover.

Once an arbitrator understands the above terms, it becomes less of a burden to help the parties implement a manageable e-discovery program appropriate to the size and complexity of a given arbitration.

One important consideration is whether the parties will produce documents in native or imaged format. Production of electronic documents in native format can be faster, simpler and less expensive. However, there are significant disadvantages to production in native format. Documents produced in native format are difficult to manage both for the producing and for the receiving party and the receiving party may not have necessary software. Documents produced in native format will change every time they are used and there is no easy way to control against improper modifications. Documents produced in native format will contain all metadata and that metadata is likely to be unintentionally altered by the recipient of the document during the arbitration. Documents produced in native format are difficult to authenticate. Documents produced in native format are not readily searched across a production database. Email produced in native format is difficult to use.

Advantages of production in imaged form include that imaged documents can be easily used by commercial document management systems; imaged documents cannot easily be modified and are readily authenticated; imaged documents can be searched across an entire production database; and imaged documents can be produced with only necessary metadata attached. Disadvantages of production of electronic documents in imaged form include that imaging may require a third party document vendor and can be very expensive; and imaging can deprive certain documents (especially spreadsheets) of necessary or useful data.

Generally, parties will prefer to produce electronic documents in imaged form. Nonetheless and notwithstanding the long list of possible disadvantages of document production in native form, such production might be appropriate under the circumstances in a given arbitration, particularly with respect to reducing costs. Arbitrators should discuss with the parties, preferably at the initial scheduling conference, whether production in native form is advantageous under the circumstances.

Before the initial scheduling conference an arbitrator may wish to ask the parties to jointly prepare an e-discovery plan consistent with the parties' arbitration agreement while keeping the following considerations in mind:

- Arbitration is not litigation and scorched earth discovery should not be tolerated
- The parties should discuss whether to produce documents in imaged or native form
- The presumption will be, assuming the parties decide to produce documents in imaged format that metadata (other than basic email metadata) will not be produced unless a party makes a showing of need as to a particular document
- Document custodians should be limited to those persons most likely to have relevant documents
- Searches of custodians should be limited to files or folders that are reasonably likely to contain relevant documents
- The parties should consider whether it is appropriate to agree on a set of keywords to reduce the volume of documents

- Data from backups need not be produced without a showing of a particularized need

One advantage of arbitration is that the parties can easily agree to more flexible rules to avoid cost and burden. If the parties are cooperative, the arbitrator may wish to consider suggesting an agreement that the parties use reasonable efforts to search for appropriate documents in good faith without formal rules. Such an arrangement, under appropriate circumstances, can enable the parties to achieve their goals in arbitration at a considerably reduced cost.

One of the main drivers of increased e-discovery cost in litigation is fear by parties and their counsel that they will be accused of spoliation. Parties must begin litigation with elaborate, and often very expensive, measures to preserve massive amounts of electronic documentation. In arbitration, fears of spoliation accusations can be minimized through an agreement between the parties. The arbitrator can explore at the preliminary hearing whether the parties to agree on reasonable measures for document preservation that are not exceedingly expensive and that can be agreed to by both sides.[3]

Endnotes

1. This article discusses "e-discovery" in the context of United States domestic arbitration The same issues arise in international arbitration although, of course, the amount of document disclosure available in international arbitration is often significantly lower than the amount available in United States domestic arbitration Arbitrators must be careful to adjust their approach based on the context of the arbitration and the parties' expectations.
2. This article can only present certain practical advice for the arbitrator For a discussion of e-discovery far beyond the scope of this article, *see* "The Sedona Principles: Second Edition, Best Practice Recommendations & Principles for Addressing Electronic Document Production," Sedona Conference 2007.
3. For additional guidance, please see the New York State Bar Association's Guidelines For the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic, Commercial Arbitrations and Guidelines For the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitrations.

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The Federal Rules of Civil Procedure as They Relate to E-Discovery

Hon. Shira A. Scheindlin
U.S.D.J. Ret.

2006 Amendments Relating to E-Discovery

- **Rule 26(a)(1) (ii)** Initial Disclosures. A party must provide a copy of, or description by category and location of ESI in the Possession, Custody or Control of the party and that the party may use to supports its claims or defenses.

2006 Rule 26(f)

- Parties must meet and confer and develop a discovery plan which must state the parties' views and proposals concerning:
- "any issues relating to disclosure or discovery of ESI, including the form of forms in which it should be produced" AND" any issues relating to claims of privilege or protection as trial prep materials" (now covered under FRE 502)

2006 Rule 26(b)(2)(B)

- "Specific Limitation on ESI" "A party need not provide discovery of ESI from sources that the party identifies as not reasonably accessible (NRA) because of undue burden or cost. If the producing party shows that the information is NRA the court may nonetheless order discovery from such sources if requesting party shows good cause (i.e. balances cost v. benefit). The court may specify conditions (i.e. cost shifting) for the discovery.

2006 Rule 33(d)

- Option to Produce Business Records. Where an answer to an interrogatory may be derived from a party's business records, **including ESI,** and the burden of extracting the information is the same for both parties, the producing party may specify the records from which the answer may be derived and permit the requesting party a reasonable opportunity to examine the records.

2015 Rule 26(b)(1)

Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

2015 Rule 37(e)

37(e) **FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION**. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

Reflections on Rule 37(e)

- Applies only to the loss of ESI, not to hard-copy or tangible things
- Defers to common law on the trigger and the scope of a party's preservation obligations
- Applies only if a party "failed to take reasonable steps to preserve" ESI
- Applies only when lost ESI "cannot be restored or replaced through additional discovery"

Reflections on Rule 37(e) (Cont'd)

- Does not use the words "sanction" or "spoliation"
- Requires a finding of prejudice unless there is an "intent to deprive another party of the information's use" in litigation
- Limits curative measures to those "no greater than necessary to cure the prejudice" (*e.g.*, additional discovery, fines, cost shifting, evidence preclusion, and allowing parties to present evidence or argument to jury regarding the loss)

Open Issues With Respect to Rule 37(e)

- Reasonable Steps. The phrase "lost because a party failed to take reasonable steps to preserve" is ambiguous. Different arbitrators may have different views on what steps are "reasonable"
- Burden of Proof. Under both subsections (1) and (2), the new rule is silent as to burden of proof. Does the party claiming prejudice have to establish its existence, or does the spoliating party have to prove lack of prejudice? Likewise, does intent to deprive need to be proven by the aggrieved party or disproven by the spoliating party?

What Factors Might an Arbitrator Consider in Deciding Whether to Impose Sanctions?

- Whether the party was on notice that litigation was likely and that the ESI would be discoverable
- Whether the party received a request to preserve, the clarity and reasonableness of the request, and whether the requestor and recipient engaged in good faith consultation regarding the scope of preservation
- Good faith adherence to neutral policies and procedures (*i.e.*, routine operation of an electronic information system
- The reasonableness of the party's efforts to preserve, including the implementation of a litigation hold and the scope of the preservation efforts
- The proportionality of the preservation efforts to any anticipated or ongoing litigation. ("A party may act reasonably by choosing the least costly form of information preservation. . . .")

What Factors Might an Arbitrator Consider in Deciding Whether to Impose Sanctions?

- Whether the information not retained reasonably appeared to be cumulative or duplicative
- The party's resources and sophistication, including whether the party "has a realistic ability to control or preserve some ESI"
- Factors outside the party's control (*e.g.*, "acts of God," cloud computing disasters)
- Adherence to best practices standards and guidelines (*e.g.*, *The Sedona Conference® Commentary on Legal Holds: The Trigger and the Process (2010)*

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TECHNOLOGY-ASSISTED DOCUMENT REVIEW: IS IT DEFENSIBLE?

By William W. Belt, Dennis R. Kiker and Daryl E. Shetterly*

Cite as: William W. Belt, Dennis R. Kiker & Daryl E. Shetterly, *Technology-Assisted Document Review: Is It Defensible?*, XVIII RICH. J. L. & TECH 10 (2012), http://jolt.richmond.edu/v18i3/article10.pdf.

I. INTRODUCTION

[1] Technology has changed the way we communicate and, in so doing, has changed the discovery phase of litigation. Parties must sift through ever-growing data volumes to find relevant material, significantly increasing time and cost requirements. Technology has also changed the way attorneys meet discovery demands. New technologies like "machine learning" and "predictive coding"[1] give lawyers important new tools to manage the growing volume of electronically stored information ("ESI").[2]

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[1] *See* Jason. R. Baron, *Law in the Age of Exabytes: Some Further Thoughts on 'Information Inflation' and Current Issues in E-Discovery Search*, 17 RICH. J. L. & TECH. 9, at 25-26 (2011), http://jolt.richmond.edu/v17i3/article9.pdf (explaining terms like "machine learning" and "predictive coding" are just two of many terms used to refer to technology-assisted review). The technology and applications that we call "technology-assisted review," "predictive coding" and "machine learning" continue to change in important ways, and are therefore difficult to accurately define. In this article, "technology-assisted review" is a family of technologies and applications that receive input such as coding decisions from humans for a subset of documents, and use that input to help categorize, "predictively" code, or rank the remaining documents in the set. *Id.*

[2] *See id.*; *see also* FED. R. CIV. P. 26(b)(2)(B) (providing special rules for ESI).

At the same time, court decisions have sent "wake-up call[s]"[3] warning attorneys that deploying technology without appropriate safeguards may be foolishly rushing in "where angels fear to tread."[4]

[2] There was a time when clients sent their lawyers a file folder or box of paper containing the documents relevant to litigation. Thanks to the proliferation of email and other ESI,[5] documents now more commonly arrive on a hard drive, and that hard drive likely contains gigabytes or terabytes of data which, if printed, would fill the law firm's halls with boxes of paper.[6] At first, the shift from reviewing and analyzing data in paper format to electronic format did little to change the document review process.[7] Attorneys sat in front of computer screens and looked through email inboxes chronologically, similar to the way they previously would

[3] William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 134 (S.D.N.Y. 2009).

[4] United States v. O'Keefe, 537 F. Supp. 2d 14, 24 (D.D.C. 2008).

[5] John Gantz & David Reinsel, *Extracting Value from Chaos*, EMC CORP. (June 2011), http://www.emc.com/collateral/analyst-reports/idc-extracting-value-from-chaos-ar.pdf (pointing out that the world's information is "more than doubling every two years.") In 2011 the world will create a staggering 1.8 zettabytes of information. *Id.*

[6] The Sedona Conference, *The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 SEDONA CONF. J. 189, 192 n.2 (2007) [hereinafter *Sedona Search Commentary*] (noting that "[o]ne gigabyte of electronic information can generate approximately 70,000-80,000 of text pages, or 35 to 40 banker's boxes of documents (at 2,000 pages per box). Thus, a 100-gigabtye storage device (*e.g.*, a personal computer hard drive), theoretically, could hold as much as the equivalent of 3,500 to 4,000 banker's boxes of documents. By contrast, in 1990, a typical personal computer held just 200 megabytes of data - 1/500 the capacity of a typical hard drive today. Even if only 10% of a computer's available capacity today contains useful or "useable" information (as distinguished from application programs, operating systems, utilities, etc.), attorneys still would need to consider and potentially review 700,000 to 800,000 pages per each device.").

[7] *See id.* at 193.

have read through a box of paper.[8] e-Discovery technology has continually evolved to offer new tools and solutions. Now counsel has a myriad of tools available to assist in locating and reviewing relevant documents. With these technological advancements, the need has grown for technological expertise. Attorneys must understand the tools they deploy and how they fit in the discovery process. For most trial lawyers, the need to understand new technologies – both the technologies clients use to communicate and the technologies attorneys may use in discovery – can create daunting challenges.

[3] In response to evolving technology, the people and processes used to solve electronic discovery problems have continually changed since the earliest days of electronic discovery. In the few short years since electronic discovery emerged as an industry, litigants and attorneys have felt the "future shock" of accelerating change.[9] Technology-assisted review is yet another jolt to attorneys—a technology with the potential to change the methods we use to comply with our electronic discovery obligations.

[4] Attorneys have been hesitant to adopt each succeeding generation of document review technology, including technology-assisted review.[10] There are likely several reasons for this hesitancy.[11] One reason is the

[8] *See id.*

[9] *See* ALVIN TOFFLER, FUTURE SHOCK 4 (1970) (explaining that Toffler "coined the term 'future shock' to describe the shattering stress and disorientation that we induce in individuals by subjecting them to too much change in too short a time.").

[10] *See* Rachel K. Alexander, *E-Discovery Practice, Theory, and Precedent: Finding the Right Pond, Lure, and Lines Without Going on a Fishing Expedition*, 56 S.D. L. REV. 25, 27 (2011).

[11] We do not argue that technology-assisted review is the right tool for every case. Examples of document populations that may not be good candidates for technology-assisted review include; small document sets, document sets containing non-standard document types and document sets with a high percentage of paper documents or image files with text generated by optical character recognition software.

cautionary messages sent by court rulings like *O'Keefe* and *William Gross*.[12] Those two decisions relate to keyword searching, which has for some time been considered safe territory.[13] Moreover, technology-assisted review requires legal, technological and business process sophistication to effectively incorporate the technology into a large-scale discovery project.[14] In other words, attorneys must understand how to integrate technology-assisted review with the human component of document review.[15] Though the same is true for other methods for

[12] *See generally* United States v. O'Keefe, 537 F. Supp. 2d 14, 24 (D.D.C. 2008); William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 134 (S.D.N.Y. 2009).

[13] *See generally id.*

[14] *See* Patrick Oot, Anne Kershaw, & Herbert L. Roitblat, *Mandating Reasonableness in a Reasonable Inquiry*, 87 DENV. U. L. REV. 533, 534-35 (2010).

[15] *See, e.g.*, Ralph Losey, *Bottom Line Driven Proportional Review*, E-DISCOVERY TEAM (Jan. 15, 2012), http://e-discoveryteam.com/2012/01/15/bottom-line-driven-proportional-review/ ("[Y]ou cannot just dispense with final manual review [...] we are not going to turn that over to the Borg anytime soon. I've asked around and no law firms do that now. No experts advocate that approach either, even the most extreme advocates for automation (of which I'm one) [...] You use predictive coding to speed up the final manual review to be sure, but only a fool (or con artist trying to get at a producing parties [sic] secrets) trusts coding software today without human verification."); *see also* MAURA R. GROSSMAN, CONOR R. CROWLEY & JOE LOOBY, TREC, REFLECTIONS OF THE TOPIC AUTHORITIES (2008), *available at* http://trec-legal.umiacs.umd.edu/other/TAreflections2008.doc (explaining "how 'responsiveness' is defined is often dependent on numerous subjective determinations involving, among other things, the nature of the risk posed by production, the party requesting the information, the willingness of the producing party to face a challenge for underproduction, and the level of knowledge that the producing party has about the matter at a particular point in time. Lawyers can and do draw these lines differently for different types of opponents, on different matters, and at different times on the same matter. This makes it exceedingly difficult to establish a 'gold standard' against which to measure relevance/responsiveness and explains why document review cannot be completely automated."); Herbert L. Roitblat, Anne Kershaw & Patrick Oot, *Document Categorization in Legal Electronic Discovery: Computer Classification vs. Manual Review*, 61 J. AM. SOC'Y INFO. SCI. 1, 8 (2009), *available at* http://www.clearwellsystems.com/e-discovery-blog/wp-content/uploads/2010/12/man-v-comp-doc-review.pdf ("Discovery cannot be wholly automated, not for the reason that it

facilitating document review, such as keyword searching, the complexity of the technology and importance of the process are new territory for most lawyers.

[5] Most importantly, uncertainty remains as to whether the use of technology-assisted review tools is legally defensible.[16] Though intellectual debate challenges the efficacy of keyword searching, it is generally-accepted and widely used. Technology-assisted review is not as of yet. Judge Peck argues that counsel may be waiting for an opinion stating that technology-assisted review is, or is not, a reasonable means of identifying relevant information.[17] Anticipating that day, and in the interest of furthering the academic discussion around technology-assisted review, included herein is a legal brief that supports the use of technology-assisted review in a hypothetical case.

[6] In this hypothetical, the producing defendant faces a motion to compel after using technology-assisted review to exclude from review a subset of documents that technology has "predictively coded" as not likely to contain relevant information. During the meet and confer process, plaintiff objected to using the technology and insisted that the producing

involves so-called subjective judgment, but because ultimately attorneys and parties in the case have to know what the data are about. They have to formulate and respond to arguments and develop a strategy for winning the case. They have to understand the evidence that they have available and be able to refute contrary evidence. All of this takes knowledge of the case, the law, and much more.").

[16] *See, e.g.*, Andrew Peck, *Search, Forward*, LAW TECH. NEWS (Oct. 1, 2011), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202516530534. See also, *Da Silva Moore v. Publicis Groupe, et al.*, As of the date of this writing, no order is available, but a transcript of a hearing before Judge Peck addressing the technology is available at http://www.law.com/jsp/lawtechnologynews/PubArticleFriendlyLTN.jsp?id=1202542221714 &slreturn=1.

[17] *Id.* ("Perhaps they are looking for an opinion concluding that: 'It is the opinion of this court that the use of predictive coding is a proper and acceptable means of conducting searches under the Federal Rules of Civil Procedure, and furthermore that the software provided for this purpose by [insert name of your favorite vendor] is the software of choice in this court.' If so, it will be a long wait.").

party review all documents, including those predictively coded as not likely to be relevant. The defendant used the technology without obtaining plaintiff's consent, and plaintiff later obtained relevant documents from a third party that were excluded from production by the technology. Plaintiff filed a motion to compel defendant to review all of the documents that had been excluded through technology-assisted review, and defendant filed this brief in response. The brief in this hypothetical case is offered to provide a starting point from which to discuss the issues in the context of a court motion. The brief is written from the perspective of the technology proponent; however, in an actual case, corresponding briefs opposing the technology would precede and follow the response brief. There is not space here to include the opponent's arguments. In addition, the provided hypothetical brief does not address in detail the complex safeguards the courts require when counsel deploys technology in the discovery process. The sampling process, for example, may involve a statistical analysis better suited to a separate study. The arguments are based on federal law, though they should prove applicable in many state courts as well.[18]

[18] In addition to the 2006 amendments to the Federal Rules of Civil Procedure, many states have added language to their statutes or rules to accommodate electronic discovery. *See Current Listing of States that Have Enacted e-Discovery Rules*, ELECTRONIC DISCOVERY L., http://www.ediscoverylaw.com/promo/state-district-court-rules/ (last visited Feb. 1, 2012).

II. HYPOTHETICAL BRIEF

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MOUNTAIN STATE

Plaintiff, Inc., Plaintiff, vs.	Civil Action No. 000-00001
Defendant, Inc. Defendant.	

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO COMPEL REVIEW AND PRODUCTION OF DOCUMENTS EXCLUDED FROM REVIEW BY TECHNOLOGY-ASSISTED REVIEW METHODOLOGY AND MOTION FOR PROTECTIVE ORDER[19]

Defendant, Defendant, Inc. ("Defendant") submits the following combined response to Plaintiff's Motion to Compel and Defendant's Motion for Protective Order. The Court should deny Plaintiff's motion because the technology-assisted review process used by Defendant in this case was reasonable and satisfies Defendant's discovery obligations under

[19] As this "brief" is presented solely for academic discussion, the format and style may not be appropriate for a brief filed with a court. *See* discussion *supra* p. 4.

the Federal Rules of Civil Procedure. Defendant combined the human review of 200,000 responsive and privileged documents with the technology-assisted review of 800,000 documents categorized by the technology[20] as "not relevant." Defendant's Response to Plaintiff's Motion to Compel at ¶¶ 8-10. Defendant respectfully submits that the process was reasonable and achieves the underlying goal of the Federal Rules of Civil Procedure to "secure the just, speedy, and inexpensive determination of every action and proceeding," by ensuring that the actions taken to identify and produce relevant information do not "outweigh[] its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Fed. R. Civ. P. 1, 26(b)(2)(C).

I. STATEMENT OF FACTS

1. Defendant and Plaintiff identified 20 custodians in Defendant's employ that were most likely to have information and

[20] Defendant's attorneys also reviewed and coded a statistical sample of randomly selected documents to allow the technology to categorize the entire set. *See infra* Part I, at 8.

documents relevant to the underlying matter. The parties also agreed upon a relevant date range for discovery. The details of the parties' agreement is contained in the ESI Protocol, attached as Exhibit A.[21]

2. Defendant collected documents in accordance with the ESI Protocol, which provides that Defendant would collect all e-mail and active files associated with the identified custodians. Defendant then engaged a third party provider, Vendor, Inc., to process and host the documents for review. After processing and de-duplication, 1 million unique documents were loaded into the review application for attorney review.

3. Recognizing the significant cost associated with reviewing each and every one of the million documents loaded into the review

[21] Since this is a brief in a hypothetical, there are no exhibits attached. Though the ESI protocol depends on the circumstances of each case, a number of resources may serve as a starting point for an ESI protocol. *See, e.g.*, *Suggested Protocol for Discovery of Electronically Stored Information ('ESI')*, U.S. DISTRICT CT. FOR THE DISTRICT OF MD., *available at* http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf (last visited Feb. 4, 2012); *An E-Discovery Model Order*, U.S. CT. APPEALS FOR THE FED. CIRCUIT, *available at* http://www.cafc.uscourts.gov /images/stories/announcements/Ediscovery_ Model_Order.pdf (last visited Feb. 4, 2012); *Default Standard for the Discovery of Electronically Stored Information ("E-Discovery")*, U.S. DISTRICT CT. FOR THE N. DISTRICT OF OHIO, *available at* http://www.ohnd.uscourts.gov/assets/Rules_and_ Orders/Local_Civil_Rules/CoverSheet.htm (follow "Appendices" tab; then follow "Appendix K" hyperlink) (last visited Feb. 4, 2012).

application, and the likelihood that many of those documents were not relevant to any matter at issue in this case, Defendant proposed to use a technology-assisted review tool[22] to divide the documents into two categories: (1) documents likely to be relevant; and (2) documents likely to be not relevant.[23] Defendant further proposed limiting human review to: (a) an initial set of randomly selected documents that would be reviewed by attorneys so that their coding decisions could be applied to the rest of the data set; (b) the data set that the tool identified as most likely to be relevant; and (c) a random, statistically significant sample of

[22] Technology-assisted review is also referred to as machine learning, predictive coding, software assisted review and suggestive coding. *See* Jim Eidelman & Ron Tienzo, *Predictive Coding & Non-Linear Review: Best Practices and Comparative Analysis*, CATALYST, *available at* http://www.catalystsecure.com/Webinars/pdfs/Partner _Pred ictive_Coding_and_Non-Linear%20Review_Webinar_Dec_15_2011.pdf. The term "technology-assisted review" is used throughout this brief to refer to these and other technologies that receive input, such as coding decisions, from humans for a subset of documents, and apply that input to help categorize, "predictively" code, or rank the remaining documents in the set.

[23] This refers to technology-assisted review in the context of filtering data that has been collected from its original environment and indexed for search. Technology-assisted review tools may also be used to filter data in its native environment, but that application is limited to instances where the technology is deployed behind the firewall. *Cf.* Gordon V. Cormack & Mona Mojdeh, *Machine Learning for Information Retrieval: TREC 2009 Web, Relevance Feedback and Legal Tracks*, *in* THE EIGHTEENTH TEXT RETRIEVAL CONFERENCE (TREC 2009) PROCEEDINGS at 3 (2009), *available at* http://trec.nist. gov/pubs/trec18/papers/uwaterloo-cormack.WEB.RF.LEGAL.pdf.

the documents the technology-assisted review technology identified as "not relevant."

4. Plaintiff refused to agree to Defendant's proposed technology-assisted review and sampling processes, and proposed instead that Defendant run several hundred search terms across the entire volume of data and review all documents that contained any of those search terms. The list of Plaintiff's proposed search terms is attached as Exhibit B.

5. Defendant ran the proposed search terms as requested and discovered that 967,453 of the documents (inclusive of family members)[24] contained one or more of the search terms, which included such common terms as "manufacture" and "quality control."

6. Under the Scheduling Order, Defendant had 30 days to complete the review and production. The deadline meant there was no

[24] The phrase "family member" in the e-Discovery context refers to an attachment. *See, e.g.*, Steve Green, *Document Family Circus*, DISCOVERY IN PRAC. (Apr. 11, 2011), http://hudsonlegalblog.com/e-discovery/the-document-family-circus.html (explaining an e-mail and its attachment are generally seen as two separate documents but are often considered part of the same "family" of documents for review and production purposes). While the number of documents that actually contain the search terms requested may be lower, it is often necessary to view a document in context with its attachments to determine privilege and responsiveness.

time to effectively negotiate further keyword limitations or to add Boolean connectors and complete the review on time.[25]

7. Because Defendant felt the search term protocol was ineffective in identifying only relevant documents, and in light of the time constraints and Plaintiff's refusal to agree, Defendant elected to use a technology-assisted review tool to identify the documents in the population most likely to be relevant. The technology-assisted review tool and process, described in detail below, utilized a subset of the search terms proposed by Plaintiff, attached as Exhibit C.

8. The technology-assisted review tool identified approximately 200,000 documents likely to have relevant information.

9. Defendant's attorneys reviewed all of these documents for privilege, confidentiality, and trade secrets, and subsequently produced 149,376 relevant, non-privileged documents.

[25] The timing and deadlines inherent in litigation are often overlooked in the discovery process. We include a deadline here to underscore the role timing plays in managing discovery projects. While computers can increase speed, data volumes can offset the advantage and make deadlines more difficult to meet. *See* Dean Gonsowski, *A Look into the Crystal Ball: E-Discovery Predictions and Trends*, ALANET.ORG (July/Aug. 2010), http://www.alanet. org/publications/issue/julaug10/LM-JulAug10-F1-EDiscovery.pdf.

10. Defendant then reviewed a random sample of the remaining 800,000 documents and, finding no additional relevant documents, determined with a 95% confidence level that less than 3% of the un-reviewed documents were relevant.[26]

11. Defendant produced 149,376 documents on time under the Scheduling Order.

12. Following production, Plaintiff identified and supplemented its production with a relevant e-mail, sent by one of the custodians during the relevant date range, that was produced pursuant to a third-party subpoena to Third Party Corp., but not included in Defendant's document production ("supplemented message"). Defendant was able to locate the supplemented message among the 800,000 documents that were excluded from review. The supplemented message was not in the random sample of documents reviewed as part of the quality control process.

[26] The exact number of documents that need to be reviewed to determine confidence level and confidence interval varies with the size of the document population. There are several resources available to identify the number of documents that need to be reviewed to determine the confidence level and confidence interval. *See, e.g.*, *Sample Size Calculator*, CREATIVE RES. SYS., http://www.surveysystem.com/sscalc.htm#one (last visited Feb. 1, 2012).

13. Following receipt of the supplemented message, Plaintiff renewed its demand that Defendant undertake a manual, linear review of the remaining 800,000 documents, and, when Defendant refused, filed its Motion to Compel.

II. Overview of the Technology-Assisted Document Review Process

A. Why Do We Need Technology-Assisted Review?

In the past decade, there has been an explosion in the volume of electronic information retained by organizations.[27] As a result, litigators must work with their clients to sift through larger and larger data sets to identify the relevant documents they are required to produce to comply with their obligations under the Federal Rules.[28]

There is generally no obligation for lawyers to look at every document within the organization to determine whether it is relevant to the

[27] Gantz, *supra* note 5.

[28] The Federal Rules of Civil Procedure require producing non-privileged documents responsive to requests "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

litigation.[29] Lawyers narrow the inquiry by interviewing employees to identify custodians – employees that have the relevant business records – and identifying data environments that contain relevant electronic and paper documents.[30] They work with information technology groups (hereinafter "IT") to collect those documents in preparation for production to the opposing party.[31]

[29] *Id; see also* The Sedona Conference, BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 38 (Jonathon M. Redgrave et al. eds., 2d ed., 2007) [hereinafter SEDONA PRINCIPLES], *available at* http://www.thesedonaconference.org/dltForm?did=TSC_PRINCP_2nd_ed_607.pdf (organizations should define the search for relevant documents by limiting their search to "electronically stored information from repositories used by key individuals rather than generally searching through the entire organization's electronic information systems.").

[30] *See* Bernd Honsel, Gerald G. Paul & Wolfgang A. Dase, *Representing Eurpean Companies in U.S. Litigation: Document handling—Document custodians*, in 1 Successful Partnering Between Inside and Outside Counsel § 23:19 ("Document custodians, including the company's information technology personnel, can be of great importance as litigation unfolds. In particular, if they are long-time employees of the company they may have a wealth of knowledge concerning documents under their supervision, including documents that may be vital to the company's position in the litigation."); *see generally* Daryl Shetterly, *Getting the Most from the Custodian Interview*, THE E-DISCOVERY MYTH (Dec. 19, 2011), http://e-discoverymyth.com/2011/12/19/getting-the-most-from-the-custodian-interview/.

[31] *See, e.g.*, Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 432 (S.D N.Y. 2004).

A decade ago, the documents copied in preparation for production were more likely to contain only the relevant, non-privileged documents.[32] Even if the data set contained other documents, a few lawyers or paralegals could sort through and categorize them efficiently with limited cost.[33] As data volumes grew, so too did the volume of irrelevant documents comingled with the documents collected from the client.[34] Given the large data volumes now collected in many cases, the document review phase (separating the relevant documents from the irrelevant documents, and identifying documents to be withheld or redacted and logged as privileged) of an electronic discovery project is often the most expensive part.[35]

Some of the common criteria or tools used to limit the volume of documents that need to be reviewed by humans include limiting document

[32] Craig Ball, *The Plaintiff's Practical Guide to E-Discovery, Part I*, CRAIG D. BALL P.C., 2 (2005), http://www.craigball.com/EDD-The%20Practical%20Plaintiffs%20Guide.pdf.

[33] *See id.*

[34] *See id.* at 16.

[35] Bennett Borden, Monica McCarroll, Mark Cordover & Sam Strickland, *Why Document Review is Broken*, WILLIAMS MULLEN (May 16, 2011), http://www.williamsmullen.com/resources/detail.aspx?pub=664.

review to specific custodians, limiting the data set by date range, and using search term filtering to separate the relevant documents from the rest of the data set.[36] Each of these criteria removes documents from the document set that humans will review. Of this list, search term filtering is probably the most complex because parties may have difficulty reaching an agreement on keywords during the meet and confer process.[37] Furthermore, the proper use of search term filtering is heavily dependent on technology and may require expertise in "statistics and linguistics."[38] Search terms are generally developed by interviews with custodians and negotiations with the opposing party.[39] Search terms can effectively identify relevant documents in some cases, but it is difficult to balance precision and recall.[40] While search terms will limit the size of the data

[36] *See* SEDONA PRINCIPLES, *supra* note 29, at 38.

[37] *See, e.g.*, United States v. O'Keefe, 537 F. Supp. 2d 14, 24 (D.D.C. 2008) (discussing how defendants "contended the search terms used by the government were insufficient").

[38] *Id.*

[39] *See* FED. R. CIV. P. 26(f); *see also* SEDONA PRINCIPLES, *supra* note 29, at 21 (listing among the topics for the 26(f) conference, the "use of search terms and other methods of reducing the volume of electronically stored information to be preserved or produced").

[40] *See* BRENT R. ROWE ET AL., ECONOMIC IMPACT ASSESSMENT OF NIST'S TEXT RETRIEVAL CONFERENCE (TREC) PROGRAM at § 2-4 (July 2010), *available at*

set, even after search term filtering, there is often a high percentage of irrelevant documents mixed in with the relevant documents that humans need to review.[41]

To reduce cost, litigators need the ability to analyze the collected data and identify the relevant documents that must be produced in order to check the documents for privilege, trade secrets, or categorize the documents in preparation for depositions or trial.[42] In addition, the producing party typically wants to know what they are producing before their opponent receives the production, since not all relevant documents have equal evidentiary value. There are many reasons a litigator may want humans to review the relevant documents before producing them to the opposing party. However, aside from confirming the absence of relevant documents, litigants gain little benefit from human review of

http://trec.nist.gov (explaining that precision refers to the percentage of relevant documents retrieved in a search while recall refers to the volume of irrelevant material that is also retrieved in the search).

[41] *Sedona Search Commentary*, *supra* note 6, at 199.

[42] *See id.* at 198.

irrelevant documents.[43] Historically, there has not been a reliable, industry-accepted technology or methodology to distinguish between relevant and irrelevant documents other than human review, meaning that humans necessarily needed to review a high percentage of documents that were not relevant.[44] In recent years, however, technology has improved.

B. The History of Technology-Assisted Review

Integrating technology with human review is not a new concept. Since the early days of reviewing electronic documents, attorneys commonly used technology to streamline and prioritize documents for human review and to assist in the quality control process.[45]

Early examples of integrating technology into human review include using a coding form to capture the reviewing attorney's work product, and using technology to create discreet batches of documents for humans to review.[46] Software providers developed indexing engines that

[43] *See id.* at 199.

[44] *Cf. id.* at 208.

[45] *Cf. id.* at 199.

[46] *See id.* at 209.

turned document text into searchable databases with metadata filters that empowered attorneys to organize documents by date range, custodian, and email thread or file type.[47] Attorneys could organize the documents in batches using date filters or search terms and prioritize batches for review.[48] Administrators gained the ability to set up workflows that allowed document reviewers to "check out" a batch, complete review, then "check in" the completed batch.[49]

Another type of technological advance used "checksum" or "hashing" algorithms to identify duplicate documents and remove the duplicate datasets ("de-dupe"), eliminating the need for attorneys to review identical documents, while retaining information about where those duplicate documents are located in the data set so these duplicates could be repopulated for production.[50] More recent technology identifies

[47] *See Sedona Search Commentary*, *supra* note 6, at 207-08.

[48] *See id.* at 200-01.

[49] *See, e.g.*, Press Release, kCura, kCura Releases Relativity Six (May 3, 2010), *available at* http://kcura.com/relativity/news/id/87/kcura-releases-e-discovery-review-platform-relativity-six.

[50] *See* Craig Ball, *Meeting the Challenge: E-Mail in Civil Discovery*, in 5TH ANNUAL ADVANCED E-DISCOVERY INSTITUTE: THE DISCOVERY OF ESI COMES OF AGE 2008, 2008

not just exact duplicates, but "near-duplicates" that vary by a few words or sentences.[51]

What these tools have in common is their ability to assist or augment the human review process – meaning these tools assist the human process rather than remove unique documents from the set of documents a human would review. More recent technologies can limit the number of documents reviewed by humans by categorizing document sets and, under the right circumstances, culling out documents not likely to be relevant.[52] This technology permits the human review team to focus on the documents that are most likely to be relevant by limiting the documents that need to be reviewed or by categorizing the relevant documents for priority review.

WL 6654666, *12 (Nov. 20, 2008); Ralph C. Losey, *Hash: The New Bates Stamp*, 12 J. TECH. L. & POL'Y 1, 12 (2007).

[51] *Sedona Search Commentary*, *supra* note 6, at 200.

[52] *See id*

C. Next Generation Technology-Assisted Review Tools

Earlier, we referenced some of the common criteria or tools used to limit the volume of documents that humans must review.[53] Technology allows us to filter data by custodian, date range and search terms.[54] While keyword searching (and for that matter, Boolean, fuzzy and concept searching) can prove effective, it has some limitations. For example, keyword searches are most effective when executed in iterations; however, the litigation process is not well suited to iterative keyword searching.[55] As a result the emergence of several newer technologies that do a better job at balancing precision and recall, and more reliably reduce the number of documents humans must review, is generating robust debate.[56]

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[53] *See supra* Part II.B.

[54] *See supra* text accompanying note 47.

[55] John W. Woods, Lisa J. Sotto & Meghan A. Podolny, *Internal Investigation and eDiscovery*, *in* EDISCOVERY FOR CORPORATE COUNSEL §7:19 (Carole Basri & Mary Mack eds., 2011).

[56] *See Sedona Search Commentary*, *supra* note 6, at 194; *see generally* Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, XVII Rich. J.L. & Tech. 11 (2011), http://jolt.richmond.edu/v17i3/article11.pdf.

Technology-assisted review tools generally work by using a human to train a computer on the categories of documents the computer should identify as relevant.[57] The computer then quickly goes out and reviews the entire data set and categorizes documents as either relevant or irrelevant based on the training it received.[58] Humans then review the documents the computer identifies as relevant as well as a statistically significant sample of the documents the computer identified as not relevant to confirm that they are, in fact, not relevant.[59] Using statistical

[57] Maura Grossman and Gordon Cormack defined these types of technology-assisted review tools as follows:

> A *technology-assisted review process* involves the interplay of humans and computers to identify the documents in a collection that are responsive to a production request, or to identify those documents that should be withheld on the basis of privilege. A human examines and codes only those documents the computer identifies – a tiny fraction of the entire collection. Using the results of this human review, the computer codes the remaining documents in the collection for responsiveness (or privilege). A technology-assisted review process may involve, in whole or in part, the use of one or more approaches including, but not limited to, keyword search, Boolean search, conceptual search, clustering, machine learning, relevance ranking, and sampling.

Grossman & Cormack, *supra* note 56.

[58] *Id.*

[59] The Sedona Conference, *The Sedona Conference Commentary on Achieving Quality in the E-Discovery Process*, 10 SEDONA CONF. J. 299, 312 (2009).

models that long predate the existence of electronic discovery, we can quantify our confidence level and say with a specific degree of certainty that we have identified at least a specific percentage of the relevant documents.[60]

However, there is much more to using this type of technology-assisted review than pushing a button. As technology-assisted review tools developed, processes and safeguards for defensibly implementing these tools developed as well.[61] With older technologies, the process was more about efficiency than reliability, since humans ultimately reviewed each document in the data set, and technology impacted only the order in which the humans reviewed documents.[62] While some commentators dispute whether humans work more accurately than machines, there are fewer challenges to processes involving humans than to processes

[60] *See* Grossman & Cormack, *supra* note 56, at 44-46; *Sedona Search Commentary*, *supra* note 6, at 192.

[61] *Sedona Search Commentary*, *supra* note 6, at 199.

[62] *See id.* at 198-99.

involving machines – perhaps because of the prevailing belief that human review serves as the gold standard.[63]

With newer technologies that reduce the need for humans to look at every document, the several types of tools available must be used properly in order to achieve a reliable result. Even the best technology in the wrong hands is a recipe for disaster. Technology is only reliable when it is used in conjunction with the right process. Indeed, in the context of litigation, the process is just as important, and perhaps more important,

[63] *Id.* at 199 ("[T]here appears to be a myth that manual review by humans of large amounts of information is as accurate and complete as possible – perhaps even perfect – and constitutes the gold standard by which all searches should be measured. Even assuming that the profession had the time and resources to continue to conduct manual review of massive sets of electronic data sets (which it does not), the relative efficacy of that approach versus utilizing newly developed automated methods of review remains very much open to debate."). *But see generally* William Webber, *Re-examining the Effectiveness of Manual Review*, http://www.umiacs.umd.edu/~oard/sire11/papers/webber.pdf (last visited July 28, 2011) (revisiting the analysis in two well known articles, "Document Categorization in Legal Electronic Discovery: Computer Classification vs. Manual Review" and "Technology-assisted review in E-Discovery Can be More Effective And More Efficient than Exhaustive Manual Review," which concluded, respectively, that manual review is at least as consistent as automated review and that manual review is superior to automated review). Webber argues that the previous studies, "while suggestive, are not conclusive" and calls for additional studies to answer the open question of whether an automated system can surpass or even achieve the reliability of a properly managed review team. *Id.* at 1.

than the technology. Some companies have taken these processes seriously enough to obtain patent protection for their technology.[64]

Historically, technology-assisted review augmented human review by allowing humans to review documents more efficiently.[65] The emerging generation of technology-assisted review tools is more analogous to search terms as it removes documents from the set of documents identified for human review.[66] However, using technology to limit the population of documents that will be reviewed by humans, either through the use of search terms or technology-assisted review, raises the question of reliability.

D. Is Technology-Assisted Review Reliable?

An attorney can assess the reliability of technology-assisted review tools the same way she assesses the reliability of search terms. Search terms are typically selected based on discussions with individual

[64] *See, e.g.*, Press Release, Recommind, Inc., Recommind Patents Predictive Coding (June 8, 2011), *available at* http://www.recommind.com/releases/20110608/recommind_patents_predictive_coding.

[65] *Cf. Sedona Search Commentary*, *supra* note 6, at 193 (explaining the changes technology has caused to the discovery process).

[66] *See id.* at 201.

custodians regarding the terms likely to identify relevant documents and negotiations with the opposing party.[67] However, the only way to determine the actual precision and recall of the search terms is to review a statistical sample of the documents identified as relevant and not relevant to confirm the level of precision and recall.[68] Technology-assisted review tools require a similar statistical review.[69]

Sampling allows the producing party to review a subset of the corpus of documents the technology-assisted review tool identifies as not relevant and say with a statistical degree of certainty that the tool has located a statistical percentage of the relevant documents (depending on how many documents were reviewed and how many errors were

[67] The discussion of search terms is generally seen as a required topic at the Rule 26(f) conference. The authors strongly suggest that counsel likewise discuss plans to use technology-assisted review tools in lieu of human document review. *See supra* text accompanying note 38.

[68] *See* Grossman & Cormack, *supra* note 56, at 8 (explaining the commonly-used terms "recall" and "precision" of an information retrieval process as the "completeness" and "accuracy" of the search, respectively).

[69] *See, e.g.*, *Application of Sampling to E-Discovery Search Result Evaluation*, E-DISCOVERY REFERENCE MODEL, app. 2, http://www.edrm.net/resources/guides/edrm-search-guide/appendix-2 (last visited Feb. 4, 2012).

identified).[70] Thus, whether the use of a technology-assisted review tool was defensible will come down to whether the party that used the technology can demonstrate that they followed the process and produced reliable results.

III. TECHNOLOGY-ASSISTED REVIEW IS DEFENSIBLE AND CONSISTENT WITH FUNDAMENTAL PURPOSES OF THE FEDERAL RULES OF CIVIL PROCEDURE

Evaluating the reasonableness of technology-assisted review in any given case requires the evaluation of two considerations: defensibility and proportionality.[71] The process employed must, in the first instance, be defensible, meaning that the proponent can "demonstrate to opposing parties, courts, and government agencies, that its chosen method and tool accurately captured a reasonably sufficient number of the relevant, nonprivileged ESI in existence, and that the remaining unreviewed and

[70] *See id.* ("The estimate of the proportion of responsive documents from a random sample can be stated to be within a specified number of standard deviations from the sample's proportion with a specific confidence level.").

[71] *See* Grossman & Cormack, *supra* note 56, at ¶ 5; *see also* The Sedona Conference, *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF. J. 289, 294 (2010).

unproduced ESI is irrelevant."[72] In addition, the proponent of technology-assisted review must demonstrate that its process satisfies the requirements of Rules 1 and 26 of the Federal Rules of Civil Procedure: that "the burden or expense of...discovery [does not] outweigh[] its likely benefit"[73] and helps to secure "the just, speedy, and inexpensive determination of [the] action[.]"[74]

A. Technology-Assisted Review is Defensible

To date, no court has addressed the defensibility of using technology-assisted review to exclude from review and production documents unlikely to contain relevant information.[75] Nevertheless,

[72] The Sedona Conference, *The Sedona Conference Commentary on Achieving Quality in the E-Discovery Process*, 10 SEDONA CONF J. 299, 320 (2009).

[73] FED. R. CIV. P. 1.

[74] FED. R. CIV. P. 26(b)(2)(C)(iii).

[75] *See, e.g.*, Peck, *supra* note 16 ("[N]o reported case (federal or state) has ruled on the use of computer-assisted coding. While anecdotally it appears that some lawyers are using predictive coding technology, it also appears that many lawyers (and their clients) are waiting for a judicial decision approving of computer-assisted review.") If faced with a challenge to the use of technology-assisted review, Judge Peck would first consider "what was done and why that produced defensible results," focusing on "whether [the process] produced responsive documents with reasonably high recall and high precision." *See id. See also,* Peck, *supra* note 16.

technology-assisted review is consistent with existing jurisprudence on the defensibility of using technology to facilitate the discovery of ESI.

In *Victor Stanley, Inc. v. Creative Pipe, Inc.*, Chief Magistrate Judge Paul Grimm analyzed a discovery dispute involving the inadvertent production of 165 purportedly privileged documents.[76] Judge Grimm ruled the attorneys had waived privilege and failed to prove they had undertaken a reasonable privilege review process.[77] In assessing the adequacy of the defendants' privilege review process, Judge Grimm noted that "it is universally acknowledged that keyword searches are useful tools for search and retrieval of ESI."[78] He further noted the danger of using "an unreliable or inadequate keyword search," and emphasized the importance of sampling to "test the reliability of the keyword search."[79]

[76] 250 F.R.D. 251, 253 (D. Md. 2008).

[77] *See id.* at 257-59, 262.

[78] *Id.* at 256.

[79] *See id.* at 257 ("The only prudent way to test the reliability of the keyword search is to perform some appropriate sampling of the documents determined to be privileged and those determined not to be in order to arrive at a comfort level that the categories are neither over-inclusive nor under-inclusive.").

In that case, the defendants failed to provide any evidence to support the reliability of their keyword search for privileged documents:

> Defendants, who bear the burden of proving that their conduct was reasonable for purposes of assessing whether they waived attorney-client privilege by producing the 165 documents to the Plaintiff, have failed to provide the court with information regarding: the keywords used; the rationale for their selection; the qualifications of [one of the defendants] and his attorneys to design an effective and reliable search and information retrieval method; whether the search was a simple keyword search, or a more sophisticated one, such as one employing Boolean proximity operators; or whether they analyzed the results of the search to assess its reliability, appropriateness for the task, and the quality of its implementation.[80]

Similarly, in *Disability Rights Council of Greater Wash. v. Wash. Metro. Transit Auth.*, a case involving alleged violations of the Americans with Disabilities Act, Magistrate Judge John Facciola was asked to resolve a dispute about whether the defendant should search backup tapes for information deleted from its computer systems during the course of the litigation.[81] The defendant objected on the basis that the process would be

[80] *Id.* at 259-60.

[81] 242 F.R.D. 139, 145-46 (D.D.C. 2007).

unduly burdensome and expensive.[82] Because potentially relevant information had been deleted after the duty to preserve had arisen and would only exist, if at all, on backup tapes, Judge Facciola ordered the defendant to search the tapes.[83] Further, he ordered the parties to confer on the process by which the backup tapes would be searched, noting that "recent scholarship...argues that concept searching, as opposed to keyword searching, is more efficient and more likely to produce the most comprehensive results."[84] Thus, courts have recognized that the proper use of technology to improve the quality and efficiency of document review is defensible so long as the proponent of the methodology can

[82] *Id.* at 147-48; *see also* FED. R. CIV. P. 26(b)(2)(B) ("A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.").

[83] *See Disability Rights Council*, 242 F.R.D. at 147-48.

[84] *See id.* at 148; *see also* A.N.S.W.E.R. Coal. v. Salazar, 258 F.R.D. 36, 38 (D.D.C. 2009) (ordering parties to confer on "a methodology for [keyword] searches [and] . . . a list of search directives that are likely to result in [relevant] documents"); Am. Family Mut. Ins. Co. v. Gustafson, No. 08-cv-02772-MSK-MJW, 2009 WL 641297, at *3 (D. Colo. Mar. 10, 2009) (ordering parties to "meet, confer, and agree upon the search terms that will be used" to search imaged hard drive).

explain "the [methodology] used; [and] the rationale for [its] selection . . . ."[85]

B. Technology-Assisted Review Furthers the Goal that the Burden and Expense of Discovery be Proportional to the Needs of the Case

Discovery "is defined in the first instance by relevance to the claims and defenses in a case."[86] Though "the bounds of permissible discovery in a civil action are generally regarded as expansive . . .they are not without limits."[87] In addition, a "party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost."[88] Indeed, a court *must* limit discovery "if it determines that the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the

[85] *See* Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 259-60 (D. Md. 2008).

[86] Wood v. Capital One Serv., LLC., No. 5:09-CV-1445 (NPM/DEP), 2011 WL 2154279, at *5 (N.D.N.Y Apr. 15, 2011).

[87] *Id.* at *3; *see also* Averett v. Honda of Am. Mfg., Inc., No. 2:07-cv-1167, 2009 WL 799638, at *2 (S.D. Ohio Mar. 24, 2009) ("recent revisions [to the Federal Rules of Civil Procedure] communicate the message that discovery is not unlimited").

[88] FED R. CIV. P. 26(b)(2)(B).

importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."[89] Similarly, Rule 26(c) allows a court to protect a party against "undue burden or expense."[90]

The plaintiff in *Wood v. Capital One Services, LLC* claimed the defendants violated the Federal Debt Collection Practices Act.[91] Prior to filing the motions discussed in the opinion, "the parties engaged in a considerable amount of discovery," including numerous interrogatories and document requests directed to Capital One Services.[92] In response to the interrogatories, the defendant produced 1,500 pages of documents, and proffered a Rule 30(b)(6) witness for two days of deposition on several topics, including the methods the company had used to answer the

[89] FED. R. CIV. P. 26(b)(2)(C)(iii) (emphasis added); *see* Dilley v. Metro. Life Ins. Co., 256 F.R.D. 643, 644 (N.D. Cal. 2009) ("The court must limit discovery if it determines that 'the burden or expense of the proposed discovery outweighs its likely benefit,' considering certain factors including 'the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.'") (quoting FED. R. CIV. P. 26(b)(2)(C)(iii)); *Averett*, 2009 WL 799638, at *2 ("the court always has a duty to limit discovery under Rule 26(b)(2)(C)(i)-(iii)").

[90] *See* FED. R. CIV. P. 26(c).

[91] *See Wood*, 2011 WL 2154279, at *1.

[92] *See id* at *6.

plaintiff's discovery request.[93] In his motion to compel, the plaintiff chose specific search terms and asked that Capital One Services use the terms to search the e-mail accounts of forty-one employees.[94] Capital One Services established that "the likely volume to be generated by the requested searches, after elimination of duplicates, is as high as 1,753,537 documents, costing in excess of $5,000,000 to process, review, and produce."[95]

The court denied the plaintiff's motion and granted Capital One Services's motion for protective order, relying on Rule 26(b)(2)(C)(iii), which, the court stated, "serves to protect a party against having to produce voluminous documents of questionable relevance."[96] The court found that the plaintiff had failed to "shed significant light on the potential relevance of the documents sought," while the defendants had "clearly identified an inordinate burden associated with responding to the

[93] *See id.*

[94] *See id.* at *7.

[95] *See id.* at *8.

[96] *See* Wood v. Capital One Serv., LLC., No. 5:09-CV-1445 (NPM/DEP), 2011 WL 2154279, at *3 (N.D.N.Y Apr. 15, 2011).

request."[97] As a result, the "rule of proportionality" dictated that the plaintiff's motion be denied "without prejudice to his right to renew the motion to compel in the event he is willing to underwrite the expense associated with any such search."[98]

A similar result was obtained in *Daugherty v. Murphy*.[99] In that class action case alleging violations of due process and federal and state law in the handling of Medicaid claims, the parties brought before the court a dispute over the defendants' production of extracts from a certain computer system.[100] The defendants moved for a protective order and the plaintiffs filed a motion to compel, each asking the court to order production of the data extracts outlined in their competing proposals.[101] The court first outlined the law governing the opposing motions:

> While the scope of discovery is broad under Rule 26, that rule confers broad powers on the court to regulate or deny discovery even though the materials sought are otherwise

[97] *See id.* at *8-9.

[98] *See id.* at *7, *9.

[99] No. 1:06-cv-0878-SEB-DML, 2010 WL 4877720, at *1 (S.D. Ind. Nov. 23, 2010).

[100] *Id.* at *1-3.

[101] *Id.* at *3-4.

> within the scope of Rule 26(b)(1). Rule 26(b) provides that the scope of discovery may be 'limited by court order,' and Rule 26(b)(2)(C) requires the court to limit discovery if the court determines that the burden or expense of the discovery on one party outweighs its likely benefit to the other party, after considering 'the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.'[102]

According to the defendants, their proposed data extract would cost $36,000, of which the defendants had already spent $16,000.[103] In contrast, plaintiffs' proposed data extract would cost nearly $100,000.[104] Although the plaintiffs argued that the cost was exaggerated, the court disagreed:

> When the court compares the heavy time and expense to create the data extracts that the plaintiffs originally proposed (and assuming that their new proposal will request a similar number of extracts) with the benefits of that discovery and its importance to the issues to be resolved in this case, the plaintiffs come up short. The plaintiffs have not provided a clear explanation of how the data from [the defendants'] extracts is insufficient to allow the plaintiffs to present evidence of the proper scope of

[102] *Id.* at *4; FED. R. CIV. P. 26(b)(2)(C)(iii).

[103] Daugherty v. Murphy, No. 1:06-cv-0878-SEB-DML, 2010 WL 4877720, at *5 (S.D. Ind. Nov. 23, 2010).

[104] *Id.*

> Class 1 and/or the proper injunctive relief for Class 1. Simply asserting that their expert would like to have it is not enough.[105]

Further, the court denied the plaintiffs' request to allow their expert to design new data extracts because the plaintiffs failed to "convince the court that the burdens and benefits of data extracts should be measured dramatically differently."[106]

IV. DEFENDANT'S TECHNOLOGY-ASSISTED REVIEW WAS DEFENSIBLE AND PROPORTIONAL TO THE NEEDS OF THE LITIGATION

Defendant deployed technology-assisted review in a reasonable manner in this case because: Defendant described the process in sufficient detail; Defendant balanced privilege against pressing time deadlines and the requirement to cooperate; and Defendant has implemented sufficient safeguards and quality control mechanisms to meet the standards set forth in the Rules and the case law interpreting the Rules.[107] Defendant should

[105] *Id.* at *7.

[106] *Id.* at *8.

[107] As discussed at the start of this article, a detailed recitation of the necessary safeguards, Judge Peck's "careful thought, quality control, testing and cooperation" is beyond the scope of this article. William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 134 (S.D.N.Y. 2009); *see supra* Part I.

not be sanctioned for using technology-assisted review and avoiding the human review of documents, less than 3% of which may be relevant to this case.[108]

Technologies like de-duplication and keyword searching have become acceptable tools to limit the volume of documents reviewed by humans in the discovery process.[109] Technology-assisted review is yet another reasonable and defensible method of reducing the volume of documents designated for human review prior to production.[110]

Defendant's use of technology-assisted review in this case is reasonable because Defendant has balanced the technology's limitations with reasonable safeguards. Defendant reviewed a statistically significant sample of the 800,000 documents that the technology identified as non-responsive after it was trained by human reviewers. That sampling has yielded a 95% confidence level that less than 3% of the documents are

[108] *See supra* Part I.

[109] *See* John Markoff, *Armies of Expensive Lawyers Replaced by Cheaper Software*, N.Y. TIMES, Mar. 4, 2011, http://www.nytimes.com/2011/03/05/science/05legal.html?pagewanted=all.

[110] *See id.*

relevant.[111] The cost of paying attorneys to review 800,000 additional documents to find 24,000 potentially relevant documents is overly burdensome and disproportionate under the Rules.[112]

Plaintiff inaccurately describes technology-assisted review as a technology and a process that *replaces* contract attorneys and non-attorney review professionals who currently perform document review.[113] *Replacement* implies a "silver bullet" solution that over-simplifies the discovery process and ignores the role that attorney reviewers have played in this case.[114] Plaintiff ignores a critical fact: Defendant has not *replaced* human lawyers. Defendant has instead incorporated technology-assisted review into a process that has remained under the control of counsel. Human reviewers designed and executed a document review plan that leveraged technology to meet the requirements of defensibility and proportionality. Humans reviewed the documents that gave the

[111] *See supra* Part I.

[112] *See* FED. R. CIV. P. 26(b)(2)(C)(iii).

[113] *See* Markoff, *supra* note 109.

[114] *See Benefits and Risks of Predictive Coding*, EXECUTIVE COUNS. INST., http://www.executivecounselinstitute.com/e-discovery/benefits-and-risks-of-predictive-coding (last visited Feb. 2, 2012).

technology the input to predictively code the data set, the documents that the technology-assisted review tool identified as responsive or privileged, and a statistically significant sample of the documents identified as non-responsive as well. Finally, information from the documents, the information counsel is using to develop trial themes, has been of necessity transferred to the lawyers who are preparing to try the case. The better question is whether attorneys are using technology-assisted review in a defensible process, leveraging the right expertise and with appropriate safeguards to improve certain phases of the discovery process, not whether technology is *replacing* lawyers. The reasonableness of deploying technology in electronic discovery with appropriate safeguards has already been answered affirmatively for technologies like de-duplication and keyword searching.[115] As courts have ruled in prior cases like *Victor Stanley*, *O'Keefe*, and *In re Seroquel*, using technology to assist attorneys in the discovery process is defensible as long as it is implemented with sufficient safeguards and documentation.[116]

[115] *Id.*

[116] *See, e.g.*, FED. R. EVID. 502 Committee Note ("Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening

Defendant has met its burden of establishing sufficient safeguards for using technology-assisted review and comparing such safeguards it to its use of technology in this case.

V. CONCLUSION OF HYPOTHETICAL BRIEF

The Court should deny Plaintiff's motion to compel, and grant Defendant's motion for protective order because the technology-assisted was reasonable, defensible, and the burden and expense of Plaintiff's requested relief would far outweigh the likely benefit.

III. ARTICLE CONCLUSION

[7] Lawyers do not eliminate risk; we manage risk. Increasingly, attorneys must develop a better understanding of the technology our clients use to generate potential evidence, and the technology available to sort through voluminous data to find necessary information. Trying cases still means developing trial themes and presenting evidence to support the elements of claims and defenses. That remains a human process. The process we use to identify, preserve, review and produce information in discovery is still evaluated based on a reasonableness standard. Reasonableness is still evaluated based on the "reasonable person" standard, not the "reasonable computer."

[8] We cannot say and do not attempt to forecast how any given judge would rule on this brief. What we can say is that given what we know

for privilege and work product may be found to have taken 'reasonable steps' to prevent inadvertent disclosure."); United States v. O'Keefe, 537 F. Supp. 2d. 14, 18, 23-24 (D.D.C. 2008); Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 259 (D. Md. 2008); *In re* Seroquel, 244 F.R.D. 650, 663 (M.D. Fla. 2007).

about the current state of the federal rules and case law, taken in conjunction with statements by thought leaders and leading members of the judiciary, technology-assisted review, when implemented with the right expertise and sufficient safeguards, can be reliable when used in conjunction with the right process.

[9] We can say that the analysis depends on the facts of each case. Those facts flow directly from a new reality lawyers must accept: in addition to a thorough understanding of a developing body of case law, attorneys can no longer hide their heads in the sand and ignore technology. They must actively pursue an understanding of the technology their clients use to run their business, and the technology that preserves and re-formats data for use in court or staff their litigation team with lawyers that do understand it. Technology and electronic discovery will always present challenges, but lawyers must respond to the challenge by understanding, or finding someone who understands, how tools like technology-assisted review work. Heeding the "wake-up call" and developing expertise in litigation technologies and the processes to implement them will allow lawyers to change the way we think of electronic discovery – electronic discovery should be a solution, not a problem.

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Best Practices In E-Discovery In New York State and Federal Courts

Report of the E-Discovery Committee of the Commercial and Federal Litigation Section of the New York State Bar Association

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NYSBA

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TABLE OF CONTENTS

Page

INTRODUCTION

These Guidelines for Best Practices in E-Discovery in New York State and Federal Courts (the "Guidelines") are intended to provide New York practitioners with practical, concise advice in managing electronic discovery ("e-discovery") issues in both state and federal courts in New York, and to be a reference for best practices in e-discovery based on the current state of the law. These Guidelines are not intended to be a comprehensive review of e-discovery matters or the law of e-discovery. Nor do these Guidelines propose how the law on e-discovery should be changed, or suggest how applicable rules or statutes should be amended. Many excellent resources on e-discovery are available and they are listed in the attached bibliography. Moreover, e-discovery analyses are inherently fact-driven and the Guidelines may not apply, in whole or in part, to any particular case or situation.

Computers are not new to the legal process, and astonishment at the constant and continuous proliferation of electronically stored information (referred to by the acronym "ESI"), networks, systems and devices has become a cliché. However, new developments in modalities of ESI are potentially significant to attorneys because any information relevant to a legal proceeding brings with it concomitant legal obligations. Whether ESI is stored on Facebook, in an iPad, or in the "cloud," counsel must understand the implications for attendant legal duties—such as preservation, collection, and production. Lawyers need not become computer experts; but they do need sufficient knowledge to represent clients competently in a world where "e-discovery" is fast becoming standard "discovery."

Do not make assumptions! Never has this precept been more apt than in e-discovery. There is no exemption from legal duties based on the electronic source of the relevant information. A recorded conversation may not escape preservation obligations simply because it occurred by instant messaging. Lawyers should also never assume, *inter alia*, that:

- the client's Information Technology personnel or the individuals responsible for the client's computer system understand what lawyers say about e-discovery;
- clients understand all of their legal obligations with respect to ESI and will take appropriate steps to carry them out;
- the court will appreciate the difficulties presented by the client's IT architecture;
- the adversary will pay for expensive e-discovery-related costs;
- the vendor will communicate promptly or accurately about any problems or delays in handling the client's electronic information; or
- the adversary will produce ESI in the form your client needs or wants, or in the form in which your client will produce its ESI.

These Guidelines in large part describe electronic discovery practices more relevant to corporate business enterprises with significant volumes of ESI than to small businesses and individuals with more limited resources. Larger business enterprises tend to have correspondingly larger volumes of ESI and more complex variations of electronic systems. However, even companies with access to substantial legal budgets routinely make decisions based on reasonableness and proportionality about how to conduct e-discovery in any particular

case. Smaller businesses and individuals with more limited resources may face a different cost/benefit calculus. But the most cost effective methods of conducting e-discovery may be following the steps outlined in these Guidelines, within a certain scope and budgetary limits clearly defined at the beginning of the case and agreed to by counsel and/or sanctioned by the court.

These Guidelines should help the practitioner recognize certain e-discovery issues that may require further examination and consideration, as well as provide a high-level framework for analysis. The topics addressed represent areas of high risk for client and counsel. The e-discovery case law demonstrates that much, if not most, of this risk arises from a lack of awareness and/or failure to communicate. These Guidelines aim to improve awareness and foster communication, with the goal of containing risk.

GUIDELINE NO. 1: The law defining when a pre-litigation duty to preserve ESI arises is not clear. The duty to preserve arises, not only when a client receives notice of litigation or a claim or cause of action, but it may also arise when a client reasonably anticipates litigation or knew or should have known that information may be relevant to a future litigation.

Comments: There is no specific provision in the Federal Rules of Civil Procedures, the New York Civil Practice Law and Rules, or any other applicable procedural rules defining when any pre-litigation duty to preserve is triggered. The duty to preserve evidence may arise from other statutes or regulations or the common law, as defined in case law. Federal case law illustrates a wide variety of triggers, from the common (*e.g.*, a credible litigation threat letter from a lawyer) to the more controversial (*e.g.*, lawsuits alleging product defects filed against other businesses in the same industry). New York State courts have addressed the duty to preserve primarily in the context of sanctions for spoliation. There are no bright line rules defining with specificity the point at which the preservation obligation is "triggered." It would be challenging to describe comprehensively the possible scenarios that might act as a "trigger" of the duty to preserve ESI. Moreover, efforts to define with specificity what events "trigger" the duty to preserve may not account for particular facts and circumstances specific to individual cases.

It is settled, under New York law, that a client must preserve evidence when that client has notice of pending litigation, or when a client has notice that the evidence probably will be needed for future litigation, or when a client must retain evidence pursuant to regulatory requirements. But it is far from clear what a client's obligations are before clear notice of a pending claim appears. Some New York courts have looked to the standards applied by the New York federal courts for guidance as to when the duty to preserve attaches.

Despite the seeming lack of clarity in the case law as to what events trigger the duty to preserve, general conclusions may be drawn. The legal duty to preserve relevant information arises when a legal proceeding is reasonably anticipated. Circumstances other than suing or being sued may also give rise to preservation duties, such as a regulatory investigation, a non-party subpoena, or a regulation requiring retention of information. Participation in a legal process where production of ESI may be required could also trigger the preservation obligation. Accordingly, the actual filing of a lawsuit or receipt of a subpoena may be the *latest* possible point triggering the preservation obligation. When a client receives notice of litigation or a claim regarding which the client holds relevant information, the preservation duty may be triggered, regardless of what documents have or have not been filed with a court, or formally served.

Given that reasonable minds may differ on when litigation is reasonably anticipated, especially with the benefit of 20/20 hindsight, the better practice often is to take a conservative approach. If there is real doubt as to whether the duty to preserve has been triggered, the safer approach usually is to assume that the duty might exist. While this may be the safest approach from a risk avoidance perspective, it is not always the most practical in light of a balancing of risk and cost.

In determining whether facts may have triggered the preservation obligation, the first step is to assess whether a legal hold concerning ESI (*i.e.*, the process implementing compliance with the duty to preserve) should be initiated. This is a judgment call made by counsel based on all

available facts and circumstances. Client organizations need to advise their employees (and/or outside advisors) designated to determine whether a preservation obligation has been triggered of the existence of the relevant facts and circumstances. Organizations may consider establishing procedures to ensure that such reporting occurs. In contemplating the potential need to justify at a later date the decision to implement, or not implement, a legal hold, the supporting rationale for the decision should be documented in writing in a manner that preserves applicable legal privileges. These decisions may not be questioned, if at all, until years later, perhaps following changes in personnel such as in-house counsel, so avoiding a 20/20 hindsight judgment that is unrealistic given the contemporaneous context that led to the decisions is critical. It is important that a written explanation is drafted and retained that justifies the decision and discusses all the facts and circumstances known at the time the decision was made and on which the client and counsel relied in determining whether there was, or was not, a reasonable anticipation of litigation.

GUIDELINE NO. 2: In determining what ESI should be preserved, clients should consider: the facts upon which the triggering event is based and the subject matter of the triggering event; whether the ESI is relevant to that event; the expense and burden incurred in preserving the ESI; and whether the loss of the ESI would be prejudicial to an opposing party.

Comments: Once a decision has been made that a duty to preserve has been triggered, the scope of that duty must be evaluated. As indicated above with respect to triggering the preservation duty, the determination of scope of preservation is a legal judgment that must be based on all of the available facts and circumstances. For the same reasons as discussed above, decisions about scope should be documented along with supporting reasoning in a manner that preserves applicable legal privileges.

Decisions as to scope may address time frames, custodians, subject matter, and responsive information by source or system, category, or type. Keyword searching and other tools may be available to identify ESI deemed to be within the scope of the preservation duty. Factual investigation including interviews of key witnesses may be indicated. As with the determination of the trigger point, it is often best to be conservative and preserve broadly. You can always argue about the appropriate boundaries of discovery later, but if you fail to preserve ESI and the court decides you should produce it, you will have a serious problem.

Identifying key witnesses and custodians early in the process is essential to effective preservation and discovery. Where it is difficult to identify particular individual custodians, it may be necessary to conduct preservation based on an analysis of what departments, regional offices, or other organizational subdivisions might include custodians believed to possess relevant information. In addition to specific individuals, entire departments or divisions may be deemed responsible for subject matters, such as contracts or specific projects that are the subject of a dispute or investigation. In identifying custodians, it is important to consider former employees, independent contractors, and any other individuals who may have had access to relevant information, and take reasonable steps to preserve relevant ESI on the desktops, laptops and files of former employees and independent contractors, to the extent the ESI is available as of the trigger point.

GUIDELINE NO. 3: Legal hold notices will vary based on the facts and circumstances but the case law suggests that, in general, they should be in writing, concise and clear, and should include: a description of the subject matter; the date ranges of the ESI to be preserved; a statement that all ESI, regardless of location or storage medium, should be preserved unless other written instructions are given; instructions on how to preserve the ESI and/or whom to contact regarding how ESI is preserved; and the name of a person to contact, if questions arise. Counsel should monitor compliance with the legal hold at regular intervals.

Comments: A written "legal hold" notice should be issued to the applicable custodians of information to instruct them regarding the duty to preserve and how it relates to information under their control. The goal here is to implement effectively a two-part process: (1) prohibit destruction and (2) monitor preservation efforts. In addition, the Information Technology ("IT") organization must be provided with a list of custodians who are subject to the legal hold to ensure that any routine deletion of ESI from electronic information systems is suspended for the applicable custodians. Where the client does not have an IT department, this responsibility falls on whomever has the practical ability to control the systems. Note that in certain cases, primarily where a large number of custodians are involved, it may be appropriate to issue legal hold notices to managers or supervisors of custodians for further "down the chain" implementation rather than sending a notice to each and every potential custodian.

Legal hold notices often precede the issuance of a written demand for the production of the needed information. While the content of legal hold notices will vary from case to case because they are, by nature, fact specific, they should be consistent where there is no reason for revision. The key to effective legal hold notices is simplicity and clarity because notices that are difficult to understand or take too long for employees to read hinder compliance. Elements of successful legal hold notices include, by way of example: a brief description of the subject matter and date range of the target information; a clear statement that *any* location or medium of storage is included (unless other written instructions are provided); instructions for the custodian to follow to ensure compliance; and a resource to contact with questions.

From a technical point of view, implementing legal holds can be easy or difficult (and everything in between) depending on the nature of the sources and systems that must be addressed. Typical technology issues involved in legal hold implementation include, for example:

1) the importance of timing because of routine operations of information systems that delete information;
2) the viability of sending out and following up on hold notices by email or whether in-person contact is required;
3) tracking the progress of steps to carry out the hold, including notices and systems implementation;
4) the impact of removing backup tapes from the routine recycling, overwriting, or destruction process;
5) the automated implementation of holds across various systems, such as emails, databases, file servers, etc.;

6) whether collection (versus hold-in-place), is the best or most appropriate method of hold implementation under the facts and circumstances presented;
7) stopping "auto-delete" functions; and
8) ensuring that all ESI sources are properly identified and addressed, including online, near-line, and offline servers and storage devices and home computers, when applicable.

Actions to prevent loss or alteration of potential ESI could include preventing manual or automated system operations such as:

1) using any software, hardware, or other means that might cause the overwriting, erasing, alteration, concealment, discarding, or destruction of ESI;
2) disabling any process that might prevent the normal logging of any form of transaction related to any form of ESI;
3) reassigning, altering, or disabling passwords, user authentication, document certificates, or any other form of custodian, user, and ESI identification and access capability; and/or
4) altering or preventing access to any desktop or portable computing or communication device that might contain potential ESI.

Depending on the circumstances, affirmative actions to preserve ESI might include:

1) establishment of a secure repository for housing collected ESI;
2) preservation of archival and backup media;
3) preservation of the content for specified individuals that may be stored on email and file servers, desktop and laptop computers, portable devices, removable media, and in online accounts;
4) forensic imaging and/or removal from service and securely impounding selected computing and storage devices and media related to designated individuals; and/or
5) preservation of tangible items that may be required to access, interpret, or search potentially relevant ESI, including logs, network diagrams, flow charts, instructions, data entry forms, abbreviations, user IDs, passwords, authentication keys, user manuals, and other legacy or proprietary media or devices required to access potential ESI.

It also may be advisable to issue a preservation notice to an adverse party or a potentially adverse party. This decision should be made considering whether the common law duty of the adverse party to preserve has already been triggered, in which case a preservation notice may not be necessary. But where there are legitimate concerns about potential spoliation, sending a preservation notice may be advisable. Such notices should be carefully tailored to ensure that what is being asked of the recipient is not overly broad and unduly burdensome. Clients should expect that sending a preservation notice to its adversary may result in the adversary sending a similar preservation notice to that client. A recipient of such a letter often has a number of difficult judgments to make, including: whether a preservation duty exists, the proper scope of that duty, and whether and how to respond to the letter. Reaching a reasonable agreement with an adversary is the best outcome when the dispute is important. Delimiting the preservation duty

as early as possible with the adverse party and acting in accordance with the agreement substantially reduces the risk of spoliation sanctions later in the case.

Another mechanism available to ensure preservation by an adversary is the preservation order, although this is not frequently imposed. Preservation orders can be a blessing in disguise to a party with a duty to preserve, if the order defines the boundaries of the duty with sufficient specificity. Such an order can reduce the uncertainty that may lead lawyers to advise expensive and operationally disruptive preservation steps. The case law on preservation orders indicates that obtaining such an order requires something more than the existence of a preservation duty -- which exists in every case -- such as a sound basis to believe that spoliation will occur without an order.

Finally, consideration should be given as to whether it is advisable to permit preservation to be controlled by specific custodians if the custodians are personally implicated by the events and/or the company faces significant exposure to liability. High ranking corporate executives may assume that IT will take care of preservation and ignore legal hold notices, and counsel should consider whether the ESI should be physically collected instead. This balancing of cost and risk may suggest that: (i) in criminal cases collection is the right form of preservation; (ii) that where a small and readily identifiable group of custodians holds the key to a multi-million dollar lawsuit, collection should also be used to preserve ESI; or (iii) where the critical data resides on a particular computer, it should be forensically imaged as a means of preservation. Reasonableness, considering all of the facts and circumstances, should guide such decisions.

GUIDELINE NO. 4: Counsel should endeavor to make the discovery process more cooperative and collaborative.

Comments: E-discovery can derail a case and may result in unanticipated, skyrocketing costs if counsel do not cooperate in a manner that may be different than has been the case historically with paper discovery. There is no benefit in trying to "hide the ball" at the preliminary conference or "meet and confer." Incomplete or inaccurate representations inevitably will be revealed later in the e-discovery process. There already have been cases in which counsel's overly optimistic projections as to scheduling and production, based on incomplete knowledge regarding the client's ESI, have cost the client millions of dollars.

A failure to be forthcoming about ESI issues could lead to further discovery, ramping up costs and possibly revealing vulnerabilities. In federal court, Rule 30(b)(6) depositions are frequently permitted, and depositions may be noticed in state court actions as well, so that counsel may explore an opposing party's IT environment, retention policies, e-discovery compliance procedures, etc. Such discovery may be avoided if relevant information regarding the client's ESI and computer systems is provided at the outset of the case. This is the type of cooperation that is necessary if the discovery process is to proceed efficiently. If the case gets bogged down in "discovery about discovery," clients will inevitably suffer additional cost and delay. It may be necessary for counsel to explain to the client the significance of being forthcoming on e-discovery issues in order to receive the client's full cooperation throughout the e-discovery process.

When errors in what has been represented to opposing counsel and/or the court are discovered, the duty of candor requires prompt correction and disclosure. If that ethical requirement is insufficient motivation, then consider the cases where severe sanctions have been levied for delays in advising the court about e-discovery problems. Courts often view the failure to report knowledge that a prior representation was wrong as equivalent to a misrepresentation.

There is a range of opinions regarding whether it is advisable to include the client's IT personnel or the client representative with the most knowledge of the client's computer system at the "meet and confer" or preliminary conference. While having a knowledgeable IT person present to address questions that may arise, or to explain detailed technical issues may be beneficial, under certain circumstances, lawyers may be uncomfortable with the unpredictability of having a non-lawyer potentially speak for the client on e-discovery issues. In any event, counsel should identify and prepare one or more of the IT personnel or other client representatives who can perform adequately as witnesses to testify as to the computer system and procedures regarding ESI, should the need arise.

The need for cooperation in e-discovery is the subject of the Sedona Conference's "Cooperation Proclamation," which has been supported by many members of the judiciary. E-discovery can be difficult and complicated, and uncooperative behavior between counsel can only serve to make it more so. Because cooperation in e-discovery can facilitate an efficient process, thus reducing costs, most clients should prefer that their counsel adopt a cooperative approach.

GUIDELINE NO. 5: Counsel should be familiar with their client's information technology, sources of ESI, preservation, and scope and form of production, as soon as litigation is anticipated, but in no event later than any "meet and confer" or preliminary conference.

Comments: In most New York State courts and in all federal courts in New York, counsel are required to confer early in the case, not later than at the preliminary conference, regarding e-discovery issues.

The rules in federal court[1] and in the Commercial Divisions of the New York State Supreme Court[2] require counsel to "meet and confer" about e-discovery *prior to* the preliminary conference. In the Commercial Divisions of the New York State Supreme Court, the parties must consider in advance the following e-discovery issues:

a) preservation of ESI;
b) "identification" of relevant ESI;
c) scope of e-discovery;
d) form of production;
e) anticipated costs and proposed allocation of same;
f) disclosure of the "programs and manner" in which the ESI is stored;
g) identification of systems holding relevant ESI; and
h) identification of the individuals responsible for ESI preservation.

In federal court, the discussions about e-discovery prior to the preliminary conference encompass similar scope and breadth, with the additional requirement of discussing the manner in which inadvertent production of privileged information will be handled procedurally.

In the New York State Supreme Court (outside the Commercial Divisions) and County Court, there is no specific rule obligating counsel to confer *before* the preliminary conference. But if a preliminary conference is held, and when it is deemed "appropriate" by the court, counsel must discuss the above issues at the preliminary conference.[3] Further, if a case "is reasonably likely to include electronic discovery," at the preliminary conference, counsel "must be sufficiently versed in matters relating to their clients' technological systems to discuss competently all issues relating to electronic discovery."[4]

Counsel should check the Rules of each Commercial Division[5] in New York State Court, as

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1 Fed. R. Civ. P. 26(f).

2 22 N.Y. Comp. Codes R. & R. §§ 202.70(g), Rules 8(a) and (b).

3 *See* 22 N.Y. Comp. Codes R. & R. § 202.12(c)(3).

4 *See* 22 N.Y. Comp. Codes R. & R. § 202.12(b).

5 For example, the New York State Commercial Division for Nassau County has its own "Guidelines for Discovery of Electronically Stored Information ("ESI")" and a Preliminary Conference Order form, which addresses e-discovery issues. *See* Commercial Division, Nassau County, "Guidelines for Discovery of Electronically Stored Information"; Preliminary Conference Order. The Nassau County Guidelines contain many of the requirements relating to e-discovery provided for in the Federal Rules of Civil Procedure.

applicable, as well as the rules of the individual federal judge and the Practice Rules of the particular New York State Court justice to determine whether any additional rules concerning e-discovery apply in a particular case.

After the preliminary conference is held in any of the above referenced courts, the court may issue an order, which may address e-discovery issues.[6]

It is clear from the plain text of these rules that a significant amount of disclosure is required, at the outset of the case, with respect to the client's information technology system as well as the e-discovery process undertaken by each party from start (preservation of information) to finish (production of documents and information). This places a substantial burden on counsel, early in the case, to prepare by assembling accurate information with the client's participation -- a process that is often much more difficult than it might seem initially. The reality is that very few clients have the up-to-date information counsel will need about each potential source of ESI in coherent written form that is easily accessed. In representing individuals and smaller companies without IT departments, the task may be even more challenging and may require more input from the client. Sometimes counsel will also need access to one or more IT personnel who can answer essential questions, but often the required information may be dispersed among many individuals in charge of various aspects of the client's IT system.

The fact that such disclosures will be necessary in any case pending in any of the New York federal courts and many cases pending in the New York State Courts indicates that it is prudent for counsel to work with the client, where appropriate, to prepare the background IT information, if possible, *before* litigation begins. The goal of this effort would be to create a summary of the sources of ESI and the facts relevant to e-discovery, such as retention periods and format of ESI,[7] which can then be used as a basis for lawyers and client representatives knowledgeable about the client's computer system to begin discussions about e-discovery strategy.

Counsel must also estimate the scope of e-discovery at a time when it may be pure guesswork to do so. The ability to estimate the likely duration of the process as well as its cost is a function of many factors, including the facts of the case, the amount at issue, the adversary and its counsel, the scope of planned e-discovery, the client's IT systems, and the client's budget and resources. Nevertheless, e-discovery is not new, and there is a wealth of informative resources available to assist in projecting e-discovery timelines and cost. In any event, this preparation is essential to fulfilling the mandate of cooperation indicated by the applicable rules.

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[6] Fed. R. Civ. P. 16(b)(3)(B)(iii); 22 N.Y. Comp. Codes R. & R. §§ 202.12(b); 202.70(g), Rules 8(a) and (b); 11(c).

[7] This type of systems overview is preferable to what is typically referred to as a data map, which is usually a "pictorial" rendering of a network or some other portion of an IT architecture. These kinds of data maps can be incomplete and in any event may be incomprehensible to lawyers.

GUIDELINE NO. 6: To the extent possible, requests for the production of ESI and subpoenas seeking ESI should, with as much particularity as possible, identify the type of ESI sought, the underlying subject matter of the ESI requested and the relevant time period of the ESI. Objections to requests for ESI should plainly identify the scope and limitations of any responsive production. Boilerplate language which obscures the particular bases for objections and leaves the requesting party with no clear idea of what is or is not being produced should be avoided. If necessary, counsel should meet and confer to resolve any outstanding disputes about the scope or format of production.

Comments: Written document requests for ESI and subpoenas for ESI are frequently met with objections that the requests are burdensome and overly broad. In addition, in e-discovery, technical, highly complex issues may render requests inherently ambiguous and compliance very difficult. To avoid, or contain, potential problems arising as a result of these issues, document requests and subpoenas for the production of ESI, and objections to those document requests and subpoenas, should be written in plain, clear language with as much specificity as possible under the circumstances. Accurate communication is key.

In articulating requests for ESI and objections to those requests, there is no place for boilerplate verbiage that is used solely for gamesmanship. Such language may give the party receiving the request the impression that the requesting party wants all ESI ever created. When the responding party uses such language in objections, the requesting party may be left with no idea what the responding party is willing or able to produce, or not produce. If the objections contain this boilerplate verbiage, the requesting party may be unable to discern with any specificity the putative justification for the responding party's objection.

The information needed to tailor document requests to seek information relevant to the claims, causes of action, and defenses at issue in the case should be part of what the parties discuss when they "meet and confer" regarding ESI prior to or at the preliminary conference, as required in all federal courts, and the New York State Supreme and County courts.[8] However, in practice, parties often fail to confer about ESI early in the case, as they should, and in any event cases evolve as counsel gather more information regarding their respective claims, causes of action, and defenses. If you cannot appropriately describe the ESI that you seek when you draft a written request for the production of documents, it is almost always beneficial to pick up the phone and confer with your adversary in an attempt to ascertain what types of ESI the adversary maintains, where the information is located, how it is stored, who the relevant individuals are and any other facts that would assist in specifying the ESI relevant to the claims, causes of action, and defenses in the action.

There may be instances in which a broad request may be appropriate. In such situations, requesting counsel should confer with responding counsel to gather facts to state the request or objection with as much particularity as possible. Conferences among counsel may not always be successful in this regard, so this Guideline is prefaced with the words "[t]o the extent possible."

[8] Counsel should check the local rules of each court and the rules of each jurist for any specific additional requirements in this area.

To the extent such lack of clarity may affect fundamental aspects of the production, such as issues relating to form or scope, which may affect costs, and no agreement is reached, counsel should consider seeking judicial intervention before producing ESI. Otherwise, there is a risk that, after production, the court could order the client to search, collect and produce additional or different ESI, which may increase costs and waste time.

GUIDELINE NO. 7: Counsel should agree on the form of production of ESI for all parties prior to producing ESI. In cases in which counsel cannot agree, counsel should clearly identify their respective client's preferred form of production of ESI as early in the case as possible and should consider seeking judicial intervention to order the form of production before producing ESI. In requests for production of documents or subpoenas and objections to requests to produce or subpoenas, the form of production of responsive ESI should be clearly stated. If the parties have previously agreed to the form of production, the agreement and the form should be stated. In any event, counsel should not choose a form of production based on its lack of utility to opposing counsel.

Comments: Form of production is one of the topics specifically identified as a required subject matter for parties to discuss prior to the preliminary conference in Rule 26(f) of the FRCP and Rule 8 of the New York State Commercial Division Rules. It is also an issue to be considered at a preliminary conference, "where the court deems appropriate," in civil actions in New York State Supreme Courts (outside the Commercial Division) and County Courts. If the form of production is not completely resolved or agreed to prior to or at the preliminary conference, the Federal Rules give parties the opportunity to address the form of production in the requests for production of ESI, or the opportunity to object to such form of production in the objections to those requests.[9] In federal court, if there is no agreement to form of production, then ESI must be produced in the form in which it is "ordinarily maintained" or in a form that is "reasonably usable."[10] New York State procedural rules do not provide counsel with similar guidance. Nevertheless, in any case involving ESI, including cases pending in New York State Court, the parties should attempt to agree to the form of production, or identify their preferred form of production, before producing ESI or requesting that their adversary produce ESI.

Failing to identify the form of production could have disastrous results. Counsel may require, where appropriate, that ESI produced by their adversary should be searchable, either full text or with respect to certain categories such as date, author or recipient, to facilitate the use of the ESI. The ESI produced by the adversary should be compatible with the requesting party's computer system or platform. Imagine receiving the electronic equivalent of a million pages of documents only to find that the production is not searchable electronically on your client's computer system or platform. Counsel using document review applications must make sure that the format they request or agree to is compatible with their system and that they request whatever associated information (*e.g.*, a "load file") is necessary to facilitate electronic review. The client should understand the issues involved in choosing the form of production and the client, or its technical personnel, if any and if appropriate under the circumstances, should be involved in the decision.

The choice of production to be used in any given case is a fact-specific inquiry that depends on the form in which the ESI is stored, the parties' respective computer systems, the

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[9] If a party responding to a request for the production of ESI does not like the form of production requested, it has the opportunity to object and propose an alternative form. If it fails to do so, then it will effectively have waived its right to choose the form of production.

[10] FRCP 34(b)(1)(C); 34(b)(2)(D) and (E).

platform to be used to search the ESI, and other relevant facts. There is no general requirement that ESI must be produced in native format, although many parties insist on that form of production.[11] Producing ESI in native files may not be necessary or appropriate considering the type of ESI requested and/or the issues in the case. Where appropriate, consideration should be given to requiring the production of ESI in native format only as to specific categories of ESI. Moreover, native files present problems relating to Bates Stamping and affixing other kinds of notation directly on files because affixing a Bates number or other designation on a native file will alter the native file. These issues may sound like minor irritations, but as the parties start to take depositions and want to show exhibits to witnesses, identifying and verifying the authenticity of the exhibits can become difficult when using ESI in native format.

It is important to ensure that the form of production demanded or agreed to does not require your client to transform native ESI in a way that is unreasonably expensive. Certain specialized or custom systems may present problems in producing ESI in certain forms. As with most other e-discovery issues, careful consultation with the client's IT personnel and, in some cases, outside experts is critical before reaching agreement on the form of production.

In determining the form of production, parties should also consider whether they want to request the production of metadata and, if so, what metadata to request.[12] Requests for metadata, like all requests for ESI, must be relevant. Requesting "all metadata" is almost certainly overbroad, as programs may generate many kinds of metadata that could not possibly be relevant to a lawsuit. Any request for metadata should be specific enough so that the requesting party can demonstrate why each field or type of metadata is relevant to the case. In determining what metadata should be requested from the adversary or produced to an adversary, counsel should consider: (i) the ability to search by authors, recipients and text, as necessary to identify certain subject matters and to be able to segregate potentially privileged ESI which was authored by, sent to, or refers to in-house or outside counsel or discusses legal advice; (ii) whether the court requires an index of ESI as it corresponds to the requests, and (iii) the list of major players involved in the case, and other similar issues.

In practice, it is common for parties to produce certain ESI in native file format along with image files (such as TIFF or .pdf) and searchable text, along with searchable metadata fields. For example, metadata relating to the date, the author, the recipient, and other aspects of the information may be produced by both parties.

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[11] Please see the definitions of Native Files and Metadata in the Glossary.

[12] It is not necessary to receive native files in order to receive metadata. Metadata can be extracted and provided along with the related file in other, more manageable formats.

GUIDELINE NO. 8: Producing ESI should be conducted in a series of steps, as follows: (1) initial review; (2) search for and collection of ESI; (3) processing of ESI to eliminate duplicates and render it searchable; (4) culling the ESI to reduce volume; (5) review by counsel; and (6) production.

Comments: To be achieved cost-effectively, electronic discovery must be conducted in an orderly manner. Described below is a process typical of many cases in which substantial e-discovery is undertaken:

(1) The first phase usually involves a high-level, initial review of emails and other ESI associated with key witnesses. In cases involving a large volume of ESI, this may be accomplished by taking random samples or by targeting a particularly important but relatively narrow time period. The potential cost of the process may be roughly estimated by considering the expected volume of ESI that will need to be searched and reviewed, as well as the sources from which that ESI will need to be collected. This phase may also involve initial conferences with opposing counsel, including the "meet and confer" required by the rules of certain courts, to discuss the scope of preservation and discovery and the form of production. Clients that are smaller businesses or individuals, or clients in small cases who may choose to have limited budgets for legal fees and e-discovery, should pay particular attention to agreeing with opposing counsel to the scope and form of production to avoid incurring unnecessary expense regarding searching, production and the form of production. They should also seek to agree with their adversary as often as possible to avoid costly e-discovery disputes and costly e-discovery do-overs.

(2) The second phase includes the search for and collection of relevant ESI. If the parties identified an initial "scope of discovery" during the "meet and confer," then that would form the basis for the execution of initial searches across all sources of potentially relevant ESI. Searches are designed to filter information according to a variety of parameters that are relevant to the matter, including, for example, key words or phrases, key persons, and dates. To the extent possible, counsel should seek to agree with opposing counsel as to the searches conducted, the types of ESI searched and the time period of the search. This process often occurs in multiple stages as more is learned about what is in the documents and how best to identify what is relevant.[13] Ideally, ESI collected from identified sources would be placed in a central repository or platform which provides security, protection, and access by authorized parties.

(3) The third phase is data processing. The purpose of processing is to decompress files, extract metadata from files, eliminate duplication ("deduplication"), and prepare the collected information for loading into a document review software tool so that the information may be searched and reviewed by counsel. This process may include creating image files such as TIFF or PDF and text files from scanned images using OCR software.

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13 Electronic searches may not be possible prior to collection and/or processing. The extent of electronic searching that is possible at this stage depends on what tools are available and what sources of ESI need to be searched. Thorough electronic searching may have to wait until a broad scope of ESI is collected and/or processed, after which ESI can be loaded into a review tool that allows robust searching of the processed ESI.

(4) After processing, further trimming of the data, sometimes called "culling," is usually required. This process involves more refined searches, filtering, and queries used to reduce the volume of ESI and create a set of potentially responsive documents for detailed review. The reality is that culling can take place at various points in the process as additional information is acquired that allows counsel to "zero in" on a more precise set of data relevant to the matter.

(5) The fifth step, universally acknowledged as the most expensive part of the process, is review by counsel. In preparation for the review, the information is organized so that it can be reviewed by counsel in an efficient, cost-effective manner. Counsel use a variety of document review software tools or "review platforms" to facilitate the review process. Documents for review are uploaded to the respective document review platform. The review platform enables counsel to perform various functions, such as native file analysis, redaction, annotation, and privilege review, and enables counsel to group or tag documents by designated categories, such as "Hot" documents, privileged, "further review", or other categories tied to the specific facts of the case or the document requests.

(6) Finally, the relevant, responsive, non-privileged ESI is prepared for production. Most litigation support systems leave the original files intact, but convert the files to TIFF or PDF while applying the appropriate redactions of privileged or confidential information, and adding annotation, Bates stamps, headers, and footers. The pages may be printed or stored on a hard drive in a folder structure. The collection of files typically is placed on a CD, DVD, or USB hard drive for production or presentation.

GUIDELINE NO. 9: Parties should carefully evaluate how to collect ESI because certain methods of collection may inadvertently alter, damage, or destroy ESI. In considering various methods of collecting ESI, parties should balance the costs of collection with the risk of altering, damaging, or destroying ESI and the effect that may have on the lawsuit.

Comments: In e-discovery, computer forensics relates to the science and art of examining and retrieving ESI from computers and other electronic devices and their associated storage devices, as well as the Internet, using methods validated by legal authorities and designed to facilitate the admissibility of evidence. In many cases, conducting e-discovery requires special handling where there is risk of ESI being inadvertently or purposefully altered or destroyed, or because certain ESI can only be extracted using special forensics techniques. In addition, in certain cases it is preferable to use an independent expert to avoid questions about whether self-interested parties may have affected the results.

Contents of storage media may be compromised because the media has degraded or has been damaged, or because some or all of the content has been deleted accidentally or intentionally by reformatting, repartitioning, reimaging, or using specialized software to perform thorough overwrites. Metadata may be altered by the simple act of moving a file to a new location, as is routinely done using common copying utilities.

To the dismay of many users, most computers do not remove the contents of a file when it is deleted, either when deleted manually by users or automatically by the system. In most operating systems, the contents of the file remain on the storage medium, while information about the file is removed from the file system directory. In some systems, even much of the metadata remains. ESI will remain on the storage medium until the operating system reuses (overwrites) the space for new data. Even when extreme attempts have been made to delete content, or the storage media has been severely damaged, forensics experts have been able to recover substantial evidence.

An exact copy of a system and all its ESI might be considered an ideal situation for e-discovery practitioners, but is impossible in conditions under which most companies must operate. Consequently, most ESI resides in systems undergoing automatic operations that can potentially disturb relevant information. In addition, normal user operations such as opening files, copying files, sending and receiving files, or turning a computer on or off can compromise the metadata of an electronic document.

Forensic experts and e-discovery practitioners are guided in any particular ESI acquisition situation by the circumstances and requirements of that particular situation, such as agreements reached among the parties, relevance and importance of ESI, cost and time constraints, potential business interruption issues, and claims of privilege. Aside from these circumstances and requirements, forensic experts and e-discovery practitioners need to be able to represent that they have taken all reasonable steps to ensure that all captured content has been preserved unaltered.

It is critical to document each step in the acquisition of ESI, to respond to challenges or inquiries as well as to support admissibility.

It is possible that some potential sources of ESI are disregarded simply because employees believe that potentially relevant content has been deleted or that the storage medium has been damaged, is degraded, or is otherwise not accessible for other technical reasons. However, because of the possibility that employees or witnesses may not have considered all of the technical factors, and because of the demonstrated success of forensics experts, thorough inquiry should be made with respect to all media (including information acquired via the Internet).

Because of budget or other constraints, some clients may prefer to perform computer forensics using internal IT staff familiar with information or network security. There are some important issues to consider before doing so. IT staff may not have the kind of in-depth knowledge, experience, or tools appropriate to perform computer forensics in an e-discovery context. Handling ESI for purposes of legal proceedings is a specialized field with specialized technology. IT staff may also not have the time to conduct e-discovery given their other commitments to ensure the IT operations of the business. In addition, they are not independent, and accordingly the original evidence is being handled by a party with an interest in its contents and its relation to the outcome of the litigation.

Organizations seeking to handle collections internally will need to devote significant resources to training and dedicating personnel to perform computer forensics. A significant investment will also be required in the software and hardware tools necessary to handle ESI properly from an evidentiary standpoint. Nevertheless, in many civil litigations, less expensive methods of collection may be perfectly acceptable. Lawyers and their clients need to assess their appetite for risk based on the adversary, the nature of the threat, and the potential exposure to the business in terms of reputation and monetary liability.

GUIDELINE NO. 10: Parties may identify relevant ESI by using technology tools to conduct searches of their ESI. In most cases, parties may search reasonably accessible sources of ESI, which includes primarily active data, although if certain relevant ESI is likely to be found only in less readily accessible sources or if other special circumstances exist, less readily accessible sources may also need to be searched. The steps taken in conducting the search and the rationale for each step should be documented so that, if necessary, the party may demonstrate the reasonableness of its search techniques. Counsel should consider entering into an agreement with opposing counsel, if appropriate, regarding the scope of the search and the search terms.

Comments: Search is an iterative process in the effective execution of e-discovery, including the process of identifying and reviewing ESI for relevance, privilege and other reasons. It is the key means of reducing the substantial volume of ESI to a smaller set of relevant, responsive and producible information and documents.

As a general matter, counsel should search for ESI in those sources most likely to contain relevant information and the scope of the search should be reasonable, considering the circumstances of the case and the client's computer systems and document retention policies. Sources may include, among many other things, desk tops, laptops, hard drives, servers, home computers, handheld devices, removable media, such as CDs, DVDs and flash drives, and sources of voice mail. Initially, the search for relevant ESI should be conducted from current data files. However, where other sources contain non-cumulative and relevant ESI, they may also need to be searched. For example, if the party has reason to believe that certain relevant ESI may *only* be located in a less readily accessible source, such as backup tapes, then that client may need to search the tapes. In the ordinary case, unless the opposing party shows good cause why ESI from sources that are particularly burdensome to access should be produced, and the court orders the party to produce ESI from such sources, at least as an initial matter, the party need not search those sources.

In most cases, if one party requests the other to search sources that are disproportionately burdensome to search under the circumstances, the searching party should consider requesting that the costs of such a search be allocated or shared among the parties. In requesting that opposing counsel search less accessible sources, counsel should be prepared to receive a reciprocal type of request from opposing counsel to produce additional ESI from less accessible sources, depending on the facts of the case. In determining whether a review of ESI from less accessible sources is justified under the circumstances, counsel should weigh the cost and other burdens incurred in searching less accessible sources against the likelihood of finding relevant evidence.

Because of the complexity of most IT infrastructures and the massive volume of potential ESI frequently encountered in complex cases, the most effective way to perform a search is through application of automated tools. Search software tools provide techniques that enable reduction of ESI based on selected criteria. However, lawyers must understand the limitations of search tools if they are to be confident that they have identified all of the documents and information they are required to produce. There are always sources of ESI or types of files that

search tools may not be able to reach effectively, and there are often search parameters that search tools cannot execute or may not execute depending on the form of the ESI. Counsel should stay informed as to the most current search tools available, as new developments in technology may affect the cost of searches and therefore the cost of e-discovery.

There are a number of considerations related to conducting searches, including the scope of the search, the objectives of the person performing the search, the search criteria used, the capabilities of the software, and the interpretations of the results of the search. The legal team should work with someone thoroughly knowledgeable about the search protocols and tools and their application to the sources under consideration in conducting the search. The various aspects of the search should be documented, with an explanation as to why each step was taken (or not taken). It may be necessary later in the legal process to provide affidavits certifying the accuracy and comprehensiveness of the search methods used and/or explaining the search methods.

The most common approach to searching is through the use of keywords. This is a simple method in which a person enters selected words into a text field of the search program, the search program searches through a list of documents or ESI, and returns a list of the ESI containing the search terms that were entered. Keyword searching can be effective in minimizing the quantity of producible records, which can in turn reduce the cost of generating a review database. Keyword searching identifies documents and ESI in which a search term appears, but cannot determine the relevance of the document to the subject being researched. In addition, keyword searches must rely solely on the specificity of the terms used in the search, and cannot "learn" through use. Because of inherent limitations, keyword searching tends to return more documents than necessary in some situations and fewer in other situations. Consequently, it should be used in conjunction with other search techniques.

There are a variety of search techniques that expand on simple keyword searches to provide more robust and useful results. Some of these techniques are used during the collection of ESI, while others are more appropriate during data processing or review and analysis. A list of common search techniques, including Boolean searches, "clustering" and "concept searching," fuzzy searches and others, are defined in the Glossary.

One common practice is for counsel for both parties to attempt to enter into an agreement regarding the scope of the search and the search terms. In many New York State Courts and in federal court, counsel for both sides are obligated to confer regarding e-discovery issues, and one result of this meet and confer may be a written agreement regarding each party's search process, or a search protocol. In the protocol, counsel may agree to the list of each party's custodians whose desktops (and other sources of ESI), should be searched. If the client's IT infrastructure is organized in a different manner, the parties may agree, for example, which server(s) or platform(s) each party would search. Counsel may further agree to the search terms to be used by each party. Entering into such an agreement may reduce the probability that disputes regarding the search process would develop later.

Decisions regarding the choice of the custodians or servers and the search terms should be documented. This is to enable the party, at a later date, to be able to justify the decisions

made and to be able to explain why the choice of the custodians or servers and search terms was reasonable. Before finally agreeing to search terms or a list of custodians, counsel should conduct a test search to determine whether relevant ESI is likely to be identified by using the proposed search protocol. The list of custodians and/or the search terms may need to be revised and refined before an effective search is achieved. The terms of the effective search should form the basis of the parties' agreement.

Although electronic search techniques and technology can be highly effective and in any event are necessary given the staggering volume of ESI, human error in implementing searches is always possible. Search results, therefore, should be tested after the search has been conducted to verify that the search was complete, accurate, and identified relevant documents. Specifically, the party should verify that some of the relevant documents it has already identified are included in the search results. Flawed searches can create issues potentially harmful to the producing party, including providing a basis for sanctions. Tests of search results should also be documented for later use, if necessary.

GUIDELINE NO. 11: Counsel should conduct searches using technology tools to identify ESI that is subject to the attorney-client privilege, the work product immunity and/or material prepared in anticipation of litigation. Counsel should document its privilege searches and verify the accuracy and thoroughness of the searches by checking for privileged ESI at the beginning of the search process and again at the conclusion of the process. To avoid the situation in which an inadvertent production of privileged ESI may possibly be deemed a waiver of the privilege, counsel should consider, as appropriate, entering into a non-waiver agreement and having the court incorporate that agreement into a court order.

Comments: Once a set of potentially responsive ESI has been identified, counsel should use automated tools and applications in the same manner discussed above to search that set of ESI to identify and withhold, as applicable, any communications subject to the attorney-client privilege, the work product immunity, material prepared in anticipation of litigation and/or any other privileges or immunities that may be involved in the case. In formulating an effective search, counsel should confer with the client and review at least a sampling of the ESI to ascertain, among many other things: (i) the names of all lawyers involved in the underlying facts of the case; (ii) the relevant dates on which the client began to consult with its counsel; (iii) topics of privileged communications; and (iv) any other unique facts relating to the privileged communications. As the ESI is reviewed, additional facts relating to the privilege may be discovered and may require that additional searches be conducted. After all necessary searches are conducted, counsel should check and verify the effectiveness, completeness and accuracy of the searches. Counsel may have to demonstrate to the court at a later date that counsel took reasonable steps to identify privileged communications.

Whether the case is pending in federal court or New York State Court, counsel should consider, as appropriate, entering into a non-waiver agreement with opposing counsel and/or having the court incorporate that agreement into an order, as provided in Federal Rule of Evidence 502. The ever expanding volume of ESI that lawyers must review for privilege may increase the probability that an inadvertent production of privileged information may occur. For this and other reasons, Rule 502 was added to the Federal Rules of Evidence. Rule 502(b) provides that any disclosure of a privileged communication in a case pending in federal court will not "operate as a waiver" if the disclosure was inadvertent, if the client took "reasonable steps" to prevent the disclosure, and if the client promptly took reasonable steps to inform the opposing party of the disclosure and request return of the privileged information. Taking "reasonable steps" may likely include some method of verifying and checking on the effectiveness, completeness, accuracy and quality of the searches for privileged communications. Among other methods, this may involve searching for known privileged communications among the documents to be produced prior to production or conducting other similar checks. Should a privileged communication be inadvertently produced, counsel may have to submit an affidavit to the court explaining the process it used in searching for privileged ESI, including verifying that the searches for privileged information were thorough and accurate, in order to secure a ruling that the production was inadvertent and does not constitute a waiver of the privilege.

In addition, Rule 502(d) and (e) provide that, if the parties enter into an agreement providing that inadvertent production of privileged information shall not constitute a waiver of

the privilege, and the court incorporates that agreement into a court order, that order is binding, not only on the parties to the instant litigation, but also on non-parties in other actions brought in either federal or state court. *See* Fed. R. Evid. 502(d) and (e). The drafters of Rule 502 reasoned that it would be unlikely that parties would actually reduce the costs of their pre-production review of privileged information if the non-waiver agreement or court order referenced in Rule 502 only applied to the instant litigation, and if a non-party could use any inadvertently produced privileged communication against the client in another lawsuit. Therefore, the Rule provides that the inadvertent production does not constitute a waiver of the privilege in the federal court proceeding in which it occurred or in any other action pending in federal or state court (including New York State Court).

There is no equivalent to Rule 502 in New York State Courts. The ethical rules applicable in New York provide that if a lawyer receives a document that may be privileged and the lawyer "knows or reasonably should know that the document was inadvertently sent," the lawyer "shall promptly notify the sender." Rules of Professional Conduct, R. 4.4(b). There is no obligation to refrain from reviewing the information or to return the document. Therefore, in cases pending in New York State Courts, counsel should consider entering into a non-waiver agreement and requesting the court to incorporate the non-waiver agreement into an order, although that order would not be subject to Rule 502(d) and would not be controlling in other actions. A non-waiver agreement or an order would provide protection for an inadvertent production which is not otherwise provided by New York law.

GUIDELINE NO. 12: Counsel should take reasonable steps to contain the costs of e-discovery. To that end, counsel should be knowledgeable of developments in technology regarding searching and producing ESI and should be knowledgeable of the evolving custom and practice in reviewing ESI. Counsel should evaluate whether such technology and/or such practices should be used in an action, considering the volume of ESI, the form of ESI and other relevant factors.

Comments: The volume of ESI involved in preservation and discovery substantially increases the costs of litigation. The lion's share of these costs is incurred during the review phase of e-discovery, when lawyers review ESI to identify relevant information for production, designate privileged information and documents for withholding, categorize information for use in depositions, and otherwise review the ESI. Clients incur additional costs in identifying, searching, preserving, collecting, extracting, loading and preparing ESI for production. These costs can be substantial where the volume of ESI possessed by the client is significant.

The aggregate cost of e-discovery can be most effectively controlled by implementing proactive programs, such as document retention policies, hold and collection procedures, adjustments to IT practices, user education and other measures beyond the scope of these Guidelines. For example, proper implementation of an effective document retention policy pursuant to which a client, in the ordinary course of business when no legal hold is in place, retains only ESI that it needs for business purposes and discards non-useful ESI that it has no obligation to retain, may reduce the volume of ESI in the client's records. This may reduce the cost of searching those records through e-discovery. But in practice, many litigators are contacted by or introduced to a client after litigation is anticipated or has commenced and the duty to preserve ESI has been triggered. Proactive programs involving the deletion of ESI in the ordinary course of business should be suspended once litigation is anticipated or pending.

Technical developments may be used to help reduce the cost of review and improve the accuracy of the review. Computer software, if implemented and effectuated properly, can identify relevant documents as well as, if not better than, human review of each document and may be more accurate and more cost-effective than traditional, manual document review.

Individual clients and small businesses, and clients involved in cases in which the amount in controversy is not substantial, should attempt to contain the costs of e-discovery by attempting to agree with counsel at the preliminary conference to limit e-discovery as much as reasonably possible given the facts and circumstances of the case. For example, the parties may agree to limit the number of custodians whose ESI is produced, the parties may agree to the form of production and the search terms to be used, and the parties may agree to produce ESI, at least initially, only from the most convenient, least expensive and least burdensome sources.

If a client seeks to work with a vendor or if counsel determines that retaining a vendor is necessary to produce, safely and effectively, the volume of ESI involved in the particular case, counsel should proceed with care. The process of "handling" ESI for legal compliance purposes is the subject of ongoing technical research and development, with vendors racing to outdo each other in selling their product's effectiveness and value. Lawyers should be careful not to advise clients regarding a vendor's products without adequate research and experience. In many cases,

consideration should be given to having the client retain the vendor directly. Counsel and vendors should clearly demarcate their respective responsibilities with respect to the production of ESI to achieve cost efficiencies and avoid mistakes.

Research has shown that whether ESI review is performed by humans or by computers, relevant information may be overlooked and not produced, and irrelevant documents may "infect" productions. Thus, lawyers should consider focusing on improving the process used to identify relevant ESI and focusing on testing that will validate the results of the process.

GUIDELINE NO. 13: Parties should discuss the expected costs and potential burdens, if any, presented by e-discovery issues as early in the case as possible. If counsel expects that the client will incur disproportionate, significant costs for e-discovery or that e-discovery will otherwise present a financial burden to the client, counsel should endeavor to enter into an agreement with opposing counsel to allocate the costs of e-discovery or, if necessary, seek a court order as early in the case as possible and before the costs are incurred, allocating the costs of e-discovery and identifying which party pays for what e-discovery costs.

Comments: Issues relating to the sharing or shifting of the costs of e-discovery usually do not arise when both parties to a litigation are of the same size or financial means, or are seeking similar amounts and/or types of ESI. However, when there is a divergence between the parties and one party believes it can demonstrate that it will incur a disproportionate share of the costs of producing ESI, that party: (i) should consider seeking the agreement of opposing counsel to share the e-discovery costs; or (ii) should consider making an application to the court for an order that the costs should be allocated between the parties. It is unlikely that the opposing party would agree to assume additional costs of e-discovery absent a court order, but certain circumstances may result in such an agreement and some courts require counsel to try to resolve discovery disputes with opposing counsel before making an application to the court.

A request for an order allocating costs of e-discovery should be made as early as possible in the litigation, such as at the preliminary conference or at an early status conference or, if necessary, by motion. If possible, the request should be made before such costs are actually incurred. The application may be based on proof of any facts that increase the cost of e-discovery, such as, the excessive cost of review or recovery of ESI which is stored, for instance, on backup tapes, or opposing counsel's overbroad request, or a request for ESI from too many custodians. The moving party may seek an order, for example, directing that e-discovery costs should be allocated or shared by the two parties, or that a portion of the costs should be shifted to the opposing party, or that discovery should be conducted in phases, or tiers, with the production of ESI that is less expensive to produce occurring first, and any additional, more expensive production from other sources occurring only if the opposing party demonstrates it is necessary. The motion should be supported by a detailed analysis of reasons why the moving party should not assume such a financial burden. Where appropriate, consideration should be given to providing an expert affidavit explaining the technical reasons why the e-discovery is so expensive. Counsel should be prepared that a court may not immediately decide the issue of cost shifting and may adopt a "wait and see" approach, by denying the party's application, without prejudice to submitting the application at a later date, such as at the close of discovery, or at or after trial.

The rule regarding the allocation of e-discovery costs is different if the case is pending in federal court versus New York State Court. In federal court, the party producing the ESI generally pays for the cost of production. This general rule is altered if there are special circumstances, a court order or a party agreement. But in New York State Court, as between parties, the CPLR has no rule specifically mandating cost-shifting. Nevertheless, some courts have found that the "New York rule" is that the party requesting the ESI generally pays.

However, decisional authority also exists in New York that each party should bear the cost of its own production.

GUIDELINE NO. 14: Courts may issue sanctions for spoliation, or the intentional or negligent destruction or failure to preserve relevant ESI.

Comments: Courts have ample authority to issue sanctions for spoliation arising from specific rules or broad inherent authority. Moreover, courts have wide latitude to determine the type of sanction for spoliation in any given case -- regardless of whether the spoliator intentionally destroyed evidence or did so through inadvertent negligence. Sanctions for spoliation have included, for example:

> monetary fines against the client and/or counsel, including but not limited to payment of attorneys' fees;
> adverse inference instructions to the jury (*e.g.*, instructing the jury that it may assume that the lost evidence was harmful to the spoliator);
> evidentiary preclusion; and,
> striking a pleading or granting a default judgment against the spoliator.

Typically, courts will weigh the prejudice to the other party and the degree of culpability of the spoliator in determining whether and how to sanction spoliation. For the practitioner, this means that it is critical to go beyond simply establishing spoliation and use any means available to show the relevance of the lost evidence. Given the obvious difficulty in proving the relevance of information that no longer exists, some creativity may be required. The greater the degree of culpability, the less courts are likely to require in terms of showing relevance.

Establishing a sound litigation hold process, as discussed in detail above, is the best way to avoid a spoliation disaster. However, it may also be important in showing good faith if spoliation does occur despite the best laid plans. Conversely, exposing the inadequacies in an adversary's process -- or the lack thereof -- is an effective way to show the court that the spoliator had no regard for ESI preservation.

GLOSSARY[14]

A

Adobe Acrobat—From Adobe Systems Incorporated, Acrobat is the leading program for creating and viewing PDF files—available in a free version and Professional version that enables file conversion, search, tagging, and other functions, and allows use of third-party add-ons.

Application Server—A server dedicated to processing applications, such as, for example, accounting systems. Also see *Server*.

Application Service Provider (ASP)—Third party that provides hosting services for a variety of information processing functions, and within e-Discovery, a portion or all of the functions related to the e-Discovery lifecycle. Also see *Hosting* and *Service Bureau*.

Archival Storage—Long-term storage of essential information under strict environmental and security parameters, but not requiring immediate access.

Attachments—Attachments fit two categories—True Attachments and Physical Attachments. True attachments are created by an author or custodian and referred to in the cover or parent document, such as an email with an attachment for example. Physical attachments are bound, clipped, or stapled without any reference by the author or custodian to the attachment. Also see *Unitization*.

Audio File—A file containing analog or digital sound elements, which can be played (heard) through an output device.

Auditability—The transparency, openness, or receptiveness of a system or process to being examined, with inherent features such as logs that facilitate the examination process.

Audit Log/Trail—Chronological record of selected information such as computer user activity for example that might include logins, logouts, files accessed, actions performed, and communications in and out.

Automated Litigation Support (ALS) Systems—ALS Systems are the application of specialized software programs to facilitate execution of functions within the e-Discovery lifecycle. ALS Systems are considered essential to the effectiveness of performing required functions and achieving objectives within the e-Discovery lifecycle.

B

Backup Storage—Exact copy of ESI stored separately from the original to serve as a source for recovery in the event of a system problem or disaster.

Backup Tape—Magnetic tape used to store backup copies of ESI.

Bates Number—A unique serial number electronically impressed on every page of a document collection. Often used in conjunction with a suffix or prefix to identify the producing party, the case, or other relevant information. Bates numbering was originally done by manually stamping the numbers onto hard copy originals.

Best Practices—Methods generally accepted and promulgated within an industry as being superior over others.

Bibliographical or Objective Coding—Recording objective information, such as date created, author, recipient, and copies, from electronic documents and associating that information with a specific electronic document.

Blowback—A hard copy set of documents printed from digital images, and usually produced in a batch from a coded database that enables automatic sorting and grouping of the documents.

Boolean Search—Use of logical operators such as “and”, “or”, and “not” to include or exclude terms from a search. Also see *Proximity Search*.

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[14] Reprinted from *ESI Handbook: Sources, Technology and Practice*, written by Adam I. Cohen and Edward Kalbaugh, Wolters Kluwer Publishers, 2009, with permission from Wolters Kluwer Publishers.

Broadband—Designation for communication networks, such a fiber optics, having higher throughput than other networks.

Burn—Copying files to a removable media, usually a CD or DVD.

Byte—Consists of 8 bits as the basic capacity measurement for most computer data, and increases in increments of 1,000 expressed as Kilobyte, Megabyte, Gigabyte, Terabyte, Petabyte, Exabyte, Zettabyte, and Yottabyte. Also see Chapter 5, Overview of File and Storage Systems, for *Table of Storage Capacity*.

C

Cartridge—See *Tape Cartridge.*

Case Management Services—A type of litigation support service to help prepare lawyers, law firms, and legal departments to try a case. Specific services may include interviewing witnesses, document review, and case preparation.

Case Management Software—Litigation collaboration software that helps law firms and third parties prepare for and manage a case.

CD (Compact Disc)—A type of optical disc storage media that includes read only (CD-ROM), write once then read only (CD-R), and write multiple/read multiple (CD-RW).

Certificate—Electronic affidavit vouching for the identity of the transmitter. Also see *PKI Digital Signature.*

Chain-of-Custody—Documentation and testimony regarding the possession, movement, handling, and location of evidence from the time it is obtained to the time it is presented in court; used to prove that evidence has not been altered or tampered with in any way; necessary both to assure admissibility and probative value.

Child—See *Parent/Child.*

CIO—Chief Information Officer.

Clawback Agreement—Agreement between parties to a litigation outlining procedures to protect against waiver of privilege or work product protection due to inadvertent production of documents or information.

Client—Any computing device that requests a service of another computer system. A *Thin Client* is a wired or wireless device that depends on a host for application processing. A *Thick Client* is a wired or wireless device that may request a service of another computer system, but also has its own computing capability.

Cloud Computing—Accessing files or using software through the Internet, generally via a service provider.

CMS—Content Management Systems are collaboration systems used to manage the creation and communication of corporate documents.

Coding—The inclusion of bibliographical information about each document into an automated litigation support program so that an affidavit or list can be produced in compliance with applicable rules. Coding also enables sorting and grouping in line with relevancy and privilege review. Coding usually includes the following basic information: Author, Bates Number, Date, Document title and type, and Recipient.

Coding Manual—Document providing instructions and information related to the coding function performed within the review process of e-Discovery. Also see *Coding*.

Collection—Process of harvesting ESI from various sources for processing and review phases e-Discovery.

Compliance (Management)—Process of adhering to policy, legal, or regulatory requirement.

Compression—Process for reducing the size of files to reduce storage space and bandwidth required for access and transmission.

Computer Forensics—See *Forensics.*

Computer Memory—See *RAM.*

Concept Search—Taking into account the context within which search words appear to ascertain meaning. Also see *Search.*

Contextual Search—Searching ESI whereby the surrounding text is analyzed to determine relevancy. Also see *Search*.

Correlation Search—A statistical method (Latent Semantic Indexing and Analysis) for finding the underlying semantic relationship of terms and their correlation, whereby the presence of one or more terms could confer significance to a document. A common example would be the relationship of words like law, lawyer, attorney, and lawsuit as representative of a shared meaning. Correlation search enables grouping and clustering of ESI into meaningful categories.

CSO—Chief Security Officer.

Culling—Removing documents from collections to be produced or reviewed. Also see *Harvesting*.

Custodian—The owner or person responsible for safekeeping of ESI.

D

Data—For practical purposes, the building blocks of ESI. Technically, data also includes elements that reside in many places within computing and storage devices, not accessible to users, such as program code, for example. Also see *Data Element* and *ESI*.

Data (Database) Administrator—IT person responsible for maintaining databases.

Database—The term database commonly refers to a collection of records and the software (database management system) used to manage user interaction. Technically, a database and a database management system are separate entities. There are a variety of database structures from which ESI is obtained, including Data Warehouse, Dimensional, Flat, Hierarchical, Network, Object, and Relational. (See Chapter 8, Databases, for a definition of each type of database.)

Database Server—A server optimized for database transactions.

Data Element—A combination of characters or bytes referring to one separate piece of information, such as name or address.

Data Sampling—Method of examining a statistically representative portion of ESI to determine how much of a universe of ESI is responsive.

Data Warehouse—Special form of large-scale dimensional database optimized for intensive queries of diverse business data elements analyzed and used to derive business insights and intelligence.

Deduplication—Deduplication is a software or hardware-based process for identifying exact or near-duplicate files within a collection, and only storing the original and any changes to the original. This eliminates file redundancy, reduces storage volume, and reduces the time required in discovery of ESI. Vertical deduplication locates duplicates within the records and information of a single custodian, while horizontal deduplication applies globally across all custodians. Also see *Near Deduplication, Block-level Deduplication*, and *Single Instance Storage*.

Deleted Data/File—ESI residing on media space that has been designated as available for reuse. The deleted ESI remains intact until it is overwritten. Deletion may be automated or manual and intentional or unintentional.

Deliverable—A project management term used to describe a tangible work product.

Digital Fingerprint—Fixed-length hash code that uniquely represents the binary content of a file. Also see *Hash*.

Digital Signature—See *Certificate* and *PKI Digital Signature.*

Directory—A simulated file folder or container used to organize files and directories in a hierarchical or tree-like structure.

Disc Drive—See *Hard Drive.*

Disc Mirroring—Process for protecting ESI by storing an exact copy of ESI on a second storage media during storage of the original ESI. Also see *Mirroring*.

Document Classification—Using a field bibliographical coding to group documents into categories such as correspondence, memo, report, and article for example.

Document Lifecycle—Phases inclusive of the functions to create, communicate, modify, store, retrieve, and destroy.

DoD 5015—Department of Defense standard for records management.

DVD (Digital Video Disc)—A type of optical disc storage media that can be written to and read from. DVDs are faster, have larger capacity, and support more data formats than CDs.

E

e-Discovery—The preparation, preservation, collection, processing, review, and production of evidence in electronic form in response to business, regulatory, or legal requirements. e-Discovery is also sometimes referred to as EDD (Electronic Data Discovery).

e-Discovery Process Lifecycle—Phases inclusive of the functions: Preparation, Search/Collection, Processing, Culling, Review/Analysis, and Production/Presentation.

e-Discovery Readiness Program—The process and initiatives (projects) to ensure adequate preparation for and optimization of the e-Discovery process.

e-Discovery Response Team—Team formed to execute e-Discovery requirements in response to investigation or litigation.

e-Discovery Vault—A secure, central repository for storage of discovered ESI, that is accessible by authorized users.

Email (Electronic Mail)—An electronic messaging system for communicating information and attached documents to one or more parties. Emails consist of addresses, header information, the message body, attachments, and metadata.

Email Administrator—IT person responsible for maintaining email systems.

Email String/Thread—Series of emails linked together by email responses and forwarding, often treated as a single document.

Encryption—A protection process using complex algorithms to render the contents of a message or file unusable or unintelligible to computers or persons not authorized to use/read it.

Encryption Key—A data value that is used to encrypt and decrypt data.

Endorser—A small printer in a scanner that adds a document-control number or other endorsement to each scanned sheet.

ePaper—Electronic version of a document, usually in PDF or TIFF file format.

ESI (Electronically Stored Information)—ESI is the term adopted in Rules 26(a)(1), 33, and 34 of the Rules of Civil Procedure, Amended December 2006, to include any type of information that can be stored electronically, and to acknowledge that electronically stored information is discoverable. It is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and technological developments.

Exabyte—See *Byte.*

Exchange Server—A server running Microsoft Exchange messaging and collaboration software. It is widely used by enterprises using Microsoft infrastructure solutions. Among other things, Microsoft Exchange manages email, shared calendars, and tasks.

F

File—Collection of ESI stored under a specified name on storage media.

File Conversion—Changing data or a file from one format to another. For example, converting native files from their original source format to an image-based format such as PDF or TIFF.

File Deletion—See *Deleted File.*

File Format/Extension—Three characters (usually) following a file name, to designate the type of file, which

defines how it is stored and used. See the Appendix, File Formats Used Worldwide.

File Server—Computing device optimized to store files for access by multiple users.

File System—Combination of software and logical structures used to organize and manage storage and access to ESI on storage media.

File System Metadata—System generated metadata stored externally from the ESI and used by the system to track ESI. Also see *Metadata*.

Filename—Name of a file excluding root drive and directory path information.

Filtering—See *Search.*

Fingerprinting—See *Forensics* and *Hash.*

Flash Drive—See *USB Drive.*

Forensic Capture/Copy—A method of preserving the original state of a physical storage media, and copying the entire contents of the media to preserve files and folders, and all other information on the media, including deleted files, file fragments, metadata, and other data. Forensic capture applies compression and encryption for protection and to guard against allegations of spoliation.

Forensics—The scientific examination and analysis of ESI while residing on storage media or after being retrieved from storage media, in a manner that conforms to legal requirements for evidence collection for use in a court of law.

FRCP (Federal Rules of Civil Procedure)—Rules that govern civil actions brought in U.S. federal district courts. Many states enact similar rules.

Full Text Search—Search of ESI for specific words, numbers, and/or combinations or patterns. Also see *Search*.

Fuzzy Search—Searches allowing and finding close approximations of words, such as misspellings for example, often to overcome errors during OCR scanning. Also see *Search.*

G

Gigabyte (GB)—See *Byte*.

Governance—Formal oversight of and direction to a process or program by one or more senior persons with authority.

H

Hard Disk Drive (HDD) Cartridge—Small, removable device containing a hard disk. Cartridge fits into a docking station connected to computer via USB port.

Hard (Disk) Drive—Storage device consisting of one or more spinning magnetic media platters on which data can be written and erased.

Harvesting—The process of retrieving and collecting ESI from storage devices/media for processing and loading to Automated Litigation Support (ALS) Systems.

Hash—A relatively small, unique number representing the unique digital "fingerprint" of data, resulting from applying a mathematical algorithm to the set of data. The fingerprint may be called hash, hash sum, hash value, or hash code. Used to validate the authenticity and/or integrity of data.

Hosting—Provisioning of applications, storage, and Internet access by a third party.

HTML (HyperText Markup Language)—Document presentation format used on the Internet that applies tags to enable Web browsers to display text and images.

HTTP (HyperText Transfer Protocol)—Underlying protocol used by the Internet to define how messages are formatted and transmitted, and what actions Web servers and browsers should perform in response to various commands.

Hybrid Search—Enables search and analytics of structured and unstructured data from single interface without requiring change in formats. Also see *Search*.

Hyperlink—Underlying code—represented on screen by underlining words or highlighted graphics—within a document that redirects to another location when clicked on by a user. Documents that include hyperlinks to navigate within the document are called HyperText.

I

Identification—One of the first steps in the e-Discovery process, finding discoverable and relevant ESI within various sources.

Image File Formats—Document images can be saved using different file formats, including JPG, GIF, PDF, single-page TIFF, or multi-page TIFF. ALS Systems can usually handle a variety of different formats.

Imaging—See *Scanning.*

Index—A technique used in information systems to enable faster and more efficient search and retrieval of information in files and databases, typically consisting of a separate file or database of key data elements (dates, names, keywords, etc.), parsed from a source, with pointers to the original source.

Information Asset (Source) Management—The inventory and tracking of custodians, and the IT devices and ESI related to them.

Instant Messaging (IM)—Form of electronic communication involving immediate text correspondence between two or more online users.

Internet—Worldwide, publicly accessible series of interconnected computer networks permitting communication among users.

Intranet—Private network that uses Internet-related technologies to provide services internal to an organization or defined infrastructure.

IP (Internet Protocol) Address—Unique address that electronic devices use to identify and communicate with each other on a computer network using the Internet Protocol. Also see *TCP/IP.*

ISP (Internet Service Provider)—Business providing access to the Internet for a fee. ISPs may be a source of ESI evidence through files stored on their servers. Also see *Hosting* and *Service Bureau*.

IT (Information Technology) Infrastructure—The people, processes, hardware, network, and software components collectively used for information processing and management within an organization.

J

Journal—Chronological record of data processing operations. Journals may be used to reconstruct previous or updated versions of a file. In database management systems, journals are records of all stored data items that have values changed as a result of processing and manipulation of the data.

Journaling—Copying of sent and received emails in native format to a secondary storage device for retention or preservation.

JPEG—Compression algorithm commonly used for still images.

K

Keyword Searching—The use of key words and Boolean techniques to search for documents containing relevant information. Also see *Search*.

Kilobyte (KB)—See *Byte*.

L

LAN (Local Area Network)—A group of computers at a single location that are connected via wired or wireless networks. Also see *Network*.

Lead Date—The date of a parent document, or if no parent, the document's own date. Lead date is used in a database as an option to enable chronological sorting of documents by parent, so that any attachments remain in

chronological sequence.

Legacy Data—ESI residing on outmoded or replaced storage devices for which little or no processing capability or knowledge remains within the organization, or which has become too costly to maintain effectively.

Legacy System—Outmoded IT components for which little or no processing capability or knowledge remains within the organization, or which has become too costly to maintain effectively.

Legal (Litigation) Hold—Communication issued as a result of current or reasonably anticipated litigation, audit, legal, or regulatory matter that suspends the normal disposition or processing of ESI. Hold orders or Hold notices may also be referred to Preservation, Suspension, or Freeze orders or notices.

Linking—The ability within an ALS System to connect evidence, transcripts, notes, pleadings, websites, and other documents to each other with hypertext links.

Load File—A data file is a critical deliverable from the scanning/coding function that establishes links between records in a database and the document image files to which each record pertains. Without a correctly structured load file, documents and their respective database records will not be in sync.

Lotus Domino—IBM's enterprise-level server product that hosts Lotus Notes and Web server capabilities.

Lotus Notes—IBM's enterprise-level collaboration suite that provides email, calendars, custom application development, database, and Web services.

LRP (Litigation Response Plan)—Developed to guide e-Discovery process.

M

Maintenance Programs—Applications that run at scheduled intervals according to predefined rules to maintain ESI and IT infrastructure components.

Meet-and-Confer—Meeting between counsels under Rule 26 of FRPC.

Megabyte—See *Byte*.

Metadata—Metadata provides information about other information sources—origins, usage, authenticity, and characteristics that provide additional meaning and context, and accordingly is considered discoverable evidence. Also, vendors may add metadata as a result of processing, most of which is used for process reporting, chain-of-custody, and ESI accountability. See Chapter 6, Native Files and Metadata.

Metadata Comparison—Comparison of specified metadata as the basis for deduplication without regard to content. Also see *Deduplication*.

Metrics—Units of measurement, and specifically within e-Discovery, those discernable units, such as documents, files, etc., that lend themselves to quantification.

Mirror Image—See *Forensic Capture*.

Mirroring—Duplication of ESI for backup or to distribute Internet or network traffic among several servers with identical ESI.

MPEG (1-4)—Various standards applied to compression/decompression of full motion video to digital.

Multimedia—Combinations of video, audio, text, and graphics in digital form.

N

Native Files—The original form in which a document or file is created by a software application. Two good examples are spreadsheets and word processing documents. Native files contain the content that users see, such as text and spreadsheet numbers, and information (metadata) about the document that users normally do not see, such as author and creation date.

Native File Review—A process that requires opening the document in the application in which it was created, or in a special application capable of supporting native file review.

Natural Language Search—Use of plain language without requiring special connectors or precise terminology. Also see *Boolean Search*.

Near Deduplication—Identification, tagging, or grouping files that do not have the same hash values, but are similar with minor differences in content and/or metadata. An example would be the various threads in an email distribution.

Near-Line Data/Storage—Use of offline storage to retrieve information in near real time for online use via robotics moving storage media (tape cartridges or optical discs) from storage library to read/write device. Also see *Offline Data/Storage.*

Network—Two or more computers and other devices connected together for the exchange and sharing of ESI and resources.

Network Administrator—IT person responsible for maintaining networks.

Network Database—See *Database.*

Node—Any device connected to a network.

O

Object Database—See *Database.*

Objective Coding—Manually reviewing a document and completing database fields, such as Bates number, author, recipient, cc, date, title, type, source, characteristics, and keywords. Objective coding, unlike subjective coding, does not require the coder to exercise discretion or be familiar with a particular case in order to correctly code the document. Also see *Coding*.

Offline Data/Storage—ESI storage in a system outside the online network (network in daily use), and only accessible by means of the offline storage system, which usually requires manual intervention. Also see *Near-Line Data/Storage, Online Data/Storage*, and *Storage.*

Online Review—Use of an ALS System by one or more persons to perform one or more of the review functions.

Online Data/Storage—ESI storage in active systems used in day-to-day operations.

Ontology—Collection of categories and their relationships to other categories and to words, and often used to find related documents when given a specific query.

Operating System (OS)—Software that directs the overall activity of a computer, network, or system, enabling all other software programs and applications to operate.

Operational Storage—Storage of information in active use for day-to-day operations. Also see *Online Data/Storage.*

Optical Character Recognition (OCR) and Optical Word Recognition (OWR)—OCR and OWR are computerized processes that generate a searchable text file from a digital image or picture file when it is scanned. As their names imply, OCR recognizes characters, and OWR recognizes words. OCR software compares the shape of letters in the image with its library of fonts and then generates the appropriate digital letter. Accuracy of OCR is largely dependent on the quality of the original document. OWR uses multiple OCR engines and compares results to a built-in dictionary. OWR is more accurate than OCR especially on older or poor-quality originals.

Outlook—Microsoft program that includes email, task management, and a calendar. All data is saved in a single PST file on the user's hard disc drive.

Outsourcing—Outsourcing refers to the shifting of work from one organization to another, including from within an organization in one country to an organization in another country. Within the e-Discovery lifecycle, Coding is the function most generally outsourced to reduce costs. Also see *Service Bureau.*

Overwrite—To manually or automatically record or copy new data over existing data, permanently deleting the original data.

P

Parent/Child—A hierarchical arrangement in which a subordinate entity is the child of a superior entity. An example would be Microsoft's file system tree structure, where one folder is the parent and folders under the parent

are child folders. Also, in e-Discovery, parent refers to the first, or cover, document and child refers to documents attached to the first or cover document.

Parsing—Transforms input text into a data structure suitable for later processing, while capturing the implied hierarchy of the input. Data may be parsed from one source of ESI to another.

Pattern Recognition/Matching—Pattern Recognition technology searches ESI for like patterns and flags, and extracts the pertinent data. Pattern matching technology compares one file's content with another file's content.

PDA (Personal Digital Assistant)—Mobile handheld device containing common applications for organizing schedules and work.

PDF (Portable Document Format)—Software from Adobe Systems Incorporated that converts single or multi-page documents into Adobe's proprietary format that captures the document's original formatting features and enables display across a variety of computer platforms. PDF provides security, navigation tools, search, and other features that facilitate document exchange.

PDF/A—The International Standards Organization (ISO) PDF specification for the long-term preservation of archived documents.

PDF Conversion—Converting documents in another file format to PDF.

Peripheral—Any accessory device attached to a computer, such as a disk drive, printer, modem, or to a network, such as router, or switch.

Petabyte (PB)—See *Byte.*

PKI (Public Key Infrastructure)—A security arrangement that enables computer users without prior contact to be authenticated to each other, and to use the public key information in their public key certificates to encrypt messages to each other.

PKI Digital Signature—A method for providing authentication of any message using the Public Key Infrastructure. A document or file may be digitally signed using the party's private signature key, creating a digital signature that is stored with the document. Anyone can validate the signature on the document using the public key from the digital certificate issued to the signer. Validating the digital signature confirms who signed it, and ensures that no alterations have been made to the document since it was signed.

Presentation Process—Phase of the e-Discovery Lifecycle devoted to developing trial presentations.

Preservation—The process of ensuring retention and protection from destruction or deletion of all potentially relevant ESI. See also *Spoliation*.

Preservation Letter/Notice/Order—See *Legal Hold*.

Print Server—Server dedicated to delivering printing services via the network.

Private Network—A network connected to the Internet but isolated by security measures allowing use of the network only by authorized users.

Privileged ESI—The compilation of ESI identified and logged as responsive and/or relevant, but withheld from production on grounds of privilege.

Privilege Review—Privilege review is often a combination of automated search and filtering combined with reading selected documents to determine and flag those considered privileged and to be excluded from production.

Production ESI—The universe of ESI identified as responsive to requests and not withheld on the grounds of privilege, and exchanged via electronic media. Also see *Quick Peek.*

Production Number—See *Bates Number*.

Production Process—Phase of the e-Discovery Lifecycle devoted to "packaging" relevant ESI for delivery.

Project Management—Formal methodology for managing resources to achieve objectives.

Project Plan—One of the first deliverables under project management—defines project components and how the project will move forward. Also see *Deliverable*.

Proximity Search—For text searches, the ability to look for words or phrases within a prescribed distance of another word or phrase.

PST File Format—Used by the Microsoft Outlook program. Also see *Outlook.*

Q

Quality Control—Formal method of controlling processes to ensure expected results.

Query—Access to a database to retrieve information.

Quick Peek—A production of ESI made available to the opposing party before being reviewed for privilege, confidentiality, or privacy, under stringent guidelines and restrictions to prevent waiver.

R

RAM (Random Access Memory)—Hardware in a computer that retains memory on a short-term basis and stores information while the computer is in use.

Record—Information, regardless of medium or format, that has value to an organization.

Records Management—Human and automated processes related to influencing the lifecycle of records in accord with business, regulatory, and legal purpose.

Redaction—The "blacking out" of information in documents to be produced. Redaction is usually accomplished in an ALS System by overlay so the original document image is not altered. Redactions should be permanent on documents included in final production.

Relational Database—See *Database.*

Relevancy Screening—The review of documents prior to scanning to eliminate irrelevant documents, using search tools that can filter out irrelevant files by criteria such as date range, custodian, folder, or in the case of emails, by date, author, or recipient.

Residual Data—Term generally referring to any information not serving a current useful purpose on a computer or storage media that may be recoverable using forensics techniques.

Restore—The act of transferring ESI from a backup medium to an online system, and possibly recreation of the original hardware and software operating environment.

Review—One of the functions within the e-Discovery lifecycle whereby potentially responsive ESI is examined and evaluated for selection of relevant ESI, including assertion of privilege or confidentiality for example.

ROM (Read Only Memory)—Permanent hardware memory that can be read but not written to or changed, usually on a chip containing firmware (software on a chip) for starting the computer and running certain imbedded system programs.

Rule 26 Automatic Disclosure of ESI—Parties in litigation must provide a copy (or description by category and location) of ESI that will support that party's claims and/or defenses.

Rule 26 Enhanced Meet-and-Confer Requirements—Parties must meet and confer at the outset of the case to discuss their plans and proposals regarding the conduct of the litigation, including any issues relating to preservation, disclosure, or discovery of ESI, including the form in which ESI should be produced and claims of privilege, or protection as trial-preparation material.

Rule 26 Inadvertent Production of Privileged Information—If discovery information is subject to a claim of privilege, or protection as privileged trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party is required to promptly return, sequester, or destroy the specified information and any copies it has and is not permitted to use or disclose the information until the claim is resolved.

Rule 26 Production of Information "Not Reasonably Accessible"—A party need not provide discovery of ESI from sources that the party identifies as "not reasonably accessible because of undue burden or cost." The party being asked to produce ESI bears the burden of demonstrating the information is not reasonably accessible because of undue burden or cost. Even if that showing is made, the court may nonetheless order discovery from that party if

the requesting party shows good cause.

Rule 33 Production of ESI In Response To Interrogatories—Provides the option to respond to an interrogatory by specifying and producing the business records, including ESI, which contain the answer.

Rule 34 Production of ESI In Response To Requests For Production Of Documents—Requires production of relevant and responsive, non-privileged ESI,.

Rule 37 Safe Harbor Provision—Remedies for a party's failure to respond to, or cooperate in, discovery. Amended Rule 37 provides that, absent exceptional circumstances, a court may not impose Rule 37 sanctions on a party for failing to provide ESI lost as a result of the "routine, good faith operation of an electronic information system."

Rule 45 Subpoena—For third parties to produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control, or permit the inspection of premises.

S

Safe Harbor—See *Rule 37.*

Sampling—Sampling refers to the process of testing a database or a large volume of ESI for the existence or frequency of relevant information as an aid in determining whether to perform more extensive searches.

Scanning—Converting text and images of a page of a paper document into a computer file as an image, as readable text, or as a combination of both.

Search—The use of various automated methods for identifying and finding potentially relevant ESI.

Search and Collection—A phase of the e-Discovery Lifecycle devoted to finding and acquiring potentially relevant ESI.

Searchable PDF—A PDF document that retains the formatting and looks of the original document, and can be text-searched using Acrobat or third-party search tools.

Server—A computer on a network that contains ESI, applications, or other services shared by multiple users of the network on their client PCs. See Chapter 3, Overview of the Information Technology Infrastructure.

Service Bureau—Company that provides services such as scanning and coding to the litigation market. Also see *ASP*, *Hosting*, and *Outsourcing*.

Situational Assessment—Examination to determine the current state in relation to the desired state, and to uncover any problems related thereto. Usually followed by a gap-impact-risk (GIR) analysis. Also see *GIR Analysis*.

Spoliation—The deliberate or inadvertent modification, loss, or destruction of evidence by a party who has been put on notice of litigation but has failed to take appropriate steps to preserve potentially relevant information.

Steering Committee—A group of stakeholders formed to provide governance and guidance to major programs.

Storage—Placement of information on a storage device for day-to-day use (operational storage) or for disaster recovery (backup storage) or for long-term retention (archival storage).

Storage Device—Any device, such as a disc or tape drive serving as the host for storage media, capable of storing ESI.

Storage Media—A medium for storing ESI, including magnetic tape, discs, CDs, DVDs, and solid state electronics for example.

Structured ESI—Information organized by computer program in a consistent manner to allow manipulation usually via database structures that enable sorting, searching, and reporting for example. Also see *Unstructured ESI*.

Subjective Coding—High-level legal analysis of documents in an ALS System that relates each relevant document to one or more appropriate legal or factual categories or issues as defined by the lead attorney.

Suspension Notice—See *Legal Hold.*

Synchronization—The ability to merge two or more copies of a database together, preserving rather than overwriting the latest changes made in any copy.

System Administrator—IT person responsible for developing and/or maintaining core infrastructure systems, as opposed to business applications.

T

Tape Cartridge—A plastic housing for a tape reel and the preferred mechanism for use in tape-based storage systems.

Tape Drive—A hardware device used to store or backup ESI on a magnetic tape.

Tape Recycling—Process of overwriting tapes with new data, usually on a fixed schedule involving tape rotation.

Tape Restoration—Process for harvesting ESI from tapes for e-Discovery or because tapes are damaged, obsolete, or difficult to maintain, and storing harvested ESI on alternative media.

Task/Resource Schedule—A project management form used to define the timeline for tasks and people to complete deliverables. Also see *Deliverable*.

Temporary File—Files temporarily stored on a computer by Internet browsers and office applications to enable faster screen display. Forensic techniques may reveal computer usage through examination of temporary files.

Terabyte—See *Byte*.

Text Messaging—Sending/receiving short messages (160 characters or less) between mobile devices or computers.

Thread—Usually refers to a series of communications on a particular topic such as might take place with emails, bulletin boards, or messaging systems.

TIFF (Tagged Image File Format)—A widely used graphic file format for storing bit-mapped images with different compression formats and resolutions.

Transactional File System—Specialized file system enabling high volume transactions with fault tolerance, transaction roll back, and audit logging—typically used in financial systems.

Transcript Formats—Discovery and trial transcripts available electronically that can be searched, annotated, linked, and organized into brief reports in ALS Systems and in dedicated transcript management programs.

Transparency—The inherent feature of a process or system to be easily externally viewed or audited.

Trial Presentation—The display of evidence via computer display at a hearing rather than by way of multiple photocopies. Full-featured ALS Systems have built-in trial presentation features.

True Attachments—See *Attachments* and *Unitization.*

U

Unstructured ESI—Information not easily readable by machine or suitable to a database structure, such as email content, and audio or video files and unstructured text such as the body of an email or word processing document. Also see *Structured ESI*.

USB Drive—Small removable storage device that uses flash memory and connects via a USB port.

V

Validation—Various automated processes used to ensure the accuracy of scanned images and coded information, and to verify the accuracy of attachment ranges and dates.

Verbatim Coding—Extracting data from documents in a way that exactly matches the information as it appears in the documents.

Vertical Deduplication—A process through which duplicate documents or information are eliminated within a single custodial or production document set. Also see *Deduplication*.

Voice Mail—Recording in a file of analog or digital voice message.

VoIP (Voice over Internet Protocol)—Transmission of voice across an Internet connection, often with limited

attachments such as images and video.

W

WAN—Wide Area Network.

Web Repository—A Web Repository is part of an ALS System made available for users to perform required functions of document review via secure connection to the Internet, with no local software required other than a Web browser.

Web Server—Server specialized for transactions via the Internet.

Workflow—The automation of a function or process whereby ESI or tasks are passed from one user to another for action according to predefined rules.

WORM Discs—WORM (Write Once Read Many) discs are primarily used to archive information that must not be altered.

X

XML (Extensible Markup Language)—Specification for enabling users to define their own elements to facilitate sharing structured data across different information systems, particularly the Internet.

Y

Yottabyte—See *Byte.*

Z

Zettabyte—See *Byte.*

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Applying Electronic Discovery in an Arbitrational Setting | Litigation News | ABA Section of LitigationAmerican Bar Association

Alternative Dispute Resolution»

By Michael Swarz

For most attorneys, embarking into the world of electronic discovery (e-discovery) and confronting the costs associated with it represent the single biggest challenge—and headache—in conducting litigation or alternative dispute resolution. The recent proliferation of federal and state laws dealing with electronically stored information (ESI) has exacerbated these hurdles. Against this backdrop of growing legislation and case law, counsel engaged in arbitration are tasked with making sense of how ESI will be approached and harnessed to its most effective use and presentation in an alternative dispute resolution setting without imposing all the courtroom expectations and sensibilities inherent in the traditional litigation setting.

Common Hurdles
For the past decade, ESI has surfaced as the foremost and most popular medium for data communication and storage. Although ESI is perhaps most recognizably represented by electronic mail messages, it may be found in a myriad of other formats and comprises enormous amounts of digital data. Some experts estimate that as many as 161 billion gigabytes of digital data were created solely in the year 2007.[1] A paper document containing an equivalent amount of information would stretch over 92 million miles!

To make matters even more complex, the sheer size of ESI is not the sole issue that must be confronted. After all, digital data can just as easily be duplicated and moved across an array of network systems with a few simple commands. As a result, it has become increasingly complicated to pinpoint the sources and locations of particular pieces of ESI. Indeed, the ESI sleuth will need to navigate through complicated servers, email systems, detachable media, voicemail, and even iPhones, to name a few. Each of these resources may contain information that is pertinent to legal discovery.

In contemplating and integrating ESI into an admissible form with a proper evidentiary foundation, counsel begin to confront an additional series of hurdles—namely, increased expenses and added risk. The combination of these two, and the fear of the unknown that they engender for the uninitiated, has led numerous cases to mistakenly settle prematurely. The arbitration attorney must therefore ensure that expense and risk are eliminated or minimized in tackling these evidentiary legal issues outside the courtroom setting.

Whither Arbitration?
At its inception, arbitration was articulated as a relatively relaxed alternative to complex litigation. The concept was thus born of the idea of giving both sides a straightforward, swift, and cost-effective arena to sort out their differences. Although the myriad rules of evidence generally did not apply, the arbitrator was granted authority to demand production of data, both electronic and not. Parties, however, did not believe that the arbitrator's mandate was robust enough to accomplish complete discovery. This understanding has transformed arbitration into an expensive and lengthy expedition in which each side is left with the often unsatisfactory results of, at best, a partial discovery process.

Nonetheless, arbitration may be favored by parties because, if nothing else, it is still viewed as being less costly than traditional litigation. This perception is based on the greater latitude granted by state and federal courts for expansive and expensive discovery requests in response to motions to compel discovery. In litigation, this outcome is particularly discouraging when strict deadlines

must be confronted and enormous amounts of ESI must be accounted for as part of the discovery process. Thus, arbitration, as flawed as it may be, is preferable from a cost-savings perspective because it allows for additional limitations as to the scope of ESI that will be admitted into evidence.

There are other benefits as well. Arbitration offers a secure, proven forum for airing and managing controversial pre-hearing dilemmas. In addition, the traditional rules of evidence do not fully govern in an arbitrational setting, and the perceived procedural shackles of litigation are therefore less restrictive in arbitration. These advantages dovetail quite well when supervising large-scale and specific ESI requisites in an arbitrational setting.

When Worlds Collide

Many have been baffled as to how e-discovery should be conducted in practical terms once ESI becomes pertinent to an arbitration. This is perhaps due to the enormous amount of possibly discoverable ESI and the expenses associated with producing it to the other side. In these and other arbitrational settings, the arbitrator should take the lead by setting up a case management conference to be attended by both parties. The conference should be of substance in terms of time and content and be attended, preferably, by the parties in person. In addition, it is recommended that the parties' information technology representatives be present as well to review, explain, and query the ESI in question.

During the case management conference, the arbitrator should mandate a litigation hold on all pieces of relevant ESI. If the parties have previously agreed to a litigation hold, the terms of the litigation hold should be scrutinized at the case management conference for all permutations of ESI along with any pertinent retention or deletion timetables to ensure that no ESI is manipulated. In addition to a methodical march through the many ESI options that may exist, including third-party and legacy systems, it is recommended that the parties review at this time the production formats and search terms to be employed thereafter.

In intricate cases, arbitrators have become accustomed to ordering sampling as a form of search term verification. Sampling can be imposed by an arbitrator when the parties may be dealing with an enormous number of ESI search terms. In doing so, the arbitrator crafts less invasive and more limited ESI searches to evaluate the helpfulness of repeating the partial sample searches more extensively. While this method may not yield consistent results, it is a practical substitute to sanctioning an indiscriminate search, which would be likely to increase the time and costs associated with interrogating the ESI.

Conclusion

E-discovery and arbitration need not be incompatible. Indeed, the fact that arbitration is the forum for resolving the parties' dispute can play a vital role in determining a party's ESI interests in a manner that is both swift and equitable. Consequently, arbitrators must be familiar with the workings of ESI to better manage the e-discovery likely to appear in their next case, so that the perceived advantages of arbitration are not lost in the process of handling ESI in the arbitrational setting.

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POTENTIAL APPROACHES AND MATTERS TO CONSIDER IN ADDRESSING ISSUES AS TO ELECTRONIC DISCOVERY IN ARBITRATION

Charles J. Moxley, Jr.

Following are some potential approaches and matters for arbitrators to consider in addressing issues as to electronic discovery in arbitrations, subject to the needs of the particular case:[1]

- Where necessary, address issues as to appropriate "litigation holds" as to ESI;
- Generally require "meet and confers" concerning ESI, as well as discovery generally, when it appears there will be issues in this regard;
- Be cognizant of disparities as to technical sophistication between competing parties/counsel and consider how, if at all, to address same;
- Importance of generally fostering/requiring a spirit of cooperation among counsel concerning ESI, as well as concerning discovery generally;
- Requiring in appropriate cases that counsel be familiar at an early discovery conference with their client's information technology, sources of ESI, preservation practices, and the anticipated scope and form of ESI to be produced;
- Requiring in appropriate cases that requests for ESI identify with particularity the type of ESI sought, the underlying subject matter of the ESI requested, and the relevant time period for which ESI discovery is to be provided – and that objections to requests for ESI plainly identify the scope and limitation of any responsive production;
- Working with counsel, where appropriate, to determine and formulate appropriate search terms;
- Working with counsel, where appropriate, to determine the appropriate number of searches to be conducted;
- Working with counsel, where appropriate, to determine the appropriate time frames for electronic searches;
- Working with counsel, where appropriate, to figure out and determine the appropriate number of custodians and the appropriate files of designated custodians to be searched;
- Addressing issues as to the numbering or other identification of ESI to be produced;
- Addressing issues as to the form of identification and production of attachments to e-mails to be produced and the like;

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[1] There will be cases where one does not really need to do much as to ESI and will likely apply few, if any, of these approaches – and cases where, if counsel and/or the arbitrator(s) do not cause various of these approaches to be considered and applied, the parties may end up spending very substantial amounts of money on ESI. While in some cases, such a level of expense may be warranted, there will be many cases — and this is where these approaches can perhaps be most helpful — where the issues are complicated and the parties sophisticated, but the amounts of money involved do not justify the expense of full ESI discovery. In such cases, alert and savvy counsel and arbitrators need to be proactive to make sure reasonable parameters are in place.

- Evaluation of hit counts *vis-à-vis* proposed search terms, custodians, files, and the like;
- Provision for test searches based on proposed search terms, custodians, etc.;
- Overall objective of having the big ESI searches only have to be conducted once;
- The advantages and disadvantages of predictive coding;
- Format of production;
- metadata to be provided;
- Requiring in appropriate cases that production of electronic documents need only be from sources used in the ordinary course of business;
- Requiring in appropriate cases that there is no need to make production of electronic materials from back-up servers, tapes or other media, absent compelling need;
- Requiring in appropriate cases that, absent the showing of compelling need, the production of electronic materials need only be on the basis of generally available technology in a searchable format usable to the party receiving the e-documents and convenient and economical for the producing party;
- Requiring in appropriate cases that counsel agree on the form of production of ESI for all parties prior to producing ESI;
- Need for developing procedures for identifying privileged documents in collecting ESI and for clawbacks where appropriate;
- Requiring in appropriate cases that ESI to be produced first be "de-duped;"
- Considering cost-shifting when 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;
- Establishing, where appropriate, that there is no need to produce ESI that is already in the possession of the other side;
- Exploration of other and less expensive sources of the information contained in the ESI requested in the particular case;
- Requiring the requesting party to show the need for the ESI;
- Requiring that a party seeking metadata demonstrate that the relevance and materiality of the requested metadata outweighs the costs and burdens of producing same, unless the documents will otherwise be produced in a form that includes the requested metadata;
- Consideration of issues as to fairness and equality of treatment concerning ESI production, particularly where most or all the ESI is on one side;
- Requiring cost estimates from counsel with respect to alternate approaches to e-discovery in a particular case;
- Requiring, where potentially helpful, that each side have its ESI expert participate in discovery conference calls concerning e-discovery;
- The usefulness, by analogy, of certain parameters developed by various courts concerning the control of e-discovery;
- The overriding principle of proportionality and the need to consider it in defining the amount of e-discovery to be permitted/required;
- The compelling need to proactively engage with counsel as to the level, extent, and potential costs of various approaches to e-discovery in the particular case, in order to avoid the situation where counsel who are experienced in litigation but

not arbitration proceed with litigation-level e-discovery, without consideration of cost, efficiency, and proportionality;

- The potential for the tribunal to appoint its own ESI expert in an appropriate case;
- The usefulness of addressing ESI issues in the preliminary hearing and, in appropriate cases, establishing a schedule for counsel to meet and confer as to ESI and report to the arbitrator(s) as to same;
- The possibility, in appropriate cases, of parties making their respective electronic files available to the other for searching;
- The need not only to engage this issue early on, but to monitor it throughout the case;
- Alternatives to e-discovery in an appropriate case, including the use of such approaches as witness statements, particularizations, representations, and even depositions;
- Dealing with issues as to sanctions for spoliation or the intentional or negligent destruction or failure to preserve relevant ESI in light of the requirements of applicable law and of the applicable arbitration rules;
- Addressing issues of concern with respect to ESI requested of non-parties through subpoenas and the like;
- Trying to identify and address ESI issues before they become a problem and, most importantly, before they become the cause of substantial expense and delay; and
- Addressing any further issues counsel or the parties may have concerning ESI.

Useful Sources as to ESI

Following are some helpful sources that suggest best practices for addressing ESI issues, including some of the above approaches:

- New York State Bar Association (Dispute Resolution Section), (1) Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations and (2) Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Commercial Arbitrations, available at http://old.nysba.org/Content/NavigationMenu/Publications/GuidelinesforArbitration/DR_guidelines_booklet_proof_10-24-11.pdf
- New York State Bar Association (ComFed Section), Best Practices in E-Discovery in New York State and Federal Courts, available at http://www.nysba.org/workarea/DownloadAsset.aspx?id=523
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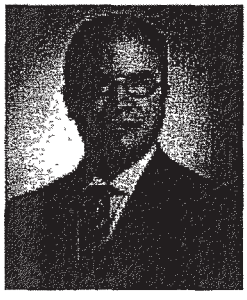
REPORT

The rising tide of globalization has meant that, more frequently than ever before, multinational corporations must navigate between U.S. litigation discovery demands seeking the production of documents and information located in the European Union and EU data protection requirements. The authors examine the arguments available in U.S. litigation for resolving conflicting laws, and suggest an approach they say lawyers and business people can take to try to navigate through the rocky shoals of U.S. discovery obligations (the proverbial "rock") and EU data protection authorities (the proverbial "hard place"). Notwithstanding conflicting obligations, there are means today to navigate this legal morass, according to the authors, who suggest a way forward.

Mind the Gap: U.S. Discovery Demands versus EU Data Protection



BY KARIN RETZER AND MICHAEL MILLER

I. THE SOURCES OF THE CONFLICTING OBLIGATIONS

Complying with U.S. discovery demands can involve enormous effort and expense, even in the best of circumstances But the discovery process can become even more difficult when compliance with U.S. discovery demands raises potentially conflicting legal obligations in non-U S. jurisdictions. One way in which these conflicting demands might arise is when EU data protection laws prohibit the discovery of the requested information. On the one hand, U.S. courts can seek to compel litigants and third-party witnesses to produce documents and other information, and impose serious sanctions for failure to do so. On the other hand, data protection authorities in EU Member States[1] can view the production of those documents and other information, whether court ordered or not, as itself vio-

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lating EU data protection rules, and can impose penalties for taking the steps necessary to comply with those U.S. discovery orders. Below we discuss these conflicting demands, and suggest a constructive way to reconcile them. A useful place to start this discussion is at the roots of the conflicting demands imposed by the different legal regimes.

A. Different Approaches to Data Protection

One of the roots of the conflict that can arise in U.S.-EU cross-border discovery is the substantially different notions of "personal data" adopted under U.S. and EU law, and the different protections accorded such data. The EU takes an omnibus approach—protecting all personal information, while the United States operates on a harms-based approach—protecting only that information that is particularly sensitive or which, if inappropriately used or disclosed, can cause substantial harm to individuals. It is critical to understand these differences in any dialogue on cross-border discovery.

The EU Member States[2] generally embrace a broad view of "personal data." The 1995 Data Protection Directive[3] ("Directive"), as implemented by the Member States, protects individuals against the unauthorized processing of personal data, which is defined as any information relating to an identified or identifiable individual. This includes e-mails or documents created in the workplace such as work related e-mails, memoranda, and reports. The concept of "processing" is broadly defined as *"any operation or set of operations,"* whether manual or automated, including, but not limited to, *"collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction."*[4]

In the European Union, regulators view any processing of personal data with suspicion. Processing personal data is prohibited unless there is a specific statutory authorization, or consent from the individuals concerned. Individuals must also receive detailed notice regarding the personal data that are processed. Personal data may only be collected for a specific, explicit purpose, and may not be further processed in a manner incompatible with that original purpose. Surprisingly to many U.S. lawyers and business people, all of these rules apply equally to documents or information created in the context of employment. These rules were not created to block U.S. discovery or to influence U.S. policy decisions. Instead, they represent EU-based policy choices, and are of equally restrictive effect in the European Union itself.

The United States, by contrast, takes a more narrow, sector-by-sector approach. Unless there is applicable legislation that prevents such actions, an organization remains free to collect, use, transfer, and retain personal data as it deems necessary. Unlike the rules in the European Union, processing of personal information in the United States is permitted unless explicitly prohibited. The concepts of "personal data" and "processing" are also quite different. In the United States, the term "personal information" is generally restricted to specific types of information that are considered particularly sensitive, such as personal medical information, Social Security numbers, information relating to children, and financial information. The focus is on protecting only certain types of personal information. Other information (such as information created in the context of employment including e-mails and other documents) is not generally covered by U.S. data protection rules. Thus, courts in the United States—unless educated by the lawyers in the case—may have a hard time weighing discovery demands against EU notions of personal data privacy if for no other reason than that EU notions of personal data privacy are truly foreign to them.

B. Different Approaches to Gathering Evidence

The other major root of the conflict stems from the varied approaches to litigation discovery in the United States and European Union. EU jurisdictions (especially civil law jurisdictions such as those in Continental Europe, but also to some extent common law jurisdictions like the United Kingdom) generally limit disclosure of evidence to what is offered by the parties as evidence in support of the case, and impose limited affirmative disclosure obligations. In these jurisdictions, the ability of one party to a litigation to require the other party to produce broad categories of documents and information is very limited; the ability to require a *non-party* to disclose such documents and information even more so. Because EU authorities often, as a practical matter, can view U.S. discovery obligations as unnecessary and unreasonable, they have a hard time weighing them against EU privacy laws.

The U.S. Federal Rules of Civil Procedure ("FRCP"), by contrast, impose on litigating parties (and non-parties when subpoenaed) broad and substantial obligations to retain, search for, and produce documents and information requested by the other party.[5] U.S. discovery gives parties the right to seek discovery relating

[1] The 27 Member States of the European Union are: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom (collectively, the "Member States")

[2] The EEA member states Iceland, Liechtenstein, and Norway are bound to implement most EU legislation—including the 1995 Data Protection Directive—under Article 7 of the European Economic Area (EEA) Agreement.

[3] Directive 95/46/EC of October 24, 1995 on the protection of individuals with regard to processing of personal data and on free movement of such data [1995] OJ L 281/31. Article 2 of the Directive defines "personal data" as *"any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity"*

[4] Article 2(b) of the Directive.

[5] State procedural laws, which apply to cases brought in the courts of an individual U.S. state rather than in a federal court, are similar A comparable set of laws extends this obligation to preserve and produce evidence to U.S.-based administrative and regulatory proceedings. For example, the U.S. Securities and Exchange Commission ("SEC") holds the authority to investigate U.S. companies for compliance with federal securities laws, and the agency may invoke its broad subpoena power to compel the prompt production of records in accordance with its investigation Failure to preserve or produce in-

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to: (1) any matter, not privileged, that is *relevant* to the claim or defense of any party; and (2) all information "reasonably calculated to lead to the discovery of admissible evidence."[6] U.S. courts apply these standards liberally, and generally resolve any doubt in favor of permitting discovery. As one federal district court put it, in language that is typical of the mindset of U.S. judges (especially judges at the trial-court level), this broad construction "is consonant with American civil process which puts a premium on disclosure of facts to ascertain the truth as the means of resolving disputes."[7] This is why major U.S. litigation can involve the production of millions of pages of documents. It is also why an entity might find itself subject to a discovery demand that an EU data protection authority is likely to view as irrelevant to the underlying litigation (and thus, from the EU perspective, excessive and unnecessarily in breach of EU data protection laws).

Two particular aspects of U.S. discovery rules increase the potential conflict between U.S. discovery demands and EU data protection laws. The first is that the physical location of a document is not dispositive or even particularly relevant. Rule 34 of the Federal Rules of Civil Procedure provides that discovery may be had of documents that are in the "possession, custody or control" of a party. The notion of " '[c]ontrol' has been construed broadly by the courts as the legal right, authority, or practical ability to obtain the materials sought upon demand."[8] So, if an entity subject to U.S. jurisdiction has possession, custody, or control of documents or information physically located in the EU, those documents are just as much subject to U.S. discovery obligations as documents actually physically located in the United States.

The second aspect giving rise to potential conflict relates to the role of foreign parents, subsidiaries, or affiliates of U.S. entities. The test in these circumstances focuses on the U.S. entity's control of the foreign affiliate's documents. Where the U.S. entity is the parent corporation, "the determination of control turns upon whether the intracorporate relationship establishes some legal right, authority, or ability to obtain the requested documents on demand. Evidence considered by the courts include the degree of ownership and control exercised by the party over the subsidiary, a showing that the two entities operated as one, demonstrated access to documents in the ordinary course of business, and an agency relationship."[9] Even where the U.S. entity is not the parent corporation, U.S. courts can require the production of documents and information from parent companies or affiliates located abroad. Again, the test focuses on the concept of "control" over those foreign-based documents and information. The factors used to evaluate control in these situations "include (a) commonality of ownership, (b) exchange or intermingling of directors, officers or employees of the two corporations, (c) exchange of documents between the corporations in the ordinary course of business, (d) any benefit or involvement by the non-party corporation in the transaction, and (e) involvement of the non-party corporation in the litigation."[10]

The U.S. entity that is subject to the discovery request cannot simply ignore the request for "foreign" documents. Sanctions for failing to comply with discovery in United States litigation are severe, and include monetary sanctions, evidentiary sanctions such as an adverse inference, or termination of the proceedings in favor of the requesting party. There has been an increase in "adverse inference" sanctions imposed by the courts recently, which means that the courts informed the jury of the fact that the company lost or failed to produce certain relevant documents, and directed jurors to assume that whatever documents were lost contained evidence harmful to the company.

II. RESPONSES TO BROAD DISCOVERY—THE BACKGROUND TO THE CURRENT DEBATE

EU data protection laws are not the first instances of non-U.S. jurisdictions adopting laws that can affect the U.S. discovery process. Many of the prior examples of these sorts of laws began in significant part as a way to deal with what was perceived in non-U.S. jurisdictions as overwhelming U.S. discovery processes or interventionist U.S. antitrust and other litigation.[11] As we argue below, however, EU data protection laws are different, in that they were adopted to achieve EU public policy objectives separate and apart from any concern over U.S. discovery or the extraterritorial application of substantive U.S. law. U.S. courts' perception of the initial motivation for these kinds of statutes, however, continues to color the legal standard that courts will apply to conflicts between U.S. discovery obligations and EU data protection laws.

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formation may result in prosecution for criminal obstruction of justice.

[6] Fed R. Civ. P. 26(b)(1)

[7] *Uniden Am. Corp. v. Ericsson Inc.*, 181 F.R.D. 302, 306 (M.D.N.C. 1998)

[8] *SEC v. Credit Bancorp*, 194 F.R.D. 469 (S.D.N.Y. 2000).

[9] *Camden Iron & Metal Inc. v. Marubeni Am. Corp.*, 138 F.R.D. 438, 442 (D.N.J. 1991); *see also In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1152 (N.D. Ill. 1979) (corporate parent held responsible for producing documents of wholly owned subsidiaries); *Am. Rock Salt Co. v. Norfolk S. Corp.*, 228 F.R.D. 426, 458-59 (W.D.N.Y. 2005) (defendants had "both legal and practical control" over the documents because: (1) defendants had access to the subsidiary's records in the ordinary course of business; (2) the defendant had a 58 percent ownership interest, and 50 percent stock interest, in the subsidiary; and (3) the subsidiary's website stated that the corporate entity "operates as an agent for its owners"); *Twentieth Century Fox Film Corp. v. Marvel Enters.*, 2002 U.S. Dist. LEXIS 14682, at *12 (S.D.N.Y. Aug. 8, 2002) (defendant had sufficient control over entity it "owns and operates" to compel production); *Dietrich v. Bauer*, 198 F.R.D. 397, 401 (S.D.N.Y. 2001) "[i]t is not always clear whether the decisions arising in the parent-subsidiary context are premised on a strict 'legal right' standard or . . . on a somewhat more flexible 'pragmatic approach.' ". *See generally*, C. Wright & A. Miller, 8 Federal Practice & Procedure 2d § 2210 (2006), *Strom v. Am. Honda Motor Co.*, 423 N.E.2d 1137, 1141-1145 (Mass. 1996) (reviewing the federal case law).

[10] *Uniden Am. Corp. v. Ericsson Inc.*, 181 F.R.D. at 306. In *Uniden*, the court concluded that the defendant had sufficient control over its sister corporation to compel overseas documents in the possession of the sister corporation.

[11] *See, e.g., Westinghouse Electric Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138 (N.D. Ill. 1979) (describing blocking statutes in Canada, Australia, and South Africa as having been enacted "for the express purpose of frustrating the jurisdiction of the United States courts over the activities of the alleged international uranium cartel").

A. The International Response: Blocking Statutes

One method that has been used to thwart the efforts of U.S. litigators and courts to obtain evidence under the FRCP is by enacting "blocking statutes" that penalize foreign citizens for complying with extraterritorial discovery requests.

For example, the French blocking statute, codified as Law No. 80538 of 16 July 1980, currently prohibits any French resident or national, as well as French legal entities and their employees, legal officers, or representatives, from disclosing, in any form, economic, commercial and technical documents and information to foreign legal entities and natural persons, except where the Hague Convention requires such disclosure.[12] This legislation also provides for potential criminal sanctions including imprisonment for compliance with discovery requests issued outside of the Hague Convention. A French witness in receipt of a discovery request issued pursuant to the FRCP (as opposed to the Convention) must inform French authorities and will usually contest its applicability on the ground that compliance will cause the witness to violate French law. The French witness will therefore ask the court to require the U.S litigants to utilize the Convention. U.S. courts have been very reluctant to accept such requests. The trend has been to refuse to order application of the Convention and instead permit U.S. litigants to seek to obtain foreign evidence using the FRCP, notwithstanding the consequences under the blocking statute if the French witness complies with the discovery request. In justifying their position, some U.S. courts have stated that the French blocking statute is "overly broad and vague and need not be given the same deference as a substantive rule of law." Other U.S. courts have ruled, more moderately, that the "protection of United States Citizens from harmful foreign products and compensation for injuries caused by such products [i.e., aircrafts]," was stronger than France's interest in protecting its citizens "from intrusive foreign discovery procedures." The bottom line is that U.S. litigators have perceived that U.S. courts will order discovery without regard to the French blocking statute, and this has led many litigants to ignore these blocking statutes altogether.[13]

The conflicts created by the coexistence of broad U.S. discovery and the more restrictive procedures in most EU countries contributed to the ratification of the Hague Evidence Convention. The Convention is a multilateral agreement that currently stands between over 40 nations; it seeks to facilitate a uniform procedure for obtaining evidence located abroad. The Convention generally provides two general methods for obtaining evidence:

- The U S. court issues letters of request, which are sent to the "Central Authority" of the jurisdiction where the discovery is located. The Central Authority is then responsible for transmitting the request to the appropriate judicial body in that jurisdiction for a response. A letter of request should typically be in the language of the Central Authority or accompanied by a translation. Execution of a letter of request is then subject to the local laws of the particular jurisdiction. Execution of a valid letter of request (i e , one that complies with the Convention) may only be refused in instances where the judiciary considers that its sovereignty or security would be prejudiced by execution of the letter

- Alternatively, where the parties consent, the Convention provides for evidence gathering abroad by U S. diplomatic officers or consular agents and appointed commissioners. These methods of gathering (oral) evidence are limited in three key respects: First, unlike letters of request, U.S diplomatic officers, consular agents, and appointed commissioners cannot compel the production of evidence. Second, these methods cannot be used to obtain documents located abroad and can be used only to take deposition testimony. Third, contracting states have the prerogative to declare that U.S diplomatic officers, consular agents, and appointed commissioners must first obtain permission from the foreign state prior to the deposition.

Many Convention signatory countries have rejected the prototypical "no holds barred," "no stone unturned" form of pre-trial discovery common in U.S. litigation. In particular, Article 23 of the Convention provides that contracting states are permitted "at the time of signature, ratification or accession" to declare that they will not execute letters of request issued in order to obtain pre-trial discovery of documents. So far, over 30 of the contracting nations to the Convention, including China, Mexico, France, and the United Kingdom, have filed limited reservations under Article 23 prohibiting some degree of pre-trial document discovery. Some nations, such as Argentina, Australia, Denmark, Germany, Italy, Luxembourg, Monaco, Poland, Portugal, South Africa, Spain, and Sweden, have filed reservations under Article 23 that essentially prohibit all pre-trial document discovery.

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[12] A translation of the French blocking statute reads as follows: *Article 1. Except when international treaties or agreements provide otherwise, no natural person of French nationality or habitually residing on French territory, nor any officer, representative, agent or employee of any legal entity having therein its principal office or establishment, may in writing, orally or in any other form, transmit, no matter where, to foreign public authorities documents or information of an economic, commercial, industrial, financial or technical nature, the communication of which would threaten the sovereignty, security, or essential economic interests of France or public order, as defined by government authorities to the extent deemed necessary*

Article 1bis. Except when international treaties or agreements and laws and regulations in force provide otherwise, no person may request, seek to obtain or transmit, in writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature, intended for the establishment of evidence in connection with pending or prospective foreign judicial or administrative proceedings.

[13] In fact, however, the statute cannot simply be ignored. In 2010 the French Supreme Court confirmed a Paris Court of Appeal Decision which ordered a French attorney to pay to a French witness €10,000 in damages for violation of Article 1bis of the blocking statute. The California Insurance Commissioner brought the suit against French insurance company MAAF regarding the takeover of U.S. insurance company Executive Life. The U.S. lawyer handling the case tried to obtain information from a former member of the MAAF board about how the board made decisions. The information was provided by a French attorney. The French court ruled, in rather broad terms, that the French attorney was liable under the blocking statute because the information sought and produced was of an economic nature and intended to establish evidence.

PVLR ISSN 1538-3423

B. Balancing Tests Applied in the U.S. Courts

U.S. courts have frequently confronted the conflict between discovery obligations and blocking statutes. However, there is no single test that is consistently used in all U.S. courts. The issue appears to be addressed largely on a case-by-case, court-by-court basis; this is most striking from an EU perspective.

Discovery disputes do reach the appellate or U.S. Supreme Court level, but such appellate cases represent only the tip the iceberg: individual judges deal with many work-a-day discovery cases, and issue decisions at the trial level that tend to be more sympathetic to parties seeking to take the discovery. Even when cases get to the Supreme Court or appellate levels, it is up to the lower courts to apply the often ambiguous standards that are created. We find generally that these trial-level courts are more likely to impose a broader application of their own discovery authority, due to their focus on day-to-day case management issues, as opposed to the wider theoretical issues of comity and international relations.[14]

No single standard governs foreign discovery in U S. courts. However, many U S. federal courts of appeal recognize a five-factor balancing test of the exercise of their enforcement jurisdiction, derived largely from the Restatement (Third) of Foreign Relations law of the United States. Under that test, courts consider the following five factors:

- The importance of the requested documents or other information to the litigation;
- The degree of specificity of the request;
- Whether the information originated in the U.S ;
- The availability of alternative means of securing the information; and
- The extent to which noncompliance with the request would undermine important interests of the state where the information is located.[15]

Some courts (including those in the U.S. Court of Appeals for the Second Circuit) add two additional factors:[16]

- The good faith of the party resisting discovery, and
- The hardship of compliance on the party from whom discovery is sought

U.S. courts applying these balancing tests have shown a propensity to prioritize discovery over foreign law. For example, in a case addressing potential violations of Malaysian law resulting from compliance with discovery demands, the court concluded:

> [T]he documents are vital to the litigation, the requests are direct and specific, the documents are not easily obtained through alternative means, the interest of the United States outweighs that of Malaysia under the circumstances, and the likelihood that [the New York branch] would face civil or criminal penalties is speculative Although [it] has acted in good faith, and the documents are located abroad, this is insufficient to overcome those factors weighing in favor of disclosure.[17]

U.S. courts tend to be less deferential to foreign authority in assessing potential hardship to the complying party because U S. courts come to the question assuming that international blocking statutes are motivated by an express desire to block U.S. discovery in order to protect non-U.S companies or to defeat substantive U.S. laws (for example, U.S. antitrust laws).[18] Litigants and U.S. courts point to the indisputable trade protection or bank secrecy rationales that characterize many blocking statutes, and openly doubt the *bona fides* of such laws.

There are, of course, cases that find in favor of the party opposing discovery.[19] Most recently, in *SEC v. Stanford International Bank Ltd.*, a Swiss non-party bank located in the United States was served with a subpoena seeking banking records located in Switzerland, the production of which, it argued, would "subject it and its employees to criminal, civil, and administrative penalties under Swiss law.[20] The non-party resisted the subpoena, arguing under *Aerospatiale* that the party seeking the discovery should first be required to proceed through the Hague Convention rather than requiring production by enforcing the U.S. subpoena. The district court agreed, after applying the seven-factor test described above. Although the court acknowledged that the requested documents were "vital" to the litigation, it found that three factors favored the non-party bank—the defense was not raised in bad faith, the documents were not located in the United States, and the non-party bank had a "potentially well-founded fear" that it could be prosecuted in Switzerland if it complied with the discovery request. Significantly, however, the district court declined to find that the U.S. interest in full discovery outweighed Switzerland's interest in its banking privacy laws, concluding that the very act of balancing was itself "political," and "especially inapposite in this case, where the legislative authorities of both nations essentially have spoken by adopting the Convention."[21] Refusing to read *Aerospatiale* as giving litigation parties a "green light to generally 'discard[] the treaty as an unnecessary hassle,' " it found that the "comity" factor required the requesting party to go

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[14] *Columbia Pictures Indus. v. Bunnell*, 2007 U S Dist LEXIS 46364, at *49-50 (C D Cal June 19, 2007) (*"[I]t is well-settled that foreign blocking statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce (let alone preserve) evidence even though the act of production may violate that statute "*) (Citing *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1474 (9th Cir 1992), *Rich v KIS Cal., Inc.*, 121 F R D. 245, 257 (M.D N.C 1988) ("[i]n general, broad blocking statutes, including those which purport to impose criminal sanctions, which have such extraordinary extraterritorial effect, do not warrant much deference")

[15] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES 442(1) (C) (1987).

[16] *See First Am. Corp. v. Price Waterhouse LLP*, 154 F 3d 16, 22 (2d Cir. 1998); *Minpeco, S A. v. ContiCommodity Servs Inc* , 116 F.R.D. 517, 523 (S.D N Y. 1987)

[17] *Gucci Am., Inc. v. Curveal Fashion*, No. 09 Civ 8458, 2010 WL 808639 (S D N.Y. Mar. 8, 2010).

[18] Indeed, in *In re Societe Nationale Industrielle Aerospatiale v. U.S Dist. Ct.*, 482 U.S. 522 (1987), the U S. Supreme Court specifically stated that the lower courts must give greater deference to the substantive law of foreign nations than to procedural rules such as the French "blocking statute."

[19] Civil Action No 3 09-CV-0298-N, 2011 WL 1378470 (N.D-.Tex. Apr. 6, 2011)

[20] *Id.* at *2

[21] *Id* at *9.

through the Hague Convention *"at least in the first instance."*[22]

Cases like *Stanford* are rare, and are unlikely to stem the tide of more numerous cases that compel discovery even in the face of foreign prosecution. And, notably, the court in *Stanford* does not make at all clear what might happen if resort to the Hague Convention "in the first instance" does not lead to the necessary discovery from the Swiss Bank.

III. GUIDANCE FROM EU AUTHORITIES ON BALANCING EU DATA PROTECTION AND U.S. DISCOVERY OBLIGATIONS

The Article 29 Working Party ("Working Party"), the consortium of EU Member State data protection authorities, provides useful non-binding guidance on the challenges that arise from discovery obligations, in its 2009 Working Paper[23] on pre-trial discovery for cross-border civil litigation ("Paper"). Unfortunately, the Paper does not cover document production in U.S. criminal and regulatory investigations.

Although the Paper does not formally address document preservation in anticipation of proceedings before U.S. courts, or in response to requests known as "freezing" or "data retention order" it does stress that EU organizations have no permission to retain data *"at random for an unlimited period of time because of the possibility of litigation in the US."* The mere or unsubstantiated possibility of an action being brought before U.S. courts is not sufficient. Rather, data may only be retained if relevant and to be used in specific or imminent proceedings, where "reasonably anticipated."

Under the Directive, personal data may only be processed where authorized by law. The Paper covers three legal bases that can be used to authorize the processing (*i.e.*, disclosure or transfer) of personal data in cross-border discovery:

- *Consent*: The Working Party considers that *"it is unlikely that in most cases consent would provide a good basis for processing"*. The use of consent is not reliable, nor particularly workable. To legitimize data processing using this basis, organizations must obtain the "specific" and "informed" consent of all individuals who might potentially be concerned by, or relevant to the discovery. Individuals may subsequently withdraw their consent at any time, and consent is only deemed valid in cases where there is a "real opportunity" to withhold or withdraw consent without suffering any penalty. In earlier guidance, the Working Party has taken the position that a current employee cannot freely provide consent because of the prejudice that might arise should he/she refuse consent. This suggests that the use of employee consent to legitimize data processing exists only in theory. While obtaining the freely given consent of third parties, such as customers or suppliers, may be more realistic than for employees, the right to withdraw consent substantially lowers the utility of consent as a legal basis for complying with U.S discovery requirements, even in the case of non-employees

- *Legal Necessity*: An organization may establish the legitimacy of data processing where *"necessary for compliance with a legal obligation"* Regulators and courts interpret this quite narrowly to only cover situations where there is an EU statutory requirement: the Directive does not consider an extraterritorial legal dispute to be a legal obligation The Working Party has also opined that *"an obligation imposed by a foreign legal statute or regulation . . may not qualify as a legal obligation by virtue of which data processing in the EU would be made legitimate."*

- *Balance of Interest*: The balance of interest exception may cover discovery—or compliance with foreign requests. This is because organizations' interest in complying with U.S. statutory requirements (*i.e.*, U S. discovery requests) is usually legitimate. The Paper stresses that the proportionality and relevance of the data, and possible consequences for the individuals concerned must be taken into account. Adequate safeguards must be adopted to protect the rights of the individual The organization supplying the data should also "anonymize" or at least aggregate the data and, where possible, apply filtering techniques to exclude or cull irrelevant data These tasks should be assigned to a "trusted" third party within the European Union.

In addition to a legitimate legal basis, an adequacy mechanism must be in place where records are transferred to the United States (or to another country outside the EEA). Generally, the only acceptable mechanism is if the recipient country meets the Directive's "adequacy" requirements for data transfers. Adequacy is determined by a global assessment of safeguards and suitability to protect personal data, based on the various provisions of the Directive. Under this standard, the United States has not been deemed to have an adequate data protection scheme. For legal transfer of data to the United States, three mechanisms exist, and are described below. However, while these mechanisms can be useful to facilitate document review, none of them legitimizes the onward transfer of data from the requesting organization to other parties, witnesses, or the arbitrators. This limits their utility in U.S. discovery proceedings.

- *Safe Harbor Provisions*: The Safe Harbor program established by the European Commission and the U.S. government allows U.S.-based organizations to self-certify that they will abide by the Safe Harbor principles of notice, choice, onward transfer, security, data integrity, access, and enforcement Thus, Safe Harbor legitimizes transfers between an organization established in the EEA or Switzerland and a U.S. organization

- *Model Clauses*: Concluding a transfer agreement including the EU model contractual language furnishes organizations located in the United States (or another country not considered "adequate") with the necessary safeguards to engage in data transfers However, because model contracts must reflect the Directive's provisions, they do not address the aforementioned conflicts over data transfers for U.S.-based discovery efforts. Crucially, model clauses impose even stricter limitations for subsequent use in U S discovery proceedings. For example, it will not generally be permissible to share the information with other parties or U.S. courts In addition, U.S courts are very unlikely to execute transfer agreements in order to receive information.

[22] *Id.* at *3, 13 (emphasis added).

[23] Article 29 Working Party, *"Working Document 1/2009 on pre-trial discovery for cross-border civil litigation,"* WP 158, Adopted on 11 February, 2009. Available at http //ec.europa.eu/justice/policies/privacy/docs/wpdocs/2009/wp158_en.pdf.

PVLR ISSN 1538-3423

- *Binding Corporate Rules*: Multinational companies that wish to transfer data between international offices may look to binding corporate rules ("BCRs") as mechanisms by which data may be transferred outside of EU countries. BCRs are internal data protection rules and practices applied at a corporate-wide level. Due to this limitation, BCRs would not allow transfers to litigators or U.S. courts.

The Directive also provides for several derogations, or exceptions, from these three mechanisms. These occur, in relevant part, when the individual unambiguously consents to the transfer, or when the transfer is necessary for the exercise or defense of a legal claim:

- *Consent*: Here, consent follows the same standard as consent as a basis for processing personal data. Because of its limitations, consent remains an unreliable basis for cross-border data transfers.
- *Necessity for Legal Claim*: Article 26(1) (d) of the Directive creates an exception for international transfers that are "necessary or legally required on important public interest grounds, or for the establishment, exercise, or defense of legal claims." Derogating from earlier Member State interpretation, the Working Party's Paper appears to apply the legal claims exception to "single" international transfers of data in compliance with foreign discovery obligations unless a "significant" amount of data are involved. There is no further guidance on what a "single" transfer or a "significant" amount of data would mean. However, according to the Working Party, the exception is subject to "strict interpretation."[24] In addition, the Working Party has opined that the exception would not apply to a data transfer undertaken "on the grounds of the possibility that such legal proceedings might one day be brought."[25] The Working Party's examples may further imply that the exception is only relevant where the individual is a party to the litigation. This would severely limit the practical application of this concept. Moreover, Working Party's Papers and Opinions are non-binding and each Member State can vary its interpretation (which has happened in several other areas, such as whistleblowing).

With the appropriate mechanisms in place, the Working Party's Paper seems to permit international transfers of data in compliance with foreign discovery obligations under the balance of interest test and the legal claims derogation. However, these exceptions are narrowly cast, and the examples cited in the Paper may imply that they are only relevant where the litigation has already commenced, and may not support anticipatory or "preventive" discovery or document hold requests. Here, further guidance from the Working Party on what is meant by *"the mere or unsubstantiated possibility that an action may be brought before U.S. courts,"* would be very helpful. In particular, the Working Party should clarify that while a remote possibility for litigation may not suffice, disclosure should be permitted when necessary for prospective proceeding.

Importantly, where data *are* legitimately transferred, the Paper affirms that there is no waiver of data protection rights. Individuals may exercise their access and correction rights during the proceedings, as afforded to individuals under the Directive. Advance general notice of the possibility of data transfer should be provided to all individuals, *e.g.*, through a detailed technology use policy or data protection notice to all employees. When the data are actually collected and transferred, additional, more concrete notices should be given *"as soon as reasonably practicable,"* and should include information on the identity of any recipients, the purposes of the processing, and the categories of data concerned, as well as details on individuals' rights. All data must be protected through appropriate security standards and policies in order to keep the data confidential and secure. Where service providers are used, they should be bound by contract to ascertain compliance with purpose limitation obligations, retention policies, and security standards. To many litigators in the United States, where court records are public, these concepts often appear foreign and counterintuitive.

IV. THE BALANCING TEST AND DATA PROTECTION

Litigants or other recipients of a subpoena must be aware that U.S. courts may "overrule" or disregard data protection laws or other mechanisms designed to limit cross-border discovery. Indeed, the weight of the case law suggests that a party seeking to resist U.S. discovery obligations on this basis face an uphill battle. But the results of these cases are driven largely by the nature of the foreign laws that were before the court—blocking statutes designed to thwart U.S. policy objectives. EU data protection laws are different from these protective blocking statutes. They are motivated not by some generalized antipathy to U.S. discovery approaches or to substantive U.S. law (like antitrust, or the pursuit of financial crimes that requires interfering with bank secrecy), but rather by an affirmative view of the substantive privacy rights of EU citizens. In other words, they are good faith attempts to forward affirmative EU policy goals, not merely schemes to block U.S. policy goals.

In light of this background, parties facing conflicting legal obligations in the United States and the European Union need to advocate for application of a balancing test that recognizes both: (i) their own good faith in seeking to balance the conflicting legal obligations and (ii) the good faith of the EU regulatory regimes in seeking to advance the public policy interests reflected in data protection laws that have equal application to both. Existing balancing tests can work, but only so long as the U.S. courts can be persuaded to look closely at the EU data protection laws rather than simply equating them with traditional blocking statutes.

A recent report suggests that at least some U.S. courts may engage in the sort of balancing and compromise approach that would give due weight to both U.S. discovery demands and EU data protection laws. In a recently published report, the Bavarian data protection authority ("DPA") referred to a U.S. court decision from early 2011 that restricted a document production request to reconcile the competing demands of U.S. discovery and EU data protection.[26] In the case, the U.S.

[24] Working Document on a Common Interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995 adopted on 25 November 2005, page 13.

[25] Working Document on a Common Interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995 adopted on 25 November 2005, page 15.

[26] The Bavarian data protection authority's 102-page 2009-2010 Activity Report is available, in German, at http://www.regierung.mittelfranken.bayern.de/aufg_abt/abt1/.

plaintiff issued a broad document production request to the Bavaria-based German defendant. The defendant asked the DPA for guidance on the production of such data.

In its response, the DPA held that the plaintiff had a legitimate interest and need to defend the claim: the production of certain documents was permitted. However, the DPA opposed the production of other documents that were not directly related to the disclosure request or did not clarify the claim. Further, the DPA specified that any additional data must be filtered out, and any personal data irrelevant for the case had to be redacted.

The German defendant thus responded to the discovery request by providing only the documents the DPA permitted it to provide, and challenged the overall scope of the discovery request. In early 2011, the United States ruled in favor of the German defendant, stating that the denial of access to the requested documents would not damage the plaintiff's claim, where consistent with the Bavarian DPA's response.

This case may be helpful in guiding organizations in resolving conflicting obligations. Although the outcome may be due to the specifics of the case (the defendant was a German company and not, as is often the case, a U S. company with offices in Europe), by raising data protection concerns and cooperating with both EU authorities and U.S. courts, parties can come to an agreeable and compliant solution. Whether the case demonstrates the beginnings of a change in U.S. courts' approach—and a real willingness to account for EU data protection laws—remains to be seen.

V. RECOMMENDATIONS

We recognize that the above analysis is not going to completely reassure an entity facing conflicting discovery obligations and EU data protection obligations. What is perhaps even more troubling than the substance of the conflicting obligations is the dizzying array of often differing and uncertain legal standards that U.S. courts will use to judge a party's compliance with relevant law. These standards often seem to be applied to justify a particular result (and that result is usually to require disclosure), rather than to weigh the parties' conflicting legal obligations.

Organizations faced with potentially conflicting mandates from a U S. court and from EU data protection laws should consider the following measures in order to navigate the risks:

- **Plan Ahead to Avoid Issues in the First Place.** A U S. court is going to be far more persuaded by an entity's inability to produce discovery without violating foreign law if it can be persuaded that the entity did everything it could beforehand to mitigate its exposure. This might include the following:
  - ***Clear policies on record management:*** Data should only be retained if relevant and if there is a legal or business need to retain the information.
  - ***Technology use policy:*** All employees should be clearly informed about the possibility that data located on the organization's infrastructure may need to be retained and shared for discovery purposes.
  - ***Notice:*** Where appropriate, employees should be informed about the details of discovery requests, including possible recipients, third party service providers and the right to access and modify information. In some countries, works council or similar employee representatives or public authorities would also need to be informed Data protection officers should be consulted on a regular basis, and have their views taken into consideration.
- **Raise Potential Data Protection Law Restrictions Early in the Discovery Process.** If you wait until the document production date to raise potential data protection law issues, you are likely to face a very hostile audience when you go to court to seek protection
  - ***As soon as practicable, raise potential issues with your adversary:*** Alert the other side to the potential issues, and to the extent possible get them to take partial ownership of the issue. Express your willingness to cooperate with them to get the discovery, or to work around the discovery issue with them. Eventually, the judge is going to ask if you are acting in good faith, so act in good faith early and often. You want the court to conclude that you and your client have done your collective best to satisfy the discovery obligations.
  - ***Context is important:*** If you are a third party witness subpoenaed in U.S. litigation, you will have more scope to prioritize your EU discovery obligations. On the other hand, if you are a party to the litigation—and especially if you are a plaintiff—be prepared to find a way to respond to your adversary's discovery requests notwithstanding apparently conflicting EU data protection requirements.
  - ***Use Existing Balancing Tests, But Adapt Their Application to EU Data Protection Laws.*** Notwithstanding what appears to be a one-sided slate of results, there is nothing inherently wrong with the five- or seven-factor balancing tests currently being applied by U.S. courts. When applying those tests in this context, however, it is vital to emphasize to the court that the EU data protection laws in question protect "important interests of the state where the information is located," and are nothing like the historical blocking statutes viewed with such suspicion by the U.S. courts
- **Remember Your Data Protection Obligations During the Discovery Process.** If you do produce documents that are potentially subject to EU data privacy laws, protect the data.
  - ***Use protective orders carefully:*** Protective orders should be used to restrict information on a case-by-case basis for relevant data, rather than all data. Terms can be negotiated to restrict who may access the information sought and for what purposes. These terms could also impose sanctions for U S. parties' non-compliance with the terms of the order as an additional safeguard against breach of EU data protection requirements. The parties can agree that sensitive data should be withheld where appropriate, "anonymized," or redacted to preserve data protection interests. Personal data should be redacted if not directly related to the discovery request, or if irrelevant to the case.
  - ***Cooperate with EU data protection authorities:*** Official guidance from EU data protection authorities

baylda_daten/dsa_Taetigkeitsbericht_2010.pdf. The U.S. court and the parties were not identified due to a confidentiality agreement between the data protection authority and the defendant.

PVLR ISSN 1538-3423

may have greater weight and may help convincing U.S. courts of the need to account for EU data protection obligations. Be careful—you do not want the U.S court to conclude that you are "conspiring" with the EU data protection authority to defeat the discovery. Instead, you want all authorities and courts to conclude that you are looking to comply with all of your legal obligations in good faith, and that so long as you can do so you are essentially neutral on whether the discovery proceeds. In other words, you do not want anyone to conclude that you are (i) actively seeking to resist discovery, or (ii) actively seeking to violate your data protection obligations.

- o ***Apply appropriate security standards:*** Security standards should be applied to all relevant data, including contractual arrangements with service providers, to ensure uniform standards.

- **Try to work through issues creatively.** Try to determine if a mutually agreeable solution can be reached that complies with your obligations under both the U.S discovery rules and the EU data protection regulations Even if a complete solution cannot be reached, your willingness to work toward one will likely be viewed favorably by both the U S court and the relevant EU authorities.
  - o For example, as was discussed above, prior to disclosing any documents or information, it may be possible for the parties to negotiate terms that restrict who may access the data sought, as well as the purposes for which it may be used, in accordance with the security, transparency, and finality principles of the Directive.
  - o Also, upon review, any particularly sensitive aspect of the disclosure could be withheld, "anonymized," or redacted to preserve the European party's privacy interest, but not with substantial prejudice to the U.S party. A protective order could also provide for the redaction of information within a requested record that is not relevant or that is obtainable through other sources, in keeping with the Directive's objective of proportionality
  - o Finally, a protective order could impose sanctions for the U S party's non-compliance with the terms of the order as an additional safeguard against abuse of the European party's disclosures, as well as a further display of cooperation.
- **Seek to educate U.S. judges on the importance of EU Data Protection Regimes.** Judges in the United States are unlikely to be familiar with EU data protection regimes and blocking statutes, and are likely to view them with some suspicion From the U S perspective, this suspicion is somewhat natural given the historic lack of enforcement As the entity at the sharp end of the stick when it comes to the need to strike the right balance here, it is up to the target of the conflicting legal obligations to make sure the U.S. judge becomes familiar with these rules, and how they can be balanced with U.S. litigation needs.

There is one additional consideration each for the U.S. lawyer and the EU lawyer to keep mind in each and every case.

- **For the U.S. lawyer:** Do not underestimate the importance of complying with EU data protection laws and blocking statutes, or the seriousness with which EU regulators and EU courts view these laws even in the face of what appears to be a contradictory mandate from across the ocean. Failure to comply with EU laws can do significant damage

- **For the EU lawyer:** Do not underestimate the importance of complying with U.S. discovery obligations, or the seriousness with which U.S. courts view these obligations even in the face of what appears to be a contradictory mandate from across the ocean Failure to comply with these laws can do significant damage.

In the long term, both the U.S. and EU's legislative frameworks on international data transfers must adapt to accommodate each other's legal needs. Without a stronger, clearer, and streamlined compliance mechanism, the issue of whether to compel international document production will continue to occupy U.S. courts.[27] Amendments to both the U.S. and EU legislative frameworks will be a vital part of future efforts toward the harmonization of international discovery policies, and U.S. district courts will need to bring their hardship analysis in line with current attitudes towards enforcement. Judges and regulators on both sides of the ocean need to give more deference to the laws of the other jurisdiction

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[27] The issue of document production in cross-border discovery is not the only instance in which EU data protection laws have come into conflict with U.S laws. The U.S Sarbanes-Oxley Act requires U S public companies to establish codes of conduct for employee behaviors with respect to finance, accounting, and corporate governance These codes should be enforced through compliance hotlines ("whistle blowing" hotlines) that allow employees to report violations anonymously. When the Act came into force and multinational companies established hotlines for foreign branch offices or subsidiaries, EU authorities held that the hotlines ran afoul of EU privacy laws. Through direct negotiations, the United States, European Union, and various individual Member States issued guidelines for the operation of these hotlines that successfully reconciled the conflicting legal requirements.

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Global data privacy laws: 89 countries, and accelerating

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Global data privacy laws: 89 countries, and accelerating

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Introduction – 40 years on

How many countries now have data protection laws? The usual answer was somewhat vague: 'about sixty' or perhaps a well-informed respondent might have said 'more than sixty'. A reasonably accurate answer could not conveniently be found until 'Global data privacy laws: Accelerating after 40 years'[1] showed that at least 76 countries had enacted data privacy laws by mid-2011. Six months later, further investigation shows that was an under-estimate, and that there are at least 89 countries with such laws.

There are four reasons why has the number grown from 76 to 88 in six months. First, new laws have been passed or come into force in four countries from four different regions (Costa Rica, St Lucia, Gabon and Vietnam). Second, further research has resulted in the addition of pre-existing laws in 5 countries (Armenia; Paraguay; St Vincent & the Grenadines; the Seychelles; and Trinidad & Tobago). Third, two 'mini-jurisdictions' have been added (Qatar Financial Centre and Dubai International Finance Centre), after reconsideration. Finally, two jurisdictions have been added that only meet this article's criteria for a data privacy law in relation to their public sectors (Thailand and the USA) and do not do so in relation to the private sectors.

The following Table lists all countries (including otherwise independent legal jurisdictions) which have enacted data privacy laws, when they did so, the sectoral coverage of the law (only private sector; only public sector; or both sectors), and the international commitments of each country, or the international recognition their laws have received.

It is almost forty years since Sweden's *Data Act 1973* was the first comprehensive national data privacy law, and was the first to implement what we can now recognise as a basic set of data protection principles. This article surveys the forty years since then of global

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* This paper was completed and updated while the author was a Visiting Fellow at the Centre for Commercial Law Studies, Queen Mary, London, January 2012. Please contact the author on < graham@austlii edu au > in relation to any additions to or corrections of the Tables.

[1] Greenleaf, G 'Global data privacy laws: 40 years of acceleration' (2011) *Privacy Laws & Business International Report*, Issue 112, 11-17, September 2011

development of data privacy laws to the start of 2012. The picture that emerges is that data privacy laws are spreading globally, and their number and geographical diversity accelerating since 2000. There are some surprising inclusions, and some illuminating trends in the expansion of these laws.

Criteria for inclusion

In this article, and the accompanying Table a country is considered to have a 'data privacy law' if it has a national law which provides a set of basic data privacy principles, to a standard at least approximating the minimum provided for by the OECD Guidelines or Council of Europe Convention 108, plus some methods of officially-backed enforcement (ie not only self-regulation). A general constitutional protection for privacy, or a civil action (tort) of infringement of privacy is not sufficient, and nor is a voluntary code of conduct.

In relation to the private sector, a law must cover most aspects of the operation of the private sector. This excludes countries which only have scattered sectoral privacy laws (eg credit reporting or medical records laws). The USA, which has numerous limited sectoral laws in the private sector is not included because of its private sector laws, but only because of its federal public sector law. Many countries have some exceptions in their private sector coverage, such as various forms of 'small business' exceptions (eg Japan and Australia), or exceptions for non-automated records, but this is not a basis for exclusion. A law with 'largely comprehensive private sector coverage' is therefore the principal basis for inclusion.

Most jurisdictions which have laws with near-comprehensive private sector coverage also have data privacy laws which cover their national public sectors. Such protection is sometimes by different legislation from that covering the private sector. Where there is a different law for the public sector it will often have principles and enforcement mechanisms which differ significantly from those applying to the private sector. There is however a growing group of countries, particularly in Asia, with laws which only cover the private sector but provide no protection in relation to the public sector: Malaysia, Vietnam, India, Qatar Financial Centre and Dubai International Finance Centre.

Some jurisdictions which now have private sector coverage initially only covered their public sectors, including the OECD members, Australia, Japan, Canada and South Korea, with private sector coverage only introduced up to 15 years later. It seems reasonable to include the two remaining jurisdictions which still provide basic data privacy protection in relation to their public sector only (the United States and Thailand), but do not do so for their private sector according to the criteria used here. As a unitary country, the Thai law covers the whole public sector. As a federation, the US *Privacy Act 1974* only covers the federal public sector, but some States have equivalent laws. Since 'private sector only' countries have been included in the Table, these 'public sector only' countries have now been included. The dates in the Table for the privacy laws of Australia, Japan, Canada and South Korea have also therefore been changed to the earlier dates on which their public sector laws were introduced. The Table does not include any countries which might have public sector privacy laws for some of their regional governments only (China might quality if it did), but not for most of its private sector or its federal public sector.

'**Countries**' is a slight exaggeration, and a more accurate term would be 'separate legal jurisdictions'. The Table originally included the two Special Administrative Regions (SARs) which have constitutionally different legal systems from the rest of China (Hong Kong and Macao, under the principle of 'One Country, Two Systems') and five British dependent territories which have their own legal systems (the Isle of Man, Jersey, Guernsey, Gibraltar and the Bahamas). By the same reasoning (and after some consideration), there has now been

added the Qatar Financial Centre (QFC) and the Dubai International Finance Centre (DIFC), because these areas, somewhat similar to 'special economic zones', have data privacy laws which are apply to all business carried out within the QFC and DIFC, and their own administrations, data protection authorities and courts to enforce such laws. Geographically, they may be like miniature versions of Hong Kong, but the size of a jurisdiction is little indication of how much personal data may be processed within it or transferred to or from it, so it seems best to include them for completeness.

However, sub-national jurisdictions which do not have their own separate legal systems, or are subject to the laws of a federation in relation to data privacy law, are not included. So States and Provinces in Germany, Canada and Australia are excluded even if they do provide some non-comprehensive coverage of the private sector. Certain provinces of the People's Republic of China which have enacted local laws are excluded for similar reasons. State or Provincial laws which only cover the local public sector are also excluded. Many of these sub-national laws are quite significant sources of data privacy legislation and case law, or were pioneers in data protection. Hesse in Germany, Quebec, Ontario and British Columbia in Canada, and Victoria and New South Wales in Australia are examples. It would be a valuable to include such jurisdictions in a separate Table, but this has not been done in this article. The result of this conservative approach is that no country is included twice in the Table, but nor has any country been unreasonably excluded.

The **year** stated in the Table under 'From' is the year from which the legislation was enacted which provided coverage of most of the private sector, or of the national public sector. So, for example, the year shown for Australia is 1988, even though the *Privacy Act 1988* operated for 13 years in relation to the public sector only, and for a lesser period in relation to the credit industry, before most of the private sector was added in 2001. Where the coming into force of a law was long-delayed after enactment (eg Russia, from 2007 to 2011) the date stated is the earlier date (enactment), but the Table notes it was not in force until the later date. A similar approach is taken where an Act has not yet come into force at all (eg Malaysia). In other cases the year stated is that of enactment, ignoring the year or so that it often takes for regulations to be made and preparations made for the law to be administered. The year of the most recent known amendment to the current law is given in the 'Latest' column. The purpose of these columns is to indicate trends in enactment and updating, not to give precise 'in force' dates (which would result in a far more complex Table).

Almost all jurisdictions provide in their legislation for a Data Protection Authority (DPA), a separate institution which has responsibility for the data privacy legislation. DPAs vary greatly in name (often called 'Privacy Commissioners'), functions and degree of independence from other government authorities. From the 87 jurisdictions, Chile, Colombia, the Kyrgyz Republic, India, Japan, Taiwan, Vietnam, Armenia and the USA are among the few remaining exceptions with no DPA, but this is not covered in the Table.

Growth by decade

The total number of new data privacy laws globally, viewed by decade, shows that their growth is accelerating, not merely expanding linearly: 8 (1970s), 13 (1980s), 21 (1990s), 35 (2000s) and 12 (2 years of the 2010s), giving the total of 89. In the 1970s data privacy laws were a western European phenomenon (Sweden, Germany, Austria, Denmark, France, Norway and Luxembourg), other than for the US public sector Act. The position was similar in the 1980s (UK, Ireland, Iceland, Finland, San Marino and the Netherlands, and three UK territories), with Israel as the first non-European state in 1981, and Australia, Japan and Canada providing 'public sector only' legislation. Acceleration commenced in the 1990s, as most remaining western European countries (EU and EEA) enacted laws (Portugal, Belgium,

Spain, Switzerland, Monaco, Italy and Greece). More significantly, with the collapse of the Soviet Union many former 'eastern bloc' countries enacted data privacy laws as part of their protection of civil liberties (Slovenia, Czech Republic, Hungary, Slovakia, Poland and Albania), and the first ex-Soviet-republics (Lithuania and Azerbaijan) did likewise. The spread outside Europe also started, with the first laws in Latin America (Chile) and the Asia-Pacific (New Zealand, Hong Kong and Taiwan, plus Thailand and South Korea's public sector laws).

In the 2000s the acceleration continued, with the expansion in the former eastern bloc and Soviet republic countries the most striking (Latvia, Bosnia & Herzegovina, Romania, Bulgaria, Croatia, Estonia, FYROM (Macedonia), Moldova, Serbia and Montenegro), plus the addition of the remaining European states (Cyprus, Malta, Andorra, Liechtenstein, Gibraltar). Outside Europe, expansion accelerated in the Asia-Pacific (Australia, South Korea, Japan, Macao SAR) and Latin America (Argentina, Colombia, Uruguay). In the Americas, the Bahamas added further new laws. Rapid development took place in Africa with new laws in Tunisia and Morocco (North African) and Mauritius, Cape Verde, Benin Senegal and Burkina Faso (Sub-Saharan Africa). The Kyrgyz Republic became the first country in Central Asia to legislate in 2008. In the first two years of this decade 11 new laws have been enacted (Faroe Islands, Malaysia, Mexico, India, Peru, Ukraine, Angola, Trinidad & Tobago, Vietnam, Costa Rica, Gabon and St Lucia) and the Russian law came into force, making this the most intensive period of data protection developments in the last 40 years.

Geographical expansion

Geographically, more than half (56%) of data privacy laws are still in European states (50/89), EU member states making up only slightly more than one third (27/89), even with the expansion of the EU into eastern Europe. There are data privacy laws in all 27 member states of the European Union (not yet counting Croatia), and a further 23 laws in other European countries or jurisdictions (including the EEA states). Only a few European states remain without such laws, (Georgia, Belarus and the Holy See/Vatican), so the potential for expansion in Europe is very limited. There are eight laws in Latin America, with Brazil set to become the ninth. In the Americas are also the laws in Canada and the USA, and four laws in the Caribbean. In Asia there are now nine data privacy laws, with Singapore promising a tenth, the other eight ASEAN states committed to improved privacy protection by 2015, and Bills before Parliaments in two others. Both Australia and New Zealand have data privacy laws, but none of the Pacific Islands do so (the only region with no such laws). In North Africa and the Middle East, there are five such laws, and eight in Sub-Saharan Africa. Further Acts are likely soon, with current Bills progressing in South Africa, Kenya and Ghana. The French-Speaking Association of Personal Data Protection Authorities (AFAPDP), and France's CNIL have both played key roles in developing expansion of data privacy in Africa. The Kyrgyz Republic law is the first in Central Asia, though Mongolia's laws also come close to qualifying.

The geographical distribution of the 89 laws by region is therefore: EU (27); Other European (23); Asia (9); Latin America (8); Africa (8); North Africa/Middle East (5); Caribbean (4); North America (2); Australasia (2); Central Asia (1); Pacific Islands (0). So there are 39 data privacy laws outside Europe, 44% of the total. Because there is little room for expansion within Europe, the majority of the world's data privacy laws will soon be from outside Europe, probably by the middle of this decade.

Bills for new Acts – Future expansions likely

The *Global Table of Data Privacy Bills* (following the Table of legislation) lists Bills for new Acts, but not for revisions of existing Acts unless they are Bills which expand a country's legislation to cover the private sector (eg Thailand) or the public sector. It first lists Bills

before the current session of a legislature (marked 'Current'); then Bills that are know to exist as current official government drafts but have not yet been introduced into the legislature; and finally Bills which were previously introduced to a legislature but have not progressed for some reason and are not current (marked 'Lapsed'). In all of these cases, it is quite possible that a Bill may rapidly enacted.

The Table shows that we can expect the pace of legislation to continue accelerating. There are Bills currently before legislatures in at least five countries (Georgia, Ghana, Philippines, Thailand and South Africa) although some have been withdrawn for redrafting. There are official draft Bills known in another five during the past year (Kenya, Cayman Islands, Nigel, Mali and Brazil). Antigua, British Virgin Islands, Jamaica, and Bermuda are known to be developing Bills (but with fewer details known), so there is considerable activity in the Caribbean. There are also older Bills which were introduced in Turkey, Lebanon and Barbados, and discussed in Madagascar, during the last decade. Not listed in the Bills Table, there are also those countries that have announced a definite intention to legislate, but have not yet developed a draft Bill. Singapore[2] and Qatar[3] (as distinct from the Qatar Financial Authority sub-region) are two countries in this category. There may be more Bills, or even more Acts, yet to be discovered. Research has not yet been done in relation to every separate jurisdiction in the world.

Measuring growth

For over two decades the rate of adoption of new data privacy laws per year has been steadily increasing, and the regions of the globe that have such laws has been steadily expanding. If the current rate of expansion is continued, 50 new laws would result in this decade, bringing the total to 127. Continued acceleration would make the total higher than that. Even on the conservative (and probably unrealistic) assumption that the 2010s will see no more data privacy laws than the 2000s, there would be 112 countries with data privacy laws by the decade's end, with the majority of the laws by then coming from outside Europe. In addition, many existing laws are being strengthened to keep up with rising expectations of privacy protection, international agreements, and the examples set by other countries (see the 'Latest' column in the Table).

There are other ways that expansion could be measured, say by the populations of the countries concerned, or by their GNP. These could show different trends, but reflection on the size and economic significance of the countries so far included makes it obvious that data privacy laws are more common in the world's larger and more economically significant countries. The recent inclusion of India accelerates this trend, as will the likely inclusion of Brazil in the near future. By any measure, data privacy laws are of increasing and accelerating global significance.

The most economically significant countries currently missing from the list are the USA (private sector), China and Brazil, now that India has adopted a data privacy law in 2011. The omission of Brazil is also expected to be remedied in 2012. China is currently enacting a profusion of sectoral laws, but a comprehensive law is still a possibility, and no-one knows what the outcome will be. The USA has many privacy laws and some effective enforcement, but no comprehensive privacy law in the private sector, nor it seems much prospect of one. Most other countries that do not yet have data privacy laws are of relatively low significance

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[3] Qatar has a draft Personal Information Privacy Protection Law under consideration: http://www.insideprivacy.com/international/qatar-seeks-views-on-draft-privacy-law/

in international trade, though some countries with large populations are among them, particularly in sub-Saharan Africa (eg Nigeria), and in Asia (eg Indonesia).

Finally, for the purposes of this brief overview, it is important to note that 'growth' or 'expansion' of data privacy laws cannot be equated with improvement in privacy protection. Some privacy laws are simply not enforced. Surveillance activities in both the private and public sectors can also grow at the same time as laws are enacted and operational, and quite often do when data privacy laws are a trade-off for, or a belated response to, more intensive surveillance. Assessing the effectiveness of data privacy laws is a far more complex task than is undertaken in this relatively simple exercise.

International commitments and recognition

International agreements concerning data protection have had a considerable influence on national and sub-national adoption of data privacy laws for thirty years since the drafting of both the OECD's privacy Guidelines and the Council of Europe Data Protection Convention at the outset of the 1980s. Since then, the European Union's data protection Directive of 1995 has been the most influential international instrument, and APEC's Privacy Framework has created regular opportunities for discussion of privacy issues among some Asia-Pacific jurisdictions.

All 27 Member States of the **European Union** are required to have data privacy laws which implement the EU privacy Directives, and all do so (see the Table). Five additional countries have applied to join the EU[4], and two of these (Montenegro and Turkey) do not yet have data privacy laws. The **European Economic Area** (EEA) includes the European Union member states plus Iceland, Norway and Liechtenstein, all of which have data privacy laws.

Countries or jurisdictions outside the EEA can obtain from the EU a decision that their laws provide an **'adequate'** level of protection of privacy, to enable free flow of personal data from EU member states to organisations in those countries. As yet, the EU has only made such decisions in relation to nine jurisdictions as a whole, a minority of which are of economic or political significance.[5] Uruguay and New Zealand should soon be added to this list, having receiving favourable Opinions from the Article 29 Working Party.

Forty-three of the forty-seven **Council of Europe** member States have ratified the Council of Europe Data Protection Convention of 1981 (Convention 108), and have data privacy laws. Armenia, Turkey and the Russian Federation have signed but not ratified the Convention. San Marino has done neither. However, Russia does now have a data privacy law (in force 2011). Armenia, Georgia and Turkey are the only Council of Europe Member State not to have enacted a data privacy law. Belarus is not a Council of Europe member because of human rights concerns, and the Vatican is not a member because it is not a democracy. The **Additional Protocol** (ETS 181) to the Convention also requires a commitment to data export restrictions and to an independent data protection authority, and brings the standards of the Convention up to approximately the same level as the Directive. Forty two Member States have signed the Additional Protocol, and 31 have subsequently ratified it. Twelve countries that have ratified the Convention (plus three territories on whose behalf the UK acceded to the Convention) have not ratified the Additional Protocol. Where a Council of Europe member has ratified both Convention 108 and the Additional Protocol, it is extremely unlikely as a matter of practice that data exports to that country would be prevented, so obtaining an

[4] Croatia; Former Yugoslav Republic of Macedonia (FYRIM); Iceland; Montenegro; Turkey

[5] Andorra, Argentina, Canada, Switzerland, Faroe Islands, Guernsey, Israel, Isle of Man, and Jersey

adequacy finding under the Directive becomes largely irrelevant in practice. This is noted in the Table.

Since 2008 the Council of Europe has made it clear that it wishes the Convention and Optional Protocol to become global agreements, and that it welcomes requests by states outside Europe with suitable data privacy laws to apply to accede to both. Uruguay is the first non-European state to be invited to do so, but has not yet formally acceded (there are Parliamentary processes requiring completion). An adequacy finding from the EU does not impose any reciprocal obligations on the recipient to allow free flow of personal data from it to EU countries. This obligation will however arise when countries outside the EU become members of the Council of Europe Convention 108.

Turkey is the only **OECD** (Organisation for Economic Cooperation and Development) member country, other than the USA in relation to the private sector, which does not have a data privacy law implementing the OECD's privacy Guidelines of 1981. The OECD's plans for enlargement[6] mean that more countries in future will be likely to be influenced by the OECD privacy Guidelines to adopt data privacy laws.

Two thirds (14) of the 21 **APEC** (Asia-Pacific Economic Cooperation) member 'economies' do have data privacy laws in at least one of the two sectors (see the Table), but 7 do not: Brunei; Indonesia; Philippines; Singapore; China; and Papua New Guinea. Thailand and the USA have public sector only laws, and Malaysia and Vietnam have private sector only laws. Singapore says it will introduce legislation in 2011; the Philippines and Thailand have bills for comprehensive laws before their legislatures. Whether APEC will expand beyond 21 members is still an open question. Numerous countries have been trying to join for some time[7]. In refusing India's application for membership, APEC decided not to admit more members until 2010. India is the only Asian country which is not an APEC member but does have a data privacy law (Macao SAR has such a law but is not a country). If APEC's membership is expanded, this will at least mean that more countries are involved in the six monthly discussions of APEC's privacy group.

The Economic Community of West African States (**ECOWAS**), a grouping of fifteen states under the Revised Treaty of the ECOWAS, agreed to adopt data privacy laws in 2008. A *Supplementary Act on Personal Data Protection within ECOWAS* (ECOWAS, 2010) to the ECOWAS Treaty, adopted by the ECOWAS member states, has established what the content of such data privacy laws should be, influenced very strongly by the EU Directive, and that each state is to establish a data protection authority. Four ECOWAS states have so enacted laws (Benin, Burkina Faso, Cape Verde, and Senegal), and a Bill is before Parliament in Ghana, leaving ten yet to take action.

Less advanced as yet, the East African Community (EAC), a regional group of five East African countries (Kenya, Tanzania, Uganda, Rwanda and Burundi) has taken various initiatives that encourage the member states to adopt data privacy legislation. Such initiatives include the current discussion of *A Draft Bill of Rights for the East African Community* which unlike the African Charter on Human and Peoples' Rights incorporates the right to privacy. Also, although not binding, the EAC has adopted *EAC Framework for Cyberlaws* Phases I and II in

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[6] "In May 2007, OECD countries agreed to invite Chile, Estonia, Israel, Russia and Slovenia to open discussions for membership of the Organisation and offered enhanced engagement to Brazil, China, India, Indonesia and South Africa" (OECD website). Chile, Solvenia, Israel and Estonia have since become members.

[7] "In addition to India, Mongolia, Pakistan, Laos, Bangladesh, Costa Rica, Colombia, Panama and Ecuador, are among a dozen countries seeking membership in APEC by 2008." – see <http://en.wikipedia.org/wiki/Asia-Pacific_Economic_Cooperation#Member_Economies>

2008 and 2011 respectively, addressing multiple cyber law issues including data protection. Yet as of now only Kenya is considering a draft bill on data protection.

Implications and further research

Now that we have this more accurate picture of the global development of data privacy laws, further research becomes possible. It has already made possible an assessment of the influence of European privacy standards on legislative developments outside Europe.[8] Further research is required on such questions as the implications of the increasingly interlocking data export restrictions in this legislation; on the effectiveness of the enforcement regimes in various countries; on the extent of judicial interpretation of these laws, and on other comparative aspects of data privacy laws. All of this requires an accurate account of the world's data privacy laws.

Updates, resources and acknowledgments

Details of new data privacy laws (and Bills for new laws) from countries which do not have them will be included in subsequent issues of *Privacy Laws & Business International Report*. This commentary and Table will be updated at least annually.

The completion of the Table is based on advice received in relation to Latin American countries from Pablo Palazzi (Allende & Brea, Argentina); in relation to francophone countries, from Marie Georges (Planete Informatique et Liberties, Paris); in relation to lusaphone (Portuguese-speaking) countries, from Magda Cocco and Inês Antas Barros (Vieira de Almeida & Associados, Lisbon), and in relation to other countries from David Banisar of Article 19, and Alex Boniface Makulilo, privacy researcher. Thanks also to Stewart Dresner and Laura Linkomies (Privacy Laws & Business).

Some of the resources which have been valuable in the research for this article are as follows: 'Data Protection Laws Around the World Map' at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1951416>; Council of Europe website, for ratifications of the Convention and the Protocol; EU website for legislation of member states <http://ec.europa.eu/justice/policies/privacy/law/implementation_en.htm>; EU website for adequacy decisions <http://ec.europa.eu/justice/policies/privacy/thridcountries/index_en.htm>; Privacy Laws & Business website <www.privacylaws.com>; Christopher Millard 'Privacy Laws & Business European Data Protection Laws Chart' *Privacy Laws & Business Newsletter*, May 1997; dataprotection.eu website <http://www.dataprotection.eu/>; Morrison & Foerster 'Privacy Library' <http://www.mofo.com/privacylibrary/>; Linklaters 'Data Protected' website for clients; BNA website. All errors and omissions remain my own.

[8] Greenleaf, G 'The Influence of European Data Privacy Standards Outside Europe: Implications for Globalisation of Convention 108' (accepted) *International Data Privacy Law*, Vol 2, Issue 2, 2012, available at <http://papers ssrn.com/abstract_id=1960299>

Global Table of Data Privacy Laws

This Table is sorted alphabetically by Jurisdiction, but can be sorted by any column (in Word).

Jurisdiction	Key Act	From[9]	Latest	Region[10]	Sec[11]	EU[12]	CoE[13]	Other Int.[14]
Albania	Act on the Protection of Personal Data	1999	1999	Europe (O)	Both	[I]	R, P	
Andorra	Law on the protection of personal data	2003	2003	Europe (O)	Both	A	R; P	
Angola	Lei da Protecção de Dados Pessoais	2011	2011	Africa	Both			
Argentina	Personal Data Protection Act	2000	2000	Latin Am	Both	A		
Armenia	Law on Personal Data	2002		Europe (O)	Both		NS; SP	
Australia	Privacy Act 1988	1988	2001	Australasia	Both			APEC, OECD
Austria	Datenschutzgesetz	1978	2009	Europe (EU)	Both	M	R; P	OECD
Azerbaijan	Law on data, data processing and data protection	1998	1998	Europe (O)	Both		R	
Bahamas	Data Protection Act	2003	2003	Caribbean	Both			
Belgium	Law on Privacy Protection in relation to the Processing of Personal Data	1992	1998	Europe (EU)	Both	M	R	OECD
Benin	Loi Portant Protection des données à Caractère Personnel	2009	2009	Africa	Both			ECOWAS
Bosnia & Herzegovina	Law on the protection of personal data	2001	2001	Europe (O)	Both	[I]	R, P	
Bulgaria	Law for Protection of Personal Data	2002	2007	Europe (EU)	Both	M	R; P	
Burkina Faso	Loi Portant Protection des Données à Caractère Personnel	2004	2004	Africa	Both			ECOWAS
Canada	Personal Information Protection and Electronic Documents Act	1983 (prior Act)	2002	North Am	Both	A		APEC; OECD
Cape Verde	Regime Juridico Geral de Protecção de Dados Pessoais a Pessoas Singulares Janeiro	2001	2001	Africa	Both			ECOWAS
Chile	Privacy Law	1999	1999	Latin Am	Both			APEC,

[9] **Date columns**: 'From' = date original law enacted; 'Latest' = year of last significant amendment known; 'NYIF' = not yet in force; 'NIFU' = not in force until date stated, where bringing into force is delayed over one year

[10] **Region column:** 'Europe (EU)' = current European member states; 'Europe (O)' = other European states (including EEA)

[11] **Sector column:** 'Pri' = covers private sector only; 'Pub' = covers public sector only; blank = covers both sectors

[12] **European Union column:** M = country is an EU member state; A = country's protection of personal data has been held 'adequate' by the EU; [A] = Favourable Article 29 Working Party opinion on adequacy, but no final decision announced; EEA = country is a member of the European Economic Area; [I] = Adequacy finding is in practice irrelevant due to country acceding to both Council of Europe Convention 108 and Additional Protocol

[13] **Council of Europe column:** ('Member' means Member State of the Council of Europe) R = Member and has ratified the Convention; R* = United Kingdom has ratified Convention on behalf of sub-jurisdiction; S = Member and has signed but not ratified Convention; P = has also ratified the optional protocol; NS = Member but has not signed Convention; [I] = not a Member but has been invited to accede to the Convention; A = not a Member but has acceded to the Convention

[14] **Other international commitments column:** APEC = 'economy' is a member of APEC (Asia Pacific Economic Cooperation); OECD = country is a member of OECD; ASEAN = county is a member of Association of South East Asian Nations; ECOWAS = country is a member of Economic Community of West African States; EAC = county is a member of the East African Community

								OECD
Colombia	Data Protection Law	2008	2008	Latin Am	Both			
Costa Rica	Protección de la Persona frente al tratamiento de sus datos personales	2011	2011	Latin Am	Both			
Croatia	Act on Personal Data Protection	2003	2003	Europe (O)	Both	[I]	R; P	
Cyprus	The Processing of Personal Data (Protection of the Individual) Law	2001	2003	Europe (EU)	Both	M	R, P	
Czech Republic	Personal Data Protection Act	1992	2000	Europe (EU)	Both	M	R, P	OECD
Denmark	Act on Processing of Personal Data	1978	2000	Europe (EU)	Both	M	R	OECD
Dubai IFC	Data Protection Law ('IFC' = International Financial Centre)	2007		N Af/M East	**Pri**			
Estonia	Data Protection Act	2003	2003	Europe (EU)	Both	M	R, P	OECD
Faroe Islands	Act on processing of personal data	2010	2010	Europe (O)	Both	A		
Finland	Personal Data Act	1987	1999	Europe (EU)	Both	M	R	OECD
France	Law relating to the protection of individuals against the processing of personal data	1978	2004	Europe (EU)	Both	M	R; P	OECD
FYROM (Macedonia)	Law on Personal Data Protection	2005	2005	Europe (O)	Both	[I]	R, P	
Gabon	Law related to personal data	2011	2011	Africa	Both			
Germany	Federal Data Protection Act	1977	2001	Europe (EU)	Both	M	R, P	OECD
Gibraltar	Data Protection Act	2004	2004	Europe (O)	Both			
Greece	Law on the Protection of individuals with regard to the processing of personal data	1997	1997	Europe (EU)	Both	M	R	OECD
Guernsey	Data Protection (Bailiwick of Guernsey) Law	1986	2001	Europe (O)	Both	A	R*	
Hong Kong SAR	Personal Data (Privacy) Ordinance	1995	1995	Asia	Both			APEC
Hungary	Law on the protection of personal data etc	1992	1992	Europe (EU)	Both	M	R, P	OECD
Iceland	Law on the Protection and Processing of Personal Data	1989	2000	Europe (O)	Both	EEA	R	OECD
India	Rules under s43A (2008 Amendt), Information Technology Act 2000	2011	2011	Asia	**Pri**			
Ireland	Data Protection Act	1988	2003	Europe (EU)	Both	M	R, P	OECD
Isle of Man	Data Protection Act	1986	2002	Europe (O)	Both	A	R*	
Israel	Privacy Protection Act 1981	1981	1981	N.Af/M East	Both	A		OECD
Italy	Consolidation Act regarding the Protection of Personal Data	1996	2003	Europe (EU)	Both	M	R	OECD
Japan	Act on the Protection of Personal Information	2003	2003	Asia	Both			APEC, OECD
Jersey	Data Protection (Jersey) Law	1987	2005	Europe (O)	Both	A	R*	
Kyrgyz Republic	Law on Personal Data	2008	2008	Central Asia	Both			
Latvia	Law on Protection of Personal Data of Natural Persons	2000	2002	Europe (EU)	Both	M	R; P	
Liechtenstein	Gesetz über die Abänderung des Datenschutzgesetzes (2002)	2002	2008	Europe (O)	Both	EEA	R, P	
Lithuania	Law on Legal Protection of Personal Data	1996	2003	Europe (EU)	Both	M	R, P	
Luxembourg	Data Protection Law	1979	2002	Europe (EU)	Both	M	R, P	OECD
Macao SAR	Personal Data Protection Act	2007	2007	Asia	Both			
Malaysia	Personal Data Protection Act	2010	NYIF	Asia	**Pri**			APEC,

								ASEAN
Malta	Data Protection Act	2001	2001	Europe (EU)	Both	M	R	
Mauritius	Data Protection Act	2004	2004	Africa	Both			
Mexico	Federal Law on the Protection of Personal Data Held by Private Parties	2010	2010	Latin Am	Both			APEC, OECD
Moldova	Law on Personal Data Protection	2007	2007	Europe (O)	Both	[I]	R; P	
Monaco	Act controlling personal data processing	1993	2001	Europe (O)	Both	[I]	R; P	
Montenegro	Law on Personal Data Protection	2008	2008	Europe (O)	Both			
Morocco	Loi relative à la protection des personnes physiques à l'égard du traitement des données à caractère personnel	2009	2009	N Af/M East	Both			
Netherlands	Personal Data Protection Act	1988	2000	Europe (EU)	Both	M	R, P	OECD
New Zealand	Privacy Act 1993	1993	2010	Australasia	Both	[A]		APEC, OECD
Norway	Personal Data Act	1978	2000	Europe (O)	Both	EEA	R	OECD
Paraguay	Law 1682 on Information of a Private Nature	2002		Latin Am	Both			
Peru	Law on Protection of Personal Data	2011	2011	Latin Am	Both			APEC, US FTA
Poland	Act on the Protection of Personal Data	1997	2004	Europe (EU)	Both	M	R, P	OECD
Portugal	Lei da protecçao de dados pessoais	1991	1998	Europe (EU)	Both	M	R; P	OECD
Qatar Financial Centre	Data Protection Regulations	2005	2005	N.Af/M.East	**Pri**			
Romania	Law on the protection of individuals with regard to the processing of personal data etc	2001	2005	Europe (EU)	Both	M	R, P	
Russia	Federal Law Regarding Personal Data	2006	NIFU 2011	Europe (O)	Both	S	S	APEC
San Marino	Law regulating the Computerized Collection of Personal Data	1983	1995	Europe (O)	Both		NS	
Senegal	Loi sur la Protection des données à Caractère Personnel	2008	2008	Africa	Both			ECOWAS
Serbia	Law on Personal Data Protection	2008	2008	Europe (O)	Both	[I]	R, P	
Seychelles	Data Protection Act	2003	2003	Africa	Both			
Slovakia	Act on the Protection of Personal Data	1992	2005	Europe (EU)	Both	M	R, P	OECD
Slovenia	Personal Data Protection Act	1999	2004	Europe (EU)	Both	M	R	OECD
South Korea	Data Protection Act	2001	2011	Asia	Both			APEC; OECD
Spain	Ley Orgánica de Protección de Datos de Carácter Personal	1992	1999	Europe (EU)	Both	M	R, P	OECD
St Lucia	Data Protection Act 2011	2011	NYIF	Caribbean	Both			
St Vincent & Grenadines	Privacy Act of 2003	2003		Caribbean	Both			
Sweden	Personal Data Act	1973	1998	Europe (EU)	Both	M	R; P	OECD
Switzerland	Data Protection Act	1992	1992	Europe (O)	Both	A	R, P	OECD
Taiwan	Personal Data Protection Act	1995	2010	Asia	Both			APEC
Thailand	Official Information Act 1997	1997	1997	Asia	**Pub**			APEC; ASEAN
Trinidad &	Data Protection Act	2011	2011	Caribbean	Both			

Tobago								
Tunisia	Loi portant sur la protection des données à caractère personnel	2004	2004	N Af/M.East	Both			
Ukraine	Law on Personal Data Protection	2011	2011	Europe (O)	Both	[I]	R, P	
United Kingdom	Data Protection Act 1998	1984	1998	Europe (EU)	Both	M	R	OECD
United States	Privacy Act of 1974	1974		North Am	**Pub**			OECD, APEC
Uruguay	Law on the Protection of Personal Data	2008	2008	Latin Am	Both	[A]	[I}	
Vietnam	Law on Protection of Consumers' Rights	2010	2010	Asia	**Pri**			APEC; ASEAN

Global Table of Data Privacy Bills

Table of Bills for new Acts (or new coverage of public/private sector), and official draft Bills

Jurisdiction	Title of Bill/Draft	From[15]	Current?[16]	Region	Sec	CoE	Other Int.
Georgia	Law on Personal Data Protection	2011	Current	Europe		R	
Philippines	Data Privacy Bill	2011	Current	Asia	Both		APEC; ASEAN
Ghana	Protection of Personal Data Bill	2010	Current, 2nd reading 10/ 2011	Africa	Both		ECOWAS
South Africa	Protection of Personal Information Bill	2009	Current, Before Committee; Being redrafted	Africa	Both		
Cayman Island	Data Protection Bill	2011	Draft	Caribbean	Both		
Madagascar	Data Protection Bill	2008	Draft	Africa	Both		
Mali	Data Protection Bill	2011	Draft	Africa	Both		ECOWAS
Niger	Data Protection Bill	2009	Draft	Africa	Both		
Brazil	Protection of Personal Data Bill	2011	Draft; in consultations	Latin Am.	Both		
Kenya	Data Protection Bill	2012	Draft; in consultations	Africa	Both		EAC
Barbados	Data Protection Bill	2005	Lapsed	Caribbean	Both		
Lebanon	Data Protection Bill	2005	Lapsed	N.Af/M.East	Both		
Thailand	Personal Data Protection Bill	2011	Lapsed	Asia	Both		APEC, ASEAN
Turkey	Law on the Protection of Personal Data	2003	Lapsed	Europe	Both	S	OECD

[15] 'From': Date of latest known Bill or official draft Bill

[16] 'Current?': 'Current' = before current session of legislature; 'Draft' = official draft known, but not yet introduced to legislature; 'Lapsed' = Bill was introduced in previous session of legislature but did not proceed

Award Writing

Arbitral Decision-Making/Some Considerations
Charles J. Moxley, Jr.

- **Big opening question: whether the objective is**
    - Justice in the eyes of the arbitrator
    - Deciding issues presented by the parties
    - Some combination of the two
    - Relevance of
        - Pro se party
        - Imbalance in sophistication in presenting claims or defenses
- **Initial distinction: decision-making by**
    - Sole arbitrator
    - panel
- **Different levels of decision-making**
    - Non-substantive matters
        - Scheduling
        - Discovery
        - Adjournment requests
        - bifurcation
    - Substantive matters
        - Arbitrability
        - Merits
        - Forms of decision
            - Orders
            - Awards
                - Interim
                - Partial final
                - final
- **Decision-making by panel members**
    - Note-taking
        - During hearing
        - At end of day or group of days of hearing
    - Types of discussions
        - Informal discussions along the way
        - Formal deliberations
    - Types of arbitrators
        - Party appointed
            - Neutral
                - Seemingly neutral
                - Seemingly partisan

        - Non-neutral
    - Relations within a panel
        - Equality
        - collegiality
        - Hierarchical
            - Chair/wing
            - Preparedness/engagement
            - Stature
            - Other
        - Groupthink
        - Ethical requirements
    - Organization of discussions: Should the chair
        - Take the lead
        - Organize the discussions
        - Defer to the co-arbitrators
- **Process: when to decide**
    - On documents
    - Versus after a hearing
- **Timing of arbitrators' forming views of the case**
    - only after all the evidence is in
    - or sometime earlier
    - or back and forth as the evidence comes in
    - tentative preliminary views
    - significance of whether it is a case
        - with detailed pleadings, witness statements, expert's reports, pre-hearing motions and the like
        - that comes to hearing without much groundwork having been laid
    - cognitive risks of
        - early expressions of views on the case
        - early reduction of views to writing
- **Bias**
    - Actual
    - Unconscious
        - Psychological
        - physiological
- **The decision-making process: respective roles of**
    - The contract
    - The law
        - Where arbitrators
            - are already familiar with the law
            - are not familiar
    - concept of the contract and the law as the opening screens for considering the facts
    - The facts/evidence

        - Arguments of counsel
        - pleadings
        - Admissions
        - Testimony
        - Exhibits
        - Briefs
            - Pre-hearing
            - Post-hearing
            - other
    - Credibility
        - Significance
        - How determined
            - Can it be articulated?
            - Are we any good at it?
    - Burdens of proof
    - Personality/experience of the arbitrator
    - Eliciting of information by arbitrators
        - On legal and factual points raised by the parties
        - On points not raised by the parties
        - Before counsel have done their thing
        - Before or while counsel are doing their thing
    - Negotiations/compromise among panel members
        - Liability
        - damages
    - Splitting the baby?
- **Drafting the award**
    - do arbitrators decide
        - before drafting the award?
        - or as part of the award-writing process?
    - the actual drafting
        - by the chair
        - or different parts of the award by different panel members
- **Diversity**
    - Significance of diversity on decision-making
- **Comparison of arbitral versus judicial decision-making**
- **Appraisal**
    - Characterization of arbitral practices in these areas
        - Substantially uniform
        - Or idiosyncratic?
    - Areas that need
        - Change
        - Further study
- **Arbitrator perspective**
    - What parties, witnesses, and counsel do
        - That helps

        - That impedes the decision-making process
- **Counsel perspective as to these questions**

CONSIDERATIONS IN INTERNATIONAL AWARD WRITING

Steven A. Certilman

1) GENERAL CONSIDERATIONS

a) Write a reasoned award, even if it is a brief one
b) Write for enforceability
c) Do justice
d) Develop your own style

2) PREPARING FOR THE DRAFTING PROCESS

a) Familiarize yourself with governing procedural law (the *lex arbitri*) as it relates to an enforceable award
b) Familiarize yourself with the award provisions of the governing arbitral rules
c) Familiarize yourself with governing law of any jurisdictions where you have information that the award is likely to be enforced
d) Re-familiarize yourself with the arbitration agreement to ensure that you take into consideration any award-related requirements contained therein
e) Determine whether your award is to be a final award, or whether it is an interim/partial award, or a supplemental award or merely a procedural order. Then, ensure that it is clear as to which it is
f) Ensure that you have addressed all claims and counterclaims – NO MORE AND NO LESS
g) Remember that an award is subject to challenge at both the place where it is issued (the *arbitral situs*) and the place where it will be enforced
h) Both form and content affect the outcome of a challenge to the award

3) TYPES OF AWARDS

a) Final Awards
    i) Usually completes the engagement of the arbitrator
    ii) not to be rendered until the arbitrator determines that that his/her assignment and responsibilities are complete
b) Interim Awards
    i) Typically addresses preliminary issues such as jurisdiction, proper law
    ii) Also used to effect interim relief (a pre-award remedy). The interim award for a pre-judgment remedy can generally be taken to court for enforcement
    iii) Also often used if the arbitrator determines to bifurcate the hearings
    iv) Make sure your governing rules allow it. Generally they do
    v) Many state statutes, including CGS § 52-418 et seq. in CT, do not specifically address partial or interim awards so an Interim Award may not be considered a final award for purposes of enforceability in court. There may be lack of uniformity in how the courts address these.
c) Default awards

i) Should be carefully addressed as courts are most suspicious of them
ii) Be sure to articulate the procedural history

4) BASIC DRAFTING

a) Caption
b) Title of award (Final, Interim etc.)
c) Recitals
   i) The arbitration agreement
   ii) Method of service and other jurisdictional information
   iii) Appointment of arbitrator and date of oath
   iv) Particulars regarding default if applicable
      (1) Material interlocutory matters such as dispositive motions and decisions.
d) Briefly outline the dispute to give the big picture. Chronologically is often best but if Terms of Reference have been agreed, that is your guide.
e) Organize and state the material issues and your findings of fact. This is the meat and potatoes of the award
   i) It is often helpful to use the pleadings as a guide
   ii) Address the material questions of fact and issues of law in a logical order. Make findings of fact as you go along and address the legal issues where they fit in
   iii) As a matter of style, some arbitrators include the findings of fact within the outline of the case
   iv) Include references to testimony, documents and other evidence, both credible and incredible
f) Come to a well founded conclusion on all questions of fact and issues of law which lead you to the conclusion section
g) Damages and Remedies:
   i) Each particular remedy should be tied as a remedy to at least one particular claim
      (1) E.g. duty→ breach→ loss suffered→ remedy
   ii) See the next section for specifics regarding remedies
   iii) Spell out your calculations including the from-to dates and **double check your calculations**
   iv) Some damages are clearly computable from the contract and others require the arbitrator to make an assessment of the damages. If you are making an assessment, indicate the methodology
   v) Types of remedies
      (1) Monetary damages
      (2) Punitive damages and other penalties where appropriate and permitted
      (3) Injunctive relief
      (4) Restitution/Specific performance
      (5) Declaratory relief
      (6) Interest

(a) Compound or simple? What is the rate? Check the agreement, the rules and the law
(b) Again, recite the from-to dates
(c) Unless prohibited by the *lex arbitri*, the governing rules or the agreement of the parties, you can generally include a post-award interest rate, with the interest to begin to run on the date after the date on which the payment of the losing party is due to be made. If there is one, I always use the rate established in procedural law, such as the 10% rate for detainer of money in CT.

(7) Costs and fees
(a) Generally, these are party costs, fees of the arbitral organization and arbitrator fees
(b) Check the *lex arbitri* and the rules for constraints on allocation
(c) Generally the arbitrator has the discretion to assess the costs in the manner deemed fair

(8) Attorney fees
(a) Usually a matter of substantive law (the *lex contractus*) but check the arbitration agreement

h) Conclusion
i) Summarizes the award: who is to do what, when. E.g. By reason of the foregoing, I hereby award the Claimant the sum of Ten Dollars ($10.00) in full and final settlement of a all claims and counterclaims between/among the parties herein, such sum to be paid by the Respondent to the Claimant within fourteen (14) days of the date hereof."
ii) In the damages area, this might differ if the parties have made preliminary payments addressing the claims or, in the area of costs if, e.g., one party paid the costs ands they are being awarded against the other party
iii) To avoid failing to render an award as to some peripheral claim which you may have discounted but not written about directly, **always conclude** with an omnibus disposition clause such as "This Award is intended as full and final settlement of all claims and counterclaims between/among the parties herein **and all claims not expressly addressed herein are hereby denied.**"

i) Sign and date the award and ensure that if the *lex arbitri* requires it, the award is notarized/acknowledged. This may also be important in some jurisdictions where the award is to be enforced
j) Deliver the award promptly as required. Determine how many original executed copies will be required. By default, my preference is to deliver a number of originals equal to the number of parties plus one for the administrative body.
k) Assuming that the award may be enforced outside of the seat, add something to the following effect:
"This Award is a final award. It is effective immediately, without the necessity of further hearings and can be confirmed in any court having jurisdiction. The hearings have been declared closed and all claims with respect to which there has been no express disposition herein are denied. The seat of the arbitration is **New York, U.S.A**."

l) You MUST include a statement that: “This award is made at xxxx (the seat of the arbitration).”

5) ADDITIONAL CONSIDERATIONS

a) Dissenting opinions
b) Res judicata
c) Effect on third parties
d) After the award is rendered, further communication with the attorneys or parties is not ethically permitted.
e) Functus officio

6) FOR ANOTHER DAY

a) Challenges to the award
b) Post award requests such as amendments, reconsideration, articulation

Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law-Civil Law Dichotomy

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Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law-Civil Law Dichotomy

*S.I. Strong**

ABSTRACT

Over the last few decades, international commercial arbitration has become the preferred means of resolving cross-border business disputes. The popularity of this particular device is due to a number of uniquely attractive features ranging from the mechanism's sophisticated blend of common law and civil law procedures to the routine use of reasoned awards. As a result, international commercial arbitration does not resemble domestic arbitration so much as it does complex commercial litigation.

Although international commercial arbitration is considered a highly mature form of dispute resolution, very little information exists as to what constitutes a reasoned award in the international commercial context or how to write such an award. This situation is becoming increasingly problematic given the rising number of international commercial arbitrations that arise every year, the expansion and diversification of the pool of potential arbitrators, and the significant individual and societal costs that can result from badly written awards.

This Article provides the first-ever in-depth analysis of the reasoned award requirement in international commercial arbitration. In so doing, the discussion draws heavily on the large body of material involving reasoned rulings in both common law and civil law courts and considers whether and to what extent those criteria apply in the arbitral context. As a result, this Article not only provides useful information to those seeking to better their understanding of the reasoning requirement in international commercial arbitration, it also provides key comparative insights into the judicial process in both common law and civil law legal systems.

Much of the analysis focuses on theoretical concerns relating to reasoned decision-making in judicial and arbitral settings. However, the discussion also incorporates a strong practical element. As a result, this Article is relevant not only to specialists in international commercial arbitration but also to judges involved in enforcing reasoned awards domestically or internationally, scholars studying arbitral and judicial decision-making, and domestic arbitrators seeking to understand the parameters of a reasoned award under national law.

TABLE OF CONTENTS

I. INTRODUCTION

Unlike many types of domestic arbitration where unreasoned awards (often called "standard awards") are the norm, international commercial arbitration routinely requires arbitrators to produce fully reasoned awards.[1] However, very little information exists as to what constitutes a reasoned award in the international commercial context[2] or how to write such an award.[3] This lacuna is extremely problematic given the ever-increasing number of international commercial arbitrations that arise every year[4] and the significant individual and societal costs that can result

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[1] *See* Rain CII Carbon, LLC v. ConocoPhillips Co., 674 F.3d 469, 473-74 (5th Cir. 2012) (distinguishing a standard award from a reasoned award); Cat Charter, LLC v. Schurtenberger, 646 F.3d 836, 844-46 (11th Cir. 2011) (same); *see also* S.I. STRONG, INTERNATIONAL COMMERCIAL ARBITRATION: A GUIDE FOR U.S. JUDGES 22 (2012) (comparing international commercial arbitration to other forms of arbitration), *available at* http://www.fjc.gov [hereinafter STRONG, GUIDE].

[2] *See Rain CII Carbon*, 674 F.3d at 473-74; *Cat Charter*, 646 F.3d at 844-46; GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3037-45 (2014). The debate about what constitutes a reasoned award extends to investment arbitration as well. *See* Tai-Heng Cheng & Robert Trisotto, *Reasons and Reasoning in Investment Treaty Arbitration*, 32 SUFFOLK TRANSNAT'L L. REV. 409, 409 (2009); Jason Webb Yackee, Book Review, *The Reasons Requirement in International Investment Arbitration: Critical Case Studies*, 103 AM. J. INT'L L. 629, 630 (2009).

[3] A few materials are available, although most are relatively short and provide only general advice. *See* George A. Bermann, *Writing the Award – An Arbitrator's Perspective, in* INTERNATIONAL ARBITRATION CHECKLISTS 171 (Grant Hanessian & Lawrence W. Newman eds., 2009); Thomas J. Brener et al., *Awards and Substantive Interlocutory Arbitral Decisions, in* COLLEGE OF COMMERCIAL ARBITRATORS GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION 225, 237-39 (James M. Gaitis et al. eds., 2014); Daniel L. FitzMaurice & Maureen O'Connor, *Preparing a Reasoned Award,* 14 ARIAS U.S. Q. (2007), *available at* http://www.daypitney.com/news/docs/dp_1987.pdf; Marcel Fontaine, *Drafting the Award – A Perspective from a Civil Law Jurist*, 5 ICC BULL. 30 (1994); Humphrey Lloyd, *Writing Awards – A Common Lawyer's Perspective,* 5 ICC BULL. 38 (1994); Humphrey Lloyd et al., *Drafting Awards in ICC Arbitrations,* 16 ICC BULL. 19 (2005); Jose Maria Alonso Puig, *Deliberation and Drafting Awards in International Arbitration, in* LIBER AMICORUM BERNARDO CREMADES 131, 144-58 (Miguel Ángel Fernández-Ballesteros & David Arias eds. 2010).

[4] International commercial arbitration is the preferred means of resolving cross-border business disputes. *See* BORN, *supra* note 2, at 73; *see also* S.I. Strong, *Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration*, 2012 J. DISP. RESOL. 1, 2-3, 5-6 [hereinafter Strong, *Border Skirmishes*] (noting increase in arbitral proceedings over the last fifty years). More generalists are entering the world of arbitration as advocates and arbitrators, which may affect the quality and nature of international award writing. *See id.* at 4.

from a badly written award.[5] Indeed, much of the current debate about the need for appellate arbitration stems from controversies generated by awards that fail to provide reasoning that is sufficiently persuasive to the losing party.[6]

Helping arbitrators write awards that are clear, concise and coherent is vitally important if international commercial arbitration is to retain its place as the preferred means of resolving cross-border business disputes.[7] However, that task is not as easy as it sounds.

First, the relative scarcity of published awards means that novice arbitrators have very little to look at in the way of models.[8] Furthermore, many of the materials that are publicly available are typically offered only in excerpted, digested or translated form and may not be suitable for use as prototypes.[9] While arbitrators could seek guidance from other types of

[5] Badly written awards (which in this context means those that provide insufficient reasoning as opposed to those that reach the "wrong" conclusion) can not only diminish parties' and society's faith in the legitimacy of the arbitral process, they can also increase the time and cost associated with final resolution of a dispute, both by taking a long time to write and by increasing the chance for a successful challenge to the award. *See* BORN, *supra* note 2, at 3044; Herbert L. Marx Jr., *Who Are Labor Arbitration Awards Written For? And Other Musings About Award Writing,* 58 DISP. RESOL. J. 22, 23 (May-July 2003). Rising costs and delays have jeopardized the future of international commercial arbitration, and parties are now considering the viability of other dispute resolution alternatives, such as international commercial mediation. *See* S.I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 45 WASH. U. J. L & POL'Y 11, 12 (2014); S.I. Strong, *Use and Perception of International Commercial Mediation and Conciliation: An Empirical Study*, 21 HARV. NEGOT. L. REV. __ (forthcoming 2015).

[6] *See* Irene M. Ten Cate, *International Arbitration and the Ends of Appellate Review,* 44 N.Y.U. J. INT'L L. & POL'Y 1109, 1111 (2012) (noting that the primary impetus for arbitral appeals in international commercial arbitration is error correction). Badly written awards, like badly written judicial decisions and opinions, fail to persuade the reader that the outcome is correct and therefore generate the desire for an appeal. *See* S.I. Strong, *Writing Reasoned Decisions and Opinions: A Guide for Novice, Experienced and Foreign Judges*, 2015 J. DISP. RESOL. __, __ [hereinafter Strong, *Writing*].

[7] *See* BORN, *supra* note 2, at 73.

[8] *See* Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration, in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 821, 821 n.4 (Mahnoush Arsanjani et al. eds. 2010) ("[I]t is uncommon to publish international commercial awards. . . ."). Although a number of arbitral institutions have been publishing denatured (anonymized) awards for decades, those materials are not widely available, since they are found only in specialized reporting series that are difficult and expensive to find. *See* S.I. STRONG, RESEARCH AND PRACTICE IN INTERNATIONAL COMMERCIAL ARBITRATION: SOURCES AND STRATEGIES 44-45, 83-85 (2009) [hereinafter STRONG, RESEARCH] (listing sources for arbitral awards and noting that databases offered by generalist provides such as Westlaw and LexisNexis generally do not include the necessary information).

[9] See Lloyd et al., *supra* note 3, at 20; *see also* James M. Gaitis, *International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards,* 15 AM. REV. INT'L ARB. 9, 17 (2004) (discussing why reasoned awards can vary widely). There are no groups responsible for identifying those arbitral awards that are particularly noteworthy from a structural or linguistic perspective, although a brief review of recently published awards demonstrates a number of examples of good writing. *See* Contractor (Zambia) v. Producer (Zambia), Final Award, ICC Case No. 16484, 2011, XXXIX Y.B. COMM. ARB. 216 (2014); Consortium member (Italy) v. Consortium leader (Netherlands), Final Award, ICC Case No. 14630 XXXVII Y.B.

reasoned rulings that are more widely available (such as awards generated in investment arbitration[10] or reasoned decisions from national courts[11]), not all of those procedures are truly analogous to international commercial arbitration.[12]

Second, new arbitrators typically come to their duties with very little in the way of formal training.[13] Indeed, the underlying assumption is that anyone appointed to an *ad hoc*

COMM. ARB. 90 (2012). The situation is quite different in the judicial realm, where exemplary judicial writing is identified regularly. *See* The Green Bag Almanac & Reader, Exemplary Legal Writing, http://www.greenbag.org/green_bag_press/almanacs/almanacs.html (listing the best judicial opinions in the United States each year); *see also* WILLIAM DOMNARSKI, IN THE OPINION OF THE COURT 97-98 (1997).

[10] Numerous investment awards are now publicly available as a result of the move toward increased transparency. *See* International Centre for Settlement of Investment Disputes (ICSID), Award – ICISD Convention Arbitration, https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Award-Convention-Arbitration.aspx (noting the presumption toward full or partial publication of investment awards); *see also* Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 841-42 (2012); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1621, 1611-12 (2005).

[11] Reasoned judicial decisions exist in both civil law and common law countries, although there are some differences between the type of judicial opinions generated by common law courts and civil law courts. *See* Allen Shoenberger, *Change in the European Civil Law Systems: Infiltration of the Anglo-American Case Law System of Precedent Into the Civil Law System*, 55 LOY. L. REV. 5, 5 (2009); *see also infra* notes 58-61, 222-23 and accompanying text. For example, judges in civil law countries often do not undertake the same type of factual analysis as judges in common law countries because of the civil law's emphasis on deductive rather than inductive reasoning. *See* S.I. STRONG ET AL., COMPARATIVE LAW FOR BILINGUAL LAWYERS: WORKING ACROSS THE ENGLISH-SPANISH DIVIDE / DERECHO COMPARADO PARA ABOGADOS HISPANO Y ANGLOPARLANTES ch. 3 (anticipated 2016) (noting that whereas "the civil law . . . uses deductive reasoning to move from general principles of law to particular outcomes in specific cases, the common law uses analogical or inductive reasoning to generate general principles of law as a result of legal conclusions generated in large numbers of individual disputes"); Julie Bédard, *Transsystemic Teaching of Law at McGill: "Radical Changes, Old and New Hats,"* 27 QUEEN'S L. J. 237, 269-70 (2001).

[12] *See* Strong, *Writing*, *supra* note 6, at __ (discussing purposes of judicial opinions and decisions); *see also infra* notes 67-85 and accompanying text (concerning differences between arbitration and litigation). For example, the quasi-public nature of investment arbitration and the strong influence of international law means that investment awards often resemble opinions generated by the International Court of Justice (ICJ). *See* Born, *supra* note 10, at 780; Thomas Buergenthal, *Lawmaking by the ICJ and Other International Courts*, 103 AM. SOC'Y INT'L L. PROC. 403, 405 (2009) (noting investment awards often rely on decisions from the ICJ); *see also* Ernest A. Young, *Supranational Rulings as Judgments and Precedents*, 18 DUKE J. COMP. & INT'L L. 477, 491-96 (2008) (suggesting that international arbitral awards are enforced more readily than judgments of international tribunals); *compare* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment of Feb. 3, 2015, http://www.icj-cij.org/docket/files/118/18422.pdf, *with* Ambiente Ufficio S.p.A. v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (Feb. 8, 2013), http:// www.italaw.com/sites/default/files/case-documents/italaw1276.pdf.

[13] A number of universities have attempted to provide advanced training in arbitration, but most of those courses focus on preparing advocates rather than arbitrators. *See* American University, Washington College of Law, Center on International Commercial Arbitration, https://www.wcl.american.edu/arbitration/; Columbia Law School, Center for International Commercial

tribunal or to an arbitral roster is already competent to serve as an arbitrator as a result of that person's extensive experience as counsel.[14] Interestingly, this reliance on selection procedures rather than on training is similar to the educational model adopted by the judicial systems of many common law countries.[15] In those jurisdictions, judges are selected from a pool of experienced lawyers and placed on the bench with very little specialized training, based on the assumption that anyone who has become a top litigator is naturally competent to take on the role of a judge.[16] However, research into judicial education and performance has demonstrated that the skills associated with serving as an adjudicator are significantly different than those associated with acting as an advocate.[17] The transition to the bench is particularly difficult with respect to the task of writing fully reasoned rulings, with many new judges finding the "move from advocacy to decision, from marshalling and presenting evidence to fact-finding and synthesizing," to be extremely challenging.[18] As a result, it appears inaccurate to claim, as some authorities have, that international arbitrators can gain the necessary skillset simply through "observation, exposure, participation and experience."[19]

This is not to say that arbitrators are entirely without resources, since new and experienced arbitrators can seek out courses in award writing from any one of a variety of

& Investment Arbitration, Related Curriculum at Columbia Law School, http://web.law.columbia.edu/center-for-international-arbitration/curriculum; MIDS-Geneva LL.M. in International Dispute Resolution, Curriculum, http://www.mids.ch/the-program/curriculum.html; Queen Mary, University of London, School of International Arbitration, Specialist Programmes, http://www.arbitration.qmul.ac.uk/courses/index.html [hereinafter QMUL]; University of Miami, LL.M. in International Arbitration, Program Requirements, http://www.law.miami.edu/international-graduate-law-programs/international-arbitration/program-requirements.php?op=3. In the one case where a course on award writing is offered, it is limited to a single session. *See* QMUL, *supra* (describing one-day short course on award writing in international arbitration).

[14] *See* STRONG, GUIDE, *supra* note 1, at 7-9 (discussing institutional arbitration and *ad hoc* arbitration). Although most arbitral institutions require some training when a new arbitrator joins their roster, those programs focus heavily on administrative issues relating to that particular institution. Some substantive elements may be offered, but not in any detail.

[15] *See* Emily Kadens, *The Puzzle of Judicial Education: The Case of Chief Justice William de Grey*, 75 BROOK. L. REV. 143, 143-45 (2009); Charles H. Koch, Jr., *The Advantages of the Civil Law Judicial Design as the Model for Emerging Legal Systems*, 11 IND. J. GLOBAL LEGAL STUD. 139, 143 (2004). The situation in civil law countries is very different. There, judges are given instruction in judicial writing from the very beginning of their legal careers. *See* Kadens, *supra*, at 143-45; Koch, *supra*, at 143.

[16] *See* Kadens, *supra* note 15, at 143-45; Koch, *supra* note 15, at 143.

[17] *See* Kadens, *supra* note 15, at 143.

[18] Jeffrey A. Van Detta, *The Decline and Fall of the American Judicial Opinion, Part I: Back to the Future From the Roberts Court to Learned Hand – Context and Congruence*, 12 BARRY L. REV. 53, 55 (2009) [hereinafter Van Detta 1]. Indeed, U.S. Supreme Court Justice Hugo Black, one of the most influential writers to ever grace the bench, once said that "the most difficult thing about coming on to the Court was learning to write." DOMNARSKI, *supra* note 9, at 36 (citation omitted).

[19] *See* Doug Jones, *Acquisition of Skills and Accreditation in International Arbitration*, 22 ARB. INT'L 275, 281 (2006).

institutions specializing in international commercial arbitration.[20] However, the current approach is problematic in several ways.[21]

First, it is not clear how many new or experienced arbitrators capitalize on the opportunity to study award writing.[22] Although some organizations require their members to undertake continuing education in arbitration, that requirement is usually minimal (one one-hour course per year may suffice) and does not mandate instruction in any particular subject.[23] Given the various pressures facing both new and experienced arbitrators,[24] it is perhaps understandable that arbitrators overlook courses in writing, particularly since many arbitrators may feel that after decades of work as practicing lawyers, they are already competent writers.[25] However, many people do not appreciate the extent to which award writing differs from other forms of communication.[26]

Arbitrators who have worked previously as judges may be particularly disinclined to take courses in award writing, based on the belief that they already know how to write reasoned decisions.[27] However, arbitral awards are in many ways different than judicial opinions, and skills learned in the judicial context may not translate into the arbitral setting.[28]

[20] *See, e.g.*, Chartered Institute of Arbitrators (CIArb), https://www.ciarb.org/ (offering courses in award writing), last visited June 14, 2015; American Arbitration Association (AAA), Course Calendar, https://www.aaau.org/courses (same), last visited June 14, 2015.

[21] Commentators have suggested that the field of international commercial arbitration is under-regulated in a variety of ways. *See* Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT'L L. REV. 957, 970 n.40 (2005) [hereinafter Rogers, *Vocation*].

[22] Although a number of organizations (such as the AAA and CIArb) require mandatory training on award writing, that requirement is usually limited a single course upon joining the organization or its roster.

[23] *See* Jones, *supra* note 19, at 288; Rogers, *Vocation*, *supra* note 21, at 978. This system is again remarkably similar to judicial education in common law countries, although that approach has been criticized in a number of ways. *See* S.I. Strong, *Judicial Education and Regulatory Capture: Does the Current System of Educating Judges Promote a Well-Functioning Judiciary and Adequately Serve the Public Interest?* 2015 J. DISP. RESOL. __, __ [hereinafter Strong, *Judicial Education*]; Strong, *Writing*, *supra* note 6, at __.

[24] Many arbitrators must not only juggle very busy dockets but must also learn a variety of new skills, ranging from the ability to manage difficult counsel and witnesses to issues relating to the type of evidence to allow or disallow. *See* Jones, *supra* note 19, at 281; AAA, Course Calendar, https://www.adreducation.org/courses (demonstrating the scope of courses available to arbitrators).

[25] Of course, it is possible that new arbitrators suffer from the Lake Woebegone Effect with respect to their writing skills. *See* A Prairie Home Companion, The Lake Woebegone Effect (noting that all the children in Lake Woebegone are above average), http://prairiehome.org/2013/04/the_lake_wobegon_effect/, last visited Jan. 19, 2015.

[26] *See* Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 503-06 (2013); Van Detta 1, *supra* note 18, at 55.

[27] *See* Bryan A. Garner, *Why Lawyers Can't Write*, ABA J. (Mar. 1, 2013), *available at* http://www.abajournal.com/magazine/article/why_lawyers_cant_write (discussing problems of judicial overconfidence); Strong, *Judicial Education*, *supra* note 23, at __ (same).

[28] *See infra* notes 67-85 and accompanying text. Furthermore, it cannot be assumed that every judge writes well. *See* Mark Painter, *No Mercy for Poorly Written Opinions*, WISC. L.J. (Sept. 10, 2010), *available at* http://wislawjournal.com/2010/09/10/no-mercy-for-poorly-written-opinions/.

Current practice regarding continuing education on award writing suffers from other problems as well. For example, most arbitral institutions only ask established arbitrators to act as faculty, presumably based on the belief that arbitrators are the only ones who have the skills and insights necessary to teach other arbitrators.[29] Not only can this practice create a number of self-reinforcing behaviors within the field as faculty members emphasize issues that they consider to be important with little input from external or empirical sources,[30] but most arbitrators are not especially qualified to teach writing, despite their practical experience in arbitration.[31] As a result, many award writing seminars end up focusing on personal anecdotes, basic writing techniques or logistical concerns that do not address the deeper challenge of producing fully reasoned awards.[32]

Many of these educational practices mirror those traditionally seen in common law forms of judicial education.[33] Although those similarities might lead some observers to conclude that the existing approach to arbitrator education is sufficient, commentators have sharply criticized the common law judicial education model.[34] This phenomenon, when combined with the various concerns enunciated within the arbitral community about the qualifications of international commercial arbitrators, suggest that the existing approach to arbitrator education needs to be changed, particularly with respect to the issue of award writing.[35]

[29] Many common law countries use a similar approach to judicial education, although that approach has been criticized. *See* Strong, *Judicial Education*, *supra* note 23, at __.

[30] *See* Oona A. Hathaway, *Path Dependence in the Law; The Course and Pattern of Legal Change in a Common Law System,* 86 IOWA L. REV. 601, 628-29 (2001); Catherine A. Rogers, *The Arrival of the "Have-Nots" in International Arbitration,* 8 NEV. L.J. 341, 383 (2007) (noting the risk that international commercial arbitration may become autopoietic) [hereinafter Rogers, *Have-Nots*].

[31] The same issues exist in many forms of judicial education. *See* Strong, *Judicial Education*, *supra* note 23, at __. Many people cling to the belief that good writing cannot be taught, either because writing is an innate skill or because the range of opinions about what constitutes good writing is too diverse to support a single standardized treatment. *See* S.I. STRONG, HOW TO WRITE LAW EXAMS AND ESSAYS 1-2 (4th ed. 2014) [hereinafter STRONG, HOW TO WRITE]. While it is certainly true that good writing can vary a great deal in terms of form, tone and style, that does not mean that it is impossible to identify certain common features that exist in all good legal decisions and opinions. *See* LOUISE MAILHOT & JAMES D. CARNWATH, DECISIONS, DECISIONS . . . A HANDBOOK FOR JUDICIAL WRITING 100 (1998) (discussing judicial writing); *see also* DOMNARSKI, *supra* note 9, at 55-74, 90-115.

[32] *See, e.g.*, Marx, *supra* note 5, at 22-23. This type of approach is also evident in materials relating to judicial writing. *See* Strong, *Writing*, *supra* note 6, at __.

[33] *See* Strong, *Writing*, *supra* note 6, at __; *see also supra* notes 15-32 and accompanying text.

[34] *See* LIVINGSTON ARMYTAGE, EDUCATING JUDGES: TOWARDS A NEW MODEL OF CONTINUING JUDICIAL LEARNING (1996); Strong, *Judicial Education*, *supra* note 23, at __.

[35] *See* Jones, *supra* note 19, at 275. The decreased emphasis on arbitrator education has led many parties to equate experience as an international arbitrator with competence as an international arbitrator, thereby making it difficult for new arbitrators to enter the field. *See* Wendy Miles, *International Arbitrator Appointment: One vs. Three, Lawyer vs. Nonlawyer,* 57 DISP. RESOL. J. 36, 36 (Aug.-Oct. 2002) (citing Redfern & Hunter); Rogers, *Vocation*, *supra* note 21, at 967.

Indeed, these issues suggest there is a critical need for more rigorous analysis regarding the reasoned award requirement in international commercial arbitration.[36] This Article attempts to meet that need by scrutinizing the elements of a reasoned award in international commercial arbitration and providing both experienced and novice arbitrators with a structured and content-based approach to writing such awards.[37] Methodologically, the discussion draws heavily on the large body of material involving the use and drafting of reasoned judicial rulings in both common law and civil law jurisdictions.[38] However, the analysis only draws those analogies that are appropriate, since arbitration and litigation are not identical.[39]

[36] This is a subject that appears particularly suitable for a written guide, since this form allows arbitrators to review the material at their own speed and in the manner that is most useful to them. For example, arbitrators, like judges, "are generally autonomous [as learners], entirely self-directed, and exhibit an intensely short-term problem-orientation in their preferred learning practices." ARMYTAGE, *supra* note 34, at 149.

[37] This Article focuses on matters relating to final awards on the merits and does not consider the special issues relating to the writing of a procedural order, an award arising out of an arbitral challenge, a consent award or an interim or partial award, although some commentators have discussed such matters. *See* International Council for Commercial Arbitration (ICCA) REPORT NO. 2: THE ICCA DRAFTING SOURCEBOOK FOR LOGISTICAL MATTERS IN PROCEDURAL ORDERS (2015); Lloyd et al., *supra* note 3, at 38-40; Margaret Moses, *Reasoned Decisions in Arbitrator Challenges*, III Y.B. INT'L ARB. 199 (2013); Rolf Trittmann, *When Should Arbitrators Issue Interim or Partial Awards and/or Procedural Orders*, 20 J. INT'L ARB. 255 (2003). This Article also does not address the special nature of investment arbitration, which carries its own unique concerns as a result of its quasi-public nature. *See* Cheng & Trisotto, *supra* note 2, at 409. However, a number of the issues discussed herein apply to these other sorts of writings to the same extent as to final awards in international commercial arbitration. *See* Fontaine, *supra* note 3, at 30.

[38] *See* Ruth C. Vance, *Judicial Opinion Writing: An Annotated Bibliography*, 17 LEGAL WRITING 197, 204-31 (2011) (listing authorities); *see also* A.B.A., Appellate Judges Conference, Judicial Administration Division, JUDICIAL OPINION WRITING MANUAL (1991), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/judicial-writing-manual-2d-fjc-2013.pdf/$file/judicial-writing-manual-2d-fjc-2013.pdf; LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES (1993); Samuel A. Alito, Jr. et al., Panel Remarks, *The Second Conversation with Justice Samuel A. Alito, Jr.: Lawyering and the Craft of Judicial Opinion Writing*, 37 PEPP. L. REV. 33 (2009); Richard B. Cappalli, *Improving Appellate Opinions*, 83 JUDICATURE 286 (May/June 2000); Elizabeth Ahlgren Francis, *The Elements of Ordered Opinion Writing*, 38 JUDGES J. 8 (Spring 1999); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); Joseph Kimble, *First Things First: The Lost Art of Summarizing*, 38 CT. REV. 30 (Summer 2001); Douglas K. Norman, *An Outline for Appellate Opinion Writing*, 39 JUDGES J. 26 (Summer 2000); Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455 (1995); Strong, *Writing*, *supra* note 6, at __; Timothy P. Terrell, *Organizing Clear Opinions: Beyond Logic to Coherence and Character*, 38 JUDGES J. 4 (Spring 1999); Patricia M. Wald, *A Reply to Judge Posner*, 62 U. CHI. L. REV. 1451 (1995); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writing*, 62 U. CHI. L. REV. 1371 (1995); Nancy A. Wanderer, *Writing Better Opinions: Communicating with Candor, Clarity, and Style*, 54 ME. L. REV. 47 (2002); James Boyd White, *What's an Opinion for?* 62 U. CHI. L. REV. 1363 (1995); Charles R. Wilson, *How Opinions Are Developed in the United States Court of Appeals of the Eleventh Circuit*, 32 STETSON L. REV. 247 (2003); *infra* notes 193-366 (listing sources).

[39] *See infra* notes 56-57 and accompanying text.

Although this Article is aimed primarily at specialists in international commercial arbitration, the material is also useful to numerous other individuals. For example, the information contained herein can be used to assist judges involved in enforcing reasoned awards domestically or internationally,[40] scholars studying arbitral decision-making,[41] arbitrators and tribunal secretaries involved in the drafting of individual awards[42] and domestic arbitrators seeking to understand what a reasoned award is under national law.[43]

The primary focus of this Article is on analyzing various process-oriented and structural issues relating to reasoned awards in international commercial arbitration so as to improve the practical and theoretical understanding of international awards. That discussion, which is found in Section IV, considers various factors from both the common law and civil law perspectives so as to take into account the blended nature of international commercial arbitration.[44]

Of course, to be fully comprehensible, the detailed analysis in Section IV must first be put into context. Therefore, Section II describes the difficulties associated with defining a reasoned award in international commercial arbitration while Section III considers why such awards are necessary or useful as a functional matter.[45]

[40] *See* BORN, *supra* note 2, at 3037-48.

[41] Scholarship concerning international commercial arbitration is expanding at a phenomenal rate. *See* STRONG, RESEARCH, *supra* note 8, at 88-137.

[42] Discussion about the role of a tribunal secretary has become heated in recent years, particularly with respect to the question of whether and to what extent a tribunal secretary may assist in the drafting of an award. *See* ICCA REPORT NO. 1, YOUNG ICCA GUIDE ON ARBITRAL SECRETARIES (2015); Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association, *Secretaries to International Arbitral Tribunals*, 17 AM. REV. INT'L ARB. 575, 576 (2006); Lloyd et al., *supra* note 3, at 21; Emilia Onyema, *The Role of the International Arbitral Tribunal Secretary*, 9 VINDOBONA J. INT'L COMM. L. & ARB. 99, 100 (2005); *see also* Michael Polkinghorne, *Different Strokes for Different Folks? The Role of the Tribunal Secretary*, kluwerarbitrationblog.com (May 17, 2014), http://kluwerarbitrationblog.com/blog/2014/05/17/different-strokes-for-different-folks-the-role-of-the-tribunal-secretary-2/. This Article takes no position on that issue but simply notes that it is possible that such a role may evolve over time, just as the role of judicial clerks has evolved to include assisting judges with drafting judicial opinions and decisions. *See* LAW CLERK HANDBOOK: A HANDBOOK FOR LAW CLERKS TO FEDERAL JUDGES 10, 86, 94-98 (2007), *available at* http://www.fjc.gov (discussing the role of U.S. law clerks in drafting judicial decisions and opinions); Joint Report, *supra*, at 576; Onyema, *supra*, at 100 (analogizing tribunal secretaries to judicial law clerks).

[43] Some countries require reasoned awards in all sorts of arbitration, including domestic proceedings, while other countries permit the parties to choose whether to obtain a reasoned award. *See* BORN, *supra* note 2, at 3037-48. In either case, domestic arbitrators would benefit from an increased appreciation of what constitutes a reasoned award and how such an award may be written, since the situation regarding the continuing education of arbitrators is often as dire domestically as it is internationally. *See supra* notes 22-32 and accompanying text. However, domestic awards differ from international awards in a number of key regards, so arbitrators should tailor their writing appropriately. *See infra* note 245 and accompanying text.

[44] *See* BORN, *supra* note 2, at 2207-10; STRONG, GUIDE, *supra* note 1, at 6.

[45] Experts in adult education have found that adult learners do best when they understand why certain information is being presented. *See* MALCOLM S. KNOWLES, THE MODERN PRACTICE OF ADULT EDUCATION: FROM PEDAGOGY TO ANDRAGOGY 45-49 (1980). These principles have been successfully

Before beginning, it is helpful to note two basic points. First, reasoned awards can vary a great deal in terms of form, tone and style.[46] As a result, this Article does not suggest a single, formulaic model that should be followed in all cases but instead provides an analytical framework that can be adapted to the particular needs of the dispute at hand. Second, when discussing how international commercial arbitrators should approach the drafting of a reasoned award, this Article does not address basic rules of good writing. Although these issues can be quite important,[47] they are covered in detail elsewhere and need not be discussed herein.[48]

II. WHAT CONSTITUTES A REASONED AWARD IN INTERNATIONAL COMMERCIAL ARBITRATION

The first matter to consider involves the question of what constitutes a reasoned award in international commercial arbitration. Most institutional rules applicable to international commercial arbitration[49] simply indicate that an award should include "reasons," at least as a default position, without any further explanation as to what is entailed by that term.[50]

applied in the context of judicial education and can be extended to arbitral education. *See* ARMYTAGE, *supra* note 34, at 106-11, 127-30.

[46] *See* Lloyd et al., *supra* note 3, at 20.

[47] Matters that initially appear to be questions of style can have substantive effect in the law. For example, legal decisions have been known to turn on the precise placement of a comma. *See* Standard Bent Glass Corp. v. Glassrobots Oy, 333 F.3d 440, 449 (3d Cir. 2003) (construing the New York Convention).

[48] Some good manuals concerning general principles of standard and legal writing include THE CHICAGO MANUAL OF STYLE (2010); ALASTAIR FOWLER, HOW TO WRITE (2007); BRYAN A. GARNER, THE ELEMENTS OF LEGAL STYLE (2002); BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES (2013); BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE (2006); ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES (2008); STRONG, HOW TO WRITE, *supra* note 31; S.I. STRONG & BRAD DESNOYER, HOW TO WRITE LAW EXAMS: IRAC PERFECTED ch. 8 (2015); WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE (1999).

[49] Most international commercial arbitrations are governed by various procedural rules chosen by the parties, although it is possible to proceed in the absence of such provisions. *See* STRONG, GUIDE, *supra* note 1, at 7-9 (discussing institutional arbitration and *ad hoc* arbitration).

[50] *See* International Centre for Dispute Resolution (ICDR) International Arbitration Rules, art. 27(2) ("The tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons need be given."), *available at* https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_002037; International Chamber of Commerce (ICC) Arbitration Rules, art. 31(2) ("The award shall state the reasons upon which it is based."), *available at* http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/ICC-Rules-of-Arbitration/; London Court of International Arbitration (LCIA) Arbitration Rules, art. 26.2 ("The Arbitral Tribunal shall make any award in writing and, unless all parties agree in writing otherwise, shall state the reasons upon which such award is based."), *available at* http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx; Stockholm Chamber of Commerce (SCC) Arbitration Rules, art. 36(1) ("The Arbitral Tribunal shall make its award in writing, and, unless otherwise agreed by the parties, shall state the reasons upon which the award is based."), *available at* http://www.sccinstitute.com/media/56030/2007_arbitration_rules_eng.pdf; United Nations Commission

To some extent, the lack of detail regarding the shape and content of a reasoned award may be the result of the difficulties inherent in describing a reasoned award in the abstract. Indeed, it is often easier to identify specific examples of fully reasoned decisions than to provide a categorical definition of what constitutes adequate legal reasoning.[51] Nevertheless,

on International Trade Law (UNCITRAL) Arbitration Rules, art. 34(3), G.A. Res. 65/22, U.N. Doc. A/RES/65/22 (Jan. 10, 2011) ("The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given."), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf. However, in practice, many standard procedural orders used by arbitrators contain phrases such as "The award shall contain the reasoning of the Arbitrator, applicable precedent and findings of fact and conclusions of law."

Although the Chinese International Economic and Trade Commission (CIETAC) adopts an approach similar to that of other arbitral institutions, CIETAC's language is a bit more fulsome and indicates that

> The arbitral tribunal shall state in the award the claims, the facts of the dispute, the reasons on which the award is based, the result of the award, the allocation of the arbitration costs, and the date on which and the place at which the award is made. The facts of the dispute and the reasons on which the award is based may not be stated in the award if the parties have so agreed, or if the award is made in accordance with the terms of a settlement agreement between the parties.

CIETAC Arbitration Rules, art. 49(3), *available at* http://www.cietac.org/index/rules.cms. Other relevant portions of the CIETAC rules state that

> 1. The arbitral tribunal shall independently and impartially render a fair and reasonable arbitral award based on the facts of the case and the terms of the contract, in accordance with the law, and with reference to international practices.
> 2. . . .
> 3. . . . The arbitral tribunal has the power to fix in the award the specific time period for the parties to perform the award and the liabilities for failure to do so within the specified time period.
> 4. . . .
> 5. Where a case is examined by an arbitral tribunal composed of three arbitrators, the award shall be rendered by all three arbitrators or a majority of the arbitrators. A written dissenting opinion shall be kept with the file and may be appended to the award. Such dissenting opinion shall not form a part of the award.
> 6. Where the arbitral tribunal cannot reach a majority opinion, the arbitral award shall be rendered in accordance with the presiding arbitrator's opinion. The written opinions of the other arbitrators shall be kept with the file and may be appended to the award. Such written opinions shall not form a part of the award.
> . . . .

Id. art. 49.

[51] No such analyses have been conducted in the international realm, although some attempts have been made in judicial and other arbitral contexts. *See* Marilyn Blumberg Cane & Ilya Torchinsky, *Explaining "Explained Decisions": NASD's Proposal for Written Explanations in Arbitration Awards,* 16 U. MIAMI BUS. L. REV. 23 (2007); s*ee also* Hart v. Massanari, 266 F.3d 1155, 1176-77 (9th Cir. 2001) (discussing and reflecting the qualities of a reasoned ruling); The Green Bag Almanac & Reader, *supra* note 9

various authorities have attempted to provide a more fulsome explanation of what constitutes a reasoned award.[52] Thus, a reasoned ruling may be described as one that includes "findings of fact and conclusions of law based upon the evidence as a whole . . . [and that] clearly and concisely states and explains the rationale for the decisions so that all can determine why and how a particular result was reached."[53]

As useful as this definition may seem, it only goes so far, since finding "the appropriate methodology for distinguishing questions of fact from questions of law [is], to say the least, elusive."[54] Indeed, "the practical truth [is] that the decision to label an issue a 'question of law,' a 'question of fact,' or a 'mixed question of law and fact' is sometimes as much a matter of allocation as it is of analysis."[55]

These kinds of practical difficulties suggest that the best way to define a reasoned award may be through a functional analysis.[56] That sort of approach is particularly useful in this setting because a functional inquiry not only overcomes various differences that exist between common law and civil law legal reasoning (an important feature given that international commercial arbitration consciously blends elements from both the common law and civil law legal traditions),[57] it also takes into account the various ways that arbitral awards differ from reasoned rulings generated by a court.

(listing well-written judicial rulings on an annual basis). One particularly detailed study has come in the world of investment arbitration, where commentators have claimed that annulment tribunals "have adopted no less than three different thresholds to meet the reasons requirement." Cheng & Trisotto, *supra* note 2, at 424. However, these tribunals

> appear to have achieved unanimity on one important conceptual point: the reasons requirement is in fact a reasoning standard. Disagreements among committees about whether the standard should be high or low are . . . fundamentally about what methods of reasoning are acceptable. The high standard countenances only reasoning that is correct on the law and facts and the rational derivation of outcomes therefrom; the low standard tolerates reasoning that is incorrect due to mistakes in the law or facts, so long as the reasoning is internally consistent; and the intermediate standard requires coherence and permits errors of law and fact, so long as these errors are reasonable errors.

Id. The highest level of scrutiny identified in investment disputes appears to contradict the standard applicable in the international commercial context. *See* BORN, *supra* note 2, at 3044 ("The requirement for a reasoned award is also not a requirement for a well-reasoned award: bad or unpersuasive reasons are still reasons, and satisfy statutory requirements for reasoned awards.").

[52] *See* BORN, *supra* note 2, at 3040-41, 3043-44.

[53] 77 Pa. Stat. Ann. § 834 (West 2013). Although this definition arises in the context of the statutory duties of a workers' compensation board, the principles appear to apply equally in other situations, including arbitration. *See* Jennifer Kirby, *What Is An Award, Anyway?* 31 J. INT'L ARB. 475, 476 (2014).

[54] Miller v. Fenton, 474 U.S. 104, 113-14 (1985) (citations omitted).

[55] *Id.* (citation omitted).

[56] *See* Ralf Michaels, *The Functional Method of Comparative Law, in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 339, 342, 357 (Mathias Reiman & Reinhard Zimmerman eds., 2006).

[57] *See* BORN, *supra* note 2, at 2207-10; STRONG, GUIDE, *supra* note 1, at 6.

In this context, a functional analysis requires two separate steps. The first considers why reasoned awards might be necessary or useful in international commercial arbitration. This issue is taken up in Section III. The second looks into how the structure of reasoned awards might vary, depending on the particular type of dispute at issue. Those concerns are addressed in Section IV.

III. WHY REASONED AWARDS ARE NECESSARY OR USEFUL IN INTERNATIONAL COMMERCIAL ARBITRATION

Some people appear to believe that reasoned rulings are an exclusive feature of the common law legal tradition.[58] However, civil law countries have long considered reasoned legal opinions to be essential to procedural justice, even though the shape of a civil law judicial opinion can differ significantly from what is standard in common law jurisdictions.[59] For example, reasoned decisions in France are usually quite short and "formulated in a single sentence, including several 'whereas-es' (*attendus*)."[60] However, other civil law jurisdictions, most notably Germany, often generate reasoned opinions that are remarkable for their "length and thoroughness."[61]

Although French courts consider very brief, highly deductive opinions to be sufficiently reasoned as a matter of procedural fairness,[62] this particular structural approach does not appear to have been routinely adopted in international commercial arbitration.[63] Instead, the concept of

[58] *See* Michael L. Wells, *"Sociological Legitimacy" in Supreme Court Opinion,* 64 WASH. & LEE L. REV. 1011, 1029 (2007) (suggesting that "French practice belies the notion that well-reasoned [apparently meaning fully reasoned] opinions are in some sense necessary").
[59] *See* Fontaine, *supra* note 3, at 33; Shoenberger, *supra* note 11, at 5.
[60] Jeffrey L. Friesen, *When Common Law Courts Interpret Civil Codes*, 15 WISC. INT'L L. J. 1, 8 (1996) ("The succinctness of French decisions is consistent with—and probably produced by—the primacy of text, conceptualism, and deduction, as well as the post-revolutionary caution on the part of judges not to exceed their limited powers."); *see also* Kai Schadbach, *The Benefits of Comparative Law: A Continental European View,* 16 B. U. INT'L L.J. 331, 343 n.63 (1998) (citing Erhard Blankenburg, *Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany*, 46 AM. J. COMP. L. 1, 40 (1998) ("Whoever compares the arguments of a decision of a German Landgericht with those of a Dutch rechtbank will be impressed by the length and thoroughness of the German argument on the one hand, the straightforward, paper-saving decision of the Dutch court on the other. In appeal courts and before the highest courts the differences in elaborateness are even more apparent. German legal style is much more differentiated, scholarly worded; the style of Dutch courts is pragmatic . . . .")).
[61] Schadbach, *supra* note 60, at 343 n.63 (citing ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, THE CIVIL LAW SYSTEM, AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 1140 (2d ed. 1977); Blankenburg, *supra* note 60, at 40; Louis Goutal, *Characteristics of Judicial Style in France, Britain and the U.S.A.*, 24 AM. J. COMP. L. 43, 45 (1976)).
[62] *See* Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach,* 72 WASH. & LEE L. REV. 483, 533 n.286 (2015).
[63] *See* Gaitis, *supra* note 9, at 17 (describing what is typically included in a reasoned award); Fontaine, *supra* note 3, at 36 (noting that French-style "whereas" clauses (*attendus*) are generally not used in international awards, even in those countries where that style of writing is common in the judicial context). *But see* Interim Award in ICC Case No. 4131, IX Y.B. COM. ARB. 131, 135 (1984) (using

a reasoned award in international commercial arbitration appears to more closely resemble the longer, more discursive models seen in the common law and in civil law jurisdictions like Germany.[64] Thus, most awards in international commercial arbitration currently run dozens of pages in length.[65]

When considering why reasoned awards might be useful or necessary in international commercial arbitration, it is helpful to distinguish structural rationales for reasoned rulings from non-structural rationales. This approach not only overcomes matters relating to the common law-civil law divide, it also helps identify rationales that are exclusively associated with judicial rulings and that are therefore inapplicable in the arbitral context.[66]

A. Structural Rationales for Reasoned Awards

Perhaps the most well-known structural rationale supporting the use of reasoned rulings comes from the common law legal tradition, which requires "subsequent courts to adhere to the legal conclusions established in earlier judgments rendered by courts whose decisions are binding upon the ruling court."[67] Reasoned decisions are used in common law jurisdictions to provide "the necessary reasoning (the '*ratio decidendi*') for courts bound to adhere to precedent under *stare decisis*."[68] Because the principle of *stare decisis* does not technically apply in international

attendu clauses, although the decision was translated from French and comes from an earlier era in international commercial arbitration).

[64] *See, e.g.*, Contractor (Zambia) v. Producer (Zambia), Final Award, ICC Case No. 16484, 2011, XXXIX Y.B. COMM. ARB. 216 (2014); Fontaine, *supra* note 3, at 36; *see also* XXXIX Y.B. COMM. ARB. 30-305 (2014) (publishing a variety of recent awards); Schadbach, *supra* note 60, at 343 n.63 (comparing German and Dutch legal decisions).

[65] *See, e.g.*, *Contractor (Zambia)*, XXXIX Y.B. COMM. ARB. at 216; Fontaine, *supra* note 3, at 36; Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301, 1316-17 n.64 (2006) [hereinafter Rogers, *Transparency*]; *see also* XXXIX Y.B. COMM. ARB. at 30-305 (publishing a variety of recent awards); QMUL, *supra* note 13 (offering a course in award writing and indicating that the mock award produced by students must exceed 5,000 words). A somewhat shorter example can be found at Consortium member (Italy) v. Consortium leader (Netherlands), Final Award, ICC Case No. 14630 XXXVII Y.B. COMM. ARB. 90 (2012). Notably, some commentators have suggested that "in some instances, longer is not better." BORN, *supra* note 2, at 3041-42.

[66] *See* W. Laurence Craig, *The Arbitrator's Mission and the Application of Law in International Commercial Arbitration*, 21 AM. REV. INT'L L. 243, 284 (2010) (noting five reasons why Lord Bingham of Cornhill, former Lord Chief Justice of England and Wales, thought reasoned judgments were necessary in court and applying those rationales to arbitration); Jones, *supra* note 19, at 282-83 (suggesting arbitrators can learn from judges); Strong, *Writing*, *supra* note 6, at __.

[67] National Aeronautics and Space Admin. v. Nelson, 131 S. Ct. 746, 766 (2011) (citation omitted). Interestingly, it was not until the late nineteenth century that common law courts began to impose upon themselves a strict duty to follow previous case law. *See* KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 260 (Tony Weir trans., 3d ed. 1998).

[68] FitzMaurice & O'Connor, *supra* note 3. *Stare decisis* has been said to "reflect[] a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right." *National Aeronautics and Space Admin*, 131 S. Ct. at 766 (suggesting that reliance on precedent is

commercial arbitration, this rationale does not appear applicable to the arbitral forum, strictly speaking.[69]

However, arbitral awards are considered very important forms of persuasive authority and have been said to reflect a type of "soft precedent" in certain types of international disputes (most notably those involving investment and sports arbitration) and in certain types of matters (most notably those involving arbitral procedure).[70] The willingness of international arbitrators to consider and in many cases follow the reasoning reflected in previous awards can be traced directly to the need for predictability and consistency in international commercial arbitration.[71] Interestingly, the approach used in international commercial arbitration is similar to that found in many civil law countries, where judges routinely follow the decisions of higher level courts, even if the principle of precedent does not apply, so as to promote predictability and consistency.[72] Thus, reasoned awards may be said to be useful for this first type of structural purpose, even if they are not strictly necessary.

Reasoned rulings serve other structural purposes. For example, reasoned decisions are used in both common law and civil law jurisdictions to give context to lower court decisions and thereby help appellate courts determine whether and to what extent to uphold the judgment below.[73]

Initially, this rationale might also appear inapplicable to international commercial arbitration, since most jurisdictions do not allow courts to review the merits of an arbitral award.[74] However, some jurisdictions, most notably England, do allow judicial appeals of

preferable to other mechanisms "because it promotes the evenhanded, predictable, and consistent development of legal principles").

[69] *See* STRONG, GUIDE, *supra* note 1, at 21; STRONG, RESEARCH, *supra* note 8, at 26-27.

[70] Although the concept of "soft precedent" is most widely supported in investment arbitration and sports arbitration, where publication of denatured awards is relatively routine, some commentators believe that arbitral awards have some precedential value even in the international commercial setting. *See* STRONG, RESEARCH, *supra* note 8, at 26-27 (noting the precedential power of previous international awards is highest in matters of arbitral procedure); Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT'L 357, 361-78 (2007) (discussing investment and sports arbitration); Rogers, *Vocation*, *supra* note 21, at 1004 ("In a meaningful sense, international arbitration produces precedents that are public goods."). Arbitral awards also contribute to the development of substantive legal principles via the *lex mercatoria*. *See* Fontaine, *supra* note 3, at 32.

[71] *See* STRONG, GUIDE, *supra* note 1, at 21 (quoting Interim Award in ICC Case No. 4131, IX Y.B. COM. ARB. 131, 135 (1984), which stated that "[t]he decisions of these [arbitral] tribunals progressively create caselaw which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international commerce, to which rules specific to international arbitration, themselves successively elaborated should respond").

[72] *See* PETER DE CRUZ, COMPARATIVE LAW IN A CHANGING WORLD 70 (3d edn. 2007); STRONG, GUIDE, *supra* note 1, at 17.

[73] *See* J.J. GEORGE, JUDICIAL OPINION WRITING HANDBOOK 26 (5th ed. 2007). Providing all of the relevant factual data and outlining each step of the legal analysis allows an appellate court to consider the propriety of the decision-making process below in a comprehensive and principled manner. *See id.*

[74] *See* BORN, *supra* note 2, at 83.

international awards, which could be seen as providing arbitrators with a strong incentive to render well-written reasoned awards in arbitrations seated in England.[75]

International awards may also be subject to other types of post-award scrutiny, both inside and outside of England.[76] One type of post-award judicial procedure involves a challenge to enforcement, either at the seat of arbitration or in a foreign jurisdiction.[77] Although these types of actions usually focus on procedural matters,[78] the likelihood of a challenge being brought in the first place may be affected by the quality of the reasoning found in the underlying award.[79] For example, a well-written and fully reasoned award may persuade the losing party that a decision is well-supported, even if the outcome is negative.[80] Alternatively, a fully reasoned award may diminish the likelihood of a judicial challenge by eliminating certain grounds for non-enforcement.[81]

Another type of post-award procedure involves collateral proceedings.[82] These types of actions may be on the rise, given the increasing incidence of parallel proceedings in

[75] The right to appeal an arbitral award is found in section 69 of the Arbitration Act 1996, although parties may opt out of this provision. *See* Arbitration Act 1996, § 69; Rowan Platt, *The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?*, 30 J. INT'L ARB. 531, 534-43 (2013). Notably, England is one of the top jurisdictions in the world for international commercial arbitration. *See* Jan Paulsson, *Arbitration Friendliness: Promises of Principle and Realities of Practice*, 23 ARB. INT'L 477, 477 (2007).

[76] Although parties in international commercial arbitration usually comply with awards on a voluntary basis, the number and type of post-award challenges may be increasing. *See* BORN, *supra* note 2, at 3410 (claiming "[i]n practice, the overwhelming majority of international awards are complied with voluntarily"); Strong, *Border Skirmishes*, *supra* note 4, at 8 (discussing rising number of challenges).

[77] *See* Strong, *Border Skirmishes*, *supra* note 4, at 2-6.

[78] Public policy objections, which could be seen as a substantive in nature, are a possible ground for non-enforcement at the seat of arbitration and elsewhere. *See, e.g.*, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]; 9 U.S.C. §§ 10, 208 (2015); Arbitration Act 1996 §§ 68, 103.

[79] *See* BORN, *supra* note 2, at 83. At one time, arbitrators were advised not to be too fulsome in their awards lest they create grounds for vacatur or non-enforcement. *See* Fontaine, *supra* note 3, at 33. However, arbitrators are now advised to "protect the award" through judicious drafting, which may include a more detailed description of the reasons for the award. *See* AAA, WRITING ARBITRATION AWARDS: A GUIDE FOR ARBITRATORS (April 23, 2014), https://www.aaau.org/media/20549/writing%20arbitration%20awards%20-%20materials.pdf (last visited Jan. 23, 2015); Edna Sussman, *Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them*, XI REVISTA BRASILEIRA DE ARBITRAGEM 76, 83 (2014).

[80] *See* Fontaine, *supra* note 3, at 34; Marx, *supra* note 5, at 23 (quoting a party who stated, "We weren't at all happy with your award, but I can't complain because you explained it so well").

[81] For example, an international arbitral tribunal that explicitly takes European competition or U.S. antitrust law into account may dissuade a losing party from challenging an award in European or U.S. courts on certain public policy grounds. *See* BORN, *supra* note 2, at 3688-70 (discussing the "second look" doctrine); *see also* Eco Swiss China Time Ltd v. Benetton Int'l NV, [1999] E.C.R. I-3055; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 638 (1985).

[82] *See* BORN, *supra* note 2, at 3732.

international commercial disputes.[83] Although the law concerning preclusion and collateral estoppel are not as well developed in arbitration as in litigation,[84] a court may find itself unable to give preclusive effect to a ruling or award that is unreasoned, since the court cannot determine whether a particular issue was fully and fairly argued in the earlier action.[85]

The final type of post-award procedure involves "arbitral appeals," which are an entirely private, contractually created means of appealing the substance of an arbitral award.[86] Over the last few years, several arbitral organizations have established formal procedures for appellate arbitration.[87] The evolution of this particular procedure has important ramifications for the award writing process, both at first instance and on appeal.[88] For example, arbitrators hearing a dispute as an initial matter may need to be increasingly aware of the quality of their awards both to avoid creating an appealable issue[89] and to provide an appellate tribunal with a solid

[83] *See* NADJA ERK-KABAT, PARALLEL PROCEEDINGS IN INTERNATIONAL ARBITRATION: A EUROPEAN PERSPECTIVE 1 (2014); STRONG, GUIDE, *supra* note 1, 85-87.
[84] *See* BORN, *supra* note 2, at 3733; STRONG, GUIDE, *supra* note 1, 85-87.
[85] *See* BORN, *supra* note 2, at 3757.
[86] *See* Judge Rudolph Kass, *A Private Path to Appellate Arbitration*, 50 BOSTON B.J. 35, 35 (Jan./Feb. 2006); Paul Bennett Marrow, *A Practical Approach to Affording Review of Commercial Arbitration Awards Using an Appellate Arbitrator*, 60 DISP. RESOL. J. 10, 14-15 (Aug.-Oct. 2005). Because this process does not require any form of judicial review, it does not run afoul of the U.S. Supreme Court's prohibition on contractual expansions of judicial jurisdiction. *See* Hall St. Assocs. v. Mattel, Inc., 550 U.S. 968 (2007); Richard C. Reuben, *Personal Autonomy and* Vacatur *After* Hall Street, 113 PENN. ST. L. REV. 1103, 1150-51 (2009). Arbitral appeals are somewhat different than the kind of annulment proceedings used in certain investment arbitrations. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), Mar. 18, 1965, Rules of Procedure for Arbitration, Rules 50-55, [1966] 17 U.S.T. 1291, T.I.A.S. No. 6090. Arbitral appeals also differ from the types of appellate procedures contemplated by the Court of Arbitration for Sport (CAS). *See* CAS, Procedural Rules 47-59, http://www.tas-cas.org/en/arbitration/code-procedural-rules.html [hereinafter CAS Arbitration Rules] (discussing arbitral appeals from rulings generated by a federation or national sports body); Louise Reilly, *An Introduction to the Court of Arbitration for Sport (CAS) & The Role of National Courts in International Sports Disputes*, 2012 J. DISP. RESOL. 63, 64-65.
[87] *See* AAA, Optional Appellate Arbitration Rules (Nov. 1, 2013), http://go.adr.org/AppellateRules [hereinafter AAA Appellate Rules]; International Institute for Conflict Prevention and Resolution (CPR) Arbitration Appeal Procedure and Commentary, https://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Clauses%20&%20Rules/CPR%20Arbitration%20Appeal%20Procedure.pdf [hereinafter CPR Appellate Rules]; JAMS, Optional Arbitration Appeal Procedure, http://www.jamsadr.com/appeal/ [hereinafter JAMS Appellate Rules]. Such procedures are not limited to the United States. *See* Arbitrators' and Mediators' Institute of New Zealand (AMINZ), Arbitration Appeals Tribunal, http://www.aminz.org.nz/Category?Action=View&Category_id=172. Furthermore, parties to do not have to adopt an appellate rule set but can instead simply establish arbitral appeal by contract. *See* STRONG, GUIDE, *supra* note 1, at 7-9; Marrow, *supra* note 86, at 13.
[88] Some authorities have suggested that in cases involving two tiers of arbitration, the first decision does not constitute an "award" per se. *See* BORN, *supra* note 2, at 2926 (citing a French decision). However, the initial decision will be referred to as an "award" for purposes of the current discussion.
[89] The notion of what constitutes an appealable issue is by no means entirely clear. *See* Marrow, *supra* note 86, at 14-15. At this point, parties must rely largely on the language reflected in the relevant rules. *See infra* notes 166-71 and accompanying text (discussing the standard and scope of appellate review).

understanding of how and why the initial decision was made.[90] Questions will also arise as to whether and to what extent an appellate award can or should differ from an award at first instance as a matter of form or content.[91]

B. Non-Structural Rationales for Reasoned Awards

As the preceding discussion suggests, there are a number of structural rationales supporting the use of reasoned awards in international commercial arbitration. These structural reasons apply despite the various functional differences between litigation and arbitration. However, there are also several non-structural reasons why reasoned awards are useful or necessary in international commercial arbitration.

First and perhaps most importantly, reasoned awards provide key assurances regarding the nature and quality of justice that is being dispensed by the arbitrator. Commentators have noted that both common law and civil law jurisdictions have recognized a "procedural trinity" that is necessary to establish the rule of law.[92] The three constituent elements include:

1. the audiatur principle (*audiatur et altera pars*), which in England and America forms part of natural justice and due process of law;
2. explicit reasons and fact finding; [and]
3. the right to appeal.[93]

While parties in arbitration are allowed to waive the right to an appeal as well as the right to explicit reasons and fact finding, such waivers are not a required feature of arbitration.[94] To the contrary, as the recent debate about arbitral appeals has shown, parties can enforce these procedural rights to the extent consistent with the arbitral setting.[95] Thus, while it remains to be seen how the reasons requirement in international commercial arbitration compares to similar standards applicable in litigation, it is clear that arbitrators must provide some minimal level of

[90] *See* Kass, *supra* note 86, at 35.
[91] *See infra* notes 157-71 and accompanying text (regarding drafting of appellate awards).
[92] Gunnar Bergholtz, Ratio et Auctoritas: *A Comparative Study of the Significance of Reasoned Decisions with Special Reference to Civil Cases*, 33 SCANDINAVIAN STUDIES IN LAW 11, 44 (1989); *see also* Rogers, *Vocation*, *supra* note 21, at 985 n.97 (claiming "the product of international arbitral decision-making is justice").
[93] Bergholtz, *supra* note 92, at 44.
[94] There has never been any claim that parties in arbitration can waive the audiatur principle. *See* S.I. Strong, *Limits of Procedural Choice of Law*, 39 BROOK. J. INT'L L. 1027, 1100-01 (2014) [hereinafter Strong, *Procedural Limits*]. Furthermore, some jurisdictions do not allow parties to waive the reasoning requirement. *See* Duarte Gorjão Henriques, *Motivation of Arbitral Awards: A Few Notes*, 10 YOUNG ARB. REV. 34, 34-35 (2013) (noting that arbitration awards must be reasoned under Portuguese law).
[95] Thus, for example, parties may require arbitral appeals but not judicial appeals. *See supra* note 86 and accompanying text.

reasoning once the parties have requested a reasoned award.[96] In fact, the length and detail associated with reasoned awards in international commercial arbitration suggests that international arbitrators are far exceeding any minimum requirements.[97]

Second, use of reasoned awards improves the quality of the decision-making process and consequently of the decision itself.[98] As U.S. Circuit Judge Richard Posner has noted, "[r]easoning that seemed sound when 'in the head' may seem half-baked when written down, especially since the written form of an argument encourages some degree of critical detachment in the writer, who in reading what he [or she] has written will be wondering how an audience would react."[99] By encouraging arbitrators to articulate their reasons for following a particular course of action, reasoned awards help "rationalize the . . . process," "safeguard against arbitrary decisions," "prevent consideration of improper and irrelevant factors," "minimize the risk of reliance upon inaccurate information," and "attain[] . . . institutional objective[s] of dispensing equal and impartial justice" while simultaneously "demonstrat[ing] to society that these goals are being met."[100]

Third, reasoned awards can be said to enhance the legitimacy of the arbitral process in the eyes of the arbitrators, the parties and the public by demonstrating the seriousness and integrity of the arbitral endeavor.[101] Reputational concerns may be particularly important as international arbitration comes under increased attack for matters ranging from the lack of transparency to the supposedly preferential treatment of large, multinational firms.[102]

Fourth, reasoned awards provide parties with a more fulsome and satisfactory explanation of why the arbitrator decided as he or she did.[103] This feature can be quite important, since parties – including parties to commercial disputes – are often motivated as much by emotion as by logic, and a party who believes that he or she has not been fully "heard" during the arbitration (a phenomenon that could be directly affected by the quality or content of

[96] *See* Lloyd et al., *supra* note 3, at 27; *see also infra* note 249 and accompanying text. For example, some commentators have suggested that arbitral awards do not necessarily need to have the same degree and depth of legal reasoning as judicial decisions and opinions. *See* BORN, *supra* note 2, at 3044.
[97] *See supra* note 65 and accompanying text; *see also infra* notes 166-306 and accompanying text. Critics of arbitration often claim that arbitration results in "second-class justice." *See* Hiro N. Aragaki, *Arbitration's Suspect Status,* 159 U. PA. L. REV. 1233, 1263 (2011) (tracing history of hostility to arbitration, primarily in the domestic U.S. context).
[98] *See* GEORGE, *supra* note 73, at 27; Fontaine, *supra* note 3, at 34; Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1302 (2008).
[99] Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1447-48 (1995).
[100] FitzMaurice & O'Connor, *supra* note 3, at n.19.
[101] *See id*.; Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 532 (1997) (quoting Thomas Carbonneau for the proposition that "reasoned awards 'could serve as a means of assessing the arbitrators' ability to assure the parties of a principled decisional basis'" (citation omitted)); *see also* GEORGE, *supra* note 73, at 26.
[102] *See* Born, *supra* note 10, at 821 n.202; Rogers, *Transparency*, *supra* note 65, at 1325.
[103] *See* Craig, *supra* note 66, at 284 (noting the importance of satisfying the parties' curiosity as to why the case has been decided as it has); Yackee, *supra* note 2, at 629.

the award) might mount a challenge, even if the chance of prevailing seems relatively low.[104] Indeed, empirical studies have shown that "the perceived fairness of arbitration hearings significantly predicts litigant decisions to accept an arbitration decision," which suggests that fully reasoned awards are beneficial to international commercial arbitration at both an individual and systemic level.[105]

IV. WRITING REASONED AWARDS IN INTERNATIONAL COMMERCIAL ARBITRATION

The preceding section discussed various reasons why reasoned awards are either necessary or useful in international commercial arbitration. However, the frequency with which parties require reasoned awards suggests that few people need to be convinced of the benefits of reasoned awards in cross-border business proceedings.[106] Instead, the primary concern is with the execution of such awards.[107]

Experts agree that writing a reasoned award is an extremely challenging endeavor requiring both time and diligence.[108] However, the task can be greatly facilitated if the arbitrator has a solid grasp of the fundamental principles underlying reasoned awards. The following discussion therefore considers a number of process- and structure-oriented issues relating to reasoned awards in international commercial arbitration so as to improve the understanding of these types of awards and to assist new and experienced arbitrators who are called upon to draft such documents.

A. Issues Relating to the Process

Although some people may view the mechanics of writing an award to be a purely logistical issue, process-related concerns can affect not only the method used to write an award but also its content and structure. The following subsections therefore consider those features that appear to have the most significant effect on the reasoning and form of an arbitral award. The list includes matters involving multi-person tribunals, dissenting and concurring opinions, ruling in

[104] *See* Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal*, 38 J. LEGAL STUD. 121, 126 (2009); Don Peters, *It Takes Two to Tango, and to Mediate: Legal Cultural and Other Factors Influencing United States and Latin American Lawyers' Resistance to Mediating Commercial Disputes*, 9 RICH. J. GLOBAL L. & BUS. 381, 398 n.124 (2010).
[105] *See* Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 177 (2005). The quality of international awards may be one reason why parties traditionally complied with the final decision of the arbitrators. *See* BORN, *supra* note 2, at 3410 (noting most awards are complied with voluntarily). *But see* Strong, *Border Skirmishes*, *supra* note 4, at 2-3, 5-6 (noting increase in judicial procedures regarding arbitration).
[106] *See* STRONG, GUIDE, *supra* note 1, at 22.
[107] *See supra* note 5 and accompanying text.
[108] *See* Hart v. Massanari, 266 F.3d 1155, 1176-77 (9th Cir. 2001); DOMNARSKI, *supra* note 9, at 36; Henry G. Stewart, *Trials of a Neophyte Neutral: The Transition From Full-Time Advocate*, 58 DISP. RESOL. J. 39 (Nov. 2003-Jan.2004) ("[D]eciding cases and writing opinions take much longer than I ever anticipated."); Van Detta 1, *supra* note 18, at 55.

the alternative or on ancillary points, conducting independent legal or factual research, and appellate awards.

1. Multi-person tribunals

Not surprisingly, the process of writing an award differs depending on how many arbitrators are involved.[109] As a rule, sole arbitrators have more flexibility in drafting a reasoned award than members of an arbitral tribunal, since sole arbitrators have only their own consciences to consider.[110] In cases involving multiple arbitrators, the drafting process often includes a certain amount of compromise and negotiation.[111]

Every tribunal approaches the process of writing judgments differently.[112] Usually the chair takes responsibility for putting together the initial draft, although that approach can be changed in any way that suits the arbitrators, such as by giving different panel members different sections to write.[113] Regardless of who has the responsibility for writing a particular section of an award, that person "does not have the luxury of writing independently, but should approach the . . . task so that it will reflect the collective mind of the collegial body that makes up the panel."[114]

Once the first draft is written and circulated, the panel considers the precise language of the proposed award.[115] Ideally, arbitrators who disagree with particular elements should not only identify the substantive grounds of concern but should also offer alternative language for the drafter to consider.[116] This process is critically important because the award must reflect the views of a majority of the tribunal.[117] If the arbitrators can reach only a narrow consensus, then the resulting award will have to be equally narrow.[118]

As the process of deliberation and drafting continues, it may become apparent that consensus cannot be reached on certain points.[119] In those cases, the majority may be able to

[109] *See* Lloyd et al., *supra* note 3, at 25-26.
[110] *See* Ruggero J. Aldisert et al., *Opinion Writing and Opinion Readers*, 31 CARDOZO L. REV. 1, 12-14 (2009).
[111] *See id.* (discussing how the deliberation process affects how an opinion is written); Tom Cobb & Sarah Kaltsounis, *Real Collaborative Context: Opinion Writing and the Appellate Process*, 5 J. ASS'N LEGAL WRITING DIRECTORS 156, 158-63 (2008); Lloyd et al., *supra* note 3, at 25-26.
[112] *See* DOMNARSKI, *supra* note 9, at 32-34; Daniel J. Bussell, *Opinions First – Argument Afterward*, 61 UCLA L. REV. 1194, 1196-97 (2014); Goodwin Liu, *How the California Supreme Court Really Works: A Reply to Professor Bussell*, 61 UCLA L. REV. 1246, 1250-58 (2014); Lloyd et al., *supra* note 3, at 25-26.
[113] *See* Lloyd, *supra* note 3, at 38-39; Lloyd et al., *supra* note 3, at 25-26.
[114] GEORGE, *supra* note 73, at 279.
[115] *See* Aldisert et al., *supra* note 110, at 12-14; Lloyd et al., *supra* note 3, at 25-26.
[116] GEORGE, *supra* note 73, at 281; *see also* Lloyd et al., *supra* note 3, at 26. Criticism should also be limited to matters of substance rather than style. *See* GEORGE, *supra* note 73, at 282.
[117] *See* Aldisert et al., *supra* note 110, at 14; Lloyd et al., *supra* note 3, at 26.
[118] *See* Aldisert et al., *supra* note 110, at 14; Lloyd et al., *supra* note 3, at 26.
[119] *See* Lloyd et al., *supra* note 3, at 26.

overcome the need for a separate opinion by taking the dissenting arbitrator's views into account in the award itself or by going forward with an award that is signed by only two members of the tribunal.[120] However, in some cases, a dissenting panelist may insist on submitting an individual opinion.[121] In those situations, the tribunal will need to refer to the arbitral rules governing the dispute to determine the availability and treatment of separate opinions.[122]

2. Dissenting and concurring opinions

The debate about individual opinions in international commercial arbitration has become increasingly heated in recent years.[123] Although most rule sets permit (or at least do not explicitly disallow) dissents and concurrences in situations where an arbitrator feels he or she cannot join the majority opinion as a matter of conscience, the strong cultural preference in international commercial arbitration is for a single majority award, since a separate opinion is both expensive to draft and largely unnecessary, given that most awards in international commercial arbitration are not published.[124]

Much of the push for dissenting opinions seems to have come from the investment realm, where there is more of an incentive for arbitrators to write separate opinions.[125] For example, a large percentage of investment awards are published in whole or in part, and an arbitrator may wish to write separately so as to help develop the type of "soft precedent" that is said to exist in treaty-based arbitration.[126] Alternatively, an arbitrator may want to set the record

[120] *See* Manuel Arroyo, *Dealing with Dissenting Opinions in the Award: Some Options for the Tribunal*, 25 ASA BULL. 437, 459-64 (2008); Lloyd et al., *supra* note 3, at 26.
[121] *See* Arroyo, *supra* note 120, at 459-64.
[122] *See* C. Mark Baker & Lucy Greenwood, *Dissent – But Only If You Really Feel You Must: Why Dissenting Opinions in International Commercial Arbitration Should Only Appear in Exceptional Circumstances*, 7 DISP. RESOL. INT'L 31, 34 (May 2013). For example, the CIETAC Arbitration Rules indicate that dissenting opinions may be written but will not form part of the award. *See* CIETAC Arbitration Rules, *supra* note 50, art. 49. The CAS Arbitration Rules adopt a similar approach. *See* CAS Arbitration Rules, *supra* note 86, art. 46.
[123] *See* Arroyo, *supra* note 120, at 437; Baker & Greenwood, *supra* note 122, at 31-40; Ilhyung Lee, *Introducing International Commercial Arbitration and Its Lawlessness, by Way of the Dissenting Opinion*, 4 CONTEMP. ASIA ARB. J. 19 (2011); Alan Redfern, *Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly*, *in* ARBITRATION INSIGHTS: TWENTY YEARS OF THE ANNUAL LECTURE OF THE SCHOOL OF INTERNATIONAL ARBITRATION 367, 373-76 (Loukas Mistelis & Julian D.M. Lew eds., 2007); Jacques Werner, *Dissenting Opinions: Beyond Fears*, 9 J. INT'L ARB. 23, 24-25 (1992); *see also* Pedro J. Martinez-Fraga & Harout Jack Samra, *A Defense of Dissents in Investment Arbitration*, 43 U. MIAMI INTER-AM. L. REV. 445, 450-63 (2012).
[124] *See* Arroyo, *supra* note 120, at 458; Baker & Greenwood, *supra* note 122, at 31-40; Redfern, *supra* note 123, at 379-92 (suggesting the current approach is too lenient toward allowing dissents); van den Berg, *supra* note 8, at 821 n.4; *see also* GEORGE, *supra* note 73, at 282, 326-30.
[125] *See* Baker & Greenwood, *supra* note 122, at 39-40.
[126] *See* Kaufmann-Kohler, *supra* note 70, at 361-78; van den Berg, *supra* note 8, at 823.

straight as to his or her views on a particular matter so as to increase the likelihood of winning future appointments.[127]

Although most of the commentary in international arbitration focuses on dissenting opinions, it is also possible for an arbitrator to write a concurring opinion.[128] Concurrences are seen even less frequently than dissents in the international commercial context, since there is little need for such awards in a private, non-precedential system of justice. However, arbitrators in investment proceedings occasionally write concurring opinions for reasons similar to those applicable to dissenting opinions.[129]

Some people oppose the use of individual opinions in international commercial arbitration because such opinions are said to threaten the legitimacy of arbitration by demonstrating a lack of unanimity among the members of the arbitral panel.[130] However, other people believe that a well-written dissent or concurrence can be a positive feature, since such opinions can be seen as advancing the legal debate, so long as the individual opinion is written in a respectful manner.[131] Thus, sarcasm and *ad hominem* attacks should play no role in a dissent, just as they should not in a majority award.[132]

3. Ruling in the alternative or on ancillary points

Another issue that occasionally arises involves the question of whether an arbitrator can or should rule in the alternative or on ancillary points.[133] On the one hand, providing alternative grounds for a decision can be confusing and hence inefficient to the extent that parties who read the award are not able to discern the precise basis on which the holding is founded.[134] On the other hand, reasoning in the alternative can increase efficiency by allowing an appellate tribunal or enforcing court to uphold the decision on the alternative rationale, thereby avoiding the

[127] *See* Martinez-Fraga & Samra, *supra* note 123, at 467-70; van den Berg, *supra* note 8, at 821, 830-31.
[128] Concurrences arise when the decision-maker agrees with the outcome reached by the majority but arrives at that result through different analytical means. *See* van den Berg, *supra* note 8, at 837; *see also* SUPREME COURT OF OHIO, WRITING MANUAL: A GUIDE TO CITATIONS, STYLE AND JUDICIAL OPINION WRITING 153-54 (2012) (noting various types of concurrences), *available at* http://www.supremecourt.ohio.gov/ROD/manual.pdf.
[129] *See* Alemanni v. Argentine Republic, ICSID Case No. ARB/07/8, Concurring Opinion of Mr. J. Christopher Thomas, Q.C., Nov. 17, 2014, *available at* http://www.italaw.com/sites/default/files/case-documents/italaw4064.pdf; van den Berg, *supra* note 8, at 833.
[130] *See* GEORGE, *supra* note 73, at 329; van den Berg, *supra* note 8, at 833.
[131] *See* GEORGE, *supra* note 73, at 281; van den Berg, *supra* note 8, at 825.
[132] *See* GEORGE, *supra* note 73, at 281; van den Berg, *supra* note 8, at 832. Observers have suggested that the increasing use of sarcasm in the judicial context has been detrimental to the public's faith in the courts. *See* Debra Cassens Weiss, *Scalia Tops Law Prof's Sarcasm Index*, ABA L.J. (Jan. 20, 2015).
[133] "An alternative ground used to support a decision is not dictum." GEORGE, *supra* note 73, at 331.
[134] Avoidance of confusion is another reason why judges and arbitrators do not always outline the entire basis for their decision. *See* Konrad Schiermann, *A Response to the Judge As Comparativist*, 80 TULANE L. REV. 281, 287-90 (2005).

possibility of non-enforcement.[135] Providing multiple reasons why a particular party prevails can also provide additional persuasive power in cases where a single rationale might appear insufficient or overly legalistic to the losing party.[136]

Arbitrators might also wonder whether and to what extent awards can or should discuss matters that technically do not need to be decided in order to reach a final conclusion.[137] Normally, such rulings (referred to as *dicta* in common law countries) are unnecessary and unwise in arbitration, since the arbitrator's jurisdiction only extends to the parties themselves and the normal rationales justifying the use of *dicta* do not apply in arbitration.[138] However, some experts have suggested that "there may be occasions when an arbitral tribunal will acknowledge that the parties themselves . . . expect to know the views of the arbitral tribunal on a point of law or of fact which, strictly, does not have to be decided."[139] In those cases, an advisory ruling might be appropriate, so long as that discussion "cannot be used to undermine the central reasoning" of the award.[140]

4. Independent legal or factual research

Another process-oriented question that is often raised involves the extent to which arbitrators may conduct independent research into legal or factual issues.[141] The issue of independent legal research has been addressed extensively in the judicial context, where various authorities have suggested that

> [a] competent judge is not so naive to believe that briefs will always summarize the relevant facts and the applicable law in an accurate fashion. A competent judge uses the briefs as a starting line and not the finish line for his or her own independent research. Not only does a good judge confirm that the authorities

[135] Although this rationale is more important in the judicial context, where substantive appeals are common, arbitration also involves various types of post-award review. *See supra* notes 67-91 and accompanying text.

[136] For example, an arbitrator might find it helpful to indicate that a party who has lost because the claim is inadmissible for some reason (such as the running of the relevant statute of limitations) would also have lost on the merits. *See* Lloyd et al., *supra* note 3, at 33.

[137] *See id.* at 28.

[138] The primary use of *dicta* is to suggest how a court would rule in the future on certain facts not presently at issue. *See* Michael Abramowicz & Maxwell Stearns, *Defining Dicta,* 57 STAN. L. REV. 953, 958 (2005). Courts use *dicta* to guide the future behavior of the parties and those who are similarly situated, thereby reducing the amount of future litigation and increasing judicial efficiency. *See id.* at 1000. Although *dicta* may be useful to the parties in cases where they are in a longstanding relationship that might give rise to future disputes that are somewhat similar to the one in arbitration, none of the other rationales are relevant in the arbitral context.

[139] Lloyd et al., *supra* note 3, at 28.

[140] *Id.*

[141] *See* Phillip Landolt, *Arbitrators' Initiatives to Obtain Factual and Legal Evidence*, 28 ARB. INT'L 173, 173 (2012).

> cited actually support the legal propositions in the briefs, a good judge also makes sure that the authorities continue to represent a correct statement of the law. A member of the bench who fails to independently develop his or her own legal rationale does so at his or her own peril and the peril of the litigants.[142]

Some commentators have gone so far as to say that "[w]hile the briefs prepared by the parties will be useful, there is no substitute for independent research."[143] However, other observers have criticized independent judicial research because it denies the parties of "the opportunity for cross-examination, rebuttal, or the introduction of further testimony."[144] Nevertheless, experts agree that "the prerogative of the judge to search the case law independently and to consult legal treatises is soundly entrenched, presumably to promote uniformity and accuracy in legal interpretation."[145]

The debate about independent legal research also exists in the arbitral realm, although it is colored by the fact that arbitrators do not have the same duty that judges do to ensure the proper development of the law.[146] The contractual nature of arbitration has also led various commentators to argue that parties have a heightened right to develop their own cases and that concerns about "the opportunity for cross-examination, rebuttal, or the introduction of further testimony" should lead arbitrators to avoid undertaking any form of independent legal research.[147]

After weighing these competing interests, most authorities have concluded that arbitrators have the right to conduct independent research but that they should exercise that right in a limited fashion.[148] In particular, arbitrators should ask for supplemental briefing on any question of law that was not initially raised by the parties in their submissions.[149] This approach

[142] Camacho v. Trimble Irrevocable Trust, 756 N.W.2d 596, 298-99 (Wisc. Ct. App. 2008); *see also* Hampton v. Wyant, 296 F.3d 560, 564-65 (7th Cir. 2002).
[143] GEORGE, *supra* note 73, at 199.
[144] Edward K. Cheng, *Independent Judicial Research in the Daubert Age*, 56 DUKE L.J. 1263, 1296 (2007) (noting that "[a] few judges and commentators have advocated against" independent legal research).
[145] *Id.*
[146] *See* GEORGE, *supra* note 73, at 275; Aldisert et al., *supra* note 110, at 14; Audley Sheppard, *Mandatory Rules in International Commercial Arbitration – An English Perspective*, 18 AM. REV. INT'L ARB. 121, 144 (2007) (discussing the concept of *jura novit curia* (*iura novit curia*) in international commercial arbitration).
[147] Cheng, *supra* note 144, at 1296; Marrow, *supra* note 86, at 24-30. *But see* Gaitis, *supra* note 9, at 17 (suggesting that "[t]he reasoning section of reasoned awards . . . , on occasion, contains citations to legal authorities that were not presented to the tribunal by the parties").
[148] *See* International Law Association, International Commercial Arbitration Committee, *Final Report – Ascertaining the Contents of the Applicable Law in International Commercial Arbitration* (2008) [hereinafter ILA Report]; Gaitis, *supra* note 9, at 17; Landolt, *supra* note 141, at nn.4-6, 39; Marrow, *supra* note 86, at 30; Sheppard, *supra* note 146, at 144-45.
[149] *See* ILA Report, *supra* note 148; Bernardo M. Cremades, *Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration*, 14 ARB. INT'L 157, n.5 (1998); Gaitis, *supra* note 9, at 17; Landolt, *supra* note 141, at nn.4-6, 39; Marrow, *supra* note 86, at 30; Sheppard, *supra* note 146, at 144-45.

is justified on the grounds that it increases the likelihood that the arbitrator will arrive at the correct conclusion of law while simultaneously avoiding surprise and allowing the parties to take the lead in developing their cases.[150] However, concerns about surprise and autonomy are not implicated with respect to legal materials that have been cited by the parties in their submissions. Therefore, an arbitrator may and perhaps should "confirm that the authorities cited actually support the legal propositions in the briefs" and ensure that the authorities "continue to represent a correct statement of the law."[151]

The situation involving independent factual research is somewhat different.[152] For example, analogies to judicial processes are largely unhelpful, since "the rules governing independent [factual] research are astonishingly unclear" and the bench is sharply divided as to what the best course of action is.[153] To the extent that any sort of consensus exists, it appears to suggest that judges should conduct independent factual research very rarely and only in the interests of justice.[154]

Although the issue has seldom been discussed in the arbitral realm, those authorities that have considered the matter have indicated that independent factual research should be treated in the same way as independent legal research.[155] Thus, an arbitrator who has discovered a factual issue of relevance should ask the parties to provide further evidentiary submissions on that matter so as to avoid the possibility of a subsequent challenge.[156]

5. Appellate awards

Although arbitral appeals are not at this point a frequent occurrence, the amount of commentary and institutional activity currently being dedicated to this issue suggests that such procedures may become relatively routine in the future.[157] If that should indeed happen, the question then

[150] *See* A v. B, Tribunal Fédéral, Ière Cour de Droit Civil, 4A_554/2014 (Apr. 15, 2015), 33 ASA BULL. 406, 406–15 (2015) (discussing situation where "plaintiff applied to the Supreme Court to have an arbitral award annulled, alleging that the arbitral tribunal had violated due process by relying in its award on an unpredictable application of the law" and concluding "that arbitral tribunals are free to apply the law (*iura novit curia*), subject only to a prohibition on taking the parties by surprise"). Concerns exist that an arbitrator who has exceeded his or her power to conduct independent research could create a situation where the award would be unenforceable. *See* Landolt, *supra* note 141, at nn.39, 64-85.
[151] Camacho v. Trimble Irrevocable Trust, 756 N.W.2d 596, 298-99 (Wisc. Ct. App. 2008); *see also* Hampton v. Wyant, 296 F.3d 560, 564-65 (7th Cir. 2002).
[152] *See* Cheng, *supra* note 144, at 1297; Landolt, *supra* note 141, at nn.1-2.
[153] Cheng, *supra* note 144, at 1267; *see also* Hernandez v. State, 116 S.W.3d 26, 32 (Tx. Ct. Crim. App. 2003) (Keller, P.J., concurring); GEORGE, *supra* note 73, at 276.
[154] *See* GEORGE, *supra* note 73, at 276. In fact, empirical research suggests this is indeed what happens. *See* Joshua Karton, *The Arbitral Role in Contractual Interpretation*, 6 J. INT'L DISP. SETTLEMENT 4, nn.37-38 (2015).
[155] *See* Landolt, *supra* note 141, at nn.7-8, 91-94; *see also* Sheppard, *supra* note 146, at 144-45.
[156] *See* Landolt, *supra* note 141, at nn.7-8; *see also* Cremades, *supra* note 149, nn.17-26.
[157] *See* M. Scott Donahey, *A Proposal for an Appellate Panel for the Uniform Domain Name Dispute Resolution Policy*, 18 J. INT'L ARB. 131, 131-34 (2001); Christian A. Garza & Christopher D. Kratovil, *Contracting for Private Appellate Review of Arbitration Awards*, 19 APP. ADVOCATE 17 (2007)

arises as to whether an appellate award should be written differently than an award at first instance.[158] Unfortunately, there is no real analysis of this issue from the arbitral perspective. Indeed, most of the appellate rules that are currently in place do not discuss the form of the appellate award at all.[159]

Fortunately, a functional analysis provides some useful insights into this particular concern.[160] For example, if an appellate tribunal is seen as functionally equivalent to an appellate court, then an appellate award might need to be written slightly differently than an award at first instance, just as an appellate opinion is written slightly differently than a trial court decision.[161]

Appellate opinions differ from decisions at first instance in a number of ways, at least in the judicial context.[162] Many of these differences arise because appellate judges typically have an obligation to achieve an outcome that is not only appropriate in the dispute at bar (justice *in personam*) but also in any similar cases that may arise in the future (justice *in rem*).[163] However, this feature does not appear to translate to the arbitral realm, since the duty to provide justice *in*

(discussing various rule sets); Erin E. Gleason, *International Arbitral Appeals: What Are We So Afraid Of?* 7 PEPP. DISP. RESOL. L.J. 269, 286-87 (2007); Roger B. Jacobs, *Compared and Contrasted: Skepticism and Promise in the Major Providers' Appellate Arbitration Procedures,* 33 ALT. TO HIGH COST LITIG. 19 (Feb. 2015); Margie-Lys Jamie, *An Appellate Body in Treaty-Based Investment Arbitration: Redefining the Investor-State Dispute Settlement Mechanism*, 21 SPAIN ARB. REV. / REVISTA DEL CLUB ESPAÑOL DEL ARBITRAJE 93, 94-97 (2014); Platt, *supra* note 75, at 547-52; Mauro Rubino-Sammartano, *An International Arbitral Court of Appeal as an Alternative to Long Attacks and Recognition Proceedings*, 6 J. INT'L ARB. 181, 181-88 (1989); Hon. David B. Saxe, *An Appellate Mechanism in Arbitration,* 86 N.Y. ST. B.J. 44, 45 (Nov./Dec. 2013) (supporting arbitral appeals in some cases); Ten Cate, *supra* note 6, at 1111. The debate has been particularly pitched in the context of investment arbitration, which raises somewhat different questions due to the quasi-public nature of investor-state disputes. *See* Barry Appleton, *The Song is Over: Why It's Time to Stop Talking About an International Investment Arbitration Appellate Body*, 107 AM. SOC'Y INT'L L. PROC. 23, 23 (Apr. 3-6, 2013) (discussing an arbitral appellate procedure created by international treaty); David A. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges,* 39 VAND. J. TRANSNAT'L L. 39 (2006); Ian Laird & Rebecca Askew, *Finality versus Consistency: Does Investor-State Arbitration Need an Appellate System?* 7 J. APP. PRAC. & PROCESSES 283, 286-87 (2005).

[158] *See supra* note 88 (discussing nomenclature regarding arbitral decisions below).

[159] *See* AAA Appellate Rules, *supra* note 87; CPR Appellate Rules, *supra* note 87; *see also* Platt, *supra* note 75, at 547-52 (discussing arbitral appeals under the Spanish Arbitration Act, the Rules of the Spanish Court of Arbitration, the Rules of the European Court of Arbitration and the International Arbitration Chamber of Paris (Chambre Arbitrale de Paris)). The one organization that does refer to the form of the appellate award does so only at a very general level, simply stating that "[t]he Panel's decision will consist of a concise written explanation, unless all Parties agree otherwise." *See* JAMS Appellate Rules, *supra* note 87, Rule D.

[160] *See* Michaels, *supra* note 56, at 342, 357; *see also supra* note 56 and accompanying text.

[161] *See* GEORGE, *supra* note 73, at 257 (considering appellate opinions in court).

[162] *See* Strong, *Writing*, *supra* note 6, at __.

[163] *See* GEORGE, *supra* note 73, at 275; Aldisert et al., *supra* note 110, at 14.

rem is directly related to the role that appellate opinions play in developing the rule of law and arbitral awards do not generate precedent in the same way that judicial opinions do.[164]

Appellate judges also have a heightened duty to include a detailed description of the procedural history of the dispute so as to establish the standard, scope and propriety of appellate review.[165] This feature could also be necessary in arbitration. However, a number of questions exist regarding the standard and scope of appellate review in arbitration.

Matters of scope are addressed, at least in some degree, by most appellate rule sets. Thus, for example, the American Arbitration Association (AAA) indicates in its rules on appellate arbitration that "[a] party may appeal on the grounds that the Underlying Award is based upon: (1) an error of law that is material and prejudicial; or (2) determinations of fact that are clearly erroneous."[166] Other arbitral organizations focus on similar criteria.[167] However,

[164] *See* Strong, *Writing*, *supra* note 6, at __; *see also supra* notes 68-69 and accompanying text. Although civil law jurisdictions do not adhere to precedent in quite the same way that common law countries do, civil law countries still recognize the need to develop consistent interpretations of the law. *See* DE CRUZ, *supra* note 72, at 70.

[165] *See* Strong, *Writing*, *supra* note 6, at __.

[166] AAA Appellate Rules, *supra* note 87, Rule A-10. The AAA further indicates that

> (a) Within thirty (30) days of service of the last brief, the appeal tribunal shall take one of the following actions:
> 1. adopt the Underlying Award as its own, or,
> 2. substitute its own award for the Underlying Award (incorporating those aspects of the Underlying Award that are not vacated or modified), or,
> 3. request additional information and notify the parties of the tribunal's exercise of an option to extend the time to render a decision, not to exceed thirty (30) days.
>
> The appeal tribunal may not order a new arbitration hearing or send the case back to the original arbitrator(s) for corrections or further review.

Id. Rule A-19.

[167] Thus, the CPR rules on appellate procedure state that

> 8.2 If the Tribunal hears the Appeal, it may issue an Appellate Award modifying or setting aside the Original Award, but only on the following grounds:
> a. That the Original Award (i) contains material and prejudicial errors of law of such a nature that it does not rest upon any appropriate legal basis, or (ii) is based upon factual findings clearly unsupported by the record; or
> b. That the Original Award is subject to one or more of the grounds set forth in Section 10 of the Federal Arbitration Act for vacating an award. The Tribunal does not have the power to remand the award.
>
> 8.3 If the Tribunal does not modify or set aside the Original Award pursuant to Rule 8.2 above, it shall issue an Appellate Award approving the Original Award and the Original Award shall be final as provided in Rule 8.6 below.

CPR Appellate Rules, *supra* note 87, Rule 8.

these provisions could be difficult to implement in practice, given the problems associated with distinguishing between findings of fact and conclusions of law.[168]

The situation is even more challenging with respect to questions relating to the standard of review, since only one arbitral organization – JAMS – addresses the standard of review in its appellate rules.[169] As a result, it is by no means clear in most cases whether and to what extent appellate arbitrators should defer to arbitrators at first instance as opposed to simply considering the matter *de novo*. In judicial appeals in the United States, the appropriate standard is usually determined by reference to the matter under review, with the three most frequently used standards – clear error, abuse of discretion and plenary (*de novo*) review – typically relating to evidentiary, discretionary and legal matters, respectively.[170] However, recent decisions from the U.S. Supreme Court have made that standard increasingly difficult to apply.[171] Other national laws could be similarly problematic.

B. Issues Relating to the Framework

As important as process-oriented issues are, perhaps the most challenging issue in this area of law involves the framework for reasoned awards. The following sub-sections therefore discuss various aspects of a fully reasoned award, including core considerations relating to scope, structure, and, to a lesser extent, style.

[168] *See* Miller v. Fenton, 474 U.S. 104, 113-14 (1985); *see also supra* notes 54-55 and accompanying text.

[169] The JAMS rules on appellate procedures state

> The Appeal Panel will apply the same standard of review that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision. The Appeal Panel will respect the evidentiary standard set forth in Rule 22(d) of the JAMS Comprehensive Arbitration Rules. The Panel may affirm, reverse or modify an Award. The Panel may not remand to the original arbitrator(s), but may re-open the record in order to review evidence that had been improperly excluded by the Arbitrator(s) or evidence that is now necessary in light of the Panel's interpretation of the relevant substantive law. . . . The Panel's decision will consist of a concise written explanation, unless all Parties agree otherwise.

JAMS Appellate Rules, *supra* note 87, Rule D. However, JAMS does not address the scope or trigger for review. *See id.*

[170] *See* Aldisert et al., *supra* note 110, at 30. Notably, the standard of review differs from the scope of review. *See* GEORGE, *supra* note 73, at 297.

[171] Recent decisions from the U.S. Supreme Court have permitted, if not required, *de novo* analysis of certain mixed questions of law and fact. *See* Russell M. Coombs, *A Third Parallel Primrose Path: The Supreme Court's Repeated, Unexplained, and Still Growing Regulation of State Courts' Criminal Appeals*, 2005 MICH. ST. L. REV. 541, 547-48. However, distinguishing questions of law from questions of fact is quite challenging. *See Miller*, 474 U.S. at 113-14; *see also supra* notes 54-55 and accompanying text.

1. Style

Although this Article does not address issues relating to diction, sentence structure, punctuation and the like, some so-called elements of style have a significant effect on the substance of an award, since they affect not just the mode of an author's communication but the ability to communicate effectively.[172] Since the first duty of an arbitrator is to produce a clear, internationally enforceable award, it is necessary to consider a few stylistic concerns.[173]

The first point involves the audience for arbitral awards.[174] Because the parties "have an all-pervasive interest" in the outcome of the dispute,[175] conventional wisdom suggests that arbitrators should direct their statements primarily if not exclusively to the litigants.[176]

This conclusion has significant repercussions for the style that an arbitrator adopts when writing an award, since parties who have taken the trouble and expense of contracting for a reasoned award want to know not only who won, but why.[177] Most parties do not have extensive training in the law, which means that arbitrators need to write awards that are "clear, logical, unambiguous, and free of" legal jargon.[178] Indeed, many experts have recognized that "[t]he mark of a well-written opinion is that it is comprehensible to an intelligent layperson."[179] Furthermore, awards "should not . . . be turned into briefs or vehicles for advocacy."[180]

Although arbitral awards are directed primarily to the parties, arbitrators need to keep other potential audience members in mind. For example, an award may need to be read by a national court judge as part of a collateral or enforcement proceeding.[181] Not all judges are as knowledgeable about the arbitral process as they could be, which suggests that an arbitrator may need to explain the nuances of the governing law and arbitral procedure so as to avoid any judicial misunderstandings.[182] The possibility of judicial confusion may be heightened in cases

[172] *See supra* note 47 and accompanying text.
[173] *See* Lloyd et al., *supra* note 3, at 20-21.
[174] Knowing one's audience is one of the fundamental rules of good writing, regardless of context. *See* Jeffrey A. Van Detta, *The Decline and Fall of the American Judicial Opinion, Part II: Back to the Future From the Roberts Court to Learned Hand – Segmentation, Audience, and the Opportunity of Justice Sotomayor,* 13 BARRY L. REV. 29, 34 (2009) [hereinafter Van Detta 2].
[175] Aldisert et al., *supra* note 110, at 17.
[176] *See* Marx, *supra* note 5, at 23 (expanding the audience slightly); *see also* Aldisert et al., *supra* note 110, at 17 (discussing judicial opinions).
[177] *See* Lloyd, *supra* note 3, at 40.
[178] Aldisert et al., *supra* note 110, at 18. Those who are writing an award in a second language often must take additional steps to make sure that they are using foreign legal terms properly and adhering to party expectations regarding the form and content of the award. *See* STRONG ET AL., *supra* note 11, ch. 1; Lloyd, *supra* note 3, at 39.
[179] FEDERAL JUDICIAL CENTER, JUDICIAL WRITING MANUAL: A POCKET GUIDE FOR JUDGES 6 (2d edn, 2013) [hereinafter FJC MANUAL], *available at* www.fjc.gov.
[180] *Id.* at 5.
[181] *See* Lloyd et al., *supra* note 3, at 28.
[182] Judges are often confused about the special nature of international commercial arbitration. *See* STRONG, GUIDE, *supra* note 1, at 1. Numerous national and international organizations are taking steps to address this issue. *See* S.I. Strong, *Improving Judicial Performance in Matters Involving International*

where the award is being enforced across the common law-civil law divide. In those situations, the arbitrator may wish to be particularly careful about making sure that the award includes various elements that will be familiar to the enforcing judge.[183]

An award may also be read by various private parties.[184] For example, an insurer may need to read an award to determine whether and to what extent any damages granted by the arbitrator fall within the terms of a business insurance policy.[185] In these sorts of cases, an arbitrator may want to be particularly clear about the nature of the underlying financial calculations, including issues relating to taxes, interest and costs.[186]

The second stylistic issue to consider involves consistency and coherence in relation to the citation of legal authorities.[187] Advocates are often advised to take their audience into account when drafting written submissions in international commercial arbitration and, in particular, to make sure that the presentation and discussion of legal materials take into account the various differences between the civil and common law.[188] The diversity of potential audience members for international commercial awards suggests that arbitrators should follow this general rule as well, since there is no way for the author of an international award to anticipate all future uses of an award or the legal background of all potential audience members.[189] As a result, international arbitrators must be very familiar with the role that different legal authorities play in arbitration and the various ways in which common law and civil law courts approach the citation, interpretation and application of legal materials.[190]

The third and final stylistic issue to mention involves the use of headers. Commentators have noted that the length of international awards makes it useful for arbitrators to make generous use of headings, sub-headings and other types of subdivisions so as to increase the reader's understanding of the structure of the award.[191] It is also often "convenient to number the paragraphs or groups of paragraphs to facilitate cross-referencing within the award."[192]

Arbitration, *in* SELECTED TOPICS IN INTERNATIONAL ARBITRATION: LIBER AMICORUM __ (Julio César Betancourt ed., forthcoming 2015).

[183] *See* Lloyd et al., *supra* note 3, at 31; *see also infra* notes 187-90 and accompanying text.

[184] *See* Lloyd, *supra* note 3, at 41.

[185] *See* Lloyd et al., *supra* note 3, at 29.

[186] *See id.* at 33-34.

[187] *See* Aldisert et al., *supra* note 110, at 18.

[188] *See* STRONG, RESEARCH, *supra* note 8, at 9-37 (discussing role of legal authority in international commercial arbitration); S.I. Strong, *Research in International Commercial Arbitration: Special Skills, Special Sources*, 20 AM. REV. INT'L ARB. 119, 130-45 (2009) [hereinafter Strong, *Sources*] (same).

[189] *See supra* notes 76-85 and accompanying text.

[190] STRONG, RESEARCH, *supra* note 8, at 9-37 (discussing role of legal authority in international commercial arbitration); Karton, *supra* note 154, at n.6; *see also* Strong, *Sources*, *supra* note 188, at 130-45 (same); STRONG ET AL., *supra* note 11, at chs. 4-6 (discussing the interpretation and use of legal authority in common law and civil law jurisdictions, particularly in Spanish- and English-speaking countries).

[191] *See* Fontaine, *supra* note 3, at 36; *see also supra* note 65 and accompanying text.

[192] Fontaine, *supra* note 3, at 36.

2. Scope

One of the first things that an arbitrator must do when sitting down to draft an award is decide the scope of the analysis.[193] Conventional wisdom suggests that a reasoned award should include a full discussion of "the nature of the case, the issues, the facts, the law applicable to the facts, and the legal reasoning applied to resolve the controversy."[194] This type of content is necessary because the award "is the authoritative answer to the questions raised by the [arbitration] . . . [and] should explain the reasons upon which the [award] is to rest."[195]

Although this description may be useful as a starting point, it fails to provide sufficiently specific advice to arbitrators faced with drafting a reasoned award. In particular, this type of general guidance fails to recognize how an award can and should be adapted in response to different types of disputes.

i. A taxonomy of arbitral disputes

When drafting awards, arbitrators from both common law and civil law jurisdictions would be well-advised to consider reviewing *The Nature of the Judicial Process,* one of the seminal guides on judicial opinion-writing.[196] In that book, U.S. Supreme Court Justice Benjamin Cardozo suggests that there are three different types of disputes that can result in a judicial ruling and demonstrates how a reasoned ruling can and should be adapted to take those underlying differences into account.[197]

"The first category . . . is comprised of those cases where '[t]he law and its application alike are plain.' Such cases 'could not, with semblance of reason, be decided in any way but one.'"[198] Cardozo's suggestion in these sorts of situations is for the adjudicator to avoid drafting a lengthy written opinion because such a ruling would contribute nothing to the jurisprudence in the field.[199]

Of course, an arbitrator who is contractually bound to render a reasoned award does not have the luxury of refusing to write a reasoned award simply because the outcome of the dispute appears clear on its face.[200] However, Cardozo's analysis provides a useful way for arbitrators to save costs by suggesting that an award addressing this type of dispute need not be very long or very detailed to be considered "reasoned."[201] Indeed, judges addressing matters falling within

[193] *See* FJC MANUAL, *supra* note 179, at 3-7 (discussing scope in the context of judicial opinions).
[194] GEORGE, *supra* note 73, at 32-33.
[195] *Id.* at 32-33.
[196] *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1949).
[197] *See* CARDOZO, *supra* note 196, at 164-65; Aldisert et al., *supra* note 110, at 8.
[198] Aldisert et al., *supra* note 110, at 8-9 (quoting CARDOZO, *supra* note 196, at 164-65).
[199] *See* CARDOZO, *supra* note 196, at 164-65; Aldisert et al., *supra* note 110, at 8-9.
[200] CARDOZO, *supra* note 196, at 164.
[201] Writing an award can be a time-consuming task and an extremely expensive one in situations where arbitrators are paid by the hour. *See* Stewart, *supra* note 108, at 39 (noting the length of time it takes to write an award).

this first category of cases usually render a summary judgment order that runs no more than a single page in length.[202] While an international award would need to be longer than that due to a number of logistical requirements that arise out of the special nature of international commercial arbitration, an arbitrator could nevertheless be quite succinct in the analytical section and still produce an award that could be considered fully reasoned in the circumstances.[203]

The second category of cases described by Cardozo involves situations

> where "the rule of law is certain, and the application alone doubtful." In such cases,
>
> > [a] complicated record must be dissected, the narratives of witnesses, more or less incoherent and unintelligible, must be analyzed, to determine whether a given situation comes within one district or another upon the chart of rights and wrongs. . . . Often these cases . . . provoke difference of opinion among judges. Jurisprudence remains untouched, however, regardless of the outcome.[204]

In these sorts of situations, Cardozo suggests rendering a non-precedential judicial opinion.[205] On one level, this sort of advice may not seem helpful to arbitrators, since arbitral awards are already considered non-precedential.[206] However, closer examination of the nature of a non-precedential judicial opinion provides useful lessons for international arbitrators.

Judges faced with this second category of cases typically issue a memorandum opinion.[207] These documents are slightly more fulsome than the summary orders used in Cardozo's first category of cases and provide a short description of how the court arrived at its decision, even though they do not include a detailed discussion of the facts or a comprehensive explanation of the legal rationales underlying the decision.[208] Although arbitrators are again bound by their contractual duty to provide a fully reasoned award, Cardozo's taxonomy suggests that analyses in this second category of cases can and should focus on those elements that are most in contention (i.e., the facts) while spending less time on those matters that are not

[202] *See* CARDOZO, *supra* note 196, at 164; Aldisert et al., *supra* note 110, at 10-11; *see also* FJC MANUAL, *supra* note 179, app. B (suggesting that these types of orders include a brief statement of the findings of fact and conclusions of law, but without a detailed explanation of why the court reached the outcome that it did).
[203] *See* Lloyd et al., *supra* note 3, at 29-31 (describing various logistical requirements and basic data needs in international commercial awards); *see also infra* notes 255-56 and accompanying text.
[204] Aldisert et al., *supra* note 110, at 8-9 (quoting CARDOZO, *supra* note 196, at 164-65.
[205] *See* CARDOZO, *supra* note 196, at 164-65; Aldisert et al., *supra* note 110, at 8-9.
[206] *See supra* notes 68-69 and accompanying text.
[207] *See* CARDOZO, *supra* note 196, at 164; *see also* Aldisert et al., *supra* note 110, at 8, 11.
[208] *See* GEORGE, *supra* note 73, at 325-26; Aldisert et al., *supra* note 110, at 11; *see also* FJC MANUAL, *supra* note 179, app. A.

really debatable (i.e., the law).[209] By focusing on what is truly at issue and avoiding the notion that a reasoned award in international commercial arbitration requires exhaustive analysis of every nuance of the dispute, arbitrators can operate in an efficient, timely and cost-effective manner without jeopardizing the enforceability of the award or the parties' interest in understanding how and why the result was obtained.[210] Indeed, a number of civil law legal systems have shown that length has little to do with whether a legal ruling can be considered reasoned.[211]

Cardozo then goes on to discuss his "third and final category" of cases, which is the only one he believes should generate a fully reasoned ruling.[212] This category

> is comprised of cases "where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law. . . ." From such cases, each modestly articulating a narrow rule, emerge the principles that form the backbone of a court's jurisprudence and warrant full-length, signed published opinions.[213]

Some aspects of Cardozo's analysis (for example, statements about "the development of the law") do not apply to arbitration.[214] However, Cardozo's description of this third category of cases is nevertheless useful because it helps arbitrators identify those types of disputes that merit a detailed analysis of both the facts and the law.[215] As a result, awards falling into this category will probably be somewhat longer than those in the previous two categories, since the legal and factual issues are both more complicated.[216]

Although Cardozo's taxonomy is useful in distinguishing between different types of disputes, it does not address a number of more detailed issues, such as how a judge or arbitrator is to distinguish between a factual finding and a legal conclusion.[217] That particular analysis is extremely challenging even for experienced decision-makers, since "the appropriate

[209] *See* CARDOZO, *supra* note 196, at 164; *see also* Aldisert et al., *supra* note 110, at 8, 11.
[210] *See* Fontaine, *supra* note 3, at 34. The international legal and business communities have expressed concern about the time it takes many arbitrators to generate their awards. *See* Berwin Leighton Paisner, International Arbitration: Research Based Report on Perceived Delay in the Arbitration Process 15-19 (2012), *available at* https://www.blplaw.com/media/pdfs/Reports/BLP_International_Arbitration_Survey_Delay_in_the_Arbitration_Process_July_2012.pdf.
[211] *See supra* notes 60-63 and accompanying text; *see also* BORN, *supra* note 2, at 3041-42 (noting that "in some instances, longer is not better").
[212] Aldisert et al., *supra* note 110, at 8-9 (quoting CARDOZO, *supra* note 196, at 164-65).
[213] Aldisert et al., *supra* note 110, at 8-9 (quoting CARDOZO, *supra* note 196, at 164-65); *see also* GEORGE, *supra* note 73, at 32-34 (discussing types of judicial writings).
[214] *See supra* notes 68-69 and accompanying text.
[215] *See* CARDOZO, *supra* note 196, at 164-65.
[216] *See supra* notes 198-211 and accompanying text.
[217] *See* CARDOZO, *supra* note 196, at 164-65.

methodology . . . has been, to say the least, elusive."[218] This matter is discussed in more detail in the following subsection.

ii. Distinguishing between factual findings and legal conclusions

When considered in the abstract, distinguishing between factual findings and legal conclusions appears relatively easy. For example, "[f]indings of fact may be defined as those facts which are deduced from the evidence and which are found by the . . . [arbitrator] to be essential to the judgment rendered in the case."[219] Conclusions of law, on the other hand, "are drawn by the . . . [arbitrator] through the exercise of her [or her] legal judgment from those facts he [or she] has found previously as the trier of fact."[220]

As straightforward as these definitions appear, they can be quite challenging to apply in practice.[221] The situation is further exacerbated in the international context by virtue of certain differences between common law and civil law analyses. For example, it has been said that

> [a] civilian system differs from a common law system much as rationalism differs from empiricism or deduction from induction. The civilian naturally reasons from principles to instances, the common lawyer from instances to principles. The civilian puts his faith in syllogisms, the common lawyer in precedents; the first silently asking himself as each new problem arises, "What should we do this time?" and the second asking aloud in the same situation, "What did we do last time?" . . . The instinct of a civilian is to systematize. The working rule of the common lawyer is *solvitur ambulando*.[222]

Another way of describing the differences between the two legal systems is by recognizing that the common law places

> its faith in experience rather than in abstractions. It is a frame of mind which prefers to go forward cautiously on the basis of experience from this case or that case to the next case, as justice in each case seems to require, instead of seeking to refer everything back to supposed universals. It is a frame of mind which is not ambitious to deduce the decision for the case in hand from a proposition formulated universally . . . . It is the . . . habit of dealing with things as they arise

[218] Miller v. Fenton, 474 U.S. 104, 113-14 (1985) (citations omitted); *see also* GEORGE, *supra* note 73, at 235-38 (including examples).
[219] GEORGE, *supra* note 73, at 188 (noting findings of fact are "a form of judicial inquiry").
[220] *Id.* at 189 (noting "[w]hen the judge considers the facts and draws the legal conclusion . . . [the statement] becomes a conclusion of law").
[221] *See Miller*, 474 U.S. at 113-14.
[222] Lord Cooper, *The Common Law and the Civil Law – A Scot's View*, 63 HARV. L. REV. 468, 470 (1950), *as quoted in* ZWEIGERT & KÖTZ, *supra* note 67, at 259.

> instead of anticipating them by abstract universal formulas [as is the case with the civil law].[223]

Differences in the nature of common law and civil law analysis can have a significant effect on how an arbitrator writes an award. Indeed, both the form and the content of an arbitral award will likely be influenced by the legal system with which an arbitrator is most familiar, at least to some extent.[224]

This is not to say that an arbitrator cannot or should not adopt a more blended perspective in appropriate circumstances.[225] In fact, the most successful international arbitrators in the world are renowned for precisely that ability.[226] However, it can be difficult for novice arbitrators to overcome their early training and learn how to reflect an appropriately international perspective in their awards.[227]

Perhaps the best way to explain how this type of comparative methodology can be applied in international commercial arbitration is through an example involving a situation where an arbitrator has been asked to apply the substantive law of a country that not only differs from the law with which the arbitrator is most familiar but that falls on the other side of the common law-civil law divide.[228] In these types of cases, the arbitrator needs to adopt certain comparative legal skills to be sure that he or she is ascertaining, interpreting and applying the appropriate legal standard.[229]

[223] Roscoe Pound, *What Is the Common Law*, *in* THE FUTURE OF THE COMMON LAW 3, 18 (1937), as quoted in ZWEIGERT & KÖTZ, *supra* note 67, at 259.

[224] *See* Lloyd et al., *supra* note 3, at 20. For example, arbitrators from common law jurisdictions often spend a significant amount of time discussing the underlying facts and analyzing legal precedents while arbitrators from civil law jurisdictions focus more heavily on categorizing the type of legal issues at stake during the initial stages of the analysis. *See id.*; *see also* Bergholtz, *supra* note 92, at 42.

[225] This approach can not only be useful in communicating the arbitrator's rationale to the parties, it can be helpful in smoothing the path to enforcement. *See* Lloyd et al., *supra* note 3, at 31 ("If a national court has ever to examine an award, for example for the purposes of recognition or setting aside, it will naturally be less likely to be critical if the reasoning adopts a pattern with which it is familiar.")

[226] *See* Emmanuel Gaillard, *Sociology of International Arbitration*, 31 ARB. INT'L 1, 8 (2015) (listing most popular international arbitrators in the world).

[227] *See* Helena Whalen-Bridge, *The Reluctant Comparativist: Teaching Common Law Reasoning to Civil Law Students and the Future of Comparative Legal Skills*, 58 J. LEGAL EDUC. 364, 368-69 (2008). While an arbitrator should never pretend to be an expert in foreign law, that person cannot ignore the governing law simply because he or she is not qualified in that jurisdiction. However, each arbitrator was intentionally selected so as to be able to bring his or her unique technical or legal skills to bear on the problem at hand, resulting in a more blended analysis of the law and the facts at issue. *See* Cremades, *supra* note 149, at 172; Miles, *supra* note 35, at 39-41. Arbitrators in international commercial arbitration may not only be qualified in a jurisdiction different than the one whose law controls the dispute, they may be qualified as lawyers in no jurisdiction whatsoever. *See id.; see also* BORN, *supra* note 2, at 1679, 1745 (noting that only some jurisdictions require arbitrators to be legally qualified).

[228] *See* Friesen, *supra* note 60, at 3.

[229] *See* Strong, *Sources*, *supra* note 188, at 145-50. Interestingly, parties have been known to require arbitrators to apply common law and civil law principles simultaneously. *See* William W. Park, *Michael Mustill: A Reminiscence*, 31 ARB. INT'L __ (forthcoming 2015) (discussing the *Channel Tunnel Case*,

Thus, for instance, a French-qualified arbitrator who is faced with a dispute governed by U.S. law might want to adopt more of a common law methodology when seeking to ascertain the governing legal principles.[230] In so doing, the arbitrator would likely give considerable weight to case law in his or her deliberations and drafting[231] and might also place a stronger emphasis on factual considerations than he or she would normally do.[232] Finally, the arbitrator might consider discussing how the facts in the case generated the legal principles chosen to govern the dispute.[233]

Similarly, a U.S.-qualified arbitrator faced with a dispute governed by French law might want to approach the dispute from more of a civil law perspective.[234] In so doing, the arbitrator would likely rely heavily on scholarly commentary when interpreting and applying various statutes and would avoid focusing exclusively on case law as a guide to interpretation.[235] Similarly, the arbitrator might interpret legislation from more of a purposive or teleological perspective rather than rely on the four-corners or plain meaning doctrine[236] would perhaps aim to derive the applicable legal standard primarily by reference to various legal principles rather than through factual analogies.[237]

Although this approach may seem complicated and perhaps somewhat confusing to those who have not undertaken such analyses, all of the underlying interpretive techniques are used in both common law and civil law jurisdictions, even if conventional wisdom tends to associate particular methodologies more closely with one or the other of the two legal traditions.[238] Therefore, this approach does not require arbitrators to abandon their longstanding professional expertise but instead encourages them to supplement their analysis by incorporating techniques and authorities that are used and valued in the legal system whose law controls.[239]

Channel Group v. Balfour Beatty Ltd. [1993] Adj. L. R. 01/21, which involved a contract requiring application of common principles of English and French law); *see also* Karton, *supra* note 154, at nn.45-46 (discussing the ICC awards in the *Channel Tunnel Case*, referred to in this example as the *Eurotunnel* cases).

[230] *See* Strong, *Sources*, *supra* note 188, at 145-50; *see also* Karton, *supra* note 154, at nn.185-89.

[231] *See* ZWEIGERT & KÖTZ, *supra* note 67, at 259.

[232] *See id.*

[233] *See id.*

[234] *See id.*; Carl Baudenbacher, *Some Remarks on the Method of Civil Law*, 34 TEX. INT'L L.J. 333, 348-49 (1999) (discussing the hermeneutical nature of contemporary civil law analysis); Friesen, *supra* note 60, at 7-11. One commentator has suggested that that "a civil law perspective on contractual interpretation predominates" in international commercial arbitration. *See* Karton, *supra* note 154, at n.53.

[235] *See* Strong, *Sources*, *supra* note 188, at 145-50; *see also* Karton, *supra* note 154, at nn.185-89.

[236] *See* S.I. Strong, *Beyond the Self-Execution Analysis: Rationalizing Constitutional, Treaty and Statutory Interpretation in International Commercial Arbitration*, 53 VA. J. INT'L L. 499, 571 (2013).

[237] *See* Strong, *Sources*, *supra* note 188, at 145-50. This is not to say that different interpretive techniques may not lead to different outcomes, since that is obviously the case. *See* Karton, *supra* note 154, at nn.111-22.

[238] *See* Strong, *Sources*, *supra* note 188, at 145-50.

[239] The technique is explained thusly by Bernardo Cremades, a highly esteemed international arbitrator:

Notably, arbitrators cannot hope to hide their evaluative approach, since any and all influences on the arbitrator's analytical methodology will necessarily affect the manner in which the final award is written, both as a matter of style and content.[240] Indeed, commentators have long recognized that the substance of a legal ruling influences the form, as well as the reverse.[241]

3. Structure

i. Required elements

As important as questions of style and scope may be, the real challenge for those charged with writing an arbitral award involves structure. Without a good structural framework, an arbitrator cannot hope to persuade or even inform his or her readers.[242]

Some structural concerns have already been resolved by the international arbitral community.[243] Thus, as noted previously, reasoned awards in international commercial arbitration are usually quite lengthy and tend to adopt an approach reminiscent of judicial opinions generated by common law and certain civil law courts.[244] As a result, international awards are often longer and more formal than arbitral awards rendered in domestic proceedings, even in cases that feature legal and factual issues that are as complicated those arising in the cross-border context.[245]

> [A]rbitrators display their real expertise and professionalism at the time of making their decision, placing aside their individual cultural background. Thus, the truly international arbitrator is one who is immediately able to distinguish what is purely local from that which is outside his own national frontiers and within a globalized economy. His professionalism leads his decision to be independent from the "bag and baggage" of the system or national systems from which he originates: *da mihi factum et tibi dabo ius*. In the final decision, he is not conditioned either by his geographical origin or by education, race, religion or even personal sympathies. Here lies the true professionalism of the international arbitrator who knows how to face the expectations of the parties, who have chosen him for his impartiality and neutrality.

Cremades, *supra* note 149, n.27 (citation omitted).

[240] Bergholtz, *supra* note 92, at 42 (noting that "[i]n the grounds of legal decisions form and substance, procedural form and substantive law, meet"); *see also* STRONG, RESEARCH, *supra* note 8, at 3-7; Baudenbacher, *supra* note 234, at 348-49; Cremades, *supra* note 149, at 161; Friesen, *supra* note 60, at 7-11. Although some commmentators have suggested that arbitrators do not explicitly describe their interpretive approach, that does not mean that the interpretive methodology cannot be gleaned from the structure, style and content of the opinion. *See* Karton, *supra* note 154, at nn.13-29.

[241] *See* Bergholtz, *supra* note 92, at 42.

[242] *See* STRONG & DESNOYER, *supra* note 48, ch. 1.

[243] *See supra* notes 60-63 and accompanying text.

[244] *See* Lloyd et al., *supra* note 3, at 29-31; *see supra* notes 60-61 and accompanying text.

[245] *See* STRONG, GUIDE, *supra* note 1, at 3-6. For example, class arbitrations are often as complex as international commercial arbitrations, with similar amounts in dispute. *See* S.I. Strong, *Does Class*

The length of international awards can be somewhat problematic, given that arbitration is supposed to reduce the time and costs associated with resolving legal disputes and writing a fully reasoned award is often both expensive and time-consuming.[246] Indeed, Gary Born, one of the leading commentators in the field, has recognized that "in some instances, longer is not better."[247]

However, the detailed analysis reflected in many international awards can be defended on several grounds. For example, an arbitrator may perceive a heightened need to explain international commercial arbitration's uniquely blended procedural approach to those who may be unfamiliar with the process.[248] Alternatively, an arbitrator may wish to demonstrate his or her faithfulness to the contractual obligation to produce a reasoned award.[249]

These are both reasonable justifications for longer and more detailed awards. However, the real reason for the length of most international awards may lie in the nature of a reasoned award itself. For example, experts have suggested that an award in international commercial arbitration

> should inform the reader that the arbitral tribunal has acted in a judicial manner, not just in the way in which it heard the dispute but in the manner in which the dispute was decided, i.e., the reasoning must be both thorough and self-sufficient. The award must therefore be – and be seen to be – the product of compliance by the arbitral tribunal with the fundamental principles of the processes by which civil disputes are to be resolved (insofar as they apply to arbitration). Thus the

Arbitration "Change the Nature" of Arbitration? Stolt-Nielsen, AT&T and a Return to First Principles, 17 HARV. NEGOT. L. REV. 201, 262-66 (2012). However, class awards often adopt a different structure and tone than international awards. *Compare* Contractor (Zambia) v. Producer (Zambia), Final Award, ICC Case No. 16484, 2011, XXXIX Y.B. COMM. ARB. 216 (2014) (reflecting an international award) *with* Hausner v. United – Clause Construction Award, AAA Class Arbitration Docket, www.adr.org.

[246] *See* Stewart, *supra* note 108, at 39 (noting the length of time it takes to write an award). Notably, some arbitrators in international commercial arbitration are not paid by the hour. *See* ICC Arbitration Rules, *supra* note 50, Appx. III, art. IV (basing arbitrator's fees on amount in dispute).

[247] BORN, *supra* note 2, at 3041-42.

[248] Enforcing courts often need to assess the fairness of the arbitral procedure, which will be reflected in certain aspects of the award. *See* Lloyd et al., *supra* note 3, at 24-25 ("National courts throughout the world also expect or require certain fundamental principles to be followed by arbitral tribunals, such as the right of a party to know and to be able to deal with the case against it. The award must make it clear that these principles have been observed by the arbitral tribunal and how the tribunal did so."); *see also* New York Convention, *supra* note 78, art. V.

[249] *See* Lloyd et al., *supra* note 3, at 27 ("The arbitral tribunal ought to facilitate voluntary compliance [with an award] by producing an award which explains clearly and persuasively how and why it has arrived at its conclusions."); *see also* Bergholtz, *supra* note 92, at 45, 48 (noting that judges also need to demonstrate their faithfulness with legal authority so as to avoid being perceived as arbitrary). These obligations include the duty to comply with necessary procedural rules as well as the duty to comply with the substantive law chosen explicitly or implicitly by the parties. *See* BORN, *supra* note 2, at 1963-64; Strong, *Procedural Limits*, *supra* note 94, at 1089-1109 (noting the limits on procedural and substantive autonomy in international commercial arbitration).

> arbitral tribunal must allow each party the opportunity to answer the case against it and also any pertinent point raised by the arbitral tribunal on its own initiative, as well as to deal with any fact or allegation brought to the attention of the tribunal.[250]

These requirements have significant ramifications with respect to the structure of the award, as discussed in the next sub-section.

ii. A classical structural framework

As mentioned previously, arbitrators do not need to adhere to any pre-established structural norms when drafting international awards.[251] Instead, arbitrators simply need to fulfill various functional requirements[252] that may be imposed privately, institutionally[253] or as a result of the special nature of arbitration.[254]

A number of these elements are relatively straightforward. For example, an international award should include:

- the names of the arbitrator(s)
- the manner in which the tribunal came to be appointed;
- the names and addresses of the parties (including any company or commercial registration number) and of their legal or other representatives;
- how the dispute arose (and thus why an arbitral award is required);
- the terms of the arbitration agreement (and any variations) – these are best set out in full as they establish the basis for the jurisdiction of the arbitral tribunal; . . .
- the place of the arbitration together with how it came to be chosen;
- the law or rules applicable to the merits of the dispute and whether they were agreed by the parties or decided by the arbitral tribunal (in the latter case, the reasons considered to be appropriate by the arbitral tribunal must be given at some point in the award); . . .
- the procedural rules agreed [by the parties] . . . or determined by the arbitral tribunal;

[250] Lloyd et al., *supra* note 3, at 21.
[251] *See id.* at 20.
[252] *See* BORN, *supra* note 2, at 3037-45.
[253] For example, the ICC has a number of form requirements that may not apply in other types of proceedings. *See* Lloyd et al., *supra* note 3, at 23; *see also* BORN, *supra* note 2, at 3030-37.
[254] For example, an arbitrator must be aware of any requirements imposed as a result of the national law of the seat or by the New York Convention. *See* New York Convention, *supra* note 78; Lloyd, *supra* note 3, at 41. Authorities also suggest that an arbitrator should be aware of any requirements imposed at the place where the award is likely to be enforced. *See* Fontaine, *supra* note 3, at 31-32.

- the language or languages of the arbitration (and any departures therefrom and the reason for any such deviation);
- the principal chronology both of the dispute and of the proceedings . . . ;
- the steps that the arbitral tribunal took, in accordance with the procedural rules, to ascertain the facts of the case;
- the dates of any evidentiary hearings and previous awards; [and]
- the date when the proceedings were closed.[255]

This material, which usually appears at the beginning of the arbitral award, is relatively easy to draft, which obviates the need for further discussion herein.[256] Instead, this Article will focus on issues relating to the arbitrator's legal reasoning and factual analysis, since those are the elements that are the most challenging for both new and experienced arbitrators.[257]

Although very little material exists on how arbitrators should draft the reasoning section of an international award,[258] extensive commentary exists regarding judicial reasoning.[259] While arbitral awards do not necessarily have to reflect the same degree and depth of analysis as judicial decisions and opinions, it nevertheless appears useful to consider the various recommendations made to judges in case the advice is transferrable to arbitration.[260] In so doing, it will of course be necessary to take into account the various functional differences between arbitral awards and judicial rulings.[261]

It is impossible to provide a comprehensive analysis of every type of reasoned analysis, since every nation takes its own particular approach to judicial writing.[262] However, one popular

[255] Lloyd et al., *supra* note 3, at 29-30 (footnotes omitted). Other logistical information, such as that relating to the appointment of a tribunal expert, can be included in this section if necessary. *See id.* at 30. This material is necessary in case the award ever needs to be enforced internationally and therefore should be presented in a strictly informational and non-controversial manner. *See id.*

[256] *See id.*

[257] *See id.* at 31-37.

[258] *See id.* at 29-31; *see also supra* notes 8-13 and accompanying text.

[259] *See supra* note 38 (listing authorities); *see also infra* note 262.

[260] *See* BORN, *supra* note 2, at 3044.

[261] *See* Michaels, *supra* note 56, at 342, 357; *see also supra* notes 56-57 and accompanying text.

[262] *See* FJC MANUAL, *supra* note 179 (United States); CHERYL THOMAS, REVIEW OF JUDICIAL TRAINING IN OTHER JURISDICTIONS 8, 16 (May 2006) (discussing judicial writing programs around the world and noting the United States, Canada and Spain are leaders in judicial education, offering numerous courses in "judge craft," which includes judicial writing), http://www.ucl.ac.uk/laws/judicial-institute/files/Judicial_Training_and_Education_in_other_Jurisdictions.pdf ; *see also* European Commission, European Judicial Training, Good Training Practices (noting courses on decision writing from Estonia and the Netherlands), https://e-justice.europa.eu/content_good_training_practices-311-en.do?clang=en#n03; National Judicial Institute – Institut Nacional de la Magistrature, Judicial Education Course Calendar, https://www.nji-inm.ca/index.cfm/publications/ (offering advanced courses in opinion-writing); Susan Glazebrook, *Restoring Image and Trust Through Judicial Training on Communication*, 2 JUD. EDUC. & TRAINING: J. INT'L ORG. JUD. TRAINING 50, 55-56 (2014) (discussing judicial writing in New Zealand); Plan Docente de Formación Inicial 66a Promoción de la Carrera Judicial, Curso 2014-2016 Escuela Judicial 22 (2014) (noting the need to provide training in writing

multicultural model is based on the classical principles of Greco-Roman rhetoric.[263] The long-standing appeal of this particular approach, combined with its proven effectiveness in a variety of countries and contexts, could prove very useful for those seeking to rationalize drafting techniques in international commercial arbitration.[264] Indeed, close examination of existing awards suggests that this approach is already quite common in the international realm.[265]

This model includes five different sections, including:

- an opening paragraph or orientation (*exordium*);
- a summary of the issues to be discussed (*divisio*);
- a recitation of material adjudicative facts (*narratio*);
- an analysis of the legal issues (*confirmatio a. confutatio*); and
- a conclusion indicating the holding or disposition (*peroratio*).[266]

Each section is considered in more detail below.

a. Orientation (exordium)

The classical principles of rhetoric suggest that every reasoned award should begin with an opening or orientation section that puts the legal and factual discussion into context and lets the

reasoned judicial rulings during the initial training (formación inicial) at the Spanish judicial training institute (La Escuela Judicial, part of the Consejo General de Poder Judicial), *available at* http://www.poderjudicial.es/stfls/CGPJ/ESCUELA%20JUDICIAL/FORMACIÓN%20INICIAL/PLANES%20DE%20FORMACIÓN/FICHERO/20141222%20Plan%20Docente%2066PCataleg%20justicia%20nou%20(negro).swf.

[263] *See* RUGGERO J. ALDISERT, OPINION WRITING 77-82 (2d ed. 2009); FJC MANUAL, *supra* note 179, at 13; GEORGE, *supra* note 73, at 291-304; MAILHOT & CARNWATH, *supra* note 31, at 37-38; EDWARD D. RE, APPELLATE OPINION WRITING 11 (1975), *available at* http://www.fjc.gov; SUPREME COURT OF OHIO, *supra* note 128 (providing an outline of a judgment); Aldisert et al., *supra* note 110, at 24; George Rose Smith, *A Primer of Opinion Writing, for Four New Judges*, 21 ARK. L. REV. 197, 204 (1967); *see also* Justice Roslyn Atkinson, *Judicial Writing*, Australasian Institute of Judicial Administration (2002) (Australia; citing Greco-Roman principles and citing the FLAC (facts-law-application-conclusion) system, which is similar to analytical techniques used in the United States and England), *available at* http://www.aija.org.au/Mag02/Roslyn%20Atkinson.pdf.

[264] *See* Aldisert et al., *supra* note 110, at 24; Van Detta 2, *supra* note 174, at 32.

[265] *See* Fontaine, *supra* note 3, at 34-35 (writing from a civil law perspective); Lloyd, *supra* note 3, at 41-45 (writing from a common law perspective); Lloyd et al., *supra* note 3, at 29-37 (writing from a mixed common law-civil law perspective).

[266] *See* Aldisert et al., *supra* note 110, at 24; *see also* ALDISERT, *supra* note 263, at 77-82; FJC MANUAL, *supra* note 179, at 13; GEORGE, *supra* note 73, at 291-304; MAILHOT & CARNWATH, *supra* note 31, at 37-38; RE, *supra* note 263, at 11; SUPREME COURT OF OHIO, *supra* note 128, at 129-30; Smith, *supra* note 263, at 204.

reader know what is to come.[267] This sort of roadmap or executive summary[268] should include all of the critical information about the case and attempt to "pique the opinion reader's interest with its language."[269]

Experts suggest that a well-written orientation section should provide answers to six key questions known to every journalist: who, what, when, where, why and how.[270] "Who" is perhaps the easiest of the questions to answer, since it simply requires the arbitrator to identify the parties and their counsel.[271] If the matter is being heard on arbitral appeal, then the orientation section should also indicate who prevailed in the first proceeding.[272]

The concept of "what" is also relatively straightforward and simply requires the arbitrator to identify the major factual and legal issues that are at stake.[273] Thus, for example, an arbitrator might indicate that the case involved a claim in negligence and that the primary issue in contention involved whether the respondent owed a legal duty to the claimant.[274] This section should also outline any remedies or relief sought by the parties in their claims or counterclaims.[275]

"When" refers to the time of the legal injury so as to establish whether the dispute has been brought in a timely manner.[276] Timing may also be important to the calculation of damages or interest[277] or to the issue of whether an arbitral appeal has been brought within the proper period of time.[278]

"Where" can be considered a jurisdictional question. For example, it is critical in an international proceeding that the arbitrator identify the arbitral seat.[279] Appellate arbitrators may

[267] *See* Aldisert et al., *supra* note 110, at 24-25. Some commentators refer to this section as "the nature of the action." GEORGE, *supra* note 73, at 162.
[268] *See* Lloyd et al., *supra* note 3, at 32 (discussing "points on order"); *see also* STRONG, HOW TO WRITE, *supra* note 31, at 180-81.
[269] Aldisert et al., *supra* note 110, at 27. For examples of both good and bad orientation paragraphs, *see* Smith, *supra* note 263, at 205 (citing Johnson v. Smith, 219 S.W. 2d 926 (Ark. 1949); McClure Ins. Agency v. Hudson, 377 S.W. 2d 814 (Ark. 1964); Garner v. Amsler, 377 S.W.2d 872 (Ark. 1964); and Dereuisseaux v. Bell, 378 S.W.2d 208 (Ark. 1964)).
[270] *See* GEORGE, *supra* note 73, at 12; Smith, *supra* note 263, at 204.
[271] *See* Aldisert et al., *supra* note 110, at 26.
[272] *See id.*
[273] *See id.*
[274] The tort of negligence typically requires the plaintiff to establish the existence of a legal duty, breach of that duty, legal causation, factual causation and damages, at least in the United States. *See* Detraz v. Lee, 950 So.2d 557, 562 (La. 2007); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §6, cmt. b. Only some of these issues will be in doubt in any particular case. *See* STRONG, HOW TO WRITE, *supra* note 31, at 39.
[275] *See* Lloyd et al., *supra* note 3, at 31.
[276] *See* GEORGE, *supra* note 73, at 12; Smith, *supra* note 263, at 204.
[277] *See* GEORGE, *supra* note 73, at 12; Smith, *supra* note 263, at 204.
[278] *See* Aldisert et al., *supra* note 110, at 26. Parties typically have between fourteen and thirty days from the date the underlying award is issued or finalized to file an appeal. *See* AAA Appellate Rules, *supra* note 87, Rule A-3 (providing for thirty days); CPR Appellate Rules, *supra* note 87, Rule 2.1 (providing for thirty days); JAMS Appellate Rules, *supra* note 87, Procedure B(i) (providing for fourteen days).
[279] *See* Lloyd et al., *supra* note 3, at 29-30.

wish to establish the provenance of the dispute so as to demonstrate that appellate jurisdiction exists.[280]

The next question relates to "why" the matter has been brought to the arbitrator's attention. Sometimes this issue will have already been answered as a result of the "who," "what," "when" or "where" analyses.[281] If the motivation for the suit has not already been addressed, the arbitrator should discuss the matter independently, since the question of "why is this matter being brought before this arbitrator at this time" is fundamental to every proceeding.[282]

"How" can be interpreted in two ways. First, "how" can refer to the manner in which the issue reached the arbitrator.[283] Because arbitration is a creature of contract, it is important for an arbitrator to demonstrate that all the necessary requirements have been met before taking jurisdiction over the dispute.[284]

Second, "how" can refer to the manner in which the arbitrator has decided to rule. While some arbitrators believe that withholding the result until the end of the award increases the reader's anticipation, there is little to be gained by not indicating the outcome of the dispute in the orientation paragraph, since most readers who do not find the outcome at the beginning of the award will simply turn to the dispositive section at the end of the document.[285] As a result, most authorities suggest that the orientation paragraph should include a reference to the holding or disposition "as a guide to the intelligent reading" of the award.[286]

When announcing the outcome of the dispute, either in the orientation paragraph or the dispositive section, arbitrators should avoid using the passive tense or other indirect language (such as "I believe"), since such phrases "dilute the vigour which should characterize the result."[287] A clear reference to the outcome of the case may be particularly important in "splintered" awards in which a claim is denied in part and granted in part.[288] Disputes with multiple opinions offer similar opportunities for confusion, which suggests a heightened need for a well-written orientation paragraph.[289]

[280] *See* Aldisert et al., *supra* note 110, at 26.
[281] *See* GEORGE, *supra* note 73, at 12; Smith, *supra* note 263, at 204.
[282] *See* GEORGE, *supra* note 73, at 12; Smith, *supra* note 263, at 204.
[283] *See* GEORGE, *supra* note 73, at 12; Smith, *supra* note 263, at 204.
[284] *See* Lloyd et al., *supra* note 3, at 29-30.
[285] *See* GEORGE, *supra* note 73, at 301; MAILHOT & CARNWATH, *supra* note 31, at 53; Lloyd et al., *supra* note 3, at 35 ("The award must contain, often at the very end, a section containing the dispositive part of the award.").
[286] Aldisert et al., *supra* note 110, at 27 (quoting B.E. WITKIN, MANUAL ON APPELLATE COURT OPINIONS §57, at 93 (1977)).
[287] MAILHOT & CARNWATH, *supra* note 31, at 54.
[288] *See* SUPREME COURT OF OHIO, *supra* note 128, at 150 (containing example).
[289] *See* Robin Kundis Craig, *Agencies Interpreting Courts Interpreting Statutes: The Deference Conundrum of a Divided Supreme Court*, 61 EMORY L. J. 1, 7-10 (2011) (discussing the difficulties associated with plurality opinions); Justin Marceau, *Plurality Decisions: Upward-Flowing Precedent and Acoustic Separation*, 45 CONN. L. REV. 933, 935-37 (2013) (same).

Although the orientation section is comprehensive in scope, it should be very brief.[290] Learning to write a good orientation takes practice, and even experienced arbitrators spend considerable time getting the wording just right.[291] However, the benefits of a clear, concise opening justify the time spent.

b. Summary of legal issues (divisio)

The second section of a reasoned award involves a summary of the various legal issues that will be discussed in the body of the document.[292] This section focuses exclusively on legal issues, since factual issues are considered separately.[293]

Some common law arbitrators may worry about discussing legal issues outside their factual context, thinking that such an analysis is too academic and treatise-like.[294] However, the goal in this subsection is not to discuss the law in a vacuum but rather to provide a clear analysis of the legal dispute that will ultimately be informed by the material adjudicative facts.[295] This technique not only brings the discussion of legal concerns down to a manageable size, it helps the reader understand the materiality of the facts that that are presented later in the decision or opinion.[296] As one expert notes, "[t]he effect is like reading a review of a movie before seeing it, so that one knows what to look for in the theater."[297] Arbitrators from civil law systems are less likely to be troubled by this particular element of the award, since they have a great deal of experience in categorizing legal disputes as an initial matter.[298]

Some disputes present more than one legal issue.[299] In those cases, an arbitrator can either present all of the potential issues in a single summary paragraph or split up the various issues and introduce them in separate paragraphs under topic sentences introducing individual sub-issues.[300] Either approach is fine, so long as the structure is clear to the reader. The arbitrator should also note if any changes have been made to the claims or counterclaims and

[290] *See* Aldisert et al., *supra* note 110, at 26.
[291] *See id.*
[292] *See id.* at 28.
[293] An issue can be defined as "a point in dispute between two or more parties." BLACK'S LAW DICTIONARY (2009). Strictly separating the legal and factual analysis is a skill that is first taught in law school, at least in the United States and the United Kingdom. *See* STRONG, HOW TO WRITE, *supra* note 31, at 53-97 (discussing legal education in England and Wales); STRONG & DESNOYER, *supra* note 48, chs. 4-5 (discussing legal education in the United States).
[294] *See* STRONG, HOW TO WRITE, *supra* note 31, at 69, 81.
[295] *See* Aldisert et al., *supra* note 110, at 28. Adjudicative facts are those that are adduced through evidence at trial. *See, e.g.*, FED. R. EVID. 201, advisory committee note (a).
[296] *See* Aldisert et al., *supra* note 110, at 28.
[297] *Id.*
[298] *See* Cooper, *supra* note 222, at 470 (noting the civil lawyer's need to "systematize"); *see also* ZWEIGERT & KÖTZ, *supra* note 67, at 259.
[299] *See* STRONG, HOW TO WRITE, *supra* note 31, at 42-43 (discussing cases with multiple causes of action and/or multiple party pairings); Aldisert et al., *supra* note 110, at 28.
[300] *See* Aldisert et al., *supra* note 110, at 28-29.

how those changes came about (for example, through a party amendment to the pleadings or as a result of a decision by the arbitrator).[301]

When discussing legal issues, it is usually not necessary to address everything raised by counsel in detail, since not every point will be equally contentious.[302] While it is important to address any claim, defense, error or objection that has been properly raised, some concerns do not merit lengthy analysis and can be handled in a relatively succinct manner.[303] Furthermore, it is important to separate the arguments of the parties from the legal conclusions identified by the arbitrators.[304]

Awards generated by appellate arbitration need to include one additional item, namely a brief description of the appropriate standard of review.[305] Debates involving the standard of review will likely increase in the coming years, since existing rules on arbitral appeals provide little guidance as to what either the scope or the standard of review should be in arbitration.[306]

c. Statement of facts (narratio)

All reasoned rulings, be they judicial or arbitral, must include a statement of the relevant facts.[307] This is an area where common law and civil law arbitrators may differ in their approach, since common law lawyers often see a wider range and number of facts as relevant to the dispute at hand.[308] However, lawyers trained in civil law jurisdictions have long recognized the importance that factual issues play in legal reasoning, even if civil law methodology differs from that of the common law.[309]

A well-written factual analysis "requires an identification of resemblances, which we may call positive analogies, and differences, which we may call negative analogies."[310] Although an arbitrator must include all the relevant facts, he or she must avoid introducing any unnecessary facts, since additional elements not only slow the reader down but may cause

[301] *See* Lloyd et al., *supra* note 3, at 31.
[302] *See* GEORGE, *supra* note 73, at 167; Aldisert et al., *supra* note 110, at 29; *see also* MAILHOT & CARNWATH, *supra* note 31, at 51 (noting "if the plaintiff is in favour of a proposition the reader can usually infer the defendant is against it"); *supra* notes 197-218 and accompanying text.
[303] *See* GEORGE, *supra* note 73, at 295; Aldisert et al., *supra* note 110, at 29.
[304] *See* Lloyd et al., *supra* note 3, at 33.
[305] *See* Aldisert et al., *supra* note 110, at 30-31.
[306] *See supra* notes 166-71 and accompanying text.
[307] *See* Aldisert et al., *supra* note 110, at 24; Lloyd et al., *supra* note 3, at 32.
[308] *See* Fontaine, *supra* note 3, at 34 ("The summary of the facts will be confined to the essential points (even though arbitrators from common law countries tend to lend particular weight to this part of the award), taking a stand on any disputed points.").
[309] *See* Baudenbacher, *supra* note 234, at 348-49 (discussing the hermeneutical nature of contemporary civil law analysis); *see also supra* notes 221-23 and accompanying text.
[310] ALDISERT, *supra* note 263, at 136.

confusion about the scope of the legal principle enunciated in the award.[311] As a result, "[o]nly material, adjudicative facts" should be reflected in the award.[312]

To determine what facts are material, an arbitrator must look to the substantive law controlling that issue.[313] Only "facts that might affect the outcome of the suit under the governing law" can be considered material.[314] Focusing on facts "that are truly essential as opposed to those that are decorative and adventitious" allows the "conclusion . . . to follow so naturally and inevitably as almost to prove itself."[315]

When summarizing the facts, arbitrators must ensure the accuracy of each individual element.[316] "While the author may interpret the law liberally or strictly, he [or she] must not take this kind of liberty with the facts."[317] As a result, arbitrators should avoid adopting any proposed findings of facts submitted by the parties, both to minimize error and to prevent claims that the arbitrator did not exercise independent judgment when reviewing the facts.[318]

When describing the material facts, an arbitrator needs to do more than simply recount the evidence.[319] Instead, the award must "set out express findings of fact showing how the . . . [arbitrator] reasoned from the evidentiary facts to the ultimate fact" that decides a particular

[311] *See* Aldisert et al., *supra* note 110, at 31.
[312] *Id.*
[313] *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (considering materiality in the context of a motion for summary judgment). Different jurisdictions may adopt different definitions as to the materiality of a certain issue. *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010), Brief of the International Chamber of Commerce et al. as Amicus Curiae in Support of Respondents, at 24 (noting the different definitions of materiality under U.S. and Swiss law).
[314] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (considering materiality in the context of a motion for summary judgment); *see also* Youngblood v. West Virginia, 547 U.S. 867, 870 (2006); Willis v. Roche Biomedical Lab., Inc., 61 F.3d 313, 315 (5th Cir. 1995); Buirkle v. Hanover Ins. Co., 832 F. Supp. 2d. 469, 471-73, 489 (D. Mass. 1993); People v. White, 308 N.W.2d 128, 131-32 (Mich. 1981); ALDISERT, *supra* note 263, at 137. For examples from both U.S. and English law, *see id.* at 139-40 (discussing Rylands v. Fletcher, (1868) L.R. 3 H.L. 330 (HL), and Brown v. Board of Education, 347 U.S. 483 (1954)).
[315] Aldisert et al., *supra* note 110, at 31-32 (quoting Benjamin N. Cardozo, *Law and Literature*, 14 YALE L.J. 705 (1925)); *see also* ALDISERT, *supra* note 263, at 138-40. In some ways, the task of deciding what constitutes a material versus non-material fact is not as difficult as it seems, since an arbitrator has been considering those issues throughout the proceedings. *See* GEORGE, *supra* note 73, at 232 (noting the "definition of what is and is not [legally] at issue . . . determines the evidence to be presented and limits what will be heard" at trial)
[316] *See* Aldisert et al., *supra* note 110, at 33.
[317] GEORGE, *supra* note 73, at 164.
[318] *See* El Paso 376 U.S. 651, 656-57 (1964); United States v. Crescent Amusement Co., 323 U.S. 173, 184-85 (1944); Bright v. Westmoreland County, 380 F.3d 729, 731-32 (3d Cir. 2004); GEORGE, *supra* note 73, at 187. Commentators have cautioned against "judicial plagiarism," which occurs when a judge does not give proper credit for a particular statement or proposition. *See id.* at 707-27. Arbitrators could be subject to a similar charge if they copy parties' proposals too closely.
[319] *See* GEORGE, *supra* note 73, at 194-95.

legal issue.[320] While experts often suggest a chronological approach to the factual analysis, some disputes lend themselves to another type of organizational structure.[321]

If witnesses testified at the hearing, the arbitrator should address issues of credibility.[322] However, the award does not need to list all of the witnesses who have appeared.[323] Instead, it is sufficient to "identify the undisputed facts and make findings of those in dispute, all within the rubric of pertinence. It is important to make findings of credibility when establishing the probative force of a witness' testimony, and to give reasons."[324]

Some authorities believe that the summary of facts should precede the summary of legal issues, although there is no consensus on that point.[325] Ultimately, the order of the various sections is a matter of logic and individual preference.[326] However, most experts suggest writing the summary of legal issues before writing the summary of facts so as to avoid the introduction of immaterial factual information.[327] Sections can be rearranged later, during the editing process.[328]

d. Analysis of the legal issues (*confirmatio a. confutatio*)

The fourth section of a classically constructed award involves a detailed analysis of the legal issues and describes why the arbitrator has reached the outcome in question.[329] Some authorities refer to this as the "application" section, since this is the place where the law that has been identified in the legal summary is applied to the facts.[330]

Arbitrators can organize this section in a variety of ways, depending on the nature of the dispute. For example, if one issue can be considered dispositive, then the arbitrator may want to

[320] *Id.* at 195 (discussing an example). The arbitrator "must formulate the ultimate or conclusionary fact by scrutinizing the evidentiary facts." *Id.* (discussing judicial practices).
[321] *See* MAILHOT & CARNWATH, *supra* note 31, at 48.
[322] *See id.* at 50.
[323] *See id.*
[324] *Id.*
[325] *See* Aldisert et al., *supra* note 110, at 24. One expert suggests that "[f]acts should be stated in the past tense" while "[p]ropositions of law should be stated in the present tense," but that does not appear to be a hard and fast rule. GEORGE, *supra* note 73, at 163.
[326] *See* Aldisert et al., *supra* note 110, at 28, 33.
[327] *See* MAILHOT & CARNWATH, *supra* note 31, at 45-47; Aldisert et al., *supra* note 110, at 28.
[328] *See* Aldisert et al., *supra* note 110, at 28, 33. Editing is as important as writing. *See* MAILHOT & CARNWATH, *supra* note 31, at 84 (suggesting judges revise their draft texts somewhere between three and eight times).
[329] *See* Aldisert et al., *supra* note 110, at 34.
[330] *See* Lloyd et al., *supra* note 3, at 33. This technique is reminiscent of the legal writing methodology used in the United States, England and Australia. *See* STRONG, HOW TO WRITE, *supra* note 31, chs. 3-6 (discussing the IRAC (issue-rule-application-conclusion) system in the United States); STRONG & DESNOYER, *supra* note 48, chs. 3-6 (discussing the CLEO (claim-law-evaluation-outcome) system in England); Atkinson, *supra* note 263, at 3 (discussing FLAC (facts-law-application-conclusion) in Australia).

begin by addressing that element.[331] Alternatively, if no single issue controls the outcome, then the arbitrator could adopt the organizational approach used by counsel or begin with either the easiest or the most difficult of the outstanding issues, whichever seems best.[332] Regardless of which technique is used, "[t]here is but one obligation: to correctly describe the arguments in support of each party's position on each issue, and to give clear reasons justifying the result."[333]

When drafting an award, an arbitrator needs to be aware of the various ways that reasoned awards differ from written advocacy.[334] For example, reasoned awards

> resemble[] a form of justification. . . . [Arbitrators] are not required to convince, but rather to make themselves understood. They must therefore express their reasons in a fashion that will carry with them the support of the majority of the readers. The losing parties may never be convinced their cause was wrong but they are entitled to know why they lost and how the judge reached that result.[335]

Experts suggest that arbitrators adopt a thoughtful and neutral tone so as to give the parties reason to trust in the integrity of the award.[336] Arbitrators also should be careful about adopting any proposed conclusions of law submitted by a party, since that may cause the losing party to have doubts about the independence and impartiality of the arbitrator.[337]

Functionally, arbitrators "must decide all the issues in a case on the basis of general principles that have legal relevance; . . . and the opinion justifying the decision should contain a full statement of those principles."[338] Although "[t]he legal conclusion should cover each of the legal elements required to decide the case,"[339] the goal is not to "state the law [as] fully and comprehensively . . . as might be expected in writing a law review" or "to resolve unasked questions or legal issues not yet in dispute."[340] Furthermore, a well-drafted legal analysis

[331] *See* MAILHOT & CARNWATH, *supra* note 31, at 51.
[332] *See id.*
[333] *Id.*; *see also* GEORGE, *supra* note73, at 172 (noting each issue discussed requires a separate conclusion); MAILHOT & CARNWATH, *supra* note 31, at 52 (noting "reasons are the foundation of the result, a form of justification"); Aldisert et al., *supra* note 110, at 34.
[334] MAILHOT & CARNWATH, *supra* note 31, at 52.
[335] *Id.*; *see also* ALDISERT, *supra* note 263, at 157-66 (discussing inductive and deductive reasoning).
[336] *See* Aldisert et al., *supra* note 110, at 34; Fontaine, *supra* note 3, at 36-37. Arbitrators may also need to discuss any concurring or dissenting opinions. *See* Arroyo, *supra* note 120, at 459-64. While some authors address their colleagues' concerns in the body of the award (a step that may be necessary if the analysis of the dissent or concurrence is quite long), it is also possible to address these matters in the footnotes.
[337] *See* GEORGE, *supra* note 73, at 187-88; William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 SAN DIEGO L. REV. 629, 635-38 (2009); Rogers, *Vocation*, *supra* note 21, at 987-88.
[338] Kent Greenawalt, *The Enduring Significance of Legal Principles*, 78 COLUM. L. REV. 982, 990 (1978); *see also* Aldisert et al., *supra* note 110, at 36.
[339] GEORGE, *supra* note 73, at 195.
[340] *Id.* at 13. *But see supra* notes 137-40 and accompanying text. Indeed, it is generally considered "improper for the . . . [arbitrator] to state more in a decision/opinion than is necessary or to resolve or

"should not be a recitation of the case [or statutory] authorities, but rather their specific application to the precise issues raised by the case."[341] "In drawing a legal conclusion it is important to identify the factual elements necessary to support that conclusion."[342]

When undertaking a legal analysis, an arbitrator faces three possible scenarios.[343] First, after "identify[ing] the flash point of the conflict," the arbitrator may find him or herself required to "choose among competing legal precepts to determine which should control."[344] Here, the arbitrator needs to identify a controlling principle from a series of cases or statutes.[345] Once the controlling principle of law is determined, that principle must then be interpreted and applied to the facts of the case.[346]

In the second scenario, the arbitrator may not have any difficulties identifying which of several competing legal principles controls the issue but may nevertheless need to decide how to interpret that principle.[347] This type of concern arises most frequently in cases involving statutory construction.[348] In this situation, the arbitrator does not need to discuss other potential legal principles at length but can focus on the interpretation of the law and the application of that law to the facts.[349]

The third alternative arises when the dispute is primarily factual in nature. When faced with these kinds of situations, the bulk of the analysis will involve describing and weighing the evidence.[350] Once that task is complete, the arbitrator can apply the governing law (as chosen and interpreted) to the facts that have been established.[351]

attempt to resolve future problems." GEORGE, *supra* note 73, at 13; *see also id.* at 233-34 (discussing the advantages and disadvantages of so-called "lecturing" decisions).

[341] GEORGE, *supra* note 73, at 195; *see also* STRONG & DESNOYER, *supra* note 48, ch. 5.

[342] GEORGE, *supra* note 73, at 234.

[343] These scenarios are reminiscent of Cardozo's taxonomy of legal disputes, although the two analyses are not identical. *See supra* notes 196-218 and accompanying text.

[344] Aldisert et al., *supra* note 110, at 35.

[345] *See id.* For example, an arbitrator faced with a question governed by the law of a common law jurisdiction must study the various authorities, which each announce "a specific rule of law attached to a detailed set of facts." *Id.* Some commentators suggest that this process allows an adjudicator "to 'find' or create a broader legal precept attached to a broad set of facts." *Id.*; *see also* GEORGE, *supra* note 73, at 349-68; DEBORAH B. MCGREGOR & CYNTHIA M. ADAMS, THE INTERNATIONAL LAWYER'S GUIDE TO LEGAL ANALYSIS AND COMMUNICATION IN THE UNITED STATES 142-91 (2008). Although this process may appear problematic to lawyers trained in the civil law tradition, Justice Cardozo has explained how the common law method complies with certain notions of natural law and is indeed consistent with certain readings of the civil law approach to statutory interpretation. *See* CARDOZO, *supra* note 196, at 142-45 (citing FRANÇOIS GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF, vol. II (1919)).

[346] *See* Aldisert et al., *supra* note 110, at 35.

[347] *See id.*

[348] *See id.* A number of common law jurisdictions have become increasingly codified. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 5-7 (1982) (discussing the United States).

[349] *See* Aldisert et al., *supra* note 110, at 35.

[350] *See id.*

[351] *See id.*

As the preceding suggests, different types of disputes not only demand different types of analyses but also generate different type of awards.[352] In deciding how best to draft an award, an international arbitrator must not be afraid of exercising his or her judgment and discretion.[353] However, arbitrators "must not rely on value judgments to the exclusion of reasoned analysis."[354] Furthermore, the award must "not be written as a record of the tribunal's internal deliberations but for consumption by those for whom it is intended."[355]

e. Conclusion indicating the holding or disposition (*peroratio*)

The final section of a reasoned award involves the holding or disposition of the dispute.[356] In judicial opinions, this section usually constitutes "a single paragraph or sentence at the end" of the award.[357] Arbitral awards usually require a slightly lengthier conclusion, since the issue of fees and costs usually must be addressed in addition to the outcome of the various substantive claims.[358] Notably, if the issue of fees and costs is at all contentious, it may merit a special subsection following the legal analysis and prior to the conclusion.[359]

The dispositive section of the award is usually relatively formulaic so as to avoid any possible misunderstandings.[360] Arbitrators must be sure to address all alleged claims and defenses, since the doctrine of *functus officio* may make it difficult if not impossible to go back and address any gaps that have been left.[361] As a result, it is often considered a best practice to conclude the award with a provision stating that all matters not explicitly addressed in the award have been considered and determined to be without merit.[362]

Appellate arbitrators may be required to identify which aspects of the initial award have been affirmed, reversed, vacated and/or modified, although at this point very little analysis exists regarding the scope of an appellate arbitrator's powers.[363] However, existing appellate

[352] *See also supra* notes 196-218 and accompanying text.
[353] Arbitrators have long been selected for their ability to exercise appropriate discretion. *See* William W. Park, *The 2002 Freshfields Lecture – Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion*, 19 ARB. INT'L 279 nn.2-3 (2003).
[354] Aldisert et al., *supra* note 110, at 37.
[355] Lloyd, *supra* note 3, at 40.
[356] *See* Aldisert et al., *supra* note 110, at 24.
[357] GEORGE, *supra* note 73, at 176.
[358] *See* Lloyd et al., *supra* note 3, at 35-37.
[359] *See id.* at 34-35. Fee-related issues in international commercial arbitration can become quite complicated and could require detailed submissions regarding the allocation of costs, interest and attorneys' fees. *See id.* In those cases, the discussion of fees and costs can run several pages in length and should be analyzed in a separate section in the award. *See id.*
[360] *See id.* at 34-37 (including model language).
[361] *See* Gaitis, *supra* note 9, at 12.
[362] *See* Aldisert et al., *supra* note 110, at 38.
[363] *See* GEORGE, *supra* note 73, at 302-04; Aldisert et al., *supra* note 110, at 38.

rules suggest that appellate arbitrators do not have the power to remand a matter to the original tribunal.[364]

The conclusion should also include any formalities that are required as a matter of national or international law.[365] Thus, for example, an award should be signed by all arbitrators (or at least a majority thereof if a dissent exists) and should include both the date and the place of arbitration.[366]

V. CONCLUSION

As the preceding discussion suggests, writing a reasoned award is one of the most important and challenging tasks that an international arbitrator must undertake.[367] Not only do international awards typically reflect the same degree of analytical complexity as many judicial decisions, they also require a uniquely international perspective that is very difficult to master. Learning to overcome the allure of parochialism and incorporate key elements of both the common law and the civil law legal traditions into one's legal analysis is something that requires a great deal of skill and training.[368] Unfortunately, the arbitral community has adopted the view that international arbitrators can become competent in award writing simply through "observation, exposure, participation and experience."[369]

To some extent, this highly deferential approach to arbitral education would appear unassailable, since it strongly resembles the standard means by which many common law jurisdictions have educated their judges.[370] However, experts have expressed a number of concerns about the efficacy of the common law approach to judicial education, thereby raising similar questions about the nature and quality of arbitral education, particularly with respect to award-writing.[371]

[364] *See* AAA Appellate Rules, *supra* note 87, Rule A-19(a) ("The appeal tribunal may not order a new arbitration hearing or send the case back to the original arbitrator(s) for corrections or further review."); CPR Appellate Rules, *supra* note 87, Rule 8.2(b) ("The Tribunal does not have the power to remand the award."); JAMS Appellate Rules, *supra* note 87, Procedure D ("The Panel may not remand to the original Arbitrator(s) . . . .").

[365] *See* Lloyd, *supra* note 3, at 41; Lloyd et al., *supra* note 3, at 37.

[366] *See* Lloyd et al., *supra* note 3, at 37 (suggesting the phrase "Place of Arbitration" should be used to designate the arbitral seat rather than the more archaic "Done at").

[367] *See* Hart v. Massanari, 266 F.3d 1155, 1176-77 (9th Cir. 2001); *see supra* note 38 and accompanying text.

[368] McGill University in Canada is one of the few institutions that teaches law on a transsystemic basis. *See* Bédard, *supra* note 11, at 239; *see also* McGill University, Paul-André Crépeau Centre for Private and Comparative Law, http://www.mcgill.ca/centre-crepeau/transsystemic/.

[369] *See* Jones, *supra* note 19, at 281.

[370] *See* Strong, *Judicial Education*, *supra* note 23, at __; *see also* Symposium, *Judicial Education and the Art of Judging: From Myth to Methodology*, 2012 J. DISP. RESOL; *supra* note 38 and accompanying text.

[371] *See* Strong, Judicial Education, *supra* note 23, at __; THOMAS, *supra* note 262, at 113.

The current approach to arbitral education has also been defended on the grounds that market forces will ensure the requisite degree of competence in writing international awards.[372] The hypothesis is that good arbitrators – meaning those that can and do comply with national and international requirements regarding reasoned awards and who reflect an appropriately international perspective in their analyses – will be rewarded through repeat appointments, while those arbitrators who do not rise to the task of drafting an adequate award will eventually find themselves without jobs.[373] However, this argument breaks down in several ways. First, commentators have long recognized that the lack of transparency in international commercial arbitration can allow sub-standard arbitrators to continue to work for a significant period of time.[374] Second, experts have noted that that "no selection method can guarantee the continued fitness" of an adjudicator.[375] Indeed, many judges "turn out to be ill-suited for the job," despite having complied with selection procedures that are ostensibly more rigorous than those facing international arbitrators.[376]

As it turns out, there are a number of ways to improve the skills of international arbitrators. One is to increase the number and quality of educational opportunities concerning award-writing in international commercial arbitration.[377] In so doing, the arbitral community can consider some of the recent innovations in judicial education to see what types of improvements are possible on both a procedural and substantive level.[378] For example, educational providers can combine in-person sessions with written guidebooks so as to take the particular needs and learning style of international arbitrators into account.[379]

Another possibility is to create more rigorous standards regarding arbitrator education, such as by imposing a mandatory minimum regarding the number or type of courses a new or experienced arbitrator should take.[380] Similar initiatives have met with significant resistance in

[372] *See* Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47, 62 (2010). However, it is also likely that market forces and concerns about predictability will limit the number of arbitrators who are chosen on a regular basis. *See id.* at 68.

[373] *See id.* at 62 (applying a law and economics approach to arbitrator appointment); Rogers, *Transparency*, *supra* note 65, at 1316-17.

[374] *See* Susan D. Franck, *The Role of International Arbitrators*, 12 ILSA J. INT'L & COMP. L. 499, 516-17 & n.75 (2006). One particularly noteworthy effort to overcome lack of transparency in international commercial arbitration involves *Arbitrator Intelligence*, a new database developed by Professor Catherine Rogers to provide parties in arbitration with accurate information on arbitrators and arbitral awards. *See* Arbitrator Intelligence, http://www.arbitratorintelligence.org/.

[375] Wayne Doane, Note, *The Membership of Judges in Gender Discriminatory Clubs*, 12 VT. L. REV. 459, 461 (1987); *see also* Keith R. Fisher, *Education for Judicial Aspirants*, 54 AKRON L. REV. 163, 164 (2010).

[376] Fisher, *supra* note 374, at 164.

[377] *See supra* notes 13-36 and accompanying text.

[378] *See supra* note 262 and accompanying text.

[379] *See* ARMYTAGE, *supra* note 34, at 149; KNOWLES, *supra* note 45, at 45-49; *see also supra* note 36 and accompanying text.

[380] *See* David Lord Hacking, *Ethics, Elitism, Eligibility: A Response – What Happens if the Icelandic Arbitrator Falls Through the ICC?* 15 J. INT'L ARB. 73, 77 (1998).

the judicial context on the grounds that such measures were somehow "insulting," and similar types of objections can be anticipated in the arbitral context.[381] However, mandatory minimums in arbitrator education would be consistent with other efforts to improve the quality of international commercial arbitration.[382] Furthermore, mandatory education would help overcome the fact that those individuals who are most in need of additional training are often the least likely to recognize that need.[383]

At this point, international commercial arbitration is considered to be one of the legal world's most remarkable success stories,[384] and nothing in this Article should be taken as criticizing the excellent work done by the large majority of international arbitrators. Indeed, studies suggest that most observers and participants appear satisfied with decision-making in international commercial arbitration.[385] However, the arbitral community must continue to be vigilant if international commercial arbitration is to retain its position as the preferred method of resolving cross-border business disputes.[386] One of the best ways of ensuring the continued excellence of international commercial arbitration is to ensure the quality of reasoned awards. While it is not recommended that the international arbitral community attempt to adopt a single standard approach to award writing, new and experienced arbitrators would undoubtedly benefit from an improved understanding of what is involved in a reasoned award.[387] Hopefully this Article has proven useful in that regard.

[381] *See* National Judicial Education Program, Testimony to the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct 15 (Apr. 2004), *available at* http://www.americanbar.org/content/dam/aba/migrated/judicialethics/resources/Comm_Code_HechtSchafran_0504ddt.authcheckdam.pdf ("Mandatory judicial education is a vexed question. Many judges find it insulting and strenuously oppose it."). Concerns have also been raised about whether and to what extent a mandatory educational regime would infringe on judicial independence, although those questions can easily be answered. *See* Strong, *Judicial Education*, *supra* note 23, at __.

[382] *See* Rogers, *Have-Nots*, *supra* note 30, at 377 ("[T]he international arbitration community is highly sensitive to perceptions of its own legitimacy."). The International Bar Association has been particularly active in this regard. *See* International Bar Association, Arbitration Committee Publications, http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Publications.aspx.

[383] *See* Stephen V. Burks et al., *Overconfidence and Social Signalling*, 2013 REV. ECON. STUD. 1, 4 (2013); Garner, *supra* note 27 (discussing the problem of judicial overconfidence); Strong, *Judicial Education*, *supra* note 23, at __ (discussing sociological studies regarding overconfidence and the illusion of competence).

[384] *See* BORN, *supra* note 2, at 73.

[385] *See* Hacking, *supra* note 379, at 75; Ten Cate, *supra* note 6, at 1148-49; *see also* Queen Mary, University of London, 2013 International Arbitration Survey, Corporation Choices in International Arbitration: Industry Perspectives 5, 7 (2013), http://www.arbitration.qmul.ac.uk/docs/123282.pdf.

[386] *See* BORN, *supra* note 2, at 73; *see also supra* note 5.

[387] Indeed, some efforts have already been made in this regard. *See* QMUL, *supra* note 13 (offering a short course on award-writing); *see also supra* notes 20-22 and accompanying text.

RULES-of-THUMB

for

DELIBERATIONS and AWARD DRAFTING

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RULE 1

Keep an open mind throughout the proceedings

RULE 2

Avoid discussing ultimate conclusions with Tribunal members while the record is still open

- Discussing unanswered questions, demeaner can be OK
  - so long as it does not reflect a closed mind as to the ultimate questions submitted to the tribunal for decision

RULE 3

Make sure all tribunal members are working with the same record

- Put counsel to the task, before the record is closed, to keep the tribunal organized

RULE 4

Prepare for deliberations
- Re-read
  - The pleadings
  - Witness statements and exhibits
  - Any post-hearing briefs and make a list of questions / discussion topics for the tribunal
- Prepare a list of Decision Points
  - Cover what the Parties raise – No More, No Less
- If there is a transcript – read it thoroughly
- Take notes, highlight, flag points for discussion
- Read the exhibits with the transcript
- Annotate your Decision Points with transcript and exhibit references

If there is no transcript, make sure you take good notes and read them in connection with deliberations and drafting

RULE 5

"Arbitral discretion" is no substitute for reasoning
- Reasoning explains why arbitrators exercise discretion in a certain manner
- "The Tribunal, in the exercise of its wide discretion, finds that…" is excess verbiage
  - except to remind counsel and a reviewing court of the standard of review
  - comes across as defensive
    - or worse, *lazy*

RULE 6

Resolve any doubts as to applicable law long before the parties brief the law

Be comfortable with the briefing before the record closes

Limit yourself to the law as it has been briefed, unless you disclose and obtain consent *in advance* authorizing you to independent legal research
- *Iura novit curia* is for the *courts* in civil law countries
- In common law countries, the typical party expectation is that, in arbitration, the arbitrators will confine themselves to the law as briefed

Do not check your prior knowledge at the door – make use of it before and during the hearing process to make sure the briefing is adequate

RULE 7

- Never compromise on essential points
- Compromise on non-essential points to achieve consensus

RULE 8

- Listen carefully to your tribunal colleagues
- Remain collegial even if a disagreement is heartfelt
- Look for points of agreement in the midst of any disagreement

RULE 9

- THINK AGAIN
  - Sleep on it

RULE 10

- Have your draft of the award reviewed
  - By co-arbitrators (INSIST) and/or by the institution
    - Language
    - Sense
    - Reasoning
    - Calculations

Supplemental Rules for the

Preservation of Arbitrator Sanity

(the "Sanity Rules")

SANITY RULE 1

In the pre-hearing phase, maintain an up-to-date chronology of procedural developments

- Avoid the need to re-construct it at the end of the case
- Keep it concise, but include dates
  - American parties tend to find lengthy procedural preambles to be an infuriating waste of time and money in commercial cases
  - A detailed procedural history may be necessary or helpful to enforce the award in some countries, so strike an appropriate balance

SANITY RULE 2

Have counsel for the parties keep you organized

- Stipulated chronology
  - Stated in the most neutral terms possible
  - Temporal relations of events to one another – nothing more or the parties will not agree
- A list of the named parties with essential descriptions
  - Alignment of each party
  - Legal nature/nationality of the party
  - Legal headquarters/ relevant place(s) of operations
  - Membership in any Corporate Group

    Affiliates relevant to the case

SANITY RULE 2 cont.

- Witness Lists
  - Identity
  - Affiliation(s)
  - Citizenship; place of business
  - Topic areas of testimony
  - For experts, short description of areas of expertise
  - Date(s) of witness statement(s), testimony
- Exhibit Lists
  - In a logical order
  - Brief description of each document with other identifiers
  - Area(s) of relevance
  - Cross-references, if used with multiple witnesses

SANITY RULE 3

Persuade the parties to arrange for a verbatim transcript

- Explain that a transcript will empower the tribunal to provide more detailed reasoning
  - If necessary, explain that the lack of a transcript will adversely impact the level of detail in the award or will increase the time and cost of deliberations, or both

SANITY RULE 4

Develop a workplan with tribunal members while you are all still together at the hearing

- Ensure that all tribunal members have their calendars with them on the last day of the hearing
- Agree on a workplan to ensure completion of the award, taking into account the institutional review process, within the deadline set by the applicable rules
  - Confirm the workplan in writing as soon as you get back to your computer

    Use your computer to deny your colleagues deniability – send them calendar appointments with the deadlines and with generous reminders.

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Advocate's Best Practices in Selecting Arbitrators

NEW YORK CITY BAR ARBITRATION COMMITTEE
SUBCOMMITTEE ON ARBITRATOR APPOINTMENT PROCEDURES

ARBITRATOR APPOINTMENT PROCEDURES OF ARBITRAL INSTITUTIONS IN COMMERCIAL ARBITRATIONS

Committee on Arbitration

April 2018

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TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

INTRODUCTION / OVERVIEW

This Report by the Arbitration Committee of the New York City Bar Association describes arbitrator appointment procedures of arbitral institutions in commercial arbitrations. The aim of this Report is to bring together information that is not easily accessible to arbitration users and counsel without extensive research and experience. The Report provides guidance on arbitrator appointment options that may not be readily apparent from the institution's arbitration rules and web site.

The arbitral institutions discussed in the Report are the American Arbitration Association (AAA) and its international arm, International Centre for Dispute Resolution (ICDR), the International Court of Arbitration of the International Chamber of Commerce (ICC), the International Institute for Conflict Prevention and Resolution (CPR), JAMS, and the London Court of International Arbitration (LCIA).

There is a section of the Report dedicated to discussing the arbitrator appointment procedures of the respective institutions. Each section is structured similarly for consistency to cover generally the same topics with respect to each institution. The information collected in the Report is the result of extensive research based on publicly available data, user experience, and interviews with representatives of the institutions. The institutions discussed were provided an opportunity to review and provide feedback on a draft of the section describing the practices of that institution. A substantial team from the Arbitration Committee participated in drafting the Report, with two or three members dedicated to researching and drafting each section.

Each section of the Report provides an overview of the arbitral institution and the institution's approach to the selection of both party-nominated arbitrators and institutional appointments. The Report also discusses the role of the institution as an appointing authority, in the appointment of emergency arbitrators, and in special situations such as multi-party arbitration, consolidated arbitration, arbitrations involving state entities, and small claims in expedited arbitration. The Report also discusses the institution's approach to arbitrator challenges and replacement of arbitrators. Where applicable, the Report discusses the institution's arbitrator list services.

The Report is designed to be user-friendly so that corporate in-house and outside litigation counsel who have less experience in arbitration can quickly learn about the arbitrator appointment procedures of various arbitral institutions with respect to commercial arbitrations. The Report reflects research performed in 2016 and 2017. For the most part, this Report does not capture developments within the respective arbitral institutions after 2017.

We take this opportunity to thank the members of the drafting subcommittee who contributed the substantial time and effort to prepare this Report: John Delehanty, Matthew Draper, James Hosking, Jennifer Kim, Giovanna Micheli, Jonathan Montcalm, Nancy Nelson, Steven Reisberg, Steven Skulnik, Joshua Slocum, Jonathan Tompkins and Jeffrey Zaino. Dana MacGrath served as Chair of the drafting subcommittee (during her term as Chair of the Arbitration Committee).

AMERICAN ARBITRATION ASSOCIATION (AAA)

I. Overview

Established in 1926, the American Arbitration Association ("**AAA**") is headquartered in New York and has offices in major cities throughout the United States. The international arm of the AAA is the International Centre for Dispute Resolution ("**ICDR**"), which is discussed in a separate section of this Report. The AAA administers cases from filing to closing and provides various administrative dispute resolution services in the United States. For parties who wish to choose only select services rather than full arbitral administration, the AAA also offers the option to use stand-alone services, including eDiscovery Special Master appointments, arbitrator list or appointment services, arbitrator challenge review, expert case evaluation, and judicial settlement conferences.

The AAA Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes), amended and effective October 1, 2013 (the "**AAA Commercial Rules**")[1] include rules for general commercial arbitration, preliminary hearing procedures, expedited procedures, procedures for large, complex commercial disputes, and commercial mediation procedures. Unless the parties agree otherwise, the Procedures for Large, Complex Commercial Disputes will be applied to all cases administered by the AAA under the AAA Commercial 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 primary AAA Commercial Rules governing arbitrator selection and appointment are Rules 12 through 16. As a general principle, the AAA will defer to party agreement and choice throughout the arbitral process. In the absence of such agreement or where certain Rules allow the AAA to exercise discretion, an understanding of the institutional practices of the AAA in the selection and appointment of arbitrators can be particularly helpful for users of AAA arbitration. This section of the Report describes AAA institutional practices in the selection and appointment of arbitrators and provides guidance on the various options available that may not be readily apparent from the text of the AAA Commercial Rules.

II. Number of Arbitrators

A. Applicable Rules

Where the arbitration agreement does not specify the number of arbitrators and the parties have not otherwise agreed to the number of arbitrators, the AAA Commercial Rules provide that the dispute shall be heard and determined by a sole 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 the AAA will consider in exercising its discretion regarding the number of arbitrators appointed to the dispute. *See* Rule 16(a). A party can also request to change the number of arbitrators as a result of an increase or decrease in the amount of a claim or

[1] Specific Rules within the Commercial Arbitration Rules section (Rules R-1 through R-58) of the AAA Commercial Rules are referenced in this section of the report without the "R" prefix. The AAA also maintains specialized arbitration rules for particular industries and sectors. This report focuses, however, on the AAA Commercial Rules.

a new or different claim. Such a request must be made to the AAA and other parties to the arbitration no later than seven calendar days after receipt by the AAA of the notice of change of claim amount required under Rule 6. If the parties are unable to agree on the request for a change in the number of arbitrators, the AAA will make the determination. *See* Rule 16(b).

B. Institutional Practices

Although Rule 16 gives the AAA discretion to direct the appointment of three arbitrators in the absence of party agreement on the number of arbitrators, in practice the AAA will usually apply the threshold set forth in Rule L-2 of the AAA Procedures for Large, Complex Commercial Disputes. Rule L-2 provides that if the amount in dispute is $1,000,000 or higher, the AAA will almost always direct the appointment of three arbitrators and not a sole arbitrator. In circumstances involving the financial hardship of a party or other circumstances, however, the AAA may deviate from the foregoing threshold and require that, regardless of the amount in dispute, a sole arbitrator determine the case.

The AAA recently began offering parties to disputes over $1,000,000 an interesting option for maintaining a three-person tribunal at a potentially lower cost. Under this Three Arbitrator Streamlined Process, only the chair is involved in the initial phases of the case and decides all initial procedural and disclosure issues. The other two arbitrators then actively join the case for the evidentiary hearings phase.

III. Party Nominations

A. Applicable Rules

If the agreement of the parties names an arbitrator or specifies a method of appointing arbitrator(s), the AAA will follow that designation or method. Upon the request of any appointing party, the AAA will provide a list of members of the National Roster from which the party may, if it so desires, make its appointment. *See* Rule 13(a). Under Rule 13(b), where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Rule 18 regarding impartiality and independence unless the parties have specifically agreed that the party-appointed arbitrators are to be partial and need not meet those standards.

The AAA may appoint the chairperson of the tribunal in certain circumstances. These include, for example, if the time period for appointment specified by the parties for the party-appointed arbitrators to appoint a chairperson has expired, or if no time period is specified by the parties and a chairperson is not appointed within 14 days of appointment of the last-appointed arbitrator, the AAA may appoint the chairperson. *See* Rule 14.

B. Institutional Practices

Like many other arbitral institutions, where the parties to an arbitration agreement have agreed upon the process for selecting a tribunal, the AAA will endeavor to fulfill the parties' agreement and generally will defer to a party's nomination. One arguably unique aspect of the AAA Commercial Rules is that Rule 13(b) provides the express right of the parties to appoint

non-neutral arbitrators. Rule 13(b) clarifies however that there is a presumption of neutrality for all arbitrators, including party-appointed ones, *unless* parties agree to the contrary.[2] Neutral arbitrators appointed by the parties must meet the impartiality and independence standards set forth in the AAA Commercial Arbitration Rules. *See* Rule 18(a); AMERICAN ARBITRATION ASSOCIATION, A GUIDE TO COMMERCIAL MEDIATION AND ARBITRATION FOR BUSINESS PEOPLE 21 (2013) (the "**AAA GUIDE**").[3] Furthermore, under Rule 18, the non-neutral arbitrator is still required to perform his or her duties "with diligence and in good faith."

Where the parties have agreed to appoint non-neutrals under Rule 18(b), parties are exempted from the default prohibition against *ex parte* communications between a party and an arbitrator after the tribunal has been constituted. Rule 19(b). Nevertheless, the AAA's administrative practice is to suggest to the parties that they agree that Rule 19(a), which limits *ex parte* communications after the tribunal is appointed,[4] should nonetheless apply prospectively. Usually, this suggestion is made immediately prior to the initial conference among the arbitrators and counsel, so that the chairperson can raise the issue at the initial conference. *See* Carter & Fellas, INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 155 n.33 (2d. ed. 2016). In cases where the party-appointed arbitrators are serving as non-neutrals, the AAA has issued guidance recommending that parties agree to not communicate *ex parte* with their party-appointed arbitrator after the appointment procedures in the rules have been completed. *See* AAA GUIDE 21. However, the parties still can agree to allow *ex parte* communications.

Because the default rule is to have neutral arbitrators, confusion can arise where parties agree to appoint non-neutral arbitrators. For example, the AAA Commercial Rules as well as the AAA Code of Ethics, both distinguish neutrality, on the one hand, from fairness, integrity, and good faith, on the other. For example, Canon X in the AAA Code of Ethics exempts party-appointed arbitrators serving as non-neutrals from certain ethical obligations, yet still requires such non-neutral arbitrators to "act in good faith and with integrity and fairness" even though they "may be predisposed toward the party who appointed them." AAA Code of Ethics, Canon X(A)(1).[5]

The AAA has issued guidance to parties on ways to avoid or minimize some of the risks of agreeing to non-neutral arbitrators. *See* AAA GUIDE 21.

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[2] This presumption is also consistent with the requirements of the AAA/American Bar Association Code of Ethics for Arbitrators in Commercial Disputes (effective March 1, 2004) (the "AAA Code of Ethics"). *See* AAA Code of Ethics, at 2. Ethical codes are not binding on courts but often are cited as "highly significant." JOHN H. CARTER & JOHN FELLAS, INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 155 n.29 (2d. ed. 2016) (citing *Positive Software Solutions, Inc. v. New Century Mortgage Corp*., 436 F.3d 495, 503 n.43 (5th Cir. 2006), *rev'd en banc* 476 F.3d 278 (5th Cir.), cert. denied, 127 S.Ct. 2943 (2007)).

[3] Available at https://www.adr.org/sites/default/files/document_repository/A%20Guide%20to%20Commercial.pdf.

[4] *See also* AAA Code of Ethics, Canon III (on the requirement of arbitrators to avoid impropriety or the appearance of impropriety in communicating with parties).

[5] Similarly, under Canon X, non-neutral arbitrators are not exempt from either Canon IV's obligation to conduct the proceedings "fairly and diligently" or Canon V's requirement to make decisions in a just, independent and deliberate manner, "except that they may be predisposed toward deciding in favor of the party appointed them." AAA Code of Ethics, Canons X(D); X(E).

1. Enhanced Neutral Selection Process

In the event that the parties need assistance in nominating a party-appointed arbitrator, a sole arbitrator, or a chairperson, the parties have the option of using the strike-and-rank list method, which is discussed in greater detail below, or the AAA's Enhanced Neutral Selection Process. Under the Enhanced Neutral Selection Process, the parties agree to use one or more screening and/or selection methods to assist them in choosing an arbitrator. The standard options that the AAA provides for the Enhanced Neutral Selection Process include (i) oral or written interviews of the arbitrator candidates; (ii) pre-screening arbitrator disclosures and availability; and (iii) expanded resumes (based on research conducted by the AAA or supplementary information provided by the arbitrators). Through this process, the AAA works with the parties to develop an interview protocol for a telephone conference or written questions to prospective arbitrators and to pre-screen a limited number of selected potential arbitrators for conflicts. *See* Carter & Fellas, INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 147 (2d. ed. 2016). The parties must agree in advance on the questions to ask the candidates. In most cases, the parties submit their questions for the arbitrators in writing, and the AAA will review the questions and remove any that are substantive in nature. The AAA also will provide the parties with an early, initial sample of arbitrator resumes based on qualifications requested by the parties and receive feedback from counsel on the type of arbitrators preferred before preparing a final list of arbitrators from which the parties may select through the strike process. *Id*. Parties are not required to use the Enhanced Neutral Selection Process. If they wish to use a separate neutral selection process, the AAA is willing to implement the parties' agreed-upon alternative process so long as it is reasonable, fair and comports with applicable law and the AAA Commercial Rules.

2. Chair Selection

For selection of the chairperson, the AAA generally leaves the selection to the two arbitrators if they are party-appointed. The AAA may appoint a chairperson if there are difficulties in selecting the chairperson or if the selection has not been made within the time period required. In practice, the parties participate in this selection process through the list procedure. When all arbitrators are selected from a list or without a party-appointed selection process, the AAA will either select the highest ranked as chairperson or let the tribunal decide who will be chairperson.

3. Non-Participation by a Party in the Appointment Process

In some cases, a party will fail or refuse to nominate an arbitrator where required to do so. If the AAA confirms that a party has been served with a notice of arbitration but such party fails to participate in nominating an arbitrator, the AAA will complete the arbitrator appointment process. The AAA case administrator will provide notice to such party requiring it to nominate its arbitrator and, if the party fails to do so within 14 days of the notice, the AAA will make the appointment. *See* Rule 13(d). Generally, the AAA will provide additional time to such party to appoint its arbitrator before resorting to appointing the arbitrator itself but in any event will intervene to ensure a panel is formed.

IV. Institutional Appointments

A. General

1. Applicable Rules

The AAA Commercial Rules provide generally that if the parties have not appointed an arbitrator and have not provided for another method of appointment, the AAA will use the "strike-and-rank method" to select arbitrators. Rule 12(b). The AAA will send each party a list of ten names chosen from its National Roster of arbitrators. If the parties cannot agree on an arbitrator from this list within 14 days, each party must strike the names it finds objectionable and return the remaining names to the AAA in order of preference. *See* Rule 12. The AAA will then either appoint an arbitrator based on the parties' preference or, if an appointment cannot be made based on the submitted lists, the AAA may select an arbitrator from its National Roster without submitting additional lists to the parties.

2. Institutional Practices

After filing of the submission or the answering statement, or upon the expiration of the time within which the answering statement is to be filed, the AAA sends each party a copy of the same list of proposed arbitrators. *Id*.

Rule 12(a) states that the AAA will provide to the parties a list of ten arbitrator candidates chosen from the National Roster. Where possible, the AAA's practice is to provide ten arbitrator candidates for a sole arbitrator case and fifteen arbitrator candidates for a case with three arbitrators. When the lists are returned to the AAA, the case administrator reviews the parties' indicated preferences and makes note of the mutual choices.

If desired, the parties can request that the AAA provide additional arbitrator candidates. Alternatively, the parties can create their own strike-and-rank list instead of having the case administrator create the list. Under this method, the parties create their own list and submit it to the case administrator. The case administrator will then add several other names to the list and the parties then proceed to strike and rank the combined list. Where parties are unable to find a mutual choice on a list, additional lists may be submitted at the request of both parties. If the parties cannot agree on an arbitrator, the AAA will make an administrative appointment, but in no case will an arbitrator whose name was crossed out by either party be appointed.

In drafting the list, the AAA is guided by the nature of the dispute. Biographical information on each arbitrator accompanies the list of candidates. AAA GUIDE 20. By default, the AAA will search within the geographical region of the seat of arbitration to minimize travel costs for the parties. When identifying arbitrators for the proposed lists, arbitrator availability is not initially considered. An arbitration agreement may specify that the arbitrator have certain experience or characteristics. For example, an arbitration clause may specify that the arbitrator have a certain number of years' work experience in a particular industry. Where the arbitration agreement contains such specifics, the AAA will first search its National Roster using keyword searches or by contacting listed neutrals directly to determine if they have the requisite characteristics or experience.

The AAA seeks to have diverse candidates comprise at least 20% of all lists of arbitrator candidates provided to parties. If meeting the 20% diversity goal is not possible given other required attributes (*e.g*., location, language, nationality, qualifications or experience), the AAA may waive its 20% diversity goal in particular circumstances.

If the AAA is unable to identify from its National Roster any neutrals with the specified characteristics or experience, the AAA may look for arbitrator candidates beyond its National Roster. This expanded research may also include contacting other industry or arbitration associations. To the extent that a non-AAA candidate is identified, all parties to the dispute must agree that such person may be appointed as an arbitrator. The AAA then will follow the parties' agreement and appoint a non-AAA candidate as an arbitrator. In the event that the AAA is not able to identify arbitrators with the requisite experience either on its National Roster or by searching beyond its roster, the AAA may contact the parties to determine whether they are amenable to deviating from the arbitration agreement in that regard. While the AAA Commercial Rules grant the AAA full authority to select the arbitrator or arbitrators if the parties are unable to agree for any reason whatsoever, the AAA generally tries to avoid administrative appointments.

The AAA offers users an online database called the Arbitrator Search Platform to view all of its panelists. The AAA has regional panels for various parts of the United States. Approximately 500 Commercial panelists are based in the greater New York area. The nationwide AAA panel consists of approximately 6,000 panelists, including more than 280 former federal and state judges. Approximately 15% of the AAA panel consists of non-attorney industry professionals. All AAA arbitrators must undergo AAA-organized training courses and updates. The AAA also requires that arbitrator applicants have a minimum of ten years of senior-level business or professional expertise or legal practice prior to being considered for the National Roster and maintains an ongoing review of the quality of its National Roster. AAA GUIDE 6-7. Current panelists as well as new applicants are evaluated for management skills, commitment, ethics, training, and suitability to the caseload. *Id*. at 7.

B. Acting as Appointing Authority

The AAA provides a service called "Arbitrator Select (List or List and Appointment)" for parties who do not require AAA administration of the arbitration past the point of arbitrator selection.[6] The AAA's only role in providing this service is to generate a list of arbitrator candidates and complete the appointment process. Using the parties' own criteria, the AAA provides users with a list of the most appropriate arbitrators for their dispute. If desired, the AAA will facilitate conflicts checks with specified arbitrators and assist parties with arbitrator selection and/or appointment. This service may be used by a party to select a party-appointed arbitrator or by both parties to select their arbitrator(s).

As part of the process for the List and Appointment services, all parties must mutually agree to use the "List and Appointment" service. If the parties are unable to agree on a proposed

[6] The costs for AAA Arbitrator Select (List and Appointment) Services are as follows: For a list of 5 arbitrators: $750; 5 additional names, if needed: $750 plus $500 for each arbitrator appointed; for a list of 10 arbitrators: $1,500; 10 additional names, if needed: $750 plus $500 for each arbitrator appointed; for a list of 15 arbitrators: $2,000; 15 additional names, if needed: $1,000 plus $500 for each arbitrator appointed.

arbitrator, each party ranks the list of arbitrators in order of preference. The AAA then extends an invitation to the highest-ranked mutually agreeable candidate and facilitates a conflicts check. If the arbitrator declines, the AAA invites the next highest-ranked candidate, and so on. Upon the arbitrator's acceptance of the appointment, the AAA notifies the parties of the arbitrator's identity and provides any disclosure(s) the arbitrator may have made. Parties thereafter have seven calendar days to object to the arbitrator's appointment based on the disclosure(s). If the parties cannot agree on whether the disclosure(s) disqualifies the arbitrator from service, the AAA will determine whether to reaffirm or disqualify the arbitrator. If an arbitrator is disqualified due to a disclosure, the AAA will invite the next highest-ranked candidate to serve. Should no candidate remain from those originally provided, or if there are no mutually agreeable candidates, the AAA may appoint an arbitrator from its National Roster without the submission of additional lists, unless the parties agree otherwise.

C. Emergency Arbitrators

In circumstances where parties require immediate injunctive relief, the AAA Commercial Rules provide a process for emergency measures of protection. Prior to October 1, 2013, the AAA had as part of its Commercial Rules "Optional Rules for Emergency Measures of Protection." The Optional Rules applied only if the parties specifically adopted them in their arbitration clause or otherwise agreed to use them.

The current AAA Commercial Rules provide that, unless the parties agree otherwise, Rule 38 applies with respect to emergency procedures if the parties entered into their arbitration agreement on or after October 1, 2013. *See* Rule 38(a). A party seeking emergency relief must notify the AAA and all parties in writing regarding the nature of the relief sought and the reasons why such relief is required on an emergency basis. Pursuant to Rule 38(c), the AAA must appoint a single emergency arbitrator within one business day of receipt of notice of a party's request for emergency relief to make a determination on emergency measures of protection. Emergency arbitrators are selected from the Large Complex Case Panel and are required to immediately disclose any circumstance likely, based on the facts disclosed on the application, to affect such arbitrator's impartiality or independence. Any challenge to the appointment must be raised within one business day thereafter. The emergency arbitrator's authority ends when the tribunal is constituted. *See* Rule 38(f).

D. Small Claims in Expedited Arbitration

Unless the parties or the AAA determines otherwise, the AAA applies the Expedited Procedures (Rules E-1 through E-10) in any case involving claims or counterclaims less than $75,000, exclusive of interest, attorneys' fees, and arbitration fees and costs. Pursuant to Rule E-4 (a), the AAA will provide a list of (5) five proposed arbitrators drawn from its National Roster from which a single arbitrator will be appointed. If for any reason the appointment of an arbitrator cannot be made from the list, under Rule E-4 (b) the AAA may make the appointment from other members of the panel without the submission of additional lists.

V. Special Situations

A. Multi-Party Arbitration

Whereas some arbitral rules specifically address joinder and multi-party arbitration procedures, the AAA Commercial Rules do not. Rather, the AAA Commercial Rules simply provide that, unless the parties agree otherwise, the Expedited Procedures will not apply in cases involving more than two parties.[7] *See* Rule 1(b). The AAA therefore requires the parties to opt into the Expedited Procedures if they want the option of expediting the matter in cases with more than two parties. Under Rule 12(c), unless the parties agree otherwise, when there are more than two claimants or more than two respondents in a case, the AAA may appoint all the arbitrators.

B. Consolidation

The AAA Commercial Rules do not specifically address consolidation of arbitral proceedings. However, Rule P-2 suggests that at the preliminary conference arbitrators should inquire whether claims or counterclaims should be consolidated with another arbitration. If a party requests that two or more arbitral proceedings administered by the AAA be consolidated, the general practice of the AAA is for the first panel that was appointed to decide whether consolidation is warranted, in consultation with the parties. If the panel determines that the matters should be consolidated and heard together, that panel will hear the entire matter. The first panel also shall determine which rules will govern the dispute.

C. State Entities

The AAA Commercial Rules do not include specific rules on arbitrations involving states or state-owned entities.

D. Challenges to and Replacement of Arbitrators

Rule 17(a) requires parties and their representatives as well as any appointed arbitrator to disclose to the AAA any circumstance "likely" to give rise to "justifiable doubts" about an arbitrator's impartiality or independence. Such disclosure obligations are ongoing. Failure of a party or a representative to comply with Rule 17(a) may result in waiver of the right to object to an arbitrator. *See* Rules 17(a), 41 (waiver of right to object for a party who proceeds with the arbitration "after [having] knowledge that any provision or requirement of [the AAA Commercial] Rules has not been complied with and who fails to state an objection in writing"). Rule 17(a) specifies examples of circumstances that require disclosure. These include any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. *See* ELLIOT E. POLEBAUM, INTERNATIONAL

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[7] For multi-party class arbitrations, the AAA has adopted Supplementary Rules for Class Arbitration (eff. October 8, 2003) under which the AAA agrees to administer demands for class arbitration where "(1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Associations' rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims." American Arbitration Association, "AAA Policy on Class Arbitrations", July 14, 2005, available at: https://www.adr.org/sites/default/files/document_repository/AAA%20Policy%20on%20Class%20Arbitrations.pdf.

ARBITRATION: COMMERCIAL AND INVESTMENT TREATY LAW AND PRACTICE 7-18 (1st ed. 2015). Unlike Rules 18 and 19, Rule 17 does not provide an exception for non-neutral arbitrators. This suggests that the disclosure obligations in Rule 17 apply even where the parties have agreed that the arbitrators may be non-neutral.

Upon objection of a party, or its own initiative, the AAA will determine whether the arbitrator should be disqualified under the grounds set forth in Rule 18(a).[8] The AAA's determination regarding arbitrator disqualifications is conclusive. Rule 18(c). AAA disqualification determination decisions do not contain any statement of reasons and are not published. The vast majority of AAA arbitrator challenges are raised at the very beginning of the arbitral proceedings. Challenges to arbitrators are made in only 4-5% of arbitrations filed with the AAA each year.

Unlike some other arbitral rules, the AAA Commercial Rules do not specify the procedures for arbitrator challenges, responding to challenges, or determinations as to disqualification. The AAA has an Administrative Review Council (ARC) that rules on various administrative matters, including arbitrator challenges.[9] The ARC is comprised of five members who meet on a weekly basis. The AAA has published "review standards" for arbitrator challenges, which state that removal is based on a weighing of four aspects of a suggested conflict: whether it is "direct, continuing, substantial, recent." CARTER AND FELLAS, INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 168 (2d. ed. 2016). The determination as to an arbitrator challenge is based on whether the disclosed conflict "creates, to a reasonable person, the appearance that an award would not be fairly rendered." *Id*. Where a party raises a potential conflict not previously disclosed, the AAA will ask the arbitrator to make a supplemental disclosure to the parties regarding the new issue before the ARC considers the objection. *Id*.

If 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. *See* Rule 20(a). Some examples include when an arbitrator cannot physically perform the duties of the office or is unavailable for extended time periods. If the vacancy occurs prior to the commencement of hearings, the AAA will select the next available arbitrator on the strike-and-rank list. Should no arbitrator on the list be available, an additional list of arbitrators will be generated. If the vacancy occurs after commencement of hearings, the remaining arbitrators can proceed with the hearing and determination of the controversy, unless the parties agree otherwise. *See* Rule 20(b).

VI. Arbitrator List Services

Through the Arbitrator Select service, the AAA offers list and appointment services for those parties who do not want full administration. Under the List Only service (the List and Appointment service is discussed above), the AAA acts as a referral source to identify arbitrators

[8] As discussed above, Rule 18(b) provides an exception to the grounds for disqualification where the parties have agreed in writing that the arbitrators appointed by the parties are to be non-neutral, in which case such arbitrators need not be impartial or independent and are not subject to disqualification for partiality or lack of independence.

[9] The fee for this service is $3,500.

to serve on arbitration cases and provides a list of 5, 10, or 15 arbitrators.[10] To initiate the process, a party completes a detailed filing form, providing the number of arbitrators requested and preferences regarding the characteristics of the arbitrator (*e.g.*, area of expertise, geographic limitations). The AAA then will provide a list of arbitrators whose credentials best match the criteria specified by the parties along with their AAA Roster biographies. The arbitrators subsequently are notified that their information is being provided to a party seeking an arbitrator, which party may contact them directly. The parties handle the rest of the appointment process themselves without involvement of the AAA.

[10] The costs for AAA Arbitrator Select (List Only) Services are as follows: For a list of 5 arbitrators: $750; 5 additional names, if needed: $750; for a list of 10 arbitrators: $1,500; 10 additional names, if needed: $750; for a list of 15 arbitrators: $2,000; 15 additional names, if needed: $1,000.

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)

I. Overview

The International Centre for Dispute Resolution ("**ICDR**") is the international arm of the American Arbitration Association. Established in 1996, the ICDR provides administrative services for international disputes, including both arbitration and mediation. The ICDR maintains administrative offices in New York, Houston, and Miami in the United States and also operates offices through joint venture agreements in Mexico City, Singapore and Bahrain. In 2017, the ICDR administered international arbitrations seated in over 90 countries.

The ICDR issued its International Dispute Resolution Procedures, as amended and effective June 1, 2014 (the "**ICDR Rules**"), which includes mediation and arbitration rules for international cases. The ICDR Rules automatically apply to international cases unless the parties agree otherwise. The ICDR also administers cases pursuant to whatever set of rules the parties have designated. In practice, the ICDR routinely administers international arbitrations pursuant to the AAA's Construction Industry Arbitration Rules, Commercial Arbitration Rules, and Employment Rules; the ICDR Protocol for Manufacture/Supplier Disputes; the Commercial Arbitration and Mediation Center for the Americas (CAMCA) Rules; and the UNCITRAL Arbitration Rules.

This section of the Report focuses on the ICDR Rules and institutional practices regarding the selection and appointment of arbitrators. The ICDR Rules fully recognize the principle of party autonomy regarding the selection of arbitrators, while providing rules and procedures which assure that each arbitrator will be impartial, independent and free of conflicts of interest.

As a general matter, it should first be noted that it has long been the practice of the ICDR to conduct an administrative conference with the parties before the arbitral tribunal is constituted (the "**Administrative Conference**"). This institutional practice is now formalized in Article 4 of the ICDR Rules. The conference is conducted by the ICDR case manager assigned to the case. The Administrative Conference provides an important opportunity for the parties to discuss with the ICDR issues such as the number and method of appointment of arbitrators, arbitrator qualifications, and other preliminary issues. The ICDR's practice is to have such an administrative conference within ten business days after the Notice of Arbitration has been submitted. [11]

II. Number of Arbitrators

A. Applicable Rules

Under the ICDR Rules, the parties can specify the number of arbitrators in either their arbitration agreement or after the dispute arises. The number of arbitrators is one of the issues the ICDR will discuss with the parties during the Administrative Conference. *See* Art. 4. In the

[11] *See* James M. Hosking and Gretta Walters, Ch. 3, The ICDR International Rules, INTERNATIONAL ARBITRATION IN THE UNITED STATES, at 57 (2018)(edited by Laurence Shore; Tai-Heng Cheng;Mara V.J. Senn; Jenella La Chiusa; Lawrence Schaner) (hereinafter "Hosking & Walters").

absence of agreement by the parties, the ICDR Rules provide for the dispute to be heard by one arbitrator, unless the ICDR determines in its discretion that three arbitrators are more appropriate "because of the size, complexity, or other circumstances of the case." *See* Art. 11.

B. Institutional Practices

Where the arbitration agreement does not specify the number of arbitrators, the ICDR first attempts, by means of the Administrative Conference, to obtain agreement by the parties as to the number of arbitrators. If agreement cannot be reached, the ICDR has discretion to decide the number of arbitrators taking into the account specific circumstances of the case. In practice, the ICDR will appoint a single arbitrator in smaller cases. While there is no monetary threshold specified in the ICDR Rules, the ICDR will normally direct that the arbitral tribunal consist of three members in cases where the amount in dispute exceeds $1 million, especially where the underlying dispute is complex or the parties ask for arbitrators with different expertise.[12]

The ICDR may also use the Administrative Conference to discuss with the parties whether the appointment of a single arbitrator might be more appropriate in cases where the amount is dispute is less than $1 million, even where the arbitration clause specifies a three-member tribunal. The major advantage of a sole arbitrator is that the arbitration will be at a lower cost and a sole arbitrator may be able to resolve the dispute with greater speed. However, in the absence of agreement of the parties, the number of arbitrators specified in the arbitration agreement will apply. During the Administrative Conference, the ICDR case manager will advise the parties of the availability of the Streamlined Three-Arbitrator Panel Option for Large Complex Cases. Under this option, the parties work with a single arbitrator through the preliminary procedural and discovery stages; the full panel of three arbitrators comes aboard only at the evidentiary hearing stage and to issue the final award.

III. Party Nominations

A. Appointment of Arbitrators by the Parties without the Assistance of the ICDR

The ICDR Rules provide that the parties "may agree upon any procedure for the appointing arbitrators." *See* Art. 12. The parties may agree to select arbitrators with or without the assistance of the ICDR. In those cases where the parties have agreed to select arbitrators without the assistance of the ICDR, the parties are to inform the ICDR as to the procedures agreed upon and notify the ICDR when such selections have been made. However, any arbitrator selected by the parties must comply with the ICDR requirement that arbitrators serving on a tribunal pursuant to the ICDR Rules be "impartial and independent." *See* Art. 13.

The ICDR Rules provide an important procedural safeguard to make sure that the arbitration is not unreasonably delayed because of the failure of the parties to reach agreement on a method of selection or to timely appoint the arbitrators. *See* Art. 12. The ICDR Rules provide that if within 45 days after the commencement of the arbitration the parties have not agreed on

[12] *See* James H. Carter & John Fellas, INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 145 (2d. ed. 2016).

the procedure for appointing the arbitrators or have not agreed on the selection of the arbitrators, then "at the written request of any party" the ICDR will become directly involved in the process. *See* Art. 12(3).

Where the parties have failed to reach agreement upon the procedure for the selection of arbitrators, the ICDR, upon the written request of one of the parties, has the right to appoint the arbitrators. *See* Art.12(3). Similarly, in the event the parties have agreed upon a method of appointment, but one or more of the appointments has not been made within the agreed time period, the ICDR, upon the written request of one of the parties, will step in and perform any remaining functions that remain to be performed. *See* Art.12(3). This may include the ICDR appointing one or more of the party-appointed arbitrators or appointing the presiding arbitrator. This important procedural safeguard is intended to ensure that the arbitration proceeds in a timely manner and prevents one party from unreasonably delaying the process.

When the ICDR becomes directly involved in the appointment of one or more of the arbitrators, the IDCR Rules provide that it shall so do after inviting consultation with the parties. In addition, at the request of a party or on its own initiative, the ICDR may appoint nationals of a country other than that of any of the other parties as the arbitrators or as the sole or presiding arbitrator. *See* Art. 12(4).

Finally, and importantly, the ICDR Rules require that in all cases, and regardless of the method of appointment, each arbitrator selected to serve must be "impartial and independent," and this requirement applies unless the parties have expressly agreed otherwise. *See* Art. 13. This requirement of impartiality and independence is further discussed in the sections below addressing the Notice of Appointment and the rules governing when a party may challenge the appointment of an arbitrator. *See* Arts. 13, 14.

B. Appointment of Arbitrators with the Assistance of the ICDR

If the parties have not agreed on the method of appointment of arbitrators, then the ICDR Rules provide that the ICDR may use the ICDR "list method" to appointment of the arbitrators. *See* Arts. 12(1), (6). The ICDR can also assist the parties in agreeing on arbitrators by providing temporary access to the Arbitrator Search Tool, which allows the parties to review the resumes of the entire International Panel. Where appropriate, the ICDR may also grant access, as applicable, to its domestic rosters of commercial, construction, or employment arbitrators. The ICDR, like the AAA also offers Enhanced Neutral Selection to assist the parties.

If the parties cannot agree on arbitrators, then under the list method, the ICDR will generally send each party a list of 10 names (in the case of a sole arbitrator) or 15 names (in cases involving a three person tribunal) of potential arbitrators, together with biographical information. Each party then has 15 days review the list, strike the names of those it objects to as potential arbitrators, and then rank the remaining names in order of preference. Each party returns the annotated list to the ICDR in confidence. The ICDR will then invite names from the list to serve as arbitrators in accordance with the designated order of mutual preference. If an arbitrator invited to serve is unable to do so, then the ICDR will approach the next ranking person on the list.

In some cases, there may not be sufficient overlap between the parties' rankings for the tribunal to be fully formed. In such event, the ICDR, after discussion with the parties, may send out a second list. The ICDR, after discussion with the parties, may also limit the number of names on the list that each party may strike. The ICDR Rules, however, provide that the ICDR retains the right to make the arbitrator appointments without sending out additional lists. *See* Art. 12(6). The ICDR will not designate as an arbitrator anyone who has been stricken from the list of potential arbitrators by one of the parties.

C. Appointment of the Chair of the Tribunal

In many cases, the arbitration agreement provides that each party shall appoint its own arbitrator, with the two party-appointed arbitrators appointing the chairperson. A common issue that arises in such cases is the degree to which the parties may consult with their party-appointed arbitrator with regard to the selection of the chairperson.

While the ICDR Rules generally prohibit any party from having *ex parte* communications with any arbitrator, they do permit the parties to discuss with their party-appointed arbitrator the suitability of candidates to serve as the presiding arbitrator where the arbitration agreement contemplates the participation of the parties or the party-appointed arbitrators in the selection of the presiding arbitrator. *See* Art. 13(6). However, the ICDR Rules prohibit any party from having any *ex parte* communications with any candidate for presiding arbitrator. *Id*. The ICDR Rules also allow a party when first considering a person for appointment as a party appointment arbitrator to have limited *ex parte* communications with such persons, provided such communications are restricted to advising the person of the general nature of the case and discussion of the candidates' qualifications, availability, or impartiality and independence. *Id.*

If requested, the ICDR can provide the parties with a list of potential candidates to serve as the chairperson. Also, upon agreement of the parties, or where the two party-appointed arbitrators cannot agree upon the chairperson within the proscribed time, the ICDR can use the list method as the means for the selection of the chairperson.

If the ICDR appoints all three arbitrators, unless the parties agree on who should serve as chairperson, the arbitrators will decide which of them will serve in that role. If requested by the arbitrators, the ICDR will designate the chairperson. In cases where the ICDR is appointing the chairperson, it may consult with the other members of the tribunal in selecting the presiding arbitrator.[13]

D. Institutional Practices

As previously noted, all arbitrators serving on an arbitral tribunal under the ICDR Rules must be impartial and independent. *See* Art. 13(1). As part of its procedures to ensure arbitrator independence and impartiality, the ICDR sends a Notice of Appointment to each of the arbitrators which sets forth the conditions of the appointment. *See* Art. 13(2). The appointment of the arbitrator becomes effective only after receipt by the ICDR of the Notice of Appointment

[13] Martin F. Gusy, James M. Hosking & Franz J. Schwarz, A GUIDE TO THE ICDR INTERNATIONAL ARBITRATION RULES ¶ 6.27 (2011).

completed and signed by the arbitrator. *See* Art. 12(7). No person, regardless of the method of selection, will be confirmed by the ICDR as an arbitrator unless such person agrees and complies with the conditions set forth in the Notice of Appointment.

The Notice of Appointment requires the arbitrator to agree to act in compliance with the ICDR Rules, the Code of Ethics for Commercial Arbitrators, and to disclose any fact or circumstance which might give rise to any "justifiable doubts as to the arbitrator's impartiality or independence." *See* Art. 13(2). The Notice of Appointment contains a list of questions which are designed to help assure disclosure by the arbitrator of any past or present financial, professional, social or other relationship of any other kind that the arbitrator has had with any of the parties, their counsel, potential witness, or the other arbitrators on the tribunal that may be perceived as affecting the arbitrator's impartiality or independence.

This disclosure obligation is a continuing one that applies throughout a person's service as an arbitrator. *See* Art. 13(3). The arbitrator is required to sign and return the Notice of Appointment to the ICDR, and all disclosures made by the arbitrator are provided to the parties.

The ICDR maintains an International Panel of potential arbitrators for international cases. The International Panel consists of approximately 750 arbitrators, the majority of whom are located outside the United States. The ICDR draws from this panel, as well as its domestic panels, where appropriate, to compile lists or to make appointments.

The ICDR has signed the Equal Representation in Arbitration Pledge. As of 2017, more than 15% of the ICDR panel members are women. The ICDR has a policy of striving for a minimum of 20% of diverse arbitrator candidates for every list of potential arbitrators sent to the parties.

E. Emergency Arbitrators

The ICDR was one of the first arbitral institutions to include procedures for emergency relief prior to the formation of the arbitral tribunal. Under Article 6 of the ICDR Rules, a party may apply for emergency relief before the panel is constituted by filing a written notice to the ICDR setting forth the nature of the relief sought and why the party is entitled to such relief on an emergency basis. The request for emergency relief can be submitted concurrent with or following the submission of a Notice of Arbitration, and copies must be served on all other parties. A request for emergency relief cannot be made on an *ex parte* basis.

A sole emergency arbitrator will be appointed by the ICDR within one business day of its receipt of the request for emergency relief. *See* Art. 6(2). The emergency arbitrator is subject to the same independence and impartiality requirement as any other arbitrator, and prior to appointment must disclose, in accordance with Art. 13, any circumstances that may give rise "to justifiable doubts as to the arbitrator's impartiality or independence." *See* Art. 6(2). Any objection to the appointment of the emergency arbitrator must be made within one business day after the ICDR has given notice to the parties of the emergency arbitrator. The emergency arbitrator's authority ends when the tribunal is constituted. The emergency arbitrator may not serve as a member of the tribunal unless the parties agree otherwise. *See* Art. 6(5).

The ICDR does not require any administrative fee for the emergency arbitration proceedings. The only cost to the parties are the compensation and expenses of the emergency arbitrator. [14]

F. Small Claims and Expedited Arbitration

The ICDR Rules provide for the application of its International Expedited Procedures in cases where no claim or counterclaim exceeds $250,000, unless the parties agree otherwise. *See* Article 1(4). The International Expedited Rules are also available for use by the parties in larger cases upon mutual consent. The ICDR may discuss with the parties during the Administrative Conference use of the International Expedited Rules.

In cases where the International Expedited Procedures apply, the matter will be heard by a single arbitrator. *See* Art. E-6. For selection of the sole arbitrator, the ICDR will simultaneously send each party an identical list of five proposed arbitrators. If the parties are unable to agree upon an arbitrator within ten days after transmittal of the list, each party may strike up to two names, and return the list to the ICDR. If for any reason the appointment cannot be made from the submitted lists, the ICDR may make the appointment without the circulation of any additional lists. The parties will then be given notice by the ICDR of the name of the appointed arbitrator, together with any disclosures by the arbitrator as required by Article 13.

The International Expedited Procedures serve as a supplement to the ICDR Rules, rather than a stand-alone replacement of the ICDR Rules. Accordingly, all other provisions of the ICDR Rules, unless in conflict with a specific provision of the International Expedited Procedures, continue to apply.

IV. Special Situations

A. Multi-party Arbitration

The ICDR Rules provide that if there are more than two parties to the arbitration, then the ICDR may appoint all the arbitrators, unless the parties have agreed otherwise. *See* Art. 12(5). Notwithstanding the ICDR's authority to appoint all the arbitrators in multi-party cases, the ICDR's practice is to work with the parties to encourage agreement on a method of selection and suggest variations of the list method as the method of appointment.

The ICDR Rules allow for the joinder of additional parties. *See* Art. 7. However, no additional party may be joined after appointment of any arbitrator, except upon the consent of all parties, including the additional party. *Id.* This limitation is in recognition of the importance of each party's equal participation in the appointment process. [15] Where joinder occurs prior to the appointment of any arbitrator, the additional party will be a full participant in the appointment process.

[14] *See generally* The ICDR International Arbitration Reporter, at 5-6 (Fall 2016).
[15] *See* The ICDR International Arbitration Reporter, at 4 (Fall 2016)

B. Consolidation

The ICDR Rules provide for the appointment of a special "consolidation arbitrator" (the "**Consolidation Arbitrator**") to hear and rule on any request by a party to consolidate two or more arbitrations into a single arbitration. *See* Art. 8. The power to consolidate only applies to two or more arbitrations pending under the ICDR Rules or other arbitration rules administered by the AAA or the ICDR. The Consolidation Arbitrator's sole power is to rule on the issue of consolidation. The Consolidation Arbitrator may not be an arbitrator who is part of the tribunal to any of the arbitrations subject to potential consolidation. *See* Art. 8(2)(c).

After receipt of a request for consolidation, the ICDR will notify the parties of its intent to appoint a Consolidation Arbitrator. The parties then have 15 days to agree upon an appointment procedure. Absent agreement of the parties, the ICDR will follow the list method set forth in Art. 12, which includes the right of the ICDR to appoint the Consolidation Arbitrator.

In deciding whether to consolidate, the Consolidation Arbitrator shall consult the parties, may consult with the arbitral tribunals at issue, and may consider all relevant circumstances.[16] Where the Consolidation Arbitrator decides to consolidate an arbitration with two or more arbitrations, each party in those arbitrations shall be deemed to have waived its right to appoint an arbitrator. *See* Art. 8(6). The Consolidation Arbitrator has substantial discretion as to the membership of the tribunal designated to hear the consolidated arbitration, including the power to revoke the appointment of any previously appointed arbitrator, select one of the previously appointed tribunals to serve in the consolidated proceeding, and complete the appointment of the consolidation arbitration tribunal. Unless agreed by all parties, the Consolidation Arbitrator may not serve on the tribunal of the consolidated arbitration. *Id*.

C. State Entities

The ICDR Rules do not include specific rules relating to the appointment of arbitrators in arbitrations involving states or state-owned entities.

D. Challenges to and Replacement of Arbitrators

Article 14 of the ICDR Rules addresses a party's right to challenge an arbitrator when circumstances exist that give rise to "justifiable doubts" as to an arbitrator's impartiality or independence. A party must send a written notice of any challenge to the ICDR within 15 days after (i) being notified of the appointment of the arbitrator or (ii) learning of the circumstances giving rise to the challenge. *See* Art. 14 (1). The party shall not send a copy of this notice to any member of the tribunal.

Upon receipt of a challenge, the ICDR will notify the other party and give such other party an opportunity to respond. The ICDR notifies the tribunal only that a challenge has been received, without identifying the party making the challenge. *See* Art. 14(2). The ICDR may

[16] Such relevant circumstances include: (1) applicable law; (b) whether one or more arbitrators have been appointed in more than one of the arbitrations and, if so, whether the same or different persons have been appointed; (c) the progress already made in the arbitrations; d) whether the arbitrations raise common issues of law and/or facts; and (e) whether the consolidation of the arbitrations would serve the interests of justice and efficiency. Art. 8(3).

also request information from the challenged arbitrator relating to the challenge. When a challenge has been made, the other party may elect to agree that the challenged arbitrator should withdraw and the challenged arbitrator then must withdraw. The challenged arbitrator may also independently elect to withdraw. However, in neither case does the withdrawal by the arbitrator imply acceptance of the validity of the grounds asserted in the challenge. *See* Art. 14(2).

Under the present rules, if the other party does not agree to the challenge or the challenged arbitrator does not independently elect to withdraw, then the ICDR makes the decision on the challenge. *See* Art. 14. The ICDR is also empowered on its own initiative to remove an arbitrator for failing to perform his or her duties. *See* Art. 14(3).

The ICDR plans to launch in 2018 an Administrative Review Council, along the lines of the ARC established by the AAA (*see* earlier section of this Report on the AAA, supra),[17] that would rule on certain administrative matters, including arbitrator challenges. The ICDR is drafting guidelines to take into account issues that do not arise in the domestic arena (*e.g.*, choice of seat).

Article 15 of the ICDR Rules governs the replacement of an arbitrator in the event an arbitrator resigns or is removed. The procedure for the selection of the replacement arbitrator is set forth in Article 12 and is the same as that for the original appointment of an arbitrator. If a substitute arbitrator is appointed then, unless the parties agree otherwise, the arbitral tribunal at its discretion may decide whether all or part of the case will be repeated. *See* Art. 15(2). In rare cases, in the event an arbitrator on a three-person tribunal fails to participate in the arbitration, the two other arbitrators may, in their sole discretion, decide to continue the arbitration without the participation of such arbitrator. Alternatively, the ICDR may remove the arbitrator under Article 14(4), declare the position vacant, and appoint a substitute arbitrator.

V. Arbitrator List Services

The ICDR also offers services to parties separate from full administration of a case.[18] Under the ICDR's Arbitrator Appointment Service, the ICDR will provide the parties with a list of the most appropriate arbitrators for their dispute, based on criteria specified by the parties. The arbitrators are notified that their information is being provided to parties and that they may be contacted directly by the parties. It then is up to the parties to handle the rest of the appointment process and case management as the ICDR's involvement ends once the list is provided.

The ICDR also offers Arbitrator Search and Appointing Authority services. Under this service, the ICDR assists the parties in identifying arbitrators and completing the selection and appointment process. The ICDR will provide the parties with a list of 10 or 15 arbitrators whose credentials best match the criteria specified. If the parties are unable to agree on a proposed arbitrator, they may strike any unacceptable candidates from the list and rank the remaining ones according to their preferences. The ICDR extends an invitation to the highest-ranked mutually

[17] *See* Eric Tuchmann; Sasha Carbone; Tracey Frisch; Simon Kyriakides, *The American Arbitration Association's Administrative Review Council*, NEW YORK DISPUTE RESOLUTION LAWYER at 11-15 (Fall 2017).
[18] *See* https://www.icdr.org/about_icdr.

agreeable candidate and facilitates a conflicts check. When a candidate accepts the appointment, the ICDR notifies the parties of the arbitrator's identity and provides the parties with any disclosures the arbitrator may have made. The parties have seven calendar days to object to the arbitrator's appointment. If the parties cannot agree on whether the disclosure disqualifies the arbitrator from service, the ICDR will determine whether to reaffirm or disqualify the arbitrator. If no candidate remains from those originally provided, or if there are no mutually agreeable candidates, the ICDR will appoint the arbitrator.

INTERNATIONAL COURT OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE (ICC)

I. Overview

The International Court of Arbitration of the International Chamber of Commerce ("**ICC**") is headquartered in Paris, France. The ICC Secretariat, with offices around the world, manages the day-to-day aspects of administering arbitrations under the auspices of the International Court of Arbitration and serves as the principal liaison to parties involved in ICC arbitrations. The North American arm of the Secretariat is known as SICANA (Secretariat of the ICC International Court of Arbitration in North America).

The ICC has promulgated Rules of Arbitration (the "ICC Rules") to govern arbitrations under its administration, including detailed procedures for selecting arbitrators. The current edition of the ICC Rules went into effect on March 1, 2017.[19] With few exceptions, the ICC permits parties to deviate by agreement from the procedures outlined in the ICC Rules, including for the selection of arbitrators. The ICC Rules thus permit significant flexibility in accommodating the parties' wishes regarding the procedure of selecting arbitrators while also offering default procedures and the finality of an appointing authority as a backstop where party agreement proves elusive.

While the ICC's approach to confirming arbitrators nominated by the parties or the co-arbitrators pursuant to such an agreement is highly deferential,[20] some of the ICC's internal procedures for appointment may be less well-known. This section of the Report explores the applicable rules governing the nomination or appointment of arbitrators, primarily Articles 11 to 13 of the ICC Rules, as well as institutional practices of the ICC in carrying out its functions. We discuss how the ICC Rules intersect with special situations, including arbitrations with multiple parties or where a state is a party, the appointment of emergency arbitrators, and the ICC's new Expedited Procedure Rules for smaller disputes, which went into effect with the amendment to the ICC Rules on March 1, 2017. Against this backdrop we include discussion of various techniques that parties may consider using to maintain greater control over the selection of arbitrators, including a list service offered by the ICC and other arrangements that parties have used to find agreement on sole arbitrators or tribunal presidents.

II. Number of Arbitrators

A. Applicable Rules

The ICC Rules contemplate that the arbitral tribunal will consist of one or three arbitrators. The number of arbitrators is frequently specified in the parties' arbitration clause but may also be agreed afterwards, including after the arbitration is filed. However, an important feature of the ICC Rules is that where the parties have not agreed on the number of arbitrators,

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[19] The ICC Rules are available at https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration.

[20] The ICC Rules distinguish between *nomination* of arbitrators by the parties and *appointment* of arbitrators by the ICC. Notwithstanding colloquial references to party appointment of arbitrators, parties cannot appoint arbitrators under the ICC Rules. The nomination of an arbitrator by one or more parties always remains subject to *confirmation* by the ICC.

the ICC will decide whether there will be a sole arbitrator or three. *See* Art. 12(1)-(2). In making this decision, the ICC will consider the comments of the parties, which must be included in the Request for Arbitration and in the Answer. *See* Art. 4(3)(g), 5(1)(e).

B. Institutional Practices

The criteria that the ICC considers in deciding between a one- and three-arbitrator tribunal include the amount in dispute and complexity of the issues. While there is no firm rule, the current guidance from the ICC is that it is unusual for the ICC to decide in favor of three arbitrators when the amount in dispute is less than $5 million, or in favor of a sole arbitrator where the amount in dispute exceeds $30 million.[21] If the amount in dispute has not been quantified or the complexity of the dispute cannot be readily determined, the ICC may seek more information from the parties.

III. Party Nominations

A. Applicable Rules

Where there is a sole arbitrator, the ICC Rules grant the parties 30 days, running from when the respondent receives the Request for Arbitration, to attempt to agree on a nominee. If the parties do not agree within the prescribed period (or any extension thereon), the ICC will appoint the arbitrator. See Art. 12(3). Where there are three arbitrators, Article 12(4) of the ICC Rules provides that each side will nominate one arbitrator, in the Request for Arbitration and in the Answer, respectively.[22] However, for the president of a three-arbitrator tribunal, the presumption is that the ICC will appoint *unless* the parties agree to another procedure, whether in the arbitration clause or otherwise. If the parties so agree, they may jointly nominate an arbitrator to serve as president, subject to confirmation by the ICC. *See* Art. 12(5). The parties must inform the ICC of their agreement before the ICC has appointed the arbitrator, as the decisions of the ICC as to the appointment of arbitrators are final (subject only to challenge, which is beyond the scope of this report). *See* Art. 11(4).

The criteria the ICC uses when confirming arbitrators nominated by the parties is set forth in Articles 11(1) and 13(1)-(2). Foremost among these are the requirements of independence and impartiality. It is a non-waivable requirement under the ICC Rules that all arbitrators, including party-nominated arbitrators, "must be and remain impartial and independent of the parties involved in the arbitration." Art. 11(1). This is one of the few areas where the ICC will not permit derogation even by party agreement. The parties have the opportunity to raise objections to the other party's nomination. *See* Art. 13(2).

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[21] J. Fry, S. Greenberg, F. Mazza, The Secretariat's Guide to ICC Arbitration: A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration, ICC (2012) (hereinafter, "Secretariat's Guide"), § 3-440.

[22] Special situations where there are multiple parties who are unable to agree on an arbitrator are discussed in Section V, infra.

B. Institutional Practices

While the nomination of an arbitrator by one or more parties always remains subject to confirmation by the ICC, the ICC's approach is highly deferential to the preference of the nominating party or parties. The ICC requires each nominated arbitrator to complete a Statement of Acceptance, Availability, Impartiality and Independence disclosing potential conflicts and other pertinent facts, as well as a confirmation of the arbitrator's availability, after which the parties have a week to submit any objection to the nomination.[23] Notwithstanding this deadline, the two party-nominated arbitrators are usually confirmed at the same time, not *seriatim*.

As a matter of practice, unless a party objects to a nomination or the ICC has information raising concerns about the arbitrator's independence or impartiality, the ICC will almost always confirm the arbitrator. Rare circumstances warranting an exception to this rule might include the proposed arbitrator having an excessive caseload, such that he or she could not carry out his or her duties in a timely fashion, or a particularly poor track record of doing so in prior ICC arbitrations. In addition, if the nomination does not comply with the criteria for arbitrators that the parties have established in their arbitration agreement (such as nationality, expertise, or language proficiency), the parties must expressly waive those criteria or the ICC will not confirm the nomination.

In the vast majority of cases, the ICC Secretariat will make the confirmation directly, rather than the ICC Court.[24] If a nomination is referred to the Court, it can add 2-3 weeks to the confirmation process. If an objection is raised, the nomination will be considered by the ICC Court, unless the objection is of a minor nature with no independence/impartiality implications, in which case the ICC Secretariat will usually confirm the nomination over the objection. Only the ICC Court has the power to refuse to confirm an arbitrator. If the ICC refuses to confirm a nomination, the nominating party will have an opportunity to nominate a different candidate. The ICC considers the confirmation process confidential and does not provide parties with its rationale for confirming, or refusing to confirm, party-nominated arbitrators.

One area in which the ICC has recently increased transparency is disclosing and updating on a monthly basis the names of all arbitrators sitting in ICC arbitrations since January 1, 2016. Once the terms of reference for an arbitration are finalized, the names of the arbitrators and nationality are made public on the ICC's website, unless the parties to an arbitration agree not to have them published for reasons of confidentiality.[25] Also included is the method by which the arbitrator was selected (i.e., nominated by a party or by the co-arbitrators, or appointed by the

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[23] Occasionally, an arbitrator disclosure will elicit a request from a party for further information. If the ICC considers the request reasonable, it will act as an intermediary in obtaining such information from the arbitrator candidate.

[24] The ICC Court is composed of practitioners from around the world and is the ultimate decision-making body. The ICC Secretariat employs full-time staff and carries out ministerial and other routine functions that have been delegated by the ICC Court, which include confirming arbitrator nominations in the absence of a party objection. *See* https://iccwbo.org/dispute-resolution-services/arbitration/icc-international-court-arbitration/

[25] *See* https://iccwbo.org/dispute-resolution-services/arbitration/icc-arbitral-tribunals.

ICC). This enhanced transparency is intended to give users greater visibility into an arbitral candidate's existing commitments.[26]

Given the flexibility that the ICC Rules grant parties in regard to the selection of arbitrators, parties have often devised procedures to facilitate agreement on the nomination of a sole arbitrator or president of a three-arbitrator tribunal. Such procedures commonly include the arrangement by which the co-arbitrators will collaborate, with or without input by the parties, on a nomination for president. Variations on this framework might include generating a list of candidates, either by the co-arbitrators alone or including candidates proposed by the parties, which the parties may then strike and rank to arrive on a joint nomination for the president. To the extent such a slate includes candidates proposed by the parties, it has been found helpful for the proposals to be made on a blind basis, where neither party knows which candidates were proposed by the adversary and which by the co-arbitrators. Alternatively, upon request, the ICC will supply a list of candidates, which the parties can strike and rank.[27] These list techniques can be adapted to the particular needs and preferences of the parties. However constructed, they permit the parties to retain some control over the selection of the sole arbitrator or president, rather than the default route of appointment by the ICC.

IV. Institutional Appointments

A. General

1. Applicable Rules

As noted above, unless the parties have agreed on a nominee, the ICC will appoint a sole arbitrator or president of a three-arbitrator tribunal. Art. 12(3), (5). In the vast majority of cases, appointment of arbitrators by the ICC is governed by Article 13(3) of the ICC Rules. It provides:

> Where the [ICC] Court is to appoint an arbitrator, it shall make the appointment upon proposal of a National Committee or Group of the ICC that it considers to be appropriate. If the Court does not accept the proposal made, or if the National Committee or Group fails to make the proposal requested within the time limit fixed by the Court, the Court may repeat its request, request a proposal from another National Committee or Group that it considers to be appropriate, or appoint directly any person whom it regards as suitable.

Article 13(4) of the ICC Rules may also apply in certain circumstances where a direct appointment by the ICC Court is made without the need to involve a National Committee or Group[28] (for brevity, "**National Committee**").

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[26] *See* Note to the Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, ICC, 30 October 2017 (hereinafter, "**Note to Parties**"), ¶¶ 27-31.

[27] The use of the "list method" to make appointments is discussed further below in Section VI.

[28] Territories that are not sovereign states (Palestine, Chinese Taipei, Hong Kong and Macau) have a "Group" rather than a National Committee. *See* Secretariat's Guide § 3-521.

Article 13(4) reads:

> The Court may also appoint directly to act as arbitrator any person whom it regards as suitable where:
>
> a) one or more of the parties is a state or may be considered to be a state entity;
>
> b) the Court considers that it would be appropriate to appoint an arbitrator from a country or territory where there is no National Committee or Group; or
>
> c) the President certifies to the Court that circumstances exist which, in the President's opinion, make a direct appointment necessary and appropriate.

In addition to the general considerations noted above, for the appointment of a sole arbitrator or a tribunal president in particular, the ICC Rules presume that he or she "shall be of a nationality other than those of the parties" except "in suitable circumstances and provided that none of the parties objects within the time limit fixed by the Court." Art. 13(5).

2. Institutional Practices

The ICC Rules clearly give the ICC significant latitude in how it selects arbitrator candidates. However, for some users, it can also make the appointment process seem opaque. For example, Article 13(5) of the ICC Rules states that the ICC will consult "a National Committee or Group of the ICC that it considers to be appropriate." This raises several questions. What National Committee is the ICC likely to consider appropriate for a dispute? How does the choice of a National Committee influence the selection of arbitrators? How does a National Committee identify arbitrator candidates to propose to the ICC? The selection process by an ICC National Committee is confidential. Additionally, the ICC does not disclose the National Committee(s) with whom the ICC has consulted with respect to the selection of arbitrators on a case or whether the ICC accepted or declined a candidate proposed by a National Committee.

If the ICC requests that a National Committee propose an arbitrator candidate, the ICC typically asks for a response from the National Committee within seven days.[29] The ICC expects the National Committee to convey relevant case information to potential arbitrators and ask them to complete the disclosure forms, in which arbitrator candidates which must disclose "any facts or circumstances that might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, or that could give rise to reasonable doubts as to the arbitrator's impartiality."[30] As a matter of practice, the ICC generally only accepts proposals

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[29] *See* Note to National Committees and Groups of the ICC on the Proposal of Arbitrators, dated May 10, 2016 (hereinafter "Note to National Committees and Groups"), ¶ 27. When appropriate for the case, the ICC accommodates party requests to expedite formation of the arbitral tribunal by shortening the response time to three days and accelerating other internal procedures.

[30] *See* Note to National Committees and Groups, ¶ 41.

from National Committees where the arbitrator candidates provide unqualified disclosure statements.

A National Committee may propose more than one candidate, but usually proposes a single candidate. The ICC usually accepts the candidate proposed by the National Committee if suitable. If a National Committee does not respond to the ICC's request for candidates within seven days, or proposes a candidate that the ICC does not find suitable, the ICC may ask for a different proposal, contact a different National Committee, or appoint the arbitrator directly.[31] If the ICC already has a particular candidate in mind before contacting the National Committee, it may inform the National Committee of that, but a National Committee is independent and free to propose any candidates it deems appropriate.[32] The ICC also encourages National Committees to consider gender and generational diversity in their arbitrator candidate proposals, as well as to consider new or less experienced arbitrators for cases with less complexity or lower amounts in dispute.[33]

The ICC will select a National Committee principally based on geography, where the ICC considers it appropriate that a national of that National Committee's country or territory serve as the arbitrator for a case. National Committees are almost invariably expected to nominate candidates who are nationals of the same country, though that is not a formal requirement.[34] As a matter of practice, when the ICC seeks a proposal from a National Committee, it is often (but not always) the National Committee of the place of arbitration. For example, for an arbitration seated in New York, the ICC would likely look to the United States Council for International Business ("**USCIB**"), which is the U.S. National Committee for the ICC. The USCIB has a standing Nomination Committee, currently consisting of six prominent practitioners responsible for making arbitrator candidate proposals. Nomination Committee members are appointed by the Executive Director of the USCIB and serve two-year terms, which may be renewed once. While the USCIB maintains a database of potential arbitrators, who are either U.S. citizens (wherever located) or non-U.S. citizens residing in the United States,[35] the Nomination Committee is not limited to the database when proposing arbitrators to the ICC.

Even for a U.S.-seated arbitration, the ICC may look to a different National Committee, or more than one, depending on the circumstances. Factors that may counsel in favor of contacting a different National Committee would include the nationality of the parties, the governing law, or any characteristics that are necessary or desirable in the arbitrator. For example, if one of the parties is domiciled in the U.S., Article 13(5) creates the presumption that the president or sole arbitrator should be of a different nationality. In the exceptional case where

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[31] *See* Note to National Committees and Groups, ¶ 28.

[32] *See* Secretariat's Guide, § 3-527.

[33] *See* Note to National Committees and Groups, ¶¶ 33-34. The ICC has signed on to the Equal Representation in Arbitration Pledge, whose goal is to promote equal opportunities for women as arbitrators. *See* https://iccwbo.org/media-wall/news-speeches/icc-pledges-support-for-equal-representation-of-women-in-arbitration/. The ICC has seen an increase in women arbitrators. The ICC announced in a press release on May 31, 2017 that 209 women had been appointed as arbitrators in 2016 (whether by the parties, co-arbitrators, or the ICC), up from 136 in 2015. *See* https://www.iccwbo.be/icc-court-sees-marked-progress-on-gender-diversity/ Some progress remains, however, as women arbitrators represented only 14.8% of all arbitrators appointed in 2016, albeit up from 10.4% in 2015.

[34] *See* Secretariat's Guide, § 3-526.

[35] *See* http://www.uscib.org/dispute-resolution-ud-835/.

the ICC considers it appropriate to appoint an arbitrator of the same nationality of one of the parties, it would give the parties an opportunity to comment before making the appointment. The ICC may also seek recommendations from multiple National Committees where particular qualifications are needed.[36]

As noted, Article 13(4) of the ICC Rules also gives the Court the power to make a direct appointment without seeking input from a National Committee.[37] This process applies in a much smaller number of cases than those covered by Article 13(3). Article 13(4) identifies three circumstances in which the Court may make such a direct appointment. First, where one of the parties "is a state or may be considered to be a state entity." Art. 13(4)(a). In such a scenario, it is considered that the strict "neutrality" of the Court is more appropriate than involving a National Committee. Second, where the Court considers it appropriate to make an appointment from a territory where there is no National Committee. Art. 13(4)(b). Given that the ICC has more than 90 National Committees across the world, this situation arises rarely. Third, where the President certifies to the Court that circumstances exist that "make a direct appointment necessary and appropriate." Art. 13(4)(c). Such circumstances might, for example, include where an identical tribunal is to be appointed in more than one case, and thus the involvement of a National Committee is unnecessary.[38]

Where an appointment is made directly, candidates will be identified by the Secretariat through internal discussions. The Secretariat will consider the factors identified in Article 13(1) and discussed above. The candidates(s) will be approached and must provide the usual Statement of Acceptance, Availability, Impartiality and Independence and other background materials prior to being proposed to the ICC Court for appointment.[39]

B. Acting as Appointing Authority in Non-ICC Cases

While most arbitration agreements designate an institution to administer the proceedings, the parties may also choose an *ad hoc* arbitration to be conducted outside any institutional framework, often but not necessarily by adoption of the UNCITRAL Arbitration Rules. In such *ad hoc* cases, the parties can agree to use the ICC to assist with constituting the tribunal and resolving any arbitrator challenges. Importantly, unlike many other institutions, the ICC currently will not administer such an *ad hoc* arbitration, although it recently has begun providing certain administrative services. The ICC has a separate set of rules that are applicable in such cases – the Rules of ICC as Appointing Authority (the "Appointing Authority Rules"), which were amended as of January 1, 2018.[40] The number of such cases is small compared to the total number of ICC cases. The ICC acted as an appointing authority in 16 cases in 2015, 15 of which were under the UNCITRAL Arbitration Rules. In 2016, the ICC was called upon to act as appointing authority in 12 cases, only 4 of which were under the UNCITRAL Arbitration Rules.

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[36] *See* Secretariat's Guide, § 3-528.

[37] *See generally* Secretariat's Guide, §§ 3-537 - 3-545.

[38] In addition to these three circumstances, the Court also maintains a residual power to make a direct appointment if the National Committee process has failed. *See* Art. 13(3).

[39] *See* Secretariat's Guide, §§ 3-545

[40] *Available at* https://iccwbo.org/dispute-resolution-services/appointing-authority/rules-of-icc-as-appointing-authority.

The ICC can only act as appointing authority in accordance with the parties' agreement as expressed in either the arbitration clause, by subsequent agreement,[41] or when designated as appointing authority by a competent authority.[42] *See* Appointing Authority Rules, Art. 1. The UNCITRAL Arbitration Rules, for example, provide for use of an appointing authority where the parties fail to appoint an arbitrator or the tribunal. The parties can designate the ICC to serve this role.[43] Where the ICC is designated to serve as appointing authority, its functions are carried out exclusively by the ICC Court, with the assistance of the ICC Secretariat. *See* Appointing Authority Rules, Art. 1(2).

The Appointing Authority Rules provide a timeline and procedures for appointing an arbitrator or the tribunal that differ with respect to an arbitration governed by the UNCITRAL Arbitration Rules (*see* Appointing Authority Rules, Art. 6) as opposed to any other *ad hoc* arbitration (*see* Appointing Authority Rules, Art. 7). These specific timelines and procedures are beyond the scope of this report. However, practitioners should familiarize themselves with the distinctions between these provisions and those applying to an arbitration governed by the ICC Rules. To take one example, unless otherwise agreed by the parties or the Court determines it to be inappropriate, the ICC will use the list method for making appointments of sole or presiding (third) arbitrators in UNCITRAL arbitrations. *See* Appointing Authority Rules, Art. 6(2).

The ICC acting as an appointing authority may in appropriate cases also have the power to decide any challenge to the appointment of an arbitrator and/or to appoint a substitute arbitrator. *See* Appointing Authority Rules, Arts. 6(1) and 7(1)). As of January 1, 2018, the ICC also offers certain administrative services in *ad hoc* arbitrations, which include maintaining the file, assisting with logistical arrangements or notifications, and administering funds. *See* Appointing Authority Rules, Art. 8.

C. Emergency Arbitrators

It is not uncommon for a commercial dispute to require some form of interim conservatory relief as the first step in the dispute resolution process, *e.g.*, a preliminary injunction to prevent the sale of an asset, a restraining order to seize funds, or an order to preserve crucial evidence. All arbitration rules permit the tribunal to order interim or conservatory relief but this is of little use when there is not yet a tribunal in place. At the same time, a party may not want to go to state court as the state court may not have the necessary authority to grant interim relief or may be perceived as slow or biased.[44]

Since January 1, 2012, the ICC Rules have included an emergency arbitrator mechanism. Unless the parties opt out as provided in Article 29 of the ICC Rules, this mechanism allows for the appointment of an "emergency arbitrator" empowered to order interim relief before the

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[41] The agreement may also be in the form of an offer to arbitrate contained, for example, in an investment agreement.

[42] For example, in accordance with the UNCITRAL Rules, the Secretary-General of the Permanent Court of Arbitration in The Hague may designate the ICC as appointing authority if the parties fail to agree on the choice of appointing authority. *See* UNCITRAL Rules, Art. 6(2).

[43] UNCITRAL Rules, Art. 6(1).

[44] *See* Secretariat's Guide § 3-1052.

arbitral tribunal has received the file and even before a Request for Arbitration has been filed.[45] Article 29 of the ICC Rules provides the framework for emergency arbitrator proceedings. Appendix V sets out the Emergency Arbitrator Rules themselves.

Article 29 states that a party in need of urgent interim or conservatory measures that cannot await the constitution of the tribunal may make an application for emergency measures. The President of the Court is responsible for appointing an emergency arbitrator as soon as possible, "normally within two days" from receipt of the application for emergency measures. *See* Appendix V, Art. 2(1). Given the timing, the President of the Court will appoint the emergency arbitrator before respondent submits its response to the emergency application.[46]

When appointing an emergency arbitrator, the President of the Court will consider the challenging time restrictions in the Emergency Arbitration Rules.[47] While the parties are free to agree on attributes or qualifications for the emergency arbitrator, this rarely happens. In practice, the President will consult with the Secretariat to identify suitable candidates from the pool of individuals who have served as ICC arbitrators and who are available to sit as emergency arbitrators.[48] There is no specific list of emergency arbitrator candidates that is maintained. As with all other arbitrator appointments under the ICC Rules, the emergency arbitrator shall be independent and impartial. *See* Appendix V, Art. 2(4)-(5). The emergency arbitrator must sign the usual statement of acceptance that attests to availability, impartiality and independence. *Id.* At that time, the arbitrator (or prospective arbitrator) must disclose any circumstance that might call into question independence or impartiality.[49] Of course, this all takes place in an expedited timeframe to ensure the appointment is made urgently.

Any challenge to the emergency arbitrator must be made within three days of appointment. *See* Appendix V, Art. 3(1). The Secretariat will allow all parties and the arbitrator an opportunity to comment on the challenge, usually within a three-day time frame.[50] The ICC Court is to decide the challenge. *See* Appendix V, Art. 3(2).[51]

The emergency arbitrator becomes *functus officio* once the full arbitral tribunal is constituted; as of that time the full tribunal will be responsible for interim or conservatory measures. Art. 28. The emergency arbitrator shall not act as an arbitrator in any arbitration relating to the dispute unless all parties agree otherwise. *See* Appendix V, Art. 2(6).[52] As of January 1, 2017, there had been more than 50 emergency arbitrator proceedings conducted under the ICC Arbitration Rules

[45] *See* Secretariat's Guide § 3-1051.
[46] *See* Secretariat's Guide, § 3-1058.
[47] *See* Secretariat's Guide, § 3-1056(e).
[48] *See* Secretariat's Guide, § 3-1056(e).
[49] *See* Note to Parties, ¶ 18.
[50] *See* Secretariat's Guide, § 3-1056(d).
[51] *See also* Secretariat's Guide, § 3-1056(d).
[52] *See also* Secretariat's Guide, § 3-1056(e).

D. Small Claims in Expedited Arbitration

The 2017 amendments to the ICC Rules introduced an expedited procedure that is automatically applicable in cases where the amount in dispute does not exceed $2 million. Article 30 provides that the Expedited Procedure Rules set forth in Appendix VI take precedence over any contrary terms of the arbitration agreement if the amount in dispute is $2 million or less or if the amount in dispute is greater but the parties agree to use the Expedited Procedure Rules. Parties with a dispute less than $2 million can opt-out of the Expedited Procedure Rules. *See* Art. 30(3)(b).

The Expedited Procedure Rules, Article 2, states that "notwithstanding any contrary provision of the arbitration agreement" the Court "may" appoint a sole arbitrator. By submitting to arbitration under the 2017 ICC Rules (and not opting out of the Expedited Procedure Rules), the parties agree that any agreement to have disputes resolved by three arbitrators is subject to the Court's discretion, if the Expedited Procedure Rules apply.[53] Indeed, the Court "will normally appoint a sole arbitrator in order to ensure that the arbitration is conducted in an expeditious and cost-effective manner."[54] The Court will invite comments from the parties before deciding the number of arbitrators.[55] The Secretariat will also allow the parties a period of time to nominate a sole arbitrator; but if they do not do so, the Court will make the appointment directly. *See* Appendix VI, Art. 2(2).

The Expedited Procedure Rules only apply where the arbitration agreement was concluded after March 1, 2017, unless the parties agree otherwise. For disputes involving arbitration agreements that predate the 2017 amendments, there is no equivalent provision.

V. Special Situations

A. Multi-Party Arbitrations

Where there are multiple claimants or multiple respondents, and where the dispute is to be referred to three arbitrators, the claimants, jointly, and the respondents, jointly, shall each nominate an arbitrator. *See* Art. 12(6). The same procedure applies if a party is joined to the arbitration. *See* Art. 12(7).[56] The additional party may align itself with either claimant(s) or respondent(s) for the purpose of nominating an arbitrator.[57]

If either the multiple claimants or multiple respondents are unable to agree to a joint nomination, the Court has discretion to appoint *all* members of the tribunal. *See* Art. 12(8).[58] This is a significant departure from the procedure applicable where there are only two parties to

[53] *See* Note to Parties, ¶ 83.
[54] Note to Parties, at ¶ 84.
[55] Note to Parties, at ¶ 85.
[56] Pursuant to Article 7, a party cannot be joined after the arbitrator has been confirmed or appointed unless the party has agreed otherwise. Participation in the constitution of the tribunal is a fundamental principle of the ICC Rules. This explains why the ICC does not permit a party to join the arbitration after the tribunal has been confirmed or appointed. *See* Secretariat's Guide, § 3-479.
[57] *See* Secretariat's Guide, § 3-467.
[58] *See also* Secretariat's Guide, § 3-481

the dispute.[59] In that case, where one party defaults in its nomination, the Court will appoint an arbitrator on behalf of the defaulting party only. *See* Arts. 12(2), 12(4).

By way of background, up until 1992 the Court would only appoint an arbitrator on behalf of a side where one or more parties had failed to make a nomination. In 1992, the French Court of Cassation issued a landmark decision in *Sociétés BKMI et Siemens v. Société Dutco construction*, Cour de cassation (7 January 1992), *Revue de l'arbitrage* (1992) 470 ("*Dutco*"). In the *Dutco* arbitration, the ICC Court confirmed the arbitrator nominated by the sole claimant. The multiple respondents jointly nominated an arbitrator, but they did so under protest. Respondents argued that they should each be able to nominate a co-arbitrator. They challenged the ICC Rule in French litigation. The Court of Cassation ultimately held that parties are entitled to equal treatment, including in the nomination of arbitrators. When the ICC Rules were revised in 1998, the provisions relating to a failure of multiple parties to nominate an arbitrator jointly were amended to provide that where multiple claimants or respondents fail to jointly nominate an arbitrator, the Court may (and typically will) appoint all arbitrators. What is now Article 12(8) was enacted to ensure equality between parties in the process of constituting the tribunal.[60]

In practice, it is extremely rare for multiple claimants not to nominate a co-arbitrator jointly as their interests are typically aligned on commencement of the proceedings. It is also not uncommon for multiple respondents to nominate a co-arbitrator jointly.[61] However, the ICC occasionally administers cases where there are more than two opposing sides—*e.g.*, where third party claims are asserted, or where the respondents' interests are adverse. In those cases, it is unlikely that the parties will agree on the co-arbitrators, so the Court usually appoints all arbitrators under Article 12(8).[62]

While the ICC has discretion not to apply Article 12(8), it rarely does so absent exceptional circumstances, *e.g.*, where the multiple parties are closely related or if their failure to agree to a co-arbitrator appears to be a tactical decision.[63]

If the ICC decides to appoint all arbitrators, it will generally select and appoint three arbitrators whom it considers appropriate. It need not consult a National Committee, and it will not appoint the candidates previously nominated by the parties.[64] Where the ICC appoints arbitrators in two or more related cases, it may decide to appoint the same tribunal in each case. In practice, the ICC Court has done so where the disputes arise out of the same contracts or contracting parties.[65]

B. Consolidation

Article 10 provides that the Court may, at a party's request, consolidate two or more arbitrations pending under the Rules into a single arbitration. In deciding whether to consolidate,

[59] Secretariat's Guide, §§ 3-468-69.
[60] See Secretariat's Guide, §§ 3-471-72.
[61] See Secretariat's Guide, § 3-476.
[62] Secretariat's Guide, § 3-477.
[63] See Secretariat's Guide, §§ 3-483 – 3-485.
[64] *See* Secretariat's Guide, § 3-486.
[65] See Secretariat's Guide, § 3-489.

one of the factors most often considered is whether arbitrators have been confirmed or appointed in one or more of the arbitrations, and, if so, whether the same or different arbitrators have been confirmed. *See* Art. 10. If the arbitrations have different arbitrators the Court would be unable to consolidate unless the different arbitrators resign or are removed at the parties' request.[66] Where the Court decides not to consolidate, it may still appoint the same tribunal in each case to allow the cases to run in parallel.[67]

C. State Entities

As discussed above, where the ICC is charged with appointing one or more arbitrator(s), it shall make the appointment upon proposal of a National Committee that the ICC Court considers appropriate. In cases where one party is a state or may be considered to be a state entity, however, the Court need not seek a recommendation from the National Committee prior to appointing an arbitrator. Article 13(4) provides that in such cases the Court may appoint the arbitrator directly. This provision was added in the 2012 amendments to the Rules, on advice from the ICC's Task Force on Arbitration Involving States or State Entities, to address the perception that National Committees favor business interests over state interests.[68]

While Article 12(2) creates a presumption in favor of a sole arbitrator, in disputes involving one or more state entities as parties the Court will often decide that three arbitrators are appropriate.[69]

D. Replacement of Arbitrators

Article 15 of the ICC Rules governs the replacement of an arbitrator during the arbitration. Reasons why an arbitrator would be replaced include death, incapacity, or voluntary resignation. The ICC Court is vested with discretion to decide whether the replacement arbitrator will be selected according to the original nominating process. *See* Art. 15(4). In addition, if the proceedings are closed before the death or departure of the prior arbitrator, the ICC Court may elect not to order a replacement, taking into account the views of the parties and the remaining arbitrators. *See* Art. 15(5).

As a matter of practice, where the former arbitrator was a co-arbitrator nominated by one of the parties, the ICC will typically ask that party to nominate the replacement. Deviations from this practice are rare, but may arise if, for example, the ICC considers that the party in question is attempting to delay or derail the arbitration.[70] Likewise, where the departing arbitrator is the president of the tribunal and was nominated by the co-arbitrators, the ICC will usually invite the

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[66] *See* Secretariat's Guide, § 3-358.
[67] *See* Secretariat's Guide, § 3-360.
[68] See Secretariat's Guide, § 3-539. In the 2012 ICC Rules, Article 13(4) would apply where a party "claims" to be a state entity. This was intended to relieve the ICC Court of the potentially difficult task of deciding whether the party is a state entity. Secretariat's Guide, §§ 3-539 to 3-540. The 2017 amendment broadened the provision to apply where a party "may be considered to be a state entity." In this regard, the ICC Task Force report, as updated in June 2017, emphasized that the ICC Court always has the discretion to decide whether to make a direct appointment. *See* ICC Commission Report, States, State Entities and ICC Arbitration (rev'd June 2017) ¶¶ 37-40.
[69] *See* Secretariat's Guide, § 3-439.
[70] Secretariat's Guide, §§ 3-635, 3-639-640.

co-arbitrators to nominate a replacement.[71] However, where the ICC appointed the departing arbitrator directly, its practice is to appoint the replacement directly without seeking a proposal from a National Committee.[72] It is important to note that, while the Secretariat might not solicit comments from the parties, the parties will usually have a window of time, after being notified of the removal of the departing arbitrator, to comment on the process for selecting the replacement, and the Secretariat will consider such comments.[73]

VI. Arbitrator List Services

The ICC's National Committees maintain databases of potential arbitrators. Anyone can submit an application to be considered for inclusion in such a database. In the U.S., information on how to apply to be considered for appointment as an ICC arbitrator is available on the USCIB website. http://www.uscib.org/dispute-resolution-ud-835/.

The arbitrator candidate lists are not generally publicly available. However, the relevant ICC case management team may be willing to provide names and resumes for recommended arbitration candidates if requested as part of an agreement subject to ICC arbitration or where the ICC acts as appointing authority.

Separately from the above informal recommendations, the ICC Secretariat will also provide a list of candidates as part of an agreement between the parties that the sole arbitrator or president will be selected by the parties using the list method.[74] The ICC does not dictate a specific procedure for implementing list appointments. Typically, with the assistance of an ICC case manager, the parties will agree on a protocol.

In most cases, the ICC will require the parties to advise of the desired characteristics of the arbitrator (or note divergences if there are any) before identifying candidates. Unlike some other institutions, the candidates will be contacted and required to submit a Statement of Acceptance, Availability, Impartiality and Independence before their names are proposed to the parties. The ICC will then provide, typically, a list of five candidates who have already advised that they are willing and able to serve. The candidates on the list will be selected by the ICC Secretariat (unless the ICC is acting as appointing authority, in which case the list must be approved by the ICC Court). The ICC Secretariat generates the list based on its knowledge of arbitration practitioners; it does not consult a National Committee. In appropriate cases, the ICC uses the list method to provide opportunities for younger or less experienced arbitrators. The ICC also attempts to achieve balance in its list proposals in terms of gender diversity.

The parties will be given a certain number of days to return the list to the ICC ranking the candidates in order of preference. If part of the agreed protocol, the parties may also object to the inclusion of a particular candidate on the list, although the fact that all candidates have

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[71] Secretariat's Guide, § 3-642.
[72] Secretariat's Guide, § 3-643.
[73] Secretariat's Guide, § 3-637.
[74] As noted above, the list method is the default appointment mechanism where the ICC is acting as appointing authority in UNCITRAL arbitrations. *See* Section IV.B, *supra*. The list method provisions set out in the UNCITRAL Rules and the Appointing Authority Rules provide a useful template where the parties must adopt an agreed protocol.

already provided a Statement of Acceptance, Availability, Impartiality and Independence should limit the likelihood of this occurring. The candidate with the highest ranking will be selected, and that nomination will then be subject to Court confirmation.

The ICC's willingness to use the list method as part of a party agreement is not well-known. SICANA advises that as of mid-2017 this agreed list-method approach had only been used approximately 5-7 times in the prior year. Because the list of candidates is compiled by the Secretariat rather than through a National Committee, there may be greater scope for including a more geographically diverse slate of potential arbitrators.

INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION (CPR)

I. Overview

The International Institute for Conflict Prevention and Resolution ("**CPR**") entered the realm of dispute resolution focused on enabling parties to take charge of their disputes and fashion their own solutions. CPR very actively promoted mediation processes as the most flexible of party-controlled practices best suited to achieve efficient, effective and amicable results; however, it also promulgated arbitration rules for situations where the parties preferred a more structured adjudicatory approach or where mediation had failed to result in an agreement. Central to CPR's early arbitration regime was its non-administered nature, reflecting its view that "[m]ost disputes are best resolved privately and by agreement." Principle 1, CPR Non-Administered Arbitration Rules (2007) Principles.

After years of experience with its non-administered rules, CPR, in consultation with its advisors and members, began administering arbitration. CPR administers arbitrations under CPR's Administered Arbitration Rules (2013) and CPR Rules for Administered Arbitration of International Disputes (2014). Citations to specific rules by number in this Report are to the CPR domestic rules except as noted.

The range of arbitrator selection methods anticipated by the rules is broad and flexible: Arbitrators may be directly selected with no intervention from CPR; CPR may assist the parties to select their arbitrators; or CPR may appoint the arbitrators. CPR's non-administered rules provide for CPR assistance in the appointment process only by party request, and are dealt with separately in Section VI.

CPR's international and domestic appointment procedures vary only slightly, as follows: (1) time periods are somewhat lengthened and telephone conferences made discretionary under the international rules in recognition of increased communication difficulties where parties and CPR are presumed likely located more distantly from each other; (2) nationality may form a basis of appointment in international matters; (3) under the international rules, greater flexibility is provided in selecting arbitrators—in that nominated arbitrators are not required to be drawn from the CPR panels—again in recognition that international arbitrations are more likely to require arbitrators of less common nationalities and/or expertise. Unless otherwise noted, quoted provisions are identical in the international and domestic rules.

In keeping with the underlying nature of arbitration as created by the parties and subject to their needs, CPR rules for the most part may be varied by the parties by agreement either prior to or during the arbitration process. This feature makes the CPR rules among the most flexible of arbitration paradigms available to parties: the CPR rules buttress the parties' freedom to agree by providing fallbacks for when they find themselves in disagreement.

Of particular note: CPR's rules provide an opt-in screening process for parties who prefer that their party-appointed arbitrators not be informed of the identity of the party designating them for appointment. Also, in creating lists of arbitrators from which the parties

make their selection, CPR first consults with the parties jointly to determine their needs and then pre-screens arbitrators for availability and absence of conflicts.

CPR maintains its Panels of Distinguished Neutrals from which arbitrators appointed under its rules are drawn (subject to exceptions as delineated in its rules). CPR panels include specialized panels, such as a Global Panel of neutrals located outside the U.S., a Cross-Border Panel of arbitrators experienced in transnational disputes, and many others. CPR lists the individual arbitrators on its panels on its website. Certain panels are publicly available while others are accessible only by CPR members. *See* www.cpradr.org.

While institutional rules, when read carefully, may be quite clear as to appointment procedures, parties may find that they are unfamiliar with how those rules work in practice. Parties may also be unaware of options they have in interacting with the appointing institution so as to enhance the appointment of the most satisfactory arbitrators. This Report describes both formal and informal practices available under CPR's rules governing arbitrator appointment.

II. Party Nomination and Appointment, Three Arbitrator Panel

CPR's default ("unless the parties have agreed otherwise in writing…") arbitral panel consists of three arbitrators, two of whom are selected by the parties and a third selected separately. Rule 5.1(a).

If the parties will be appointing their own arbitrators, both the domestic and international CPR Rules 3.2(f) and 3.7(d) provide for the appointment to be initiated by designation in the notice of arbitration and the notice of defense. Arbitrators designated by parties are **not** required to be members of CPR's panels. After receiving the parties' designations and pursuant to Rule 5.1(c), CPR will contact the named arbitrator to obtain information about the arbitrator's availability and disclosures of potential conflicts, and convey those to the parties. After any objections are determined by CPR in accordance with the rule, CPR will make the appointment.

In accordance with Rule 5.2, the third arbitrator may be appointed by the already-appointed party arbitrators, or by CPR, depending on what the parties have agreed. (CPR appointment is governed by Rule 6, discussed in Institutional Appointment, Section IV below.) The party-appointed arbitrators have 20 days (30 days under the international rules) after appointment of the second arbitrator in which to make their designation of the chair, or CPR will make the appointment as provided in Rule 6.2. As with party-nominated arbitrators, CPR will contact the arbitrator proposed by the party-appointed arbitrators for information as to availability and disclosure, transmit that information to the parties, determine any objections, and make the appointment.

III. Party Nomination and Appointment, Sole Arbitrator (Or Panel of Three Arbitrators Not Designated by the Parties)

CPR rules specifically provide for party participation in the arbitrator appointment process even in instances in which the arbitration agreement does not provide for party appointment:

> 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 (domestic)/30 (international)] days after the notice of defense provided for in Rule 3.6 is due…. 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 (domestic)/45 (international)] 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.

Rule. 5.3.

Although under other institutional rules nothing prevents parties from reaching agreement on arbitrators whose appointment is either not provided for or where a sole arbitrator is provided for, CPR formally includes the parties in the appointment process before any institutional appointment process begins, again emphasizing that CPR considers the arbitration to belong wholly to the parties (to the extent that they can agree).

If the parties fail to jointly designate an arbitrator, CPR follows the process set forth under its rule, Rule 6.2, for CPR appointment, discussed in Section V. below.

IV. Screened Appointments: Party "Designated" Arbitrators

CPR, uniquely, has also developed an arbitrator "screening" process with the goal of promoting arbitrator neutrality. The screened arbitrator selection process aims to insulate the parties and the arbitrators from knowledge of which party-designated arbitrator may be associated situationally with which party. In applying this feature, CPR provides the parties with a list of prospective arbitrators derived from its panels; CPR will appoint each party's first choice from the list (provided CPR has not sustained an objection to the arbitrator on independence/partiality grounds):

> 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, …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. …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….
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…
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….

Rule 5.4.

Significantly different in effect is the provision for screening in arbitrations under the CPR international rules: parties may nominate their own designees to be included in the list of candidates circulated by CPR; and, such designees are not required to be drawn from the CPR Panels. As a practical matter, then, parties in CPR international arbitrations may effectively select their own arbitrators and yet also screen them from being informed of which party supported their appointment. Rule 5.4, 2014 CPR Rules for Administered Arbitration of International Disputes.

V. Institutional Appointment

Rule 6 governs appointment of arbitrators by CPR itself, and by its terms applies in the following circumstances:

(1) Party failure to designate its arbitrator;
(2) Failure of joint designation process;
(3) Failure of party-appointed arbitrators to designate a third arbitrator;
(4) Agreement provides for appointment by CPR of one or more arbitrators;
(5) Multi-party arbitration covered by Rule 5.5.

In the first situation, where a party has failed to make its designation of an arbitrator, the rule provides that "CPR shall appoint a person whom it deems qualified to serve as such arbitrator." Rule 6.3.

In the international version, the rule adds that CPR will "take…into account the nationalities of the parties and any other relevant circumstances," thus reflecting common practice and the complexities often arising due to the nature of international arbitration.

For all other instances of appointment by the institution, CPR's rules emphasize the primacy of party input into the selection process: Rule 6.2 provides as the beginning step in the appointment process for CPR to meet jointly with the parties by telephone to discuss selection. In domestic cases, this consultation is mandatory; it is discretionary on CPR's part in international matters.

In the party conference, CPR engages the parties in a wide-ranging discussion designed to elicit the best information to form the basis of arbitrator selection. Topics include:

- Review of the full CPR process and applicable rules;
- Venue for the proceedings;
- Estimated length of arbitration hearings;
- Likely calendar date range within which the proceedings should take place;
- Any additional names of individuals and entities for which the parties wish candidates to check conflicts;
- Preferred qualifications and experience of prospective candidates;
- Geographic area from which candidates are to be drawn;
- Any provisions in the parties' dispute resolution agreement that may need review;
- CPR and arbitrator fees and expenses.

Parties can express preferences, discuss desired expertise and other arbitrator characteristics and generally raise concerns they have with respect to arbitrator appointment. CPR thereby gains information that makes identification of appropriate arbitrators more likely.

Once the initial consultation with the parties has concluded, CPR prepares and provides to the parties a list of candidates (numbering at least 5 if a single arbitrator is being selected, and at least 7 if two arbitrators are sought for a three-arbitrator panel). In domestic arbitrations, CPR draws candidates from the CPR Panels. If the international rules apply, CPR may list, in addition to candidates on the CPR Panels, candidates not found in such lists. Parties in international cases are also entitled to request that arbitrator candidates be of a nationality other than the nationalities of the parties.

CPR's list distributed to the parties includes "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." Rule 6.2(b). In practice, CPR derives its final list as follows:

(1) After having the discussions with the parties provided for in Rule 6, CPR narrows the field of potential candidates, considering such factors, among others, as geography, skill sets, expertise, and the like;
(2) Internally, CPR creates an initial list, usually containing the names of 20-30 candidates, although at times up to 40-50;
(3) CPR then winnows the initial list internally based on disclosures and availability of candidates;
(4) Only then does CPR externally circulate a list to the parties containing, as set forth above, biographical information, arbitrator rates, and potential conflict disclosures--the parties can request additional information if they so desire.

After considering the listed candidates, each party ranks them numerically in order of preference. CPR will then appoint as arbitrators the nominees collectively ranked the highest by the parties, and who are available and meet CPR's criteria of independence and impartiality.

CPR follows the above procedure unless the parties agree to change it. For instance, the parties may alter the ranking process in favor of alternating strikes or some other selection method. Rule 6 also specifically provides that the parties may agree that CPR circulate each party's rankings and objections to further facilitate efficiency and agreement in the appointment process. In the event of a tied ranking, CPR may designate either candidate. In so doing, CPR's practice is to base its appointment choice on the nominees' disclosures; CPR also may consider other factors such as the neutral's case management style and availability.

Finally, in the event that the above-described appointment procedure fails to produce the requisite number of arbitrators, "CPR shall appoint a person or persons whom it deems qualified to fill any remaining vacancy." Rule 6.2(b).

VI. Appointment by CPR Pursuant to CPR Non-Administered Arbitration Rules

CPR's Non-Administered Arbitration Rules do provide for CPR to assist the parties in the appointment process. Rule 6 of those Rules closely tracks its counterparts in CPR's domestic and international rules for administered arbitration. Rule 6 applies when:

> (1) A party has failed to make its appointment as provided in the contract;
> (2) The parties have failed in making a joint appointment;
> (3) Party-appointed arbitrators have been unable to agree on a third arbitrator;
> (4) The parties' contract provides for appointment by CPR;
> (5) The arbitration is a multi-party arbitration (covered by Rule 5.5).

Any party may initiate an appointment by CPR by making a written request to CPR including copies of the notice of arbitration and the notice of defense or any submission agreement. Rule 6.3. As is the case with CPR's administered rules, Rule 6 begins the appointment process with a joint consultation:

> Promptly following receipt by it of the request provided for in Rule 6.3, CPR shall convene the parties in person or by telephone to attempt to select the arbitrator(s) by agreement of the parties.

Rule 6.4.a. Here is evidenced an even stronger preference for achieving party consensus than what appears in the rules for administered arbitrations. If the parties do not succeed in agreeing on their arbitrators, the remainder of Rule 6 comes into play, and institutes the list procedure set forth in CPR's administered arbitration rules. Likewise, the non-administered rules provide for the same screening procedure as that set forth in the administered rules—also in Rule 5.4.

VII. Special Situations

A. Multi-Party Arbitrations

CPR anticipates that in cases of multiple claimants and/or multiple respondents, the parties on each side will agree on an arbitrator for their side; otherwise CPR will appoint all of the arbitrators:

> 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 5.5. The above is the sole provision in CPR's rules dealing with multiple parties (consolidated arbitrations are not mentioned). As can be seen, the rules contemplate bilateral opposing claims; tribunals are not enlarged to accommodate multiple parties.

B. Replacement Arbitrator

If an arbitrator is to be replaced (as a general matter, for some inability to serve, resignation, or successful challenge), Rule 7.9 provides that a party that designated the departing arbitrator may designate a successor arbitrator; otherwise the substitute arbitrator is replaced in the same manner as he or she was originally appointed. The same procedure applies in the case of an arbitrator who fails or is unable fully to perform the duties of an arbitrator. In the event that the parties do not agree whether the arbitrator should be replaced, CPR is empowered to make that determination.

C. Interim Measures of Protection by a Special Arbitrator

Should a party request, prior to an arbitration tribunal being established, to hear the matters in dispute in the arbitration, a special arbitrator may be appointed for the purpose of ruling on an application for interim measures. Such an arbitrator appointment is made as follows:

> 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.

Rule 14.5. Once the tribunal has been constituted, the tribunal may modify or vacate the award or order rendered by the special arbitrator (Rule 14.14). The special arbitrator may not serve as a member of the tribunal unless the parties agree otherwise (Rule 14.15)

VIII. Features of CPR List Process/Neutral Rosters

CPR qualifies a neutral for one or more of its panels. Neutrals may be invited or apply for inclusion, and are selected only after they have been reviewed and approved by CPR and/or selected users of dispute resolution services, peers and/or academics. They are screened for their litigation and ADR expertise and training, and candidate references are asked to comment specifically on the applicant's qualifications to serve on complex commercial disputes. Subject matter expertise is examined and noted. CPR seeks geographic and other diversity; it expects all neutrals to maintain the highest ethical standards as set out by the governing ethical codes and rules. As well as its National Panel and its Global Panel, CPR maintains 23 specialized panels of neutrals, including a General Counsel Panel, a Cross-Border Panel and a Judicial Panel. Bios of all of CPR's panelists are available only to CPR members on its website. Currently, CPR's lists contain approximately 600 neutrals, 60% of whom are experienced in mediation as well as arbitration.

In providing its arbitration administration services, CPR uses experienced lawyers who, among other things, evaluate neutrals for inclusion on CPR Panels, develop the candidate lists circulated to the parties in the appointment process, and determine challenges to proposed arbitrators.

JAMS

[*Note: this section of the Report was updated on April 26, 2018*]

I. Overview

JAMS is a private alternative dispute resolution provider. It is associated with over 300 full-time neutrals, who have experience resolving a wide variety of case types. The vast majority of JAMS neutrals are exclusive to JAMS. The JAMS' corporate offices are located in Irvine, California. Arbitrations before JAMS neutrals are conducted throughout the United States and internationally. Although the parties generally are free to select their JAMS arbitrators, JAMS provides a set of rules and procedures governing arbitrator selection, with a primary focus on the strike-and-rank method.

Most of the disputes administered by JAMS are governed by the JAMS Comprehensive Arbitration Rules & Procedures (hereinafter, the "**Rules**").[75] JAMS also has separate rules applicable to streamlined disputes, construction disputes, employment disputes, international disputes, and surety adjudication. Unless indicated otherwise below, the rules and procedures applicable under these other sets of rules do not differ materially from those under the Rules.

II. Number of Arbitrators

A. Applicable Rules

The JAMS Rules provide that arbitrations are to be heard by a sole neutral arbitrator unless the parties agree otherwise. *See* Rule 7(a); *but see* Rule 7(a) of the JAMS Engineering and Construction Arbitration Rules & Procedures (providing for three neutral arbitrators in certain commercial construction disputes). This default rule applies regardless of the subject matter of the arbitration or the amount in controversy. Accordingly, the majority of JAMS arbitrations are conducted before a sole arbitrator. Nevertheless, the JAMS Rules empower the parties to modify the default rule by agreement (Rule 2), so JAMS arbitrations also can be heard by a tripartite panel of neutral and independent arbitrators.[76] In the majority of cases heard by a tripartite panel, each party will name one arbitrator, and will then either agree upon, or enlist JAMS' assistance with, naming the third member of the panel. *See* Rule 7(c).

B. Institutional Practices

Unless the parties agree otherwise, JAMS does not deviate from the default rule that JAMS arbitrations are to be heard by a sole arbitrator. As a result, there are JAMS arbitrations with many millions (and even billions) of dollars at stake that are heard by a sole arbitrator. When the parties do agree to have the arbitration conducted by a tripartite panel, and that each party will name one arbitrator, those arbitrators are almost always neutral and independent.

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[75] The JAMS Comprehensive Arbitration Rules & Procedures are located at: www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2014.pdf.

[76] In theory, the parties could agree to have the Arbitration conducted by any number of arbitrators. However, in practice, all JAMS arbitrations are conducted either by a sole arbitrator or a tripartite panel.

Although the JAMS Rules permit the parties to agree that their named arbitrators can be non-neutral, in practice most JAMS arbitrators prefer to sit as neutral arbitrators.

III. Party Nominations

A. Applicable Rules

JAMS will follow the methods for arbitrator appointment that are agreed upon by the parties so long as they are consistent with applicable law and JAMS policies. *See* Rule 2. This includes allowing the parties to choose their own arbitrator or arbitrators.

If the parties cannot reach an agreement on their own, JAMS may help to facilitate such agreement. *See* Rule 15(a). This could include providing a list of potential arbitrators to the parties that focuses the parties' attempt at agreement by pre-selecting arbitrators based on party-chosen criteria, such as cost, location or subject matter expertise. Also, in tripartite cases, the parties can agree upon the chairperson, regardless of the method by which the members of the panel were selected. *See* Rule 7(b). In other words, where the parties can reach agreement in any form as to the selection of arbitrators, the JAMS Rules generally provide for and encourage such agreement.

B. Institutional Practices

JAMS encourages the parties to agree upon the selection of the arbitrator or arbitrators. To that end, JAMS makes available on its website the biographies and other pertinent information about all of its neutrals to assist the parties in conducting their own due diligence. The neutrals can be searched by name, location, areas of expertise, language and key words.[77] So, if the parties agree on the selection of the arbitrator or arbitrators, they can simply inform JAMS of their selection and those persons will be named the arbitrators if their schedules permit.

In sole arbitrator cases, the arbitrator typically is a JAMS arbitrator. Most of the time in tripartite cases, all three arbitrators are JAMS arbitrators, but there are many cases in which only one or two members of the panel are from JAMS. For example, the parties could each select their own non-JAMS arbitrator, and then agree upon the selection of a JAMS arbitrator as the third member of the panel. Alternatively, the parties could have their individually-selected arbitrator choose the third member of the panel. Regardless of how the parties agree upon the selection of arbitrators, those arbitrators must be neutral and independent, unless the parties have agreed otherwise, which is rare.

Outside of simply agreeing on their own to the appointment of arbitrators, parties can also agree to a specific method for arbitrator appointment that enlists the assistance of JAMS. For example, the arbitration agreement could specify that JAMS will provide a list of arbitrators meeting certain criteria, and the parties will select the arbitrators from that list. As discussed above, even if the parties do not formally agree to request a list from JAMS in their arbitration agreement, they can request such a list from JAMS during the selection process to aid them in reaching an agreement. In at least one instance, the arbitration agreement provided that if the

[77] *See* https://www.jamsadr.com/neutrals/search.

parties could not agree to any of the arbitrators on a list provided by JAMS, but had narrowed the choices down, a coin toss would decide arbitrator selection. The lesson, as always, is that the parties control the process through their agreement and can provide for the selection of arbitrators as they see appropriate.

The chairperson in a three-member tribunal usually is the arbitrator who was not individually selected by the parties. The parties can either agree to this beforehand, or can permit their chosen arbitrators to select the chairperson. In the rare cases where the parties cannot agree by any method on which arbitrator will serve as the chairperson, JAMS will select the chairperson. There is no requirement that a JAMS arbitrator serve as the chairperson, so long as at least one of the three arbitrators is a JAMS arbitrator.

IV. Institutional Appointments

A. General

1. Applicable Rules

Although JAMS encourages parties to select their own arbitrators, and will facilitate such agreement, the parties often rely on JAMS to appoint the arbitrator or arbitrators. This occurs when the parties do not agree otherwise, and the arbitration agreement is silent regarding appointment, simply refers to the JAMS Rules, or specifically provides for the appointment by JAMS. Under these circumstances, JAMS will "appoint" the arbitrator(s) through the use of the strike and rank method. *See* Rule 15(b). Most JAMS cases are single arbitrator cases in which a strike list is used to select the arbitrator. For tripartite cases, the parties typically will each have chosen their own arbitrator, and will then use the JAMS strike list to select the chairperson.

When the strike and rank method is applied, JAMS sends the parties a strike list of at least five arbitrators (ten for 3 member arbitral tribunals), along with descriptions of the background and experience of each arbitrator. *See* Rule 15(b). Except in rare circumstances, the strike lists will always be made up solely of JAMS arbitrators. Within one week of receiving the list, each party strikes two names (three for tripartite panel cases), and then ranks the remaining candidates in order of preference. *See* Rule 15(c). The remaining candidate(s) with the highest ranking(s) is appointed as the arbitrator. *Id.* JAMS will grant reasonable extensions of the time to strike and rank the candidates. It is important that parties communicate with JAMS about the need for such extensions, because the failure entirely to respond to a strike list will be deemed as an acceptance of all candidates on the list. *See* Rules 15(c), (e).

2. Institutional Practices

In the typical case, JAMS will send out the strike list shortly after the arbitration is formally commenced. The strike lists are supplemented if the location is in flux or if JAMS learns that the location has changed. The strike lists are created by either a case manager or senior case manager who is assigned to the case after commencement. In addition to being knowledgeable about the composition of the JAMS panel of neutrals, the case managers also have access to the statement of claims, so they are aware generally of the subject matter of the arbitration, the amount in controversy, and the contractual requirements of the arbitration. They

use that information, along with any supplemental information from the parties regarding, *e.g.*, sensitivity to costs or additional experience requirements beyond those provided for in the arbitration agreement, when creating the lists. The case managers can also enlist the help of ADR specialists when creating the list, who are regional resources at JAMS with more specialized knowledge about JAMS neutrals in particular areas of the country.

The goal of the case managers in creating the strike lists is to provide the parties with options for JAMS arbitrators that fit the parties' needs, including the contract requirements. For example, if a contract requires that arbitrators have a minimum level of experience in a particular field, the strike list will only include qualifying arbitrators. Also, if the parties are particularly concerned about costs, or the amount in controversy is relatively small, then the list will not include the most expensive JAMS arbitrators. Other inputs utilized by the case managers include the travel time and travel expense associated with particular arbitrators, and the availability of arbitrators if the contract contains a timeline for the completion of the arbitration or the parties have chosen the JAMS Streamlined Procedures, which are discussed in further detail below.

All of the strike lists are reviewed by management at some point during the process. The case managers and senior case managers responsible for creating the lists are subject to regular, ongoing training. Also, JAMS sends evaluations to the parties regarding the JAMS neutrals, and they also engage in periodic surveys of JAMS clients. Accordingly, there are procedures in place to ensure that JAMS is reviewing the performance of its employees and its neutrals to help ensure that the appointment process is as fair and effective for JAMS' clients as possible.

The strike and rank method is the way in which JAMS typically appoints arbitrators. Only in very rare circumstances does JAMS actually impose its choice of arbitrator upon the parties. This occurs when (a) the parties have explicitly agreed that JAMS will be solely responsible for the selection of the arbitrators, or (b) if the procedures for selecting the arbitrators repeatedly fail. By way of example, parties sometimes agree to solicit a list of arbitrators from JAMS and provide that the parties can strike as many names from the list as they want. At least one of the parties will then strike every candidate. If this process is repeated, it becomes clear that the parties will be unable to select an arbitrator using their agreed-upon method, and only then will JAMS select the arbitrators. JAMS will also select the arbitrators if the strike and rank method does not yield an arbitrator or a complete panel, but these situations are rare.

Finally, if a party completely fails to participate in the strike and rank process, JAMS will use the selections of the participating party to appoint the arbitrators. As discussed above, reasonable extensions will be granted, but parties risk having their adversary's choices foisted upon them if they do not participate in the selection process.

B. Appointing Authority Only (*ad hoc* arbitrations)

JAMS does not appoint arbitrators for *ad hoc* arbitrations except in the rare circumstance where the contract explicitly states that the parties will use JAMS to appoint arbitrators but for nothing else. JAMS will, however, assist its clients and its neutrals that are participating in *ad hoc* arbitrations. For example, JAMS will run disclosures and provide billing assistance to its neutrals who are presiding over *ad hoc* arbitrations. Although the JAMS Rules provide that

parties may subsequently agree to have JAMS administer an *ad hoc* arbitration (*see* Rule 2(b)), in practice this is unlikely to occur.

C. Emergency Arbitrators

Parties in need of emergency relief prior to the appointment of an arbitrator may notify JAMS by facsimile, email or hand delivery of the need and reasons why emergency relief is sought. Rule 2(c)(i). Prior to doing so, the party seeking emergency relief must notify all other parties and certify as much to JAMS. *Id.* JAMS will then appoint an emergency arbitrator, typically within 24 hours. Rule 2(c)(ii). All challenges to that emergency arbitrator must be made within 24 hours. *Id.* Within two days of appointment, the emergency arbitrator will then set a schedule that permits the parties to be heard. Rule 2(c)(iii).

The use of JAMS' emergency arbitrator appointment procedures is uncommon. JAMS has appointed emergency arbitrators in rare circumstances where the parties did not choose to go to court to obtain preliminary relief, such as in disputes involving trade secrets or other confidential information that the parties did not want made publicly available. After appointment of the tribunal, any request related to the relief granted or denied by the emergency arbitrator is determined by the tribunal. Rule 2(c)(v).

D. Small/Simple Claims (Default for Claims Under $250,000)

Where no disputed claim or counterclaim exceeds $250,000 (not including interest or attorneys' fees), or where the parties otherwise agree, the JAMS Streamlined Rules and Procedures[78] apply. Arbitrator selection under the Streamlined Rules proceeds much like that under the Comprehensive Rules, albeit with shorter lists and fewer candidates. More specifically, streamlined arbitrations must be conducted by one neutral arbitrator. If the parties do not agree on the selection of that arbitrator, a strike list with three candidates will be provided, and each party can strike one candidate and rank the remaining three. JAMS will then appoint the arbitrator based on the results of the strike and rank. *See* Streamlined Rule 12.

JAMS administers many of its cases under the Streamlined Rules. If one party wants to proceed under the Streamlined Rules, but this is not provided in the contract (and the case is over $250,000), the arbitrator will be selected using the Comprehensive Rules procedures, but that arbitrator can decide later that the case should proceed pursuant to the Streamlined Rules. The Comprehensive Rules also have Expedited Procedures that the parties can agree to apply.

E. Special Situations

1. Multi-party

Cases are considered "multi-party" when there are more than two parties whose interests are adverse and who are represented by separate counsel. In these cases, arbitrator selection

[78] The JAMS Streamlined Arbitration Rules & Procedures are located at: www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_streamlined_arbitration_rules-2014.pdf.

proceeds in the same way as two-party cases. If the parties are unable to reach an agreement on arbitrator selection, strike lists are provided to all parties.

2. Consolidation

Where not prohibited by applicable law or the parties' agreement, JAMS may consolidate arbitrations that have common issues of law or fact when: (i) a party files more than one arbitration with JAMS; (ii) when a demand for arbitration is submitted naming parties already involved in another JAMS arbitration; and (iii) when a demand for arbitration is submitted naming non-identical parties to those already involved in another JAMS arbitration. Rule 6(e).

LONDON COURT OF INTERNATIONAL ARBITRATION (LCIA)

I. Overview

Headquartered in London, England, the London Court of International Arbitration ("**LCIA**") is one of the world's leading international institutions for commercial dispute resolution. The international focus of the LCIA and its services are reflected in the fact that "typically, over 80% of parties in pending LCIA cases are not of English nationality."[79] The LCIA operates under a three-tiered structure, comprising the Company, the arbitration Court and the Secretariat.

The Company is a not-for-profit, run by a board made up largely of prominent London-based arbitration practitioners who are principally focused on the operation and development of the LCIA's business and its compliance with applicable company law.

The LCIA Court (or "**Court**") is made up of up to thirty-five members, as well as representatives of associated institutions, and former LCIA Presidents, all of whom are selected to maintain a balance of leading commercial arbitration practitioners. The Court has a President and seven Vice Presidents. The LCIA Court, specifically the Vice President assigned to the particular case, typically decides on issues of arbitrator appointment(s). The Court is aided in substantial part by two primary teams (one led by the Deputy Registrar and another led by LCIA Senior Counsel), each of which assists the Court in making decisions on arbitral appointments by providing the Vice President assigned to a particular case a summary thereof and an initial list of proposed arbitrators.

The Secretariat is headed by the Registrar and Deputy Registrar and is based at the International Dispute Resolution Centre (**IDRC**) in London. The Secretariat is responsible for the day-to-day administration of LCIA disputes and substantially aids the Court in administering LCIA arbitrations.

The LCIA has promulgated Rules of Arbitration (the "**LCIA Rules**") to govern arbitrations under its administration, including detailed directives relating to the appointment of arbitral tribunals. Nonetheless, the LCIA Rules permit significant flexibility in accommodating the parties' agreement regarding the procedure of selecting arbitrators. The current edition of the LCIA Rules went into effect on October 1, 2014 and is available on the Court's website.[80]

This section of the Report explores the applicable rules governing the nomination and appointment of arbitrators, primarily Articles 1 to 2 and 5 to 7 of the LCIA Rules, as well as institutional practices of the LCIA in carrying out its functions.

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[79] LCIA website, *available at* http://www.lcia.org/LCIA/introduction.aspx.

[80] The current 2014 LCIA Rules are available at http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx.

II. Number of Arbitrators

A. Applicable Rules

The LCIA Rules contemplate that the arbitral tribunal will consist of one or three arbitrators. *See, e.g.*, Art. 5.8. While the number of arbitrators is frequently specified in the parties' arbitration clause or agreement, the number may be agreed upon afterwards, including after the arbitration is filed. Where the parties have not agreed on the number of arbitrators, the LCIA Rules provide that a "sole arbitrator shall be appointed unless the parties have agreed in writing otherwise or if the LCIA Court determines that in the circumstances a three-member tribunal is appropriate (or, exceptionally, more than three)." Art. 5.8.

B. Institutional Practices

There are no firm criteria that the LCIA considers in determining whether a particular dispute requires a three (as opposed to a one) member arbitral tribunal, outside the requirement that the "LCIA Court shall appoint arbitrators with due regard for any particular method or criteria of selection agreed in writing by the parties." Art. 5.9. The LCIA Court will take into account such issues as "the transaction(s) at issue, the nature and circumstances of the dispute, its monetary amount or value, the location and languages of the parties, the number of parties and all other factors which it may consider relevant in the circumstances" (Article 5.9), in addition to hearing from the parties.

III. Party Nominations

A. Applicable Rules

The LCIA Rules provide that the Claimant, in its Request for Arbitration, must provide details of its nominee for party appointed arbitrator, if the arbitration clause so permits. *See* Art. 1.1(v). The Respondent, in its Response to Claimant's Request for Arbitration, must provide details of its nominee for party appointed arbitrator, if the arbitration clause so permits. *See* Art. 2.1(v). The parties are free to nominate arbitrators, including the presiding arbitrator, as they wish pursuant to agreement, subject to such nominees' compliance with Articles 5.3 to 5.5 of the LCIA Rules. *See* Art. 7.1. The LCIA Court shall "appoint the Arbitral Tribunal promptly after receipt by the Registrar of the Response or, if no Response is received, after 35 days from the Commencement Date (or such other lesser or greater period to be determined by the LCIA Court pursuant to Article 22.5)." Art. 5.6.

The criteria used by the LCIA in choosing whether to confirm arbitrators nominated by the parties is set forth in Articles 5.3 to 5.5 of the LCIA Rules. Foremost among these is the requirement of independence and impartiality. Specifically, "[a]ll arbitrators shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocate for or representative of any party. No arbitrator shall advise any party on the parties' dispute or the outcome of the arbitration." Art. 5.3. Moreover, before being appointed, each candidate "shall furnish to the Registrar (upon the latter's request) a brief written summary of his or her qualifications and professional positions (past and present)," "shall also agree in writing fee-rates conforming to the Schedule of Costs," and "shall sign a written declaration" attesting to

his or her independence and impartiality and confirming that he or she will be able "to devote sufficient time, diligence and industry" to the matter to ensure that it proceeds expeditiously and efficiently. Art. 5.4.

More recently, the LCIA adopted changes to its Notes for Arbitrators (*see LCIA Notes for Arbitrators*, http://www.lcia.org//adr-services/lcia-notes-for-arbitrators.aspx) to provide that tribunal secretaries also are required to complete a Statement of Independence and Consent to Appointment and to provide the same to the parties prior to their appointment, to ensure that the proposed tribunal secretary has no relevant conflicts and to allow the parties an opportunity to object. (*LCIA implements changes to tribunal secretary processes*, 26 October 2017, available at: http://www.lcia.org/News/lcia-implements-changes-to-tribunal-secretary-processes.aspx; *LCIA Notes for Arbitrators*, http://www.lcia.org//adr-services/lcia-notes-for-arbitrators.aspx, Notes 74-75.)

The duty of independence and impartiality continues throughout the course of the arbitration. Arbitrators (and tribunal secretaries) are required to update the LCIA Court of any changes in circumstances that might give rise in the minds of the parties to any "justifiable doubts as to his or her impartiality or independence." Art. 5.5; LCIA Notes for Arbitrators, http://www.lcia.org//adr-services/lcia-notes-for-arbitrators.aspx, Note 78.

B. Institutional Practices

While party-nomination of an arbitrator remains subject to confirmation by the LCIA, the LCIA is highly deferential to the preference of a nominating party. As a matter of practice, unless a party submits an objection to a nomination or the LCIA has information raising concerns about the arbitrator's independence or impartiality, the LCIA very rarely will refuse to confirm an arbitrator chosen by a party. However, if the LCIA refuses to confirm a party's nomination, the Court will provide that party the opportunity to nominate a different candidate. The LCIA confirmation process is confidential, and the LCIA does not provide the parties with its rationale for confirming, or refusing to confirm, a party-nominated arbitrator.

The LCIA does not publicize the names of the arbitrators, their nationality, or the method by which any of the arbitrators were selected (*i.e.*, nominated by a party or appointed by the LCIA).

Lastly, there has been some confusion regarding the interplay of Articles 5.7 and 7.1 of the LCIA Rules. Article 5.7 provides that "**[n]o** party or **third person may appoint** any arbitrator under the Arbitration Agreement." (Emphasis added.) Article 7.1 provides that "[i]f the parties have agreed howsoever that any arbitrator is **to be appointed** by one or more of them or **by any third person**…." (Emphasis added.) The LCIA suggests that these two rules should not be read to conflict. Article 5.7 is simply meant to clarify that only the LCIA Court can **appoint** (as opposed to nominate) an arbitrator; while, pursuant to Article 7.1, the parties, or third persons approved by the parties, may "nominate" arbitrators for appointment by the LCIA Court. In other words, parties can nominate arbitrators, but the Court alone has the power to "appoint" these nominees or any other arbitrators ultimately chosen.

IV. Institutional Appointments

A. General

1. Applicable Rules

Appointment of arbitrators by the LCIA is governed primarily by Article 5 of the LCIA Rules. Article 5, *inter alia*, provides:

- The appointment of arbitrators will not be impeded by any controversy between the parties, including by the lack or sufficiency of the parties' Request for Arbitration or Response. *See* Art. 5.1.

- All arbitrators must be impartial and independent and must confirm the same in writing. *See* Arts. 5.3 to 5.5.

- Absent an agreement of the parties, the LCIA alone will appoint either a sole arbitrator or three-member arbitral tribunal within 35 days from the commencement of the arbitration, or such other period of time as determined by the LCIA Court. *See* Arts. 5.6 and 5.7.

- The LCIA will appoint a sole arbitrator unless the parties have agreed otherwise or if the LCIA Court determines that a three-member tribunal (or, exceptionally, more than three) is appropriate. *See* Art. 5.8.

- The LCIA will appoint arbitrators with due regard for any method or criteria agreed in writing by the parties. *See* Art. 5.9.

Additionally, for the appointment of a sole arbitrator or a tribunal president, the LCIA Rules provide that, "[w]here the parties are of different nationalities, a sole arbitrator or the presiding arbitrator shall not have the same nationality as any party unless the parties who are not of the same nationality as the arbitral candidate all agree in writing otherwise." Art. 6.1.

2. Institutional Practices

(a) Arbitrator Selection Process:

If the LCIA receives a Request for Arbitration (or Response) containing an arbitration clause that does not allow the parties to nominate an arbitrator or arbitrators, the LCIA Court will make the appointments itself. As previously discussed, the LCIA has two primary teams: one led by the Deputy Registrar and another led by LCIA Senior Counsel. Each of these teams assists the LCIA Court in making its decision on arbitral appointments by providing the Vice President assigned to a particular case a summary of the case – including its complexity, the parties' positions, amount in dispute, etc. – and an initial list of proposed arbitrators.

These initial lists will typically contain between three and five arbitrator candidates if the case involves a sole arbitrator. If the case may require a three-person tribunal, the teams will

typically provide two lists to the Vice President: one containing candidates for the potential president; and one containing candidates for the so-called "wing" arbitrators.

These two lists will typically contain between five and six arbitrator candidates for the wings and three to five arbitrator candidates for the president or chairperson. The Vice President, in determining a president, will make sure that the president has as much or more experience as the wing arbitrators. One of the LCIA's primary concerns is to form balanced tribunals. Importantly, the Court is not bound to choose anyone from these initial lists; it may decide to appoint someone from outside these lists.

The Vice President's decision on the appointment of particular arbitrators is considered final and not subject to appeal.

(b) Initial lists of arbitrators:

In compiling the above mentioned initial lists for the Vice Presidents of the Court, the Deputy Registrar and Senior Counsel make objective determinations based on the specific needs for each individual case. *See* Art. 5.9. The LCIA staff and LCIA Court aim for precision in the qualifications of the potential arbitrators and how those qualifications would match with the needs of any individual case. There are no formal criteria in assisting the Court to determine which arbitrator(s) should be chosen; it is very case determinative. The Court will make selections both from its internal database of arbitrators and from outside the database.

The LCIA has the capability to conduct detailed searches within its database to winnow down potential candidates. Search criteria may include, for example, the relevant or required industry (*e.g.*, insurance, shipping, banking, etc.), type of agreement, nationality, legal qualifications, knowledge of relevant legal system, and language proficiency. In researching potential arbitrator candidates, the LCIA will not rely exclusively on the information contained in the database of arbitrators, but will also conduct additional due diligence on the qualifications and other attributes of arbitrators, including reviewing current *curricula vitae* of potential arbitrator candidates.

(c) LCIA database of arbitrators:

The LCIA's arbitrator database currently contains approximately 19,000 potential arbitrator profiles. Anyone may seek to be included in the LCIA's database of arbitrators free of charge by filling out the appropriate forms, which can be found on the LCIA's website. The LCIA Membership and Conferences staff will periodically send reminders to the arbitrators whose profiles are included in the database to revise or update their profiles in order to keep them current. The database is not public.

(d) Verification of arbitrator impartiality/independence:

While the LCIA Court seeks to verify the impartiality and independence of the arbitrators, the Court generally relies on the information provided to them by the arbitral candidates pursuant to Articles 5.3 to 5.5. However, where the LCIA Court is aware of certain information that may affect the impartiality or independence of the arbitral candidate, the LCIA

Court will typically give the candidate a courtesy call and discuss with the candidate their concerns with respect to particular disclosures. The LCIA Court, however, will request that the arbitrator be full and frank in their disclosure to avoid any potential complications in the future.

(e) Timing of appointments:

According to Article 5.6 of the LCIA Rules, the "LCIA Court shall appoint the Arbitral Tribunal promptly after receipt by the Registrar of the Response [to the Request for Arbitration] or, if no Response is received, after 35 days from the Commencement Date (or such other lesser or greater period to be determined by the LCIA Court pursuant to Article 22.5)." Moreover, Article 5.1 states that "[t]he formation of the Arbitral Tribunal by the LCIA Court shall not be impeded by any controversy between the parties relating to the sufficiency of the Request or the Response," and the "LCIA Court may also proceed with the arbitration notwithstanding that the Request is incomplete or the Response is missing, late or incomplete." Art. 5.1.

These rules together demonstrate that it is the practice of the Court to make arbitral appointments quickly following the receipt of the Response. Such appointments will not be affected by any tactics of the parties to stall the arbitral appointment process.[81] Typically, the Deputy Registrar or Senior Counsel will provide a summary of the case file to the Vice President appointed to that case within a day or two of receipt of the Response. The Vice President will then typically provide a response within two business days. The Vice President will typically respond by either confirming the parties' nominees or, where the parties have not so agreed, providing the name or names of the arbitrators it has chosen to appoint. The Vice President may also provide a list of candidates by order of preference, which may be useful to the extent one of the preferred candidates is unable to accept the appointment. This eliminates the need for the staff to reintroduce the issue to the Vice President in circumstances where the arbitrator is conflicted or cannot otherwise perform.

The LCIA Court strictly applies its mandate in the LCIA Rules that appointments be made "promptly."

(f) LCIA Appointment Statistics:

Number of arbitral appointments: In 2015, the LCIA made 449 arbitral appointments. LCIA Registrar's Report 2015 ("**2015 LCIA Report**"). Of these 449 appointments, 45.4% were candidates selected by the parties, 43.5% were candidates selected by the Court, and 11.1% were candidates selected by the co-arbitrators. *See* 2015 LCIA Report, pp. 3-4. As compared to 2014, this reflects a "small decrease in the percentage of arbitrators selected by the parties (from 49% to 45.4%)." 2015 LCIA Report, p. 4.

In 2016, the LCIA Court made 496 arbitral appointments. Facts and Figures 2016: A Robust Caseload ("**2016 LCIA Report**"). Of these 496 appointments, 44.2% were candidates

[81] For example, the LCIA Court has seen situations where the Respondent has attempted to delay the appointment process by arguing Claimant did not provide enough information in its Request for Arbitration to allow Respondent to make a reasoned arbitral appointment. Article 5.1 stands as a reminder to the parties that the LCIA Court will move forward with the appointment process notwithstanding any so-called deficiencies in the parties' Request for Arbitration or Response.

selected by the parties, 39.7% were candidates selected by the LCIA Court, and 16.1% were candidates selected by the co-arbitrators. *See* 2016 LCIA Report, p. 11. As with the year prior, compared to 2015, this reflects a small decrease in the percentage of arbitrators selected by the parties (from 45.4% to 44.2%). *See* 2016 LCIA Report, p. 13.

One versus three member tribunals: According to the 2015 Report, there was a slight preference for sole arbitrator tribunals (52%) over three person tribunals (48%). *See* 2015 Report, p. 3. For 2015, of the 449 appointments, 323 were to three member tribunals in 109 arbitrations under the LCIA Rules (including five replacement arbitrators) and 118 were of sole arbitrators in 117 arbitrations under the LCIA Rules (including two replacements). *See* 2015 LCIA Report, p. 3.

In contrast, the 2016 Report reflects a preference for three person tribunals (62%) as compared to sole arbitrators (37%). *See* 2016 LCIA Report, pp. 11-12. Still, there does not appear to be a trend over the years in favor of three versus one person tribunals (or vice versa). *See* 2015 LCIA Report, p. 3; 2016 LCIA Report, p. 12. For 2016, of the 496 appointments, 400 were to three member tribunals in 141 arbitrations under the LCIA Rules (including 16 replacement arbitrators) and 85 were of sole arbitrators in 83 arbitrations under the LCIA Rules (include seven replacements). In 2016, the LCIA also saw six two-member tribunals in three arbitrations under the LCIA Rules, and five appointments were in UNCITRAL or other ad hoc arbitrations. *See* 2016 LCIA Report, p. 11.

B. Failure by a Party to Nominate an Arbitrator

If the parties' arbitration agreement provides for an arbitral appointment process, but the Claimant does not submit the name of an arbitral candidate, the LCIA Court is entitled to make the appointment itself pursuant to Article 7.2 of the LCIA Rules. *See* Art. 7.2 ("[T]he LCIA Court may appoint an arbitrator notwithstanding any absent or late nomination"). In practice, however, the Court will typically invite the Claimant to make such nomination as soon as possible if it has not done so. Typically, the Claimant will then nominate an arbitral candidate. The Respondent will be provided the opportunity to object based on the Claimant's late nomination. The ultimate decision as to whether the Claimant's nomination will be accepted is made by the Vice President assigned to the case. It is, however, very rare in practice that the Claimant does not nominate an arbitrator if the arbitration agreement allows for it, and it is also very unlikely that the Court would reject Claimant's nomination if made late (*i.e.*, subsequent to the submission of its Request for Arbitration).

Interestingly, if the parties' arbitration agreement provides for an arbitral appointment process but the *Respondent* does not submit the name of an arbitral candidate, Article 2.4 of the LCIA Rules would appear to bar Respondent from making a subsequent appointment. *See* Art. 2.4 ("Failure to deliver a Response within time **shall constitute an irrevocable waiver** of that party's opportunity to nominate or propose any arbitral candidate.") (emphasis added). However, the Deputy Registrar has made clear that this rule is not as preclusive as it might seem; rather, the Court is attempting to impress upon the parties that they must act expeditiously and to inform the parties that failure to nominate an arbitral candidate will not slow down or otherwise impede the LCIA's appointment of the tribunal. In practice, the Deputy Registrar advised that, as with a Claimant who fails to nominate an arbitral candidate, the Court will invite the

Respondent to make such nomination as soon as possible. If the Respondent thereafter submits a nomination, it will go to the Vice President for approval. Again, it is very rare that a Respondent would not submit a nomination where its arbitration agreement provides such an opportunity, and there has not been an occasion where the Court has refused to accept a late nomination.

C. Expedited Formation

Under Article 9A of the LCIA Rules, in the case of "exceptional urgency," any party may apply to the LCIA Court for the expedited formation of the arbitral tribunal. *See* Art. 9.1. The party must submit its application in writing to the Registrar setting out the grounds for exceptional urgency requiring the expedited formation of the tribunal. *See* Art. 9.2. The Court will determine the application as expeditiously as possible under the circumstances, and, if granted, for purposes of forming the tribunal, it may abridge any period of time under the arbitration agreement or other agreement of the parties. *See* Art. 9.3.

In 2015, the LCIA Court received a total of 30 applications for expedited formation, although 18 of those applications involved related cases. *See* 2015 LCIA Report, p. 5. Of those 30 applications, only 12 were granted; 17 were rejected; and one application was withdrawn. *See* 2015 LCIA Report, p. 5. In 2016, the LCIA Court received a total of 15 applications for expedited formation. *See* 2016 LCIA Report, p. 14. Of those 15 applications, only 2 were granted; 13 were rejected. *See* 2016 LCIA Report, p. 14.

Whether such application will be granted is very case dependent, and it is difficult to advise what criteria specifically would compel the court to grant an application for expedited formation.

D. Emergency Arbitrators

It is not uncommon for a commercial dispute to require some form of interim conservatory relief as the first step in the dispute resolution process, e.g., a preliminary injunction to prevent the sale of an asset, a restraining order to seize funds, or an order to preserve crucial evidence. The LCIA Rules, like many other institutional rules, permit the tribunal to order interim or conservatory relief, but this is of little use when there is not yet a tribunal in place. At the same time, a party may not want to go to state court as the court may not have the necessary authority to grant interim relief or may be perceived as slow or biased. The LCIA, in the 2014 revision of its rules, included Article 9B, which provides for the appointment of an emergency arbitrator to remedy situations where a tribunal has not yet been constituted.

Article 9B provides, *inter alia*:

- Prior to the formation or expedited formation of the arbitral tribunal, any party may apply to the LCIA Court for immediate appointment of a temporary sole arbitrator to conduct emergency proceedings. *See* Art. 9.4.

- The party shall apply to the Registrar in writing, setting out (i) the grounds for requiring appointment of an emergency arbitrator; (ii) the claim, with reasons, for

emergency relief; and (iii) confirmation that the applicant has paid or is paying the special fee to the LCIA Court, without which such application will be dismissed. *See* Art. 9.5.

- The LCIA Court will determine the application as soon as possible, and, if granted, an emergency arbitrator will be appointed within three days of the Registrar's receipt of the application (or as soon as possible thereafter). *See* Art. 9.6.

- The emergency arbitrator is provided much discretion in determining how to proceed, and he or she is not required to hold hearings and may determine the issues requested on the available documentation alone. *See* Art. 9.7.

- The emergency arbitrator will decide the claim for relief as soon as possible, but no later than 14 days following his or her appointment. The deadline will only be extended in exceptional circumstances or by written agreement of all parties. *See* Art. 9.8.

- The emergency arbitrator's decision will be made in writing and contain reasons. *See* Art. 9.9.

- There is no ability to appeal a decision by the emergency arbitrator.

- The emergency arbitrator's decision may be confirmed, varied, discharged or revoked, in whole or in part, by order or award by the arbitral tribunal on application by any party or on its own initiative. *See* Article 9.11.

In 2015, the LCIA Court received no requests for an emergency arbitrator. *See* 2015 LCIA Report, p. 5. In 2016, the LCIA Court received only one request for an emergency arbitrator, which was denied. *See* 2016 LCIA Report, p. 14. Given that this rule has only been in existence since October 2014 and only applies to agreements concluded after this date (absent party agreement), it is not surprising that the LCIA Court would not have seen many such applications to date.

E. Small Claims in Expedited Arbitration

The LCIA Rules do not contain any articles which are specific to arbitrations involving simple or small claims.

V. Special Situations

A. Multi-Party Arbitrations

Article 8.1 of the LCIA Rules provides that, where the parties' arbitration agreement "entitles each party howsoever to nominate an arbitrator, the parties to the dispute number more than two and such parties have not all agreed in writing that the disputant parties represent collectively two separate 'sides' for the formation of the Arbitral Tribunal (as Claimants on one side and Respondents on the other side, each side nominating a single arbitrator), the LCIA

Court shall appoint the Arbitral Tribunal without regard to any party's entitlement or nomination." In such circumstances, Article 8.2 provides that the parties' arbitration agreement "shall be treated for all purposes as a written agreement by the parties for the nomination and appointment of the Arbitral Tribunal by the LCIA Court alone."

Articles 8.1 and 8.2 thus make clear that where there exists an arbitration agreement providing for how the parties will nominate arbitrators, such agreement will be disregarded where there are more than two parties in the dispute and at least one of them has not agreed on how such nominations will take place. The Deputy Registrar advised that it is unlikely that the LCIA Court will have to effectively reject the parties' agreed appointment process in the case of a multi-party arbitration. More often than not, the parties' arbitration clause will be sufficiently well drafted to account for multi-party issues; even if not, the Court will typically seek confirmation from the parties on how to interpret the clause so as to implement their agreement as regards appointments, and most of the time the parties will give their consent to interpret the clause so as to accommodate their agreement as regards appointments.

B. Consolidation

Article 22.1(ix) of the LCIA Rules provides that the tribunal may decide, upon application of a party, "to order, with the approval of the LCIA Court, the consolidation of the arbitration with one or more other arbitrations into a single arbitration subject to the LCIA Rules where all the parties to the arbitrations to be consolidated so agree in writing." Art. 22.1(x) provides that the tribunal may decide, upon application of a party, "to order, with the approval of the LCIA Court, the consolidation of the arbitration with one or more other arbitrations subject to the LCIA Rules commenced under the same arbitration agreement or any compatible arbitration agreement(s) between the same disputing parties, provided that no arbitral tribunal has yet been formed by the LCIA Court for such other arbitration(s) or, if already formed, that such tribunal(s) is(are) composed of the same arbitrators."

C. State Entities

The LCIA Rules do not contain any articles that are specific to arbitrations involving State entities.

D. Revocation, Challenge and Replacement of Arbitrators

Article 10 of the LCIA Rules governs the revocation and challenge of arbitrator appointments. Article 10.1 provides that the Court "may revoke any arbitrator's appointment upon its own initiative, at the written request of all other members of the Arbitral Tribunal or upon a written challenge by any party" under the following circumstances:

(i) that arbitrator gives written notice to the LCIA Court of his or her intent to resign as arbitrator;

(ii) that arbitrator falls seriously ill, refuses or becomes unable or unfit to act; or

(iii) circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence.

This central tenet of impartiality and independence is reflected in Article 5.3 of the LCIA Rules: "All arbitrators shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocate for or representative of any party."

Absent agreement of all parties in writing to revoke the arbitrator's appointment, or the challenged arbitrator resigns in writing within 14 days of receipt of a party's written statement of reasons for the challenge, the "LCIA Court shall decide the challenge and, if upheld, shall revoke that arbitrator's appointment." Art. 10.6. The Court recently has indicated that, "[d]epending on the complexity of the challenge, the LCIA will appoint either one member or three members (or former members) of the Court as decision-makers." Further, "[o]nce appointed, these decision-makers may hold a hearing or ask for further written submissions if necessary." *LCIA Releases Challenge Decisions Online*, 12 February 2018, available at: http://www.lcia.org//News/lcia-releases-challenge-decisions-online.aspx. Decisions on arbitrator challenges must be provided in writing and contain reasons. *See* Art. 10.6. On average, it takes only 27 days for the LCIA Court to provide a reasoned decision, and over half of all decisions are provided in less than 14 days. *LCIA Releases Challenge Decisions Online*, 12 February 2018, available at: http://www.lcia.org//News/lcia-releases-challenge-decisions-online.aspx.

Recently, the LCIA made available anonymized digests of 32 LCIA arbitration challenge decisions from between 2010 and 2017. These digests can be found online at the following link: http://www.lcia.org//challenge-decision-database.aspx.

According to the LCIA, it has published these excerpts of decisions, as "[w]ritten challenge decisions are an invaluable resource for users, counsel, and arbitrators – they give guidance in relation to standards of conduct, and provide a greater understanding of the reasoning applied by the Court." The Court intends to update the decisions database periodically when new decisions are issued. *LCIA Releases Challenge Decisions Online*, 12 February 2018, available at: http://www.lcia.org//News/lcia-releases-challenge-decisions-online.aspx.

From these decisions, it appears that challenges in LCIA arbitration are not only rare, but those that are pursued rarely succeed. For example, the LCIA reports that, during the eight-year period covered by the decisions, over 1,600 cases were registered with the LCIA; challenges were heard by the Court in less than 2% of these cases; and only one-fifth of those challenges were successful.

Under circumstances where an arbitrator must be replaced, Article 11 of the LCIA Rules governs such replacement. Article 11.1 provides that, "[i]n the event that the LCIA Court determines that justifiable doubts exist as to any arbitral candidate's suitability, independence or impartiality, or if a nominee declines appointment as arbitrator, or if an arbitrator is to be replaced for any reason, the LCIA Court may determine whether or not to follow the original nominating process for such arbitral appointment." Art. 11.1. Article 11.2 provides that "[t]he LCIA Court may determine that any opportunity given to a party to make any re-nomination (under the Arbitration Agreement or otherwise) shall be waived if not exercised within 14 days (or such lesser or greater time as the LCIA Court may determine), after which the LCIA Court shall appoint the replacement arbitrator without such re-nomination." Art. 11.2.

VI. Arbitrator List Services

As previously discussed, the LCIA keeps a database of arbitrators. The LCIA Arbitrator database is not publicized. The LCIA Court will update the information regarding the arbitrators in its database periodically, although it is primarily the responsibility of the arbitrators to update their arbitrator profiles.

CONCLUSION

Each of the arbitral institutions discussed in the Report have unique aspects to their approach to the appointment of arbitrators as well as areas of common ground. Additionally, each of the arbitral institutions increasingly are willing to work with parties and their counsel to tailor an arbitrator selection process that is most appropriate for the case and parties.

We hope that this Report serves as a useful reference to those seeking to appoint arbitrators in arbitrations administered by the AAA, ICDR, ICC, CPR, JAMS and LCIA. We encourage parties and counsel to reach out to the arbitration institution administering an arbitration to see if there are additional ways in which the institution can assist in the selection of arbitrators.

Finally, we welcome feedback on this Report. If there is sufficient interest, we may expand the Report to cover additional arbitral institutions or topics with respect to the appointment of arbitrators in administered arbitrations.

NEW YORK CITY BAR

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April 2018

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Business Alternative Dispute Resolution (ADR) Provides Fast, Fair, Flexible, Expert, Economical, Private, Customized Justice

By David J. Abeshouse

I. Introduction

Several years ago, I attended a gathering in Manhattan of nearly 100 business neutrals—commercial arbitrators and mediators. One of the presenters asked the assemblage to describe succinctly the basics of ADR (Alternative Dispute Resolution). I raised my hand, eventually was called on and out spouted this torrent of words: "ADR provides fast, fair, flexible, expert, economical, private, customized justice." The crowd reacted favorably, I was asked to repeat it so that others could jot it down, and, so, the title of today's article was born.

ADR (also referred to increasingly as "Appropriate" Dispute Resolution) encompasses several non-court processes, the best known of which are arbitration and mediation. Many myths and misconceptions about both abound, even among lawyers, some of whom are unfamiliar with the profound distinctions between these two very different forms of dispute resolution. The transactional lawyers who draft business agreements often lack direct experience in dispute resolution, which usually relegates them to mechanically re-using clauses from the past, which may or may not have worked well in those circumstances but clearly are not tailored to the present contract. So summarizing the differences between arbitration and mediation, and occasionally contrasting them with the more familiar court litigation, should forge a good starting point.

(a) Business/Commercial Arbitration

Arbitration (here we address private, not court-annexed, arbitration) essentially is a more streamlined form of litigation, typically conducted in a conference room in a law firm, business party's office, hotel or private club. The arbitrator hears evidence and renders a binding, enforceable award. Federal and state court procedural and evidentiary rules do not apply unless specifically invoked; instead, the applicable arbitral rules, usually promulgated by the governing forum, are designed to expedite the process and afford the parties, their counsel, and the arbitrator(s) more control over how the matter proceeds. (Examples of commercial arbitration rules can be found on the websites of the ADR forums/providers mentioned in the conclusion of this article.) Control over the process can be accomplished in the first instance by including a customized ADR clause in the parties' underlying agreement (rather than the tired, old "standard" clause of two or three bare sentences, use of which squanders the opportunity to guide strategically the future course of any dispute arising out of that agreement).

In the absence of an existing contractual clause, enlightened parties can agree, after the dispute has arisen, to submit it to arbitration by executing a simple submission agreement (a/k/a consent to arbitration); however, it generally is better to put a process in place during the parties' contractual "honeymoon" phase than to try to arrange it once the parties have asserted their enmity. The confluence of the contractual provision, the governing arbitral rules and the participants' input charts the course of the proceeding, which is flexible and party driven.

(b) Business/Commercial Mediation

Mediation, at least in the commercial or business arena, is a settlement negotiation facilitated by a neutral trained in techniques geared to get the parties to "yes." Parties and lawyers can use mediation either before or while the parties are engaged in litigation or arbitration. It also occasionally surfaces in the context of putting together a deal between or among non-disputing parties seeking to work together (*i.e.*, "deal mediation"). We address here mediation principally as a business dispute resolution modality.

What happens in mediation? The full answer is more properly the topic of a separate, longer article or book; but for present purposes suffice it to say that the parties, their counsel and the mediator convene in settlement mode, and the mediator listens to both sides' offerings. It is more of a conversation than an interrogation. Mediators apply numerous techniques to help bring the parties together. Many mediators use the caucus, or private meeting, to elicit information—held in confidence absent express permission to reveal—that can help the mediator to assist the parties in achieving resolution of their dispute. Other mediators prefer to keep the parties in joint general session at all times, reasoning that only in this way can the parties effectively hear each other and the mediator maintain the utmost neutrality.

Most commercial mediators are "facilitative" in nature, whereas some are more "evaluative," either suggesting or opining outright regarding how (and at what dollar figure) the case should settle. Some combine elements of

both (as well as other approaches, such as "transformative" mediation techniques). Mediators add value to the settlement process by, among other things, changing the usual two-sided dynamic, and suggesting creative solutions (based on experience and training) that the parties themselves may not have conjured up.

From that quick foundation, we now examine the characteristics of ADR that might make it suitable for use by clients through inclusion in their business agreements.

II. Fast

(a) Arbitration

Business arbitration usually goes significantly faster than court litigation. Although exceptions occur, statistically cases of similar levels of complexity traveling through the New York State courts and the private processes of the main domestic arbitral forums reflect arbitration durations of between one-third and one-quarter those of litigation. Also, past complaints that arbitrators were more reluctant than courts to grant dispositive motions have been met recently with amendments to arbitration rules encouraging appropriate use of dispositive motions, which has leveled that playing field and neutralized the criticism.

Moreover, the actual time devoted to testimony and argument at trial (typically 3 to 4 hours of active trial time per court day) compares unfavorably with that at arbitration (flexibly, depending on the preferences of arbitrators and parties, from 6 to 10+ hours of active testimony and argument per day). So multi-day hearings in particular can be efficiently attenuated via arbitration, where, for example, a 5-day trial could be heard in a 2 or 3-day arbitration hearing. This is a great boon to all, especially parties conducting hearings in distant cities, as it abbreviates travel. And beyond the math, arbitration also streamlines the processes by eliminating some of the more time-consuming and less useful aspects of court litigation such as excessive discovery and repetitive or otherwise unnecessary motion practice. Most businesses cannot risk the uncertainty inherent in having a significant case languish in court for several years, so the more expeditious arbitration process is preferable in this regard.

(b) Mediation

Business mediation usually is faster than court litigation or even arbitration. Whether the mediation commences instead of arbitration or court litigation, or during it, mediations usually take between one and four months from start to finish, and many are completed with just one in-person session. Shorter duration = fewer billable hours expended (= fractional cost relative to adversarial proceedings).

III. Fair

(a) Arbitration

Commercial arbitration is fair, incorporating essentially all of the procedural safeguards of court litigation: due process, designated rules, standards of adjudicator training and conduct, and even review of decisions. Awards may be reviewed either through the courts based on federal (Federal Arbitration Act) or state (e.g., NY CPLR Article 75) statutory standards and the interpretive decisional law thereunder, or optionally—if contractually provided—through expedited arbitral review (appellate) panels that some forums recently have instituted. For many reasons, not the least of which is that widespread use of arbitration helps relieve overburdened court dockets, federal and most state courts strongly favor arbitration, with the vast bulk of case decisions upholding arbitral awards and supporting broad interpretation of the arbitrability of cases.

(b) Mediation

Commercial mediation is fair because the parties themselves determine the outcome, assisted by counsel and the mediator. Although the process is flexible, there are rules and standards. A party is not compelled to settle through mediation; it is a consensual act. No one other than the parties commits them to a particular result. And if they choose not to resolve the dispute through mediation, they can resort to the binding dispute resolution options such as court litigation or arbitration and delegate responsibility for the eventual outcome to a neutral decider.

IV. Flexible

(a) Arbitration

Business arbitration is flexible; the parties are free, almost without limit, but within the bounds of legal reason, to determine the outlines and particulars of their proceeding by including an arbitration clause in their agreement that sets out how they want the matter to proceed. Several examples distinguish the flexibility of arbitration from the more one-size-fits-all nature of court litigation—in your arbitration clause, you can: (i) select the forum of the proceeding (*e.g.*, American Arbitration Association, JAMS, CPR); (ii) decide which set of rules applies; (iii) determine the breadth or limitation of scope of the arbitration clause—in other words, what is covered by the clause and what is not (*e.g.*, relegating very low-dollar claims to be heard in small claims court); (iv) designate whether one or three arbitrators will constitute the panel; (v) mandate general or specific educational or experiential credentials of the arbitrators to qualify to serve, to ensure expertise of the panel; (vi) designate the venue or locale of the hearing as well as the applicable governing

law; (vii) create a "stepped" clause (*see* section VIII(b), below) incorporating ratcheted levels of resolution efforts such as negotiation and mediation as conditions precedent to arbitration, with stated criteria for moving from one phase to the next; (viii) set some general or specific limits on discovery (here, it is usually advisable to tread lightly, leaving flexible interpretation of stated principles to the arbitration panel, or risk infecting the entire proceeding); (ix) allow in smaller cases for a documents-only evidentiary hearing or a telephonic hearing; (x) permit witness affidavits in lieu of direct testimony so long as the witness appears for cross-examination; (xi) provide that a failure of a party to pay its share of deposits may result in specified sanctions; (xii) direct that the form of the award issued by the arbitrator be either a bare, standard award or a fully reasoned award; (xiii) dictate whether the arbitration panel has discretion to apportion costs and expenses, and/or award prevailing party attorneys' fees; (xiv) invoke arbitral appellate review; and (xv) provide many other options for the proceeding. Note that for enforcement purposes, an arbitration clause always should provide that judgment on the award rendered may be entered in any court having jurisdiction.

(b) Mediation

Business mediation similarly is flexible for all the same reasons as arbitration, plus there are fewer rules to follow in the proceeding itself. There are no evidentiary strictures to which the parties must adhere; sometimes "venting" can help to move the matter along. Ironically, parties obtain their "day in court"—the opportunity to have their stories heard—better in mediation than they do in court litigation. The mediator, the parties, and their counsel are free to determine how they will proceed, and can change the process "on the fly," so long as they maintain standards. For example, some mediations start with separate *ex parte* conference calls with the mediator, whereas others have all sides on the phone together. Similarly, in many commercial mediations the parties submit pre-mediation statements and supporting documents to the mediator before the first in-person session to inform the mediator of the relevant facts, law and settlement positions of the parties. The participants can agree that these pre-mediation statements will be exchanged between the parties or will be private or will be hybrid—partly exchanged and partly private. Another example of mediation flexibility is that whether or not to break out into a private caucus might be decided on the spot, without advance notice, based on how the discussion has developed to that point. A mediation also might include a site visit, a video or online demonstration, provision of information from someone not directly involved in the matter but who need not be qualified formally as an expert witness, or a welter of other possibilities that might be helpful to the process. The creative results that mediation can produce go far beyond those of court litigation or arbitration, where the boundaries are delineated by the rules.

V. Expert

(a) Arbitration

Commercial arbitration affords expert resolution of disputes because the parties have the opportunity—both in drafting the governing contractual clause and often in the initial administrative conference call with the case manager of the arbitration forum—to have a say about what the qualifications of the panelist(s) will be. One might require that the members of a tripartite panel include a lawyer with at least 15 years of commercial litigation experience; a CPA with similar years of audit or fraud or tax experience; and an industry business person with decades of ownership or senior management experience in the garment industry, the oil and gas business or financial services. Parties could seek a French-speaking sole arbitrator with both intellectual property and commercial litigation experience at large- or medium-sized law firms or corporate in-house law departments. Although the possibilities are wide open, it is advisable to avoid excessive specificity or risk rendering the clause less susceptible of performance.

In the ordinary course, once the forum has considered the parties' preferences, they will be provided with the resumes of prospective arbitrators from among whom they may select their choices through the "strike and rank" method. Factors to consider here include the arbitrator's substantive business or legal area experience, presence of a meaningful track record of service as an arbitrator, and the level of arbitrator training. Does the arbitrator's resume reflect substantial and continuing involvement in training over a number of years? Does it reflect that s(he) has conducted numerous arbitrations in the past, as a neutral? Do the substantive areas of the prospective arbitrator's business or legal experience match well with the nature of the matter at hand? What is the arbitrator's reputation for personality, patience, punctuality, proactivity, and other performance criteria? Engaging in this sort of basic pre-selection analysis helps parties reap the benefits of being able to select the adjudicator (disfavored as "judge shopping" in the court system).

(b) Mediation

Commercial mediation applies expertise in both the subject area of the controversy and also mediation itself. So parties and counsel considering engaging a mediator will look to the prospect's background in the substantive area(s) of the case as well as in mediation.

Training is key. The 40-hour mediation certification courses are just the beginning. It is widely accepted that it takes most mediators hundreds of hours of training and several years of mediating experience to develop substantial expertise as a mediator.

VI. Economical

(a) Arbitration

Business arbitration is economical because—as noted earlier—shorter duration and lesser expenditure of hours necessarily yields lower costs, even after adding in the costs of arbitration. The cost of the arbitrator is subsumed by the savings from the fractional duration of the entire process. This becomes particularly clear when considering that the number of hours an arbitrator typically spends on a given matter is a very small proportion of the time that the lawyers representing each party spend on the case because, for example, it takes far greater expenditure of time to create and assemble documents and deal with clients than it does to read those documents. (A fair generalization would be that other than in small, simple cases, the arbitrator might spend one-tenth the time on the case that the lawyer(s) representing each side would spend). Usually, all parties split the costs of arbitration.

With a three-arbitrator panel, the arbitral costs will increase, but need not triple, as the Chair of the panel can deal exclusively with preliminary matters such as discovery issues, and given the special expertise of some neutral arbitrators (*e.g.*, a CPA with a Certified Fraud Examiner or Business Valuator certification, or someone with specific industry expertise), costs for expert witnesses may be eliminated. Three-arbitrator panels should be reserved for large and complex cases, particularly those where having three adjudicators with disparate areas of expertise will be helpful. (The old method of each side selecting an arbitrator, two of whom in turn together select the neutral chair of the tripartite panel, generally has become disfavored.) Regardless of the number of arbitrators on the panel, counsel never will waste several hours—as they might on several occasions during the course of a court case—sitting while waiting for the case to be called on the calendar, often to have it adjourned to another date, both of which instances get billed to the client. Arbitration is individualized justice, not mass justice, and that results in many often overlooked areas of economic savings.

(b) Mediation

Business mediation is economical because it is even more expeditious than arbitration, and with far fewer hours billed by counsel and mediator, the cost savings relative to court litigation and even arbitration can be, and usually are, immense. Inasmuch as over 95% of business litigations eventually settle before trial, getting an earlier and better settlement via mediation makes sense for most parties in most cases. Essential discovery can be conducted early, setting the stage for prompt resolution that saves the parties the vast bulk of fees and expenses that they otherwise would have incurred.

VII. Private

(a) Arbitration

Commercial arbitration generally is private and confidential, and can be made more so by the execution by the parties and counsel of a confidentiality agreement, which can be "so-ordered" by the arbitrator(s). Business arbitration awards are not published like court decisions, and there exists no searchable database of these private awards, so arbitration awards set no precedent. Arbitrators are held to standards of privacy and confidentiality that ensure that they will not divulge information regarding a proceeding over which they have presided, and the law generally protects arbitrators from being called to testify as witnesses in subsequent proceedings. The privacy and confidentiality of business arbitrations stands in stark contrast to the "public record" of court litigation and is viewed as a significant advantage to certain businesses that prefer not to air their dirty laundry in public, particularly considering the easy access to video and online information that abounds today.

(b) Mediation

Commercial mediation is private. Mediators are held to standards of privacy and confidentiality that ensure that they will not divulge information regarding a proceeding in which they have participated, and the law generally protects mediators from being called to testify as witnesses in subsequent proceedings. Most private mediation agreements (which parties and counsel execute to engage the mediator) reiterate these principles, so they enjoy contractual foundation as well.

VIII. Customized

(a) Arbitration

Business arbitration is customized, as noted in section IV(a) above on flexibility. This starts with the contractual arbitration clause and follows in the arbitration panel's application of the rules and clause to developments in the matter. And because in arbitration the rules of evidence are bent, not broken, the progress of the hearing itself is not impeded with excessive evidentiary objections and arguments. Arbitrators tend to take most evidence "for what it's worth," assessing how relevant, probative and reliable it is, based on their experience. There is no need to protect the evidentiary integrity of the arbitral process from layperson jurors. Private arbitrators as a rule do

not maintain large dockets, so they can afford each case more individualized attention than can judges, who are governmental employees.

(b) Mediation

Business mediation likewise is customized, as noted in section IV(b) above on flexibility. Indeed, one can create a "stepped" clause, encompassing multiple levels or steps of dispute resolution. For example, a stepped clause might start with requiring negotiation of a conflict and move through increments ending in either binding arbitration or court litigation. Perhaps the best known of these stepped clauses is the "med-arb" clause, which first requires mediation of the dispute and, failing that, arbitration (usually before a different neutral, because the mediator has been "tainted" by hearing non-evidentiary and legally irrelevant information proffered in a wholly different context with a different purpose than parties and counsel apply in arbitration). Every aspect of mediation is tailor-made for the proceeding at hand, and changes in the process can occur on an as-needed basis.

IX. Conclusion

So, business ADR indeed provides fast, fair, flexible, expert, economical, private, customized justice for parties who invoke ADR processes. Doing so takes a modicum of lawyerly strategic foresight, deciding which process(es) to use; how to customize the myriad potential particulars of the clause to best suit the situation and/or the party being represented; and how best to raise the negotiation issue of including an ADR clause in the parties' underlying business agreement. The many advantages of ADR answer in large measure that final issue, so it is important to be armed with knowledge about ADR processes. Online resources for drafting clauses can be found on the websites of ADR providers/forums such as the American Arbitration Association (AAA) (www.adr.org); JAMS (www.jamsadr.org); and CPR (www.cpradr.org); as well as best practices organizations such as the College of Commercial Arbitrators (www.thecca.net). The AAA last year designed an online tool to help practitioners construct clear and effective ADR provisions (www.clausebuilder.org). This article and these online resources furnish a good starting point for fulfilling a lawyer's professional obligations to (i) fully inform clients about all options for resolving conflicts that might arise out of a business agreement, and (ii) be able to draft an appropriate dispute resolution clause if the informed client wishes to invoke ADR.

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Alternate Dispute Resolution

Non-Forum Pro Se Arbitration of International Commercial Dispute: A Unique Case Study

Alternative dispute resolution – also known as appropriate dispute resolution — provides fast, fair, flexible, expert, economical, private, customized justice. What follows is an example of the flexibility, efficiency, and cost-effectiveness of a private arbitration proceeding. Certain inconsequential details, including names, have been changed to protect the identities and confidentiality of the participants.

David J. Abeshouse

In an "ordinary" international commercial arbitration, filed with and managed by a forum,[1] the case proceeds through a formalized process that varies from forum to forum. Some are more streamlined and flexible than others. Several have processes that require, for example, multiple post-filing redrafts of the initial pleading, which often takes considerable time and expends significant resources in terms of counsel time and arbitrator time. In contrast, the ad hoc (non-forum) scenario in the case described below provides for great flexibility, to allow the process to bend to the needs and desires of the parties, while still maintaining the requisite legal controls such as due process.

Fact Pattern: Why International Arbitration?

Albert and Bob were American entrepreneurs and friends in their mid-thirties who lived and worked in China and the United States. They each had been involved in founding one or more substantial companies in the technology and service arenas, and each owned interests in one or more of these companies. They had a falling-out, however, over whether Bob contractually was a substantial minority shareholder of three of these companies: one Hong Kong entity, one Chinese entity, and one U.S. entity.

They recognized that reliance on the courts of any one country could be fraught with complication, delay, expense, and risk. Court rules and procedures typically result in greater duration of the dispute resolution process than occurs in arbitration, one of the hallmarks of which is the relatively streamlined nature of the proceeding. Moreover, some countries' court systems apply a much lower standard of due process than do American courts. Since the companies at issue here were based in three different countries, the courts of no one country had jurisdiction over the entire matter. Accordingly, the parties understandably turned to international arbitration for resolution of their dispute.

Why Non-Forum Arbitration?

Albert and Bob decided not to submit their dispute to one of the large international forums, largely to avoid substantial filing fees and additional procedures they deemed unnecessary. Instead, they researched prospective arbitrators in the New York metropolitan area – a hub of international arbitration resources — to adjudicate this controversy, found multiple candidates through online searches, and arrived at a mutual choice. They contacted the Arbitrator, and explained that they sought a relatively unique process for their case: an ad hoc (non-forum) arbitration in which they both would appear pro se (representing themselves, without legal counsel).

Although this proposed scenario set off several prospective alarms in the mind of the Arbitrator, the parties' intelligence and apparent willingness to work within a designed framework piqued his interest and – after discussing some of the threshold issues — the Arbitrator tentatively agreed to serve. The parties said they wanted a week to consider the process and refine their thoughts. They returned eager to proceed. Although the parties lacked the common pre-dispute arbitration agreement, they entered into a submission agreement (i.e., an agreement to arbitrate made after the dispute has arisen), setting out the terms of the proceeding, the scope of the issues to be determined, the governing rules and applicable law, and other key elements.

Arbitral Neutrality with Pro Se Parties

The Arbitrator noted prospectively that the absence of counsel might result in a heightened incidence of requests from the parties for explanation of rules, policies, and procedures, and that as a neutral, there were some questions he would be precluded from answering, such as matters of legal advice or strategy.

Focal to the arbitrator's role as a neutral in all cases is the need to refrain from making statements that might give the appearance of partiality; providing legal advice or strategy would run afoul of this requirement.[2] The parties appeared to understand and were willing to risk incurring some additional Arbitrator time and expense and some additional uncertainty, in order to avoid the expense and what they viewed as potential complication of having counsel represent them. (It was apparent to the Arbitrator from the outset that it was this same maverick approach to some of the legalities of their business together — including failure to have counsel oversee careful contractual and other documentation of their respective ownership interests in the three entities – that had gotten them into this situation in the first place.)

The parties and Arbitrator discussed the possibility of mediating the dispute instead of arbitrating it, but the parties expressed a preference for a binding expert decision, not a facilitated negotiated settlement.

Arbitration Agreement: Day 1

The Arbitrator prepared an Arbitration Agreement setting out in detail the terms of the arrangement, including fees, applicable law, confidentiality, immunity, reference to existing rules of commercial arbitration procedure that would govern to the extent feasible, and myriad other provisions.

After asking some questions and obtaining some modifications, particularly to the critical provision delineating the scope of the arbitration proceeding (*i.e.*, specifically which issues were being submitted to the Arbitrator for adjudication), the parties both signed the Arbitration Agreement on "Day 1" and paid their respective deposits (representing nearly 35 hours of arbitrator billable time) by international wire transfer.

Schedule for Discovery: Days 3–17

Initially, the parties guesstimated that they would each produce less than 100 pages of documents in discovery, and likely less than that as exhibits for the evidentiary hearing to take place at the Arbitrator's Long Island, N.Y. office. During the Preliminary Hearing Conference Call (PHCC) on Day 3 after execution of the Arbitration Agreement, it became apparent to the parties that pre-hearing discovery would be more extensive than they had anticipated.

See STUDY, Page 23

STUDY ...

Continued From Page 9

During the PHCC, the parties and Arbitrator addressed the scheduling of all aspects of the pre-hearing and hearing phases of the arbitration proceeding, likely issues that might arise, procedures to be followed, and a welter of other matters. Prompt resolution of the dispute was of utmost importance to both parties. The following day, the Arbitrator issued a Preliminary Hearing Conference Order (PHCO), memorializing all that had been agreed to during the PHCC and setting out additional terms governing the process.

The agreed schedule in the PHCO called for service of document production requests, responsive production of documents, resolution of any discovery disagreements, and completion of documentary discovery all by Day 17 after execution of the Arbitration Agreement — a seemingly improbable schedule. The hearing was scheduled for Day 35 (exactly five weeks after execution of the Arbitration Agreement), with marked exhibits, any direct testimony affidavits of witnesses, pre-hearing briefs, and other documentation to be filed directly with the Arbitrator several days in advance of the hearing, to afford him the opportunity to review all submissions in advance of the hearing. The Arbitrator's written Award would be due for receipt by the parties within 30 days following closure of the hearing.

Often in a commercial arbitration, the Arbitrator must remind the parties' counsel that arbitration is intended to be more streamlined than and different from litigation, and is governed by different rules and procedural law. In this instance, the instructions and reminders were necessarily more fundamental and frequent throughout the pre-hearing phase, as the parties were not professional litigants. As this had been discussed in advance, it did not pose an issue going forward.

Discovery Extended from Days 17–22

Albert and Bob predictably experienced some disagreements and misunderstandings during the discovery process, but these were promptly resolved through e-mailed motions resulting in directives or orders issued by the Arbitrator (including one motion relating to the scope of the issues in the arbitration). During the pre-hearing phase of the matter, the parties and Arbitrator collectively exchanged more than 250 e-mails, maintaining open channels of communication to ensure the smooth progress of the case.

This stands in stark contrast to the level of communication that courts engage in with counsel for parties in litigation. The discovery phase was extended from Day 17 to Day 22, as a result of the motion practice. Several days before the hearing, the parties together submitted more than 1,000 pages of documentary exhibits for the hearing, and each filed a pre-hearing memorandum of up to 15 pages.

Evidentiary Hearing: Day 35

On day 35, Albert and Bob flew from China to New York, and met at the Arbitrator's Long Island office for the evidentiary hearing. It started at 9 a.m. and concluded at 4:30 p.m. (with a half-hour lunch break). The Arbitrator heard approximately seven hours of testimony and argument (likely double what gets accomplished in the typical trial day in state court). Both sides presented their testimonial and documentary evidence, and one domestic non-party witness appeared voluntarily, without need for subpoena,[3] by telephone conference call, for direct and cross-examination. At the conclusion, the parties decided not to submit post-hearing memoranda, content to rely upon their presentations, including oral closing statements. Both parties expressed their satisfaction at having had a full and fair opportunity to be heard.

The aggregate arbitral fees incurred and paid were a small fraction of what this case would have cost the parties had they gone to court (or a large international arbitration forum). Total billable Arbitrator time expended throughout the proceeding — from inception through final Award — was less than 40 hours. With issuance of the Award, the Arbitrator submitted a final invoice, for the remaining approximately 5 hours of billable time, which both parties paid within the week.

Arbitral Award: Day 43

From initial contact through the evidentiary hearing, the process spanned two months. More significantly, the period from entry into the Arbitration Agreement (Day 1) through evidentiary hearing (Day 35) comprised five weeks. The Award was transmitted eight days after the evidentiary hearing (Day 43). So, from formal start through final Award, the entire case took six weeks. The parties received what they sought, and expressed emphatic appreciation following the hearing.

The flexibility that this process afforded the participants in the arbitration permitted them to secure the rapid, high-quality, binding dispute resolution process that they needed while avoiding the expense, delay, and complications that any country's court proceedings would entail. This ad hoc, pro se international commercial arbitration was fast, flexible, very economical for the parties, and wholly unique. This is but one case study example of what can be done through the alternative dispute resolution process of commercial arbitration.

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1. *E.g.*, International Centre for Dispute Resolution (ICDR), International Court of Arbitra-tion of the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), or Hong Kong International Arbitration Centre (HKIAC).
2. *See generally*, American Arbitration Association/American Bar Association's Code of Ethics for Arbitrators in Commercial Disputes, Canon I.D., available at http://tinyurl.com/pmmx98j (accessed 8/31/15).
3. Subpoenas are available in arbitration under the Federal Arbitration Act, 9 USC § 7.