Preventing the Runaway Arbitration: From Drafting the Contract Through the Award

Presenters:
Reginald A. Holmes
Patricia O’Prey
Gilda R. Turitz
Dana Welch

August 9, 2013
2:00pm – 3:30pm (1.5 hrs. CLE)
Part of the 2013 ABA Annual Meeting
Room 3011, 3rd Floor, Moscone Center West

www.americanbar.org/dispute
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Reginald Holmes is one of America’s most experienced arbitrators, mediators and private justices. He has been a member of the American Arbitration Association’s (AAA) Large Complex Case panel since its inception. He is a certified Collaborative Lawyer, the Mediation Standards Director for Resolution Services Inc. and serves on the National and International panels of the AAA and the International Centre for Dispute Resolution (ICDR). He is a Fellow and member of the Board of Directors for the College of Commercial Arbitrators (CCA), the California Dispute Resolution Council (CDRC) and the Academy of Distinguished Neutrals. He is also President and Executive Director of the Neutrals Diversity Alliance (NDA). He is the nation’s foremost expert on the role of “Private Justice” in ADR processes. He is a former patent attorney with an electrical engineering degree from the University of Florida and a law degree from Georgetown University Law Center. He has held senior executive, business, managing partner positions with several Fortune 500 corporations and law firms and has been very active in national and local civic, community and professional organizations. The Holmes Law Firm (www.theholmeslawfirm.com) has a national practice with offices in California, Chicago, New York and Atlanta.

Patricia (Trish) O’Prey is a civil litigator with experience in a wide range of cases who went in-house to GE Capital Americas in 2012 after spending more than ten years, including six years as a partner, at Richards Kibbe & Orbe LLP in New York. In addition to being a litigator, Trish is a trained arbitrator and mediator. As an advocate, Trish is particularly interested in arbitration and alternative dispute resolution, including steps to ensure that they are what they were intended to be, which is a cost-effective alternative to traditional litigation. Trish is active in the American Bar Association, participating as Co-Chair to its Section of Litigation, Alternative Dispute Resolution Committee. Trish graduated from University of California, Hastings College of Law, J.D., cum laude, in 1996 and received her B.A. from the University of California, Santa Cruz. She also clerked for the Honorable Melvin T. Brunetti on the U.S. Court of Appeals for the Ninth Circuit.

Gilda Turitz is a business trial lawyer and heads the litigation practice for Sideman & Bancroft LLP, a 35-attorney woman-owned law firm in San Francisco. Gilda’s practice concentrates on complex commercial litigation in federal and California state courts and arbitration tribunals, including contractual, partnership, intra-corporate and securities disputes; unfair competition; professional liability; real estate; fraud; breach of fiduciary duty; and intellectual property. Her clients are in diverse industries including technology, financial services, telecommunications, professional services, real estate, and hospitality. Gilda is also an experienced commercial arbitrator for the American Arbitration Association and a mediator for commercial cases. Prior to joining Sideman & Bancroft, Gilda chaired the litigation group of the international firm of Graham & James LLP, San Francisco office. Gilda received the Glass Hammer Award of the American Bar Association, Law Practice Management Section, for efforts to shatter the glass ceiling, is AV-rated by Martindale Hubbell, and has been recognized as a Northern California Super Lawyer® for business litigation and in Best Lawyers in the Bay Area®. Education: B.A., University of Michigan; M.L.S., University of California, Berkeley; J.D. (Order of the Coif), University of California, Davis, School of Law. Bar admissions: all state and federal courts in California.

Dana Welch is a commercial arbitrator based in the San Francisco Bay Area. She is a member of the American Arbitration Association’s large complex case, alternative and complex investments, and employment panels. She is the incoming Chair of the State Bar of California’s Standing Committee on ADR and a Fellow of the College of Commercial Arbitrators, and has taught fellow arbitrators on the topic of maximizing efficiency in arbitrations. Prior to serving as an arbitrator, she was the General Counsel of a financial services company. She obtained her JD from Boalt Hall School of Law, University of California, Berkeley, where she was awarded the Order of the Coif.
PREVENTING A RUNAWAY ARBITRATION

American Bar Association
Section of Dispute Resolution
Annual Meeting
San Francisco, CA
August 9, 2013
PRESENTERS

Reginald Holmes, The Holmes Law Firm, Pasadena, CA

Patricia C. O’Prey, GE Capital Americas, Norwalk, CT

Gilda R. Turitz, Sideman & Bancroft LLP, San Francisco, CA

Dana Welch, Welch ADR, Berkeley, CA
HALLMARKS OF COMMERCIAL ARBITRATION

• Parties agree to submit disputes to 1 or 3 arbitrators (“the Tribunal”).
• Parties choose the arbitrators; the process is neutral.
• Sharing of arbitrator compensation and Tribunal fees; cost-shifting may be allowed.
• Arbitration is a “creature of contract”: flexible for parties’ needs.
• Private/confidential process.
• The Tribunal’s decision is binding, final and enforceable.
GOALS OF ARBITRATION

• Justice
• Efficiency
• Speed
• Finality

• But arbitration does not always align with those goals

• In one survey, 75% of business users indicated that “most” or “all of the time” they desire arbitration to be speedier, more efficient and more economical than litigation; but 69% said in their experience arbitration failed to meet those desires “half” to “most of the time.”  *CCA Protocols for Expeditious, Cost-Effective Commercial Arbitration* (2010)
WHAT IS A RUNAWAY ARBITRATION?

• Runaway Process
  • Drawn-Out Arbitrator Selection Process
  • Collateral Litigation (e.g., scope of claims, proper parties)
  • Handled Like Courtroom Litigation
  • Excessive Discovery
  • Lengthy Time to Hearing
  • Lengthy Hearings
  • Continuances
• Runaway Costs
  • Arbitrator Fees
  • Discovery and E-Discovery Costs
  • Tribunal Costs
  • Counsel’s Legal Fees
CONCERNS ABOUT ARBITRATION

- The “Root of the Problem: Arbitration Has Become Too Much Like Litigation”
  *CCA Protocols for Expeditious, Cost-Effective Commercial Arbitration (2010)*
- “Although arbitration is touted as a quick and cheap alternative to litigation, experience suggests that it can be slow and expensive.”
  *Goldman Sachs Execution & Clearing, L.P. v. The Official Unsecured Creditors' Committee of Bayou Group, LLC, et al., S.D.N.Y. Case No. 10 Civ. 5622 (JSR) (Nov. 30, 2010)*
- 71% of Survey Respondents Believe Arbitrators “Split the Baby”
  - In fact, only 7% of all arbitration cases award between 41-60% of the damages sought. AAA Study cited in Rand Institute for Civil Justice, Business-to-Business Arbitration in the United States, 2011
- Costs (Tribunal Fees, Arbitration Compensation, Discovery/E-Discovery Costs)
- Delays in Hearings
- No Appeal/Limited Bases to Vacate Awards
## ARE COMMERCIAL ARBITRATIONS LOSING FAVOR?

2011 Survey of Fortune 1,000 Companies Shows Decreasing Use of Commercial Arbitration:

<table>
<thead>
<tr>
<th>Reason/Barrier</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>No desire from senior management</td>
<td>24.6%</td>
</tr>
<tr>
<td>Too costly</td>
<td>22.9%</td>
</tr>
<tr>
<td>Too complicated</td>
<td>9.0%</td>
</tr>
<tr>
<td>Difficult to appeal</td>
<td>51.6%</td>
</tr>
<tr>
<td>Not confined to legal rules</td>
<td>44.1%</td>
</tr>
<tr>
<td>Lack of corporate experience</td>
<td>11.9%</td>
</tr>
<tr>
<td>Unwillingness of opposing party</td>
<td>44.9%</td>
</tr>
<tr>
<td>Results in compromised outcomes</td>
<td>47.0%</td>
</tr>
<tr>
<td>Lack of confidence in third party neutrals</td>
<td>34.2%</td>
</tr>
<tr>
<td>Lack of qualified third party neutrals</td>
<td>11.0%</td>
</tr>
<tr>
<td>Risk of exposing strategy</td>
<td>6.4%</td>
</tr>
<tr>
<td>Too time consuming</td>
<td>11.0%</td>
</tr>
</tbody>
</table>

## COMPARISON OF DISPUTE RESOLUTION PROCESSES

<table>
<thead>
<tr>
<th>ARBITRATION</th>
<th>COURT LITIGATION</th>
<th>MEDIATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Pay for Arbitrators' Time and Tribunal Fees</td>
<td>• Lower Costs</td>
<td>• Pay for Mediator’s Time (and Tribunal Fees)</td>
</tr>
<tr>
<td>• Avoid Exposure to Unsophisticated/Emotional Juries</td>
<td>• Jurors Deciding Frequently Complex, High Stakes Cases</td>
<td>• Mediator Facilitates Settlement, Avoiding Decision Made By Third Party</td>
</tr>
<tr>
<td>• Choice of Arbitrators (expertise, industry knowledge)</td>
<td>• No Choice of Judge</td>
<td>• Choice of Mediators (expertise, industry knowledge)</td>
</tr>
<tr>
<td>• Ideally, faster resolution (no motion practice)</td>
<td>• Proceedings can be lengthy (motion practice, continuances, trial delays)</td>
<td>• Resolution at Stage that Parties Select</td>
</tr>
<tr>
<td>• Finality- (Almost) No Appeal</td>
<td>• Appeals Permitted</td>
<td>• Finality of Settlement if Mediation Succeeds</td>
</tr>
<tr>
<td>• Restricted Discovery</td>
<td>• Broad Discovery</td>
<td>• Informal Discovery or Within Court/Arbitration Process</td>
</tr>
<tr>
<td>• Confidentiality</td>
<td>• Open Access to Court Files</td>
<td>• Confidentiality</td>
</tr>
</tbody>
</table>
WHERE IT ALL STARTS - THE ARBITRATION CLAUSE

- Considerations:
  - Designation of Provider and Rules
  - Arbitrator Expertise
  - Number of Arbitrators (One or Three)
  - “Step Clauses” - Pre-Arbitration Negotiation or Mediation Required?
  - Discovery – allowances or limitations; discovery concerns
  - Limitation on Arbitrator Power (e.g., no punitive damages)
  - Hearing Venue, Choice of Law
  - Time to Hearing
  - Right to appeal?
• Potential Cost Savings:
• Allows the parties to explore a possible settlement before the costs of arbitration are incurred.
• But may simply delay inevitable arbitration.
• Time limits on duration of negotiations/mediation and process.
• Possible waiver of attorney’s fees in arbitration for failure to mediate.
SELECTION OF ADMINISTRATOR/PROVIDER

• AAA, JAMS, CPR, no provider (“non-administered arbitration”)

• Administered Arbitration:
  • Benefits with Institutional Providers:
    • Independent party to administer and keep proceeding on track
    • Independent party to evaluate any arbitrator bias, conflict, etc.
    • Arbitrators “vetted” by Provider
    • Ongoing Arbitrator Training and Education is required

• Non-Administered Arbitrations (No Designated Provider):
  • Lower costs/fees
  • Potential Pitfalls – Parties have limited or no recourse in the event of a conflict or arbitrator misconduct, or one party’s non-payment that stalls arbitration.
Both JAMS and AAA offer specialized panels (e.g., employment disputes, etc.); WIPO for intellectual property disputes.

With both JAMS and AAA, parties may opt for Expedited Arbitration Procedures.

For JAMS Expedited Procedures to apply:
- Must be specifically referenced in arbitration agreement
- All parties must consent
- Limitations on discovery after initial voluntary exchange
- One deposition per side
- Limited e-discovery
- Arbitration Hearing within 60 days after cutoff for fact discovery

AAA's Expedited Procedures apply:
- In any case less than $75,000.
- No specific expedited procedure for discovery, all at the arbitrator's discretion.
ARBITRATOR SELECTION: THE SINGLE MOST IMPORTANT FACTOR IN PREVENTING A RUNAWAY ARBITRATION?

- Specified rules for arbitrator selection process in clause?
  - Party–Appointed
  - List Process (Strike and Rank)
  - Special expertise required or desired?
  - Case management skills
  - “Vetting” potential arbitrators
    - Résumé review
    - Reputation
    - Interviews/written questions
    - References
    - Research on awards or opinions where public
    - Availability for hearing

- One or Three? Potential Pitfall - With only one arbitrator, you may have a decision-maker with bias or lacking thorough understanding of the issues; three decision-makers create greater tendency for balance but costs are higher.

- Sample Clause Language: The arbitration shall be conducted by a panel of three arbitrators who are knowledgeable in the subject matter of the dispute, [including at least one arbitrator with X years experience in industry or legal field of expertise].
PRE-HEARING CONFERENCES AND CASE MANAGEMENT

• Opportunities to Educate Arbitrators
• Address Case Management Concerns
• Phasing or Bifurcation of Issues
  • Expediting resolution through deciding one or more issues first?
  • Bifurcate liability and damages?
  • Bifurcate attorneys’ fees determination after merits order?
• Scope of Discovery and Handling Discovery Disputes
• Motions Allowed?
• Clear Pre-Hearing Schedule – Specified Deadlines, Disclosure Dates
• Hearing Schedule and Protocols During Hearing
DISCOVERY IN ARBITRATION

- In General: Scope and Limitations
- Document Exchanges
- E-Discovery
- Depositions
- Interrogatories/Requests for Admission
- Third Party Subpoenas (for discovery/trial purposes)
- Expert Discovery
- Resolution of Discovery Disputes
CONSIDERATIONS RELATING TO E-DISCOVERY

• Scope Allowed
  • Relevance
  • Amount in Controversy
  • Nature of Dispute
  • Nature of Parties
• Cost
• Burden
• Need
• Availability through other means/ sources
MOTIONS IN ARBITRATION

• Discovery Motions
  • Designate one arbitrator as “discovery referee”
• Expedited Procedures
• Motions for “Summary Judgment” or to Dismiss Claims
• Motions in Limine
• Motions Relating to the Conduct of Hearing
  • Bifurcation of Issues
  • Phasing
THE HEARING

• Daily Conduct
• Scheduling Witnesses/Witness Unavailability Issues
  • Use of Video/Skype
  • Direct Testimony By Affidavit
• Time Limitations/Allocation Between Parties/Chess Clocks
• Evidence Issues:
  • Repetitive/Cumulative Testimony
  • Expert Testimony Issues
• Continuance Requests
• At the Conclusion
  • Closing Arguments
  • Post-Hearing Briefing
THE AWARD

Types:
• Basic or Standard Award
• Reasoned Award
• Findings of Fact and Conclusions of Law

Considerations:
• Cost to prepare
• Party needs/desires
• Precedent
• Help with Post-Award Settlement
• Effectively No Appeal Right Following Arbitration
  • In Rand study (2011) the absence of an appeal right was viewed as a disadvantage by 63% of Respondents. Rand study, p. 20.
• Use of Appellate Arbitration Procedures offered by some provider institutions (e.g., JAMS)
• Limited Bases to Vacate Awards
  • Under the FAA, the district court may vacate an arbitration award "(1) where the award was procured by corruption, fraud, or undue means (2) where there was evidence partiality or corruption in the arbitrators ... (3) where the arbitrators were guilty of misconduct . . . ; or (4) where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter was not made.” 9 U.S.C. § 10(a).
• Does “manifest disregard for the law” remain a basis to vacate an award?
THE “AFTERMATH” OF AN ARBITRATION

• Post-Mortem or “Lessons Learned” for Counsel and Clients
• Making Adjustments in Arbitration Policies, Agreements, Management or the Process
• Changing Standard Arbitration Clauses As Result of Experience in Arbitration
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"Preventing A Runaway Arbitration" - ABA Section of Dispute Resolution
Comparison of Selected Provider Rules
By Gilda R. Turitz, Sideman & Bancroft LLP, gturitz@sideman.com
July 2013*

<table>
<thead>
<tr>
<th>SUBJECT</th>
<th>AMERICAN ARBITRATION ASSOCIATION COMMERCIAL ARBITRATION RULES</th>
<th>JAMS COMPREHENSIVE ARBITRATION RULES &amp; PROCEDURES</th>
<th>CPR: INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION + RESOLUTION ADMINISTERED ARBITRATION RULES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rules Effective Date</td>
<td>2007 Rules amended and effective June 1, 2009; Fees amended and effective June 1, 2010</td>
<td>2007 Rules amended and effective Oct. 1, 2010; Streamlined Rules effective July 15, 2009</td>
<td>Rules effective date: July 1, 2013</td>
</tr>
<tr>
<td>Website</td>
<td>www adr.org</td>
<td><a href="http://www.jamsadr.com">www.jamsadr.com</a></td>
<td><a href="http://www.cpradr.org">www.cpradr.org</a></td>
</tr>
<tr>
<td>General (from materials of provider institution)</td>
<td>The AAA Rules provide for administered arbitration of domestic commercial disputes.</td>
<td>The JAMS Rules govern binding arbitrations of disputes or claims that are administered by JAMS.</td>
<td>The CPR Rules for Administered Arbitration (newly adopted) “provide parties with the same well-designed procedures and high quality arbitrators as CPR’s non-administered option.”</td>
</tr>
<tr>
<td>Application</td>
<td>Where the parties have provided for arbitration by the AAA under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules, the Rules are deemed a part of their arbitration agreement. Parties may agree to written modifications after arbitrator’s appointment and only with arbitrator’s consent. (R-1(a))</td>
<td>Where the parties have provided for arbitration by JAMS under its Comprehensive Rules or for arbitration by JAMS without specifying any particular JAMS rules and the disputes or claims exceed $250,000, not including interest or attorneys’ fees, the rules are deemed a part of their arbitration agreement. (Rule 1(a), Rule 1(b)) Parties may agree on any procedures not specified in the rules that are consistent with applicable law and JAMS policies by promptly notifying JAMS of any such party-agreed procedures and confirming such procedures in writing. (Rule 2)</td>
<td>The CPR Administered Arbitration Rules provide for administered arbitration of disputes where the parties to a contract provide for arbitration under such rules or specify CPR arbitration without specifying non-administered or administered rules.</td>
</tr>
<tr>
<td>AAA Rules for Large, Complex Cases</td>
<td>“The procedures for Large, Complex Commercial Disputes will be applied...in which the disclosed claim or counterclaim of any party is at least $500,000...” (R.1(c))</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Expedited Rules or Procedures</td>
<td>Unless the parties or AAA determines otherwise, the Expedited Rules apply in when no claim or counterclaim exceeds $75,000... (R-1(b))</td>
<td>JAMS’ Streamlined Rules govern arbitrations when the parties agree, or if the claim or counterclaim doesn’t exceed $250,000. (Streamlined Rule 1) JAMS’ Expedited Procedures (Rule 16.1 and 16.2 of the Comprehensive Rules) apply if referenced in the parties agreement to arbitrate, or are later agreed to by all parties. (Rule 16.1)</td>
<td></td>
</tr>
<tr>
<td>Version of Rules Applicable to the Arbitration</td>
<td>Rules in effect at the time the administrative requirements are met for a demand for arbitration or submission agreement received by the AAA. (R-1(a))</td>
<td>Rules in effect at time of commencement. (Rule 3)</td>
<td>Rules in effect at time of commencement unless the parties agree otherwise. (R 1.1)</td>
</tr>
<tr>
<td>JURISDICTION OF ARBITRATOR</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Objections to Jurisdiction or Existence/Validity of Arbitration Clause</td>
<td>Arbitrator may rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement. (R-7(a))</td>
<td>Arbitrator has power to hear and determine challenges to its jurisdiction, including disputes over the existence, validity, interpretation or scope of the arbitration agreement. (Rule 13(c))</td>
<td>Tribunal has power to hear and determine challenges to its jurisdiction, including objections with respect to existence, scope or validity of the arbitration agreement. (R 8.1)</td>
</tr>
<tr>
<td>Arbitration Clause Deemed a Separate Agreement</td>
<td>Yes. (R-7(b))</td>
<td>No provision.</td>
<td>Yes. (R 8.2)</td>
</tr>
<tr>
<td>COMMENCEMENT OF ARBITRATION</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>How Commenced</td>
<td>Commenced by written demand to respondent when initiated under an arbitration provision in a contract, and the filing at AAA of demand or submission to arbitrate. (R-4, R-5)</td>
<td>Commenced when JAMS confirms in a Commencement Letter either the submission to JAMS of a post-dispute arbitration agreement fully executed by all parties; the submission to JAMS of a pre-dispute written contractual provision; oral agreement of all parties; or a court order compelling arbitration at JAMS. (Rule 5)</td>
<td>Commenced by Notice of Arbitration to respondent and to CPR, deemed commenced on the date CPR is in receipt of notice and filing fee (“Commencement Date”). (R 3.4)</td>
</tr>
<tr>
<td>Defense Statement Due</td>
<td>Required within 15 days after AAA sends confirmation of notice of filing of the arbitration demand. (R-4(b))</td>
<td>Required within 14 calendar days of the service of the notice of claim. (Rule 9)</td>
<td>Required within 20 days after the Commencement Date. (R 3.5)</td>
</tr>
<tr>
<td>Expedited Procedures</td>
<td>Except under extraordinary circumstance, only 17 day extension of time to respond to a demand for arbitration or counterclaims will be granted. (R-1)</td>
<td>Required within 7 calendar days of the service of the notice of claim. [Streamlined Rule 7]</td>
<td></td>
</tr>
<tr>
<td>CONFIDENTIALITY OF PROCEEDINGS</td>
<td>The arbitrator and AAA shall maintain the privacy of the hearings unless the law provides otherwise. (R 23)</td>
<td>Yes, except in connection with a judicial challenge to or enforcement of an award, unless otherwise required by law or judicial decision. (Rule 26(a))</td>
<td>Yes, except in connection with judicial proceedings ancillary to the arbitration, the parties agree otherwise, otherwise required by law, or to protect a legal right of a party. (R 20)</td>
</tr>
</tbody>
</table>

NOTE TO USERS:
* This Comparison of Selected Provider Rules is meant as a guide only, with every effort made to be accurate as of its preparation date. Users are advised to consult the rules themselves and the providers’ websites for up-to-date rules, changes, and other relevant materials.
### Comparison of Selected Provider Rules

**Subj: American Arbitration Association Commercial Arbitration Rules**

<table>
<thead>
<tr>
<th>ARBITRATORS/TRIBUNAL MATTERS</th>
<th>JAMS Comprehensive Arbitration Rules &amp; Procedures</th>
<th>CPR: International Institute for Conflict Prevention + Resolution Administered Arbitration Rules</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Number of Arbitrators</strong></td>
<td>Absent the parties' agreement, one arbitrator unless the AAA determines three to be appropriate. (R-35)</td>
<td>One neutral arbitrator unless all parties agree otherwise. (Rule 7(a)) Three arbitrators, unless parties have agreed in writing to a single arbitrator. Unless otherwise agreed, any arbitrator not appointed by a party shall be a member of the CPR Panels of Distinguished Neutrals. (R 5.1)</td>
</tr>
<tr>
<td><strong>Expedited Procedures</strong></td>
<td>One. (E-4(a))</td>
<td>One. (Streamlined Rule 12(a))</td>
</tr>
<tr>
<td><strong>AAA Rules for Large, Complex Cases</strong></td>
<td>Either one or three as agreed upon by the parties. Absent agreement, three arbitrators if claim/countrclaim involves at least $1,000,000; if a lesser amount, then one arbitrator. (L-2(a))</td>
<td>Arbitrators set their own hourly, partial and full day rates, available by contacting JAMS. Arbitrators compensated &quot;on a reasonable basis determined at the time of appointment.&quot; Full disclosure of compensation to all parties required. (R 17.1)</td>
</tr>
<tr>
<td><strong>Arbitrator Compensation</strong></td>
<td>Neutral arbitrators compensated at a rate consistent with the arbitrator's stated rate of compensation; made through the AAA, not directly between the parties and arbitrator. (R- 51)</td>
<td>Party designation selection or list selection process, including selection by CPR under applicable circumstances. (R 5, 6.1)</td>
</tr>
<tr>
<td><strong>Expedited Procedures</strong></td>
<td>Arbitrators will receive compensation at a rate to be suggested by the AAA regional office. (E-10)</td>
<td></td>
</tr>
<tr>
<td><strong>Selection Process</strong></td>
<td>Agreement of parties of arbitrator; if no agreement, AAA shall send an identical list to each party and the parties are encouraged to agree on an arbitrator. (R- 11(b)) if the parties fail to agree on any persons named, AAA shall have the power to appoint from among other members of the National Roster. (R-11(b))</td>
<td>In absence of parties' agreement on arbitrator selection, JAMS may attempt to facilitate agreement and shall submit candidate list of at least 5 candidates in a the case of a sole Arbitrator, and 10 candidates in the case of a tripartite panel, to parties for ranking. (Rule 15(a)) if this process does not yield an arbitrator or a complete panel, JAMS shall designate sole arbitrator or as many as are necessary to complete the panel. (Rule 15(d))</td>
</tr>
<tr>
<td><strong>AAA Rules for Large, Complex Cases</strong></td>
<td>AAA will appoint, as agreed by the parties. If no agreement on a method of appointment, AAA will appoint from the Large, Complex Commercial Case Panel, in the manner provided by the regular rules. (L-2(b))</td>
<td></td>
</tr>
<tr>
<td><strong>Selection Process - Expedited Procedures</strong></td>
<td>AAA submits a list of five proposed arbitrators from its National Roster; if parties cannot agree, each party has seven days to strike two names. If the arbitrator cannot be appointed from the list, the AAA can make an appointment without submitting additional lists. (E-4)</td>
<td>Similar to the above rule, but the candidate list is 3. (Streamlined Rule 12(c))</td>
</tr>
<tr>
<td><strong>Venue</strong></td>
<td>Determined by AAA if parties have not agreed. AAA decision is final and binding. (R-10)</td>
<td>Determined by arbitrator after consulting with the parties. (Rule 19(a)) Determined by tribunal if parties have not agreed. The award is deemed made at such place. (R 9.5)</td>
</tr>
<tr>
<td><strong>Applicable Law</strong></td>
<td>No express provision.</td>
<td>Determined by arbitrator if not designated by the parties. (Rule 24(c)) Determined by tribunal if not designated by the parties. (R 10.1)</td>
</tr>
</tbody>
</table>

**INTERIM MEASURES OF PROTECTION**

<p>| <strong>Arbitrator Authority to Take Interim Measures</strong> | Arbitrator may take interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods. (R 34(a)) Measures may include an interim award. Arbitrator may require security for the costs of such measures. (R-34(b)) | Arbitrator permitted to take such measures as deemed necessary, including injunctive relief and measures for the protection or conservation of property and disposition of disposable goods. Measures may include an interim award. Arbitrator may require security for the costs of such measures (Rule 24(e)) | Tribunal permitted to take such measures as deemed necessary, including measures for preservation of assets, conservation of goods or sale of perishable goods, at the request of a party. Tribunal may require appropriate security as a condition of ordering interim measures. (R 13.1) |
| <strong>Express Recognition of Court Proceedings as Alternative Route to Interim Measures of Protection</strong> | Yes. (R-34(c)) | Yes. (Rule 24(e)) | Yes. (R 13.2) |
| <strong>Available Procedure Before Arbitrator Appointment</strong> | Where parties by special agreement or in their arbitration clause have adopted the AAA rules for emergency measures of protection. (Optional Rules for Emergency Measures of Protection.) | No provision. | Interim measures via application to CPR and appointment of a special, pre-tribunal arbitrator. (R 14.2) |</p>
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<tr>
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<tr>
<td><strong>PRE-HEARING CONFERENCE</strong></td>
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<tr>
<td>Requirement/Timing</td>
<td>Optional at the request of any party or upon the AAA’s own initiative; may be conducted in person or by telephone. (R-9 - administrative conferences, R-20 - preliminary hearing)</td>
<td>Optional at any party’s request or arbitrator’s direction; may be conducted in person or by telephone. (Rule 16)</td>
<td>Required, generally to be held promptly after Tribunal is constituted. (R.9.3)</td>
</tr>
<tr>
<td><strong>AAA Rules for Large, Complex Cases</strong></td>
<td>&quot;Prior to the dissemination of the list of potential arbitrators, AAA shall, unless the parties agree otherwise, conduct an administrative conference...by conference call. The conference will take place within 14 days after the commencement of the arbitration.&quot; (L-1) After the selection of the arbitrator(s), a mandatory preliminary hearing will be held &quot;promptly&quot; by telephone conference call. The activities and procedures that will govern the arbitration will be memorialized in a Scheduling and Procedure Order (L-3)</td>
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<tr>
<td><strong>DISCOVERY</strong></td>
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<tr>
<td><strong>Production of Documents</strong></td>
<td>Production of documents and other information may be directed by arbitrator at any party’s request or at the discretion of the arbitrator, consistent with the expedited nature of arbitration. (R-21)</td>
<td>The parties shall cooperate in good faith and shall complete an initial exchange of all relevant, non-privileged documents within 21 calendar days after all pleadings or notice of claims have been received; arbitrator may modify obligations at Preliminary Conference. (Rule 17(a))</td>
<td>Tribunal may require and facilitate &quot;such discovery as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective.&quot; (R 11)</td>
</tr>
<tr>
<td><strong>AAA Rules for Large, Complex Cases</strong></td>
<td>Parties may conduct discovery as agreed to by all the parties but the arbitrator(s) may place limits. If parties cannot agree on the production of documents and other information, the arbitrator(s) may establish the extent of discovery, and may order depositions or interrogatories. (L-4(c), L-4(d))</td>
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<tr>
<td><strong>Expedited Procedures</strong></td>
<td></td>
<td>Document requests are limited to documents directly relevant to the dispute, restricted in time frame, subject matter and persons/entities to which they pertain, not include broad phraseology. Arbitrator may edit or limit</td>
<td>Tribunal may authorize to issue orders to protect confidentiality of proprietary information, trade secrets, or other sensitive information. (R 11)</td>
</tr>
<tr>
<td><strong>Confidentiality or Protective Orders</strong></td>
<td>No provision.</td>
<td>Arbitrator authorized to issue orders to protect the confidentiality of proprietary information, trade secrets, or other sensitive information. (Rule 26(b))</td>
<td>Tribunal authorized to issue orders to protect confidentiality of proprietary information, trade secrets, or other sensitive information. (R 11)</td>
</tr>
<tr>
<td><strong>Witness Disclosure</strong></td>
<td>Arbitrator may direct the identification of any witnesses to be called at any party’s request or at arbitrator’s discretion. (R-21(a)(i))</td>
<td>Parties are required to make an initial exchange of names of individuals whom they may call as witnesses within 21 calendar days after all pleadings or notice of claims have been received. (Rule 17(a))</td>
<td>Unless otherwise determined by the tribunal or agreed by the parties, the pre-hearing memorandum shall include the name, capacity and subject of testimony of any witnesses to be called and estimate of time required for each witness’s direct testimony. (R 12.1(e))</td>
</tr>
<tr>
<td><strong>AAA Rules for Large, Complex Cases</strong></td>
<td>The identification and availability of witnesses, including experts, is a matter to be considered at the preliminary hearing. (L-3)</td>
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*Preventing A Runaway Arbitration* - ABA Section of Dispute Resolution
Comparison of Selected Provider Rules
By Gilda R. Turitz, Sideman & Bancroft LLP, gturitz@sideman.com
July 2013

"Prior to the dissemination of the list of potential arbitrators, AAA shall, unless the parties agree otherwise, conduct an administrative conference...by conference call. The conference will take place within 14 days after the commencement of the arbitration." (L-1) After the selection of the arbitrator(s), a mandatory preliminary hearing will be held "promptly" by telephone conference call. The activities and procedures that will govern the arbitration will be memorialized in a Scheduling and Procedure Order (L-3).
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<tr>
<td>CONDUCT OF HEARINGS</td>
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<tr>
<td>General Discretion/Obligation in Conducting the Proceedings</td>
<td>&quot;The arbitrator, exercising [his or her] discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentation on issues the decision of which could dispose all or part of the case.&quot; (R-30(b))</td>
<td>&quot;Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith...&quot; (R-17) &quot;Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so.&quot; (R-25)</td>
<td>&quot;Subject to these Rules, the Tribunal may conduct the arbitration in such manner as it shall deem appropriate.&quot; (R 9.1) The Tribunal is obligated to manage the proceeding firmly in order to complete proceedings as economically and expeditiously as possible. (R 9.2) &quot;The Tribunal shall determine the manner in which the parties shall present their cases,&quot; including the manner in which witnesses are to be examined. (R 12.3, 12.4)</td>
</tr>
<tr>
<td>AAA Rules for Large, Complex Cases</td>
<td>&quot;Arbitrator(s) shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of large, complex commercial cases.&quot; (L-4(a))</td>
<td>Yes, at least 14 calendar days before the hearing (may be modified in Preliminary Conference). (Rule 20(a))</td>
<td>Yes, unless the parties agree or the Tribunal determines otherwise. The memorandum shall include statements of the following: facts; each claim being asserted; applicable law and authorities upon which the party relies; relief requested; and the nature and manner of presentation of the evidence, including witness information. (R 12.1)</td>
</tr>
<tr>
<td>Pre-Hearing Memoranda</td>
<td>No provision.</td>
<td>Arbitrator has discretion to permit or require rebuttal statements or other pre-hearing written submissions. (Rule 20(b))</td>
<td>Same as above, except within 7 calendar days. (Streamlined Rule 15(a))</td>
</tr>
<tr>
<td>AAA Rules for Large, Complex Cases</td>
<td>At the preliminary hearing the matters to be considered shall include, without limitation: (a) service of a detailed statement of claims, damages and defenses, a statement of the issues asserted by each party and positions with respect thereto, and any legal authorities the parties may wish to bring to the attention of the arbitrator(s); (b) stipulations to uncontested facts; (c) the extent to which discovery shall be conducted; (d) exchange and premarking of those documents which each party believes may be offered at the hearing; (e) the identification and availability of witnesses, including experts, and such matters with respect to witnesses including their biographies and expected testimony as may be appropriate; (f) whether, and the extent to which, any sworn statements and/or depositions may be introduced; (g) the extent to which hearings will proceed on consecutive days; (h) whether a stenographic or other official record of the proceedings shall be maintained; (i) the possibility of utilizing mediation or other non-adjudicative methods of dispute resolution; and (j) the procedure for the issuance of subpoenas. By agreement of the parties and/or order of the arbitrator(s), the pre-hearing activities and the hearing procedures that will govern the arbitration will be memorialized in a Scheduling and Procedure Order. (L-3)</td>
<td>The Arbitrator may vary these procedures if it is determined reasonable and appropriate to do so. (Rule 22(a))</td>
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<tr>
<td>Expedited Procedures</td>
<td>At least two business days prior to the hearing, parties shall exchange copies of all exhibits the intend to submit at the hearing. (E-5)</td>
<td>Either by the agreement of the parties or at the request of one party, the arbitrator may permit any party to file a motion for summary disposition. (Rule 18)</td>
<td>If either party requests or the tribunal so directs. (R 12.2)</td>
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<td>Dispositive Motions</td>
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<tr>
<td>Hearings</td>
<td>The parties may agree to waive oral hearings in any case. (R-30(c))</td>
<td>The arbitrator may set the hearing without consulting with the party that failed to participate in the arbitration process. (Rule 19). The arbitrator may proceed with the hearing in the absence of a party that fails to attend. (Rule 22(i)). The parties may agree to waive oral hearing and submit the dispute to the arbitrator for an award. (Rule 23)</td>
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<tr>
<td>Expedited Procedures</td>
<td>If the claim doesn’t exceed $10,000 and in other cases where the parties agree, the dispute will be resolved by submission of documents unless any party requests an oral hearing, or the arbitrator deems it necessary. (E-6)</td>
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<tr>
<td>Location/Time of Hearings</td>
<td>The arbitrator determines the date, time and place of each hearing. (R-22)</td>
<td>After consulting with the parties, the arbitrator determines date, time and location of the hearing. (Rule 19(a))</td>
<td>Meetings and hearings may be held anywhere the tribunal deems appropriate. (R 9.5)</td>
</tr>
<tr>
<td>Formal Rules of Evidence</td>
<td>Not required to be applied, provided however, that the arbitrator take into account principles of legal privilege. (R-31)</td>
<td>Strict conformity not required, &quot;except that the Arbitrator shall apply applicable law relating to privileges and work product.&quot; (Rule 22(d)) Settlement offers and mediator recommendations ordinarily not admissible. (Rule 22(f))</td>
<td>Not required to be applied, provided, however, the tribunal shall apply any lawyer-client privilege and work product immunity it deems applicable. (R 12.2)</td>
</tr>
<tr>
<td>Tribunal Requests for Evidence</td>
<td>Permitted. (R-31)</td>
<td>No provision.</td>
<td>Permitted. (R 12.3)</td>
</tr>
<tr>
<td>Expedited Procedures</td>
<td>Arbitrator may require further submission of documents within two days after the hearing. (E-8(a))</td>
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<tr>
<td>Tribunal Appointment of Neutral Experts</td>
<td>No provision.</td>
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<tr>
<td>Tribunal Inspection of Goods or Property</td>
<td>An arbitrator may make an inspection or investigation in connection with the arbitration. (R-33)</td>
<td>No provision.</td>
<td>Necessity for any on-site inspection by the tribunal considered at pre-hearing conference. (R 9.3(a))</td>
</tr>
<tr>
<td>Written Statements of Witnesses</td>
<td>Permitted. (R-32)</td>
<td>At discretion of the arbitrator. (Rule 22(e))</td>
<td>At discretion of the tribunal. (R 12.2)</td>
</tr>
<tr>
<td>Usages of Trade Considered</td>
<td>No provision.</td>
<td>No provision.</td>
<td>Tribunal shall take into account usages of trade applicable to the contract. (R 10.2)</td>
</tr>
<tr>
<td>Confidential Nature of Hearings/Attendance of Persons</td>
<td>The arbitrator and the AAA must maintain the privacy of the hearings, absent law to the contrary. Any person with a direct interest in the arbitration may attend hearings. (R-23)</td>
<td>JAMS and the arbitrator shall maintain the hearing's confidential nature. Any person having a direct interest in the arbitration may attend the hearing, subject to the arbitrator's discretion or the parties' agreement.</td>
<td>Tribunal may exclude witnesses during testimony of other witnesses. (R 12.4) Except as otherwise required by law or judicial proceeding, the tribunal shall treat proceedings as confidential. (R. 20)</td>
</tr>
<tr>
<td>Closure of Hearings</td>
<td>Arbitrator must specifically inquire of all parties whether they have any further evidence or witnesses. When the parties do not, or if the arbitrator is satisfied that the record is complete, the arbitrator shall declare the hearing closed. (R-35)</td>
<td>Hearings may be declared closed when the arbitrator determines that all relevant material evidence and arguments have been presented. (Rule 22(h)) The arbitrator may reopen the hearings at any time before the award is made. (Rule 22(i))</td>
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<tr>
<td>Expedited Procedures</td>
<td>Generally the hearing shall not exceed one day. (E-8(a))</td>
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**AWARD**

<p>| Types of Award | Final, interim, interlocutory and partial, and the arbitrator may make other decisions, including orders and awards. In an interim, interlocutory or partial award, the arbitrator may assess and apportion fees, expenses and compensation related to each award as the arbitrator deems appropriate. (R-43) On the request of settling parties, the arbitrator may set forth the terms of the settlement in a &quot;consent award.&quot; (R 44) | Final Award or Partial Final Award, and the arbitrator may make other decisions, including interim or partial rulings, orders and awards. (Rule 24(d)) | Final, interim, interlocutory and partial. Re non-final awards, tribunal may state that it views the award as final for purposes of any related judicial proceedings. (R 15.1) If requested by all parties and accepted by the tribunal, the tribunal may record a settlement in the form of an award made by consent of the parties. (R 21.4) |
| Form of Award | The arbitrator need not render a reasoned award except upon written request prior to the arbitrator’s appointment. (R-42(b)) | Reasoned award unless the parties agree otherwise. (Rule 24(h)) | Reasoned award unless the parties agree otherwise. (R 15.2) |
| Time Limit for Issuance | “Promptly” and no later than 30 days from date of closing of hearing. (R. 41) | Within 30 calendar days after the date of the close of the hearing. (Rule 24(a)) | Generally, 30 days after close of the hearing. (R 15.8) |
| Expedited Procedures | | Award must be in writing and signed by the arbitrator or a majority of arbitrators where there is a panel. (Rule 24(h), 24(b1)) Arbitrator shall provide the Final Award or Partial Final Award to JAMS for issuance. (Rule 24(a)) | Award must be dated and signed by at least a majority of arbitrators. (R 15.2) |
| Formalities of Award | Award must be in writing and signed by a majority of the arbitrators. It must be executed in the manner required by law. (R-42(a)) | | In the discretion of the tribunal, taking into consideration the contract and applicable law. (R 10.4) |
| Pre-Award and Post-Award Interest | The arbitrator may award interest at such rate and from such date as the arbitrator deems appropriate. (R-43(d)(i)) | | |</p>
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<td>Types of Remedies Expressly Permitted</td>
<td>Any remedy or relief, including specific performance, that the arbitrator deems just and equitable and within the scope of the parties’ agreement. (R-43(a))</td>
<td>Any remedy or relief, including specific performance, that is just and equitable and within the scope of the parties’ agreement. (R 24(c))</td>
<td>Any remedy or relief, including specific performance, within the scope of the parties’ agreement and permissible under the applicable law. (R 10.3)</td>
</tr>
<tr>
<td>Post-Award Requests</td>
<td>Within 20 days of receipt of award, a party may request a clerical, typographical or computational correction of the award. “The arbitrator is not empowered to redetermine the merits of any claim already decided.” (R 46)</td>
<td>Within 7 calendar days after issuance of the award, a party may request that the arbitrator correct any computational, typographical, or other similar error in an award. The Arbitrator may make any necessary and appropriate correction to the Award within 21 calendar days of receiving a request or 14 calendar days after the Arbitrator’s proposal to do so. (Rule 24 (j))</td>
<td>Within 15 days after receipt of the award, a party may request clarification, correction or additional award as to claims not determined. (R 15.6)</td>
</tr>
<tr>
<td>Costs</td>
<td>Fixed and allocated by tribunal at time of award. (R-43)</td>
<td>Each Party shall pay its pro rata share of JAMS fees and expenses as set forth in the JAMS fee schedule in effect at the time of the commencement of the Arbitration, unless the Parties agree on a different allocation. (Rule 31(a)). The parties are jointly and severally liable for the payment of fees. (Rule 31(ci))</td>
<td>Fixed by tribunal at time of award. (R 19.1) Allocation by tribunal subject to party agreement. (R 19.2)</td>
</tr>
<tr>
<td>Items Included in Costs</td>
<td>Administrative fees, witness expenses, and compensation for neutral arbitrator. Arbitrator may apportion such costs as the arbitrator deems appropriate. (R-43)</td>
<td>JAMS arbitration fees and arbitrator compensation and expenses. (R 31(ci))</td>
<td>Tribunal fees; expenses; costs of tribunal experts; costs of legal representation and assistance and experts incurred by a party to extent the tribunal deems appropriate; administrative fees, costs. (R 19.1)</td>
</tr>
<tr>
<td>Award of Attorneys’ Fees</td>
<td>Allowed if the parties have so requested, or attorneys’ fee award is authorized by law or their arbitration agreement. (R 43)</td>
<td>At the arbitrator’s discretion if provided by the parties’ agreement or allowed by applicable law. (Rule 24(g))</td>
<td>At the tribunal’s discretion, they may be included in costs. (R 19.1(d))</td>
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</table>

**OTHER PROCEDURES**

| Mediation During Arbitration | “At any stage of the proceedings, the parties may agree to conduct a mediation conference under the Commercial Mediation Procedures in order to facilitate settlement. The mediator shall not be an arbitrator appointed to the case.” (R-8) | Permitted; the parties may agree to submit the case to JAMS for mediation. (Rule 28(a)). The JAMS mediator may not be the arbitrator unless the parties so agree in writing to submit the matter to the arbitrator for settlement assistance. (Rule 28(b)) | Either party may propose settlement negotiations to the other party at any time. (R 21.1) Tribunal may suggest that the parties explore settlement at times the tribunal deems appropriate and with parties’ consent may have CPR arrange for mediation. (R 21.2) Tribunal will not be informed of any settlement offers or other statements made during settlement negotiations or a mediation unless both parties consent. (R 21.3) On the parties’ request, tribunal may record a settlement in the form of an award made by consent of the parties. (R 21.4) |
| Optional Arbitration Appeal | Not applicable. | Parties may agree in writing to JAMS Optional Arbitration Appeal Procedure at any time before the award becomes final. (Rule 34) |  |
Understanding the True Value of Private Justice

IN COURT CHAMBERS, legislative halls, corporate boardrooms, and law firms, a war is now being fought over ADR. Frustrated ADR users, service providers, and neutrals are dismayed that ADR (in particular arbitration) has lost its promise of being an alternative to a public court system that many consider too slow, too costly, too Byzantine, and too self-absorbed to provide justice to the litigants that appear before it.

The reasons for this frustration are not difficult to discern. In 1976, Chief Justice Warren Burger diagnosed Americans with “some form of mass psychosis that leads [them] to think courts were created to solve all the problems of mankind” and demanded drastic changes in order to rescue American courts from unmeritorious and resource-sapping litigation. America’s congested court system, coupled with perceived commercial opportunity, spurred the spectacular growth of the ADR industry. ADR and ADR professionals became ubiquitous. Presently, the annual ADR caseload processed by the American Arbitration Association alone has surpassed 60,000 cases—a figure equivalent to a fourth of the cases handled each year in the federal courts.

The ADR Backlash

The seeds that gave rise to ADR, however, also spawned a crisis. From the start, ADR was sold as a lower cost process that was inferior to the public courts. Even as more complex, expensive, and significant matters were directed to ADR, the same utilitarian arguments were made. ADR was supposed to be faster, cheaper, and simpler. Rather than selling the quality and superiority of ADR relative to court processes, many in the ADR community sold the potential for savings as the primary rationale for choosing ADR as an alternative to the courts. Scant mention is made of the real benefit of ADR: it is a party-driven and controlled process that concerns itself primarily if not exclusively with what is best for the parties and not what is best for the courts, unrelated third parties, or society as a whole. Claims of cost savings—coupled with attempts to force unwilling employees, consumers, and small businesses into ADR—have created increasing resistance to it among lawyers, judges, legislators, and members of the public.

ADR is a wonderful, essential, and liberating tool. Providing resolution forums is what private justice is all about. The provisioning of private justice in its multitudinous forms is the true value and only legitimate end of ADR. Americans have a right guaranteed by the U.S. Constitution to freely contract for this option. The public’s right to knowing, voluntary, and consensual ADR must be preserved and protected. The stereotyping of ADR as a cheap, one-size-fits-all, rough-cut resolution process must be challenged.

The true value of the ADR tool must be told: Whenever parties join to take charge of the resolution of their disputes, a higher quality and more satisfying form of justice can be had in an ADR forum than in the public court system. If parties and their counsel are willing to join in structuring the ADR process with their neutral, they can seek resolution in ways that would simply be forbidden in a public court setting.

Want to limit discovery? Have a quick hearing? No experts or many experts? A summary process? An engineer as one of your neutral decision makers? A lightning quick process or one lasting 100 days over 3 cities? Simply stipulate or convince your neutral. Parties to a dispute may even design their ADR process to be less costly than the courts. With ADR, the parties select their judge, process, procedures, venue, and law. This is the true advantage of ADR, and it has been grossly undersold.

I submit that in addition to the potential for cost savings, ADR’s greatest advantage over the public court system is private justice. Private justice is the impartial, fair, and proper resolution of a dispute through ADR processes and procedures, in accord with law, equity, and contract, as well as cultural, community, industry, and subject matter standards. As a process, private justice uses ADR processes and procedures impartially, fairly, and justly resolve disputes among parties in accordance with their contractual intent. As a person, a private justice is a neutral engaged in the profession of privately and justly resolving disputes via the application of ADR processes and procedures.

ADR was originally conceived to offer a realistic alternative to the public court system. ADR’s next evolution must be to ensure that private justice is dispensed from its many forms. This may just be ADR’s only hope for continuing legitimacy and viability. In the private justice system, the public justice system still has a role—that of an alert sentry. Within this regime, truth, justice, and the high ideals of the American justice system can once again prevail in private forums of the participants’ own choosing.

Reginald A. Holmes, chairman of the Holmes Law Firm, is an arbitrator, mediator, and private justice.
Preventing a Runaway Arbitration with a Well-Drafted Arbitration Clause

By Patricia C. O'Prey and Gilda R. Turitz

To keep legal costs under control in commercial disputes, corporations frequently rely upon binding arbitration as a reputedly faster and less expensive alternative to traditional litigation. Typically, two major factors impacting those potential cost savings are restrictions on pre-hearing discovery in arbitration and restrictions on challenges to arbitration awards in post-hearing proceedings. When enforced, these restrictions offer a significantly streamlined process, finality and a shorter time to ultimate resolution than may exist in the litigation process. Another desirable aspect of arbitration is the parties’ ability to select arbitrators with subject matter expertise relevant to the dispute, which is a quality that the decisionmakers in litigation—jury and/or judge—may not offer.

Despite the opportunities for cost-effective and efficient resolution that arbitration may offer, many in-house counsel and their outside litigators have experienced the arbitration process gone awry. A “runaway arbitration” is a costly, poorly managed, and time-consuming process that becomes bogged down by broad written, deposition, and electronic discovery and motion practice similar to traditional litigation; lengthy delays in getting to hearing; an arbitration hearing attenuated by postponements and interruptions; and post-award proceedings that erode the award’s anticipated finality. When this occurs, the runaway arbitration may be at least as lengthy and costly as a courtroom trial, but without the procedural safeguards that the traditional court process offers.

In-house counsel are uniquely positioned to prevent a runaway arbitration by taking thoughtful steps to shape the process for a future unknown dispute both before and when it arises. These steps include careful drafting of the arbitration clause to address such issues as the scope of arbitrable claims, selection of the tribunal to hear the dispute, designation of applicable rules, the parameters for arbitrator selection, limitations on discovery, motions and the hearing, and the scope of post-award review. Once a dispute arises, in-house counsel should be involved in strategic decisions on arbitrator selection and the scope of discovery to ensure, to the extent possible, a well-managed and cost-effective process. In-house counsel’s effective participation and collaboration with outside counsel to prepare for the hearing itself also will help prevent the arbitration from veering off-course and out of control. In this article, we will discuss issues in drafting arbitration clauses and ways to help prevent a runaway arbitration.

Issues in Drafting Arbitration Clauses

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however, in-house counsel’s primary attention will be focused on the contract’s substantive subject matter (e.g., the sale of goods or assets, provision of services, licensing product, merger or acquisition); the arbitration clause is rarely of foremost concern. As a practical matter, the clause may be inserted in an abbreviated fashion or as an afterthought, using boilerplate lifted from some other contract without consideration of factors that can have a dramatic impact on the way the arbitration is conducted (including the governing rules and the current state of the law concerning arbitration). Counsel may be reluctant to engage in extensive drafting or negotiation over the arbitration clause to avoid creating the impression that they are anticipating conflict, when the parties’ focus should be on resolving deal points to close the transaction at hand. Counsel should carefully draft the arbitration clause in any contract because it will govern the process of adjudicating any future disputes and can have a dramatic impact on both the cost and outcome of the arbitration. In light of the strong public policy favoring enforcement of arbitration clauses, in-house counsel should consider the following issues.

Scope and Breadth of Arbitrable Claims
In-house counsel must consider whether the arbitration clause is sufficiently comprehensive to include all disputes that may arise out of the transaction, or if the drafted language potentially excludes certain claims. Moreover, where a transaction involves multiple related contracts—for example, a purchase and sale agreement for assets of a business, accompanied by promissory notes, security agreements, and consulting or employment contracts of the selling principals—counsel should ensure consistency in the approach and scope of arbitration clauses in all the relevant contracts. The failure to include an arbitration clause in one or more of the related contracts may lead to litigation to compel or resist arbitration. Ambiguity in the scope of the clause can lead to costly motion practice to determine the parties’ intent regarding which claims to arbitrate and which are outside the scope of the clause. Such circumstances could have the undesirable result of some claims being litigated in court, while others involving the same contract or transaction are arbitrated, causing duplication of effort and potentially inconsistent outcomes between arbitration and court proceedings on the same set of facts.

Selection of Tribunal and Its Rules
In most arbitration clauses, the parties specify an institutional provider to administer the arbitration process and, frequently, a particular set of rules to govern the dispute. These rules may designate subject matter (e.g., commercial, employment or construction) or amount in controversy (e.g., appointing one arbitrator for an amount under a threshold, with all other disputes requiring three arbitrators), but otherwise are general in scope. Most rules grant substantial discretion to the arbitrator(s) over procedural matters such as motion practice and discovery (discussed further below). Therefore, before agreeing to a designated provider or a set of governing rules, in-house counsel should review the options with counsel experienced in arbitration to make informed choices that will impact resolution of a future dispute.

Selection of Venue for the Arbitration Hearing
The location of the arbitration hearing should be specified in the parties’ agreement. In-house
counsel should consider venue selection carefully, as it may involve substantial travel costs for counsel and the company’s key witnesses. In addition, the parties will usually be responsible to pay for the out-of-pocket travel and lodging costs of the arbitrators; as a result, a lengthy hearing at a distant venue can add substantially to costs.

**Selection of Arbitrators**
Because an advantage of arbitration is the ability to select arbitrators with relevant subject matter expertise, the parties may wish to specify in the arbitration clause the qualifications required for the arbitrators, such as allowing only for retired judges, attorneys with specific experience (e.g. at least ten years of commercial leasing experience), or arbitrators with a particular professional license (e.g., civil engineers, architects, real estate appraisers, brokers). Also, before doing so, if a particular Tribunal has been selected in the clause, in-house counsel should be satisfied that the selected tribunal maintains rosters of neutrals that will satisfy the specified qualifications. Highly qualified arbitrators who are specialized in the subject matter of the dispute can hone in on the truly material information, allowing a more expedited process with substantially less hearing time, as well as refereeing the course of discovery needed for a fair and efficient arbitration.

**Time When Hearing Must be Held**
In the arbitration, the parties can specify a time frame in which the arbitration must be commenced (e.g., within six months of filing the demand) and a maximum length of time for it to be completed, such as specifying the number of hearing days or hours. This will help avoid a runaway arbitration. Counsel should be cautious about including overly restrictive provisions in their clause, however, because the benefit of those restrictions may be undercut by the impossibility of predicting whether such time limitations ultimately will serve the corporation’s interests in a later dispute of indeterminate scope. As a result, in-house counsel should consider including a caveat that any specified time frames may be modified by the parties’ stipulation or in the arbitrator’s discretion upon a showing of good cause. Such an approach balances the need for time limitations against the potential prejudice to the parties if those limitations, given the facts and circumstances of the dispute, require adjustments to the process to ensure fairness.

**Scope of Discovery**
Pre-trial discovery can often be the most expensive phase of litigation. That factor alone causes parties to insert an arbitration clause in their contract in the hope of avoiding the attorney’s fees, hard costs and management time associated with traditional discovery such as interrogatories, requests for admission, unlimited rounds of document demands, and depositions. In most arbitration, discovery is allowed as a matter of course (particularly document exchanges), or the arbitrator may have broad discretion to permit discovery that either or both parties seek. If the arbitration clause is specific regarding which methods of discovery are permitted or prohibited, most arbitrators will honor those parameters unless the rules require otherwise or manifest inequities would result. If the arbitration clause is silent on discovery, however, the arbitrator, guided by the tribunal’s rules, may exercise discretion to allow very broad, costly and time-
consuming discovery. Therefore, in-house counsel should consider drafting a clause that
specifies limits on discovery to prevent this aspect of a future dispute from “running away.” But,
as in the case of time restrictions, once a dispute presents itself, limitations on discovery may not
serve the parties’ needs. The drafter should therefore consider including a “safety valve” to
allow modification by stipulation or to give the parties and the arbitrator appropriate flexibility to
ensure fairness.

Because depositions are some of the most costly discovery devices, serious consideration should
be given to addressing depositions specifically in the arbitration clause. Some alternatives
include prohibiting depositions altogether, restricting each party to a single deposition of the
other party (corporate or a single witness, specifying either a total number of depositions or
hours of deposition per side, or limiting the length of individual depositions, such as the seven-
hour limit provided for in the federal rules. Prohibiting or overly restricting depositions in a
commercial arbitration of any complexity, however, may not ultimately be a time- or cost-saving
strategy. In the absence of depositions, counsel arbitrating the case may call more witnesses or
spend more time on foundational and less important testimony while incurring fees both for
counsel and the arbitrators. Leaving flexibility, or a “safety valve,” in the clause to allow the
arbitrator to consider and order discovery, including depositions, that may be necessary or
desirable could result in a more streamlined and cost-efficient arbitration, notwithstanding the
expense of depositions.

Given the prevalence of electronic communications and e-discovery in general, and their
corresponding expenses, in-house counsel should consider limiting certain types of e-discovery,
such as providing that the production of back-up tapes will not be required. Before drafting any
clause involving e-discovery, in-house counsel should research and be aware of the most current
rulings and best practices in this rapidly evolving area, particularly as they may be applied in
arbitration. In-house counsel should also become familiar with the most current rulings and best
practices relating to e-discovery as well as the corporation’s policies regarding e-discovery,
including electronic storage, retrieval and documents destruction policies, in order to avoid
memorializing requirements that the corporation may find difficult to satisfy in a future
arbitration. Because of the expense associated with e-discovery, in-house counsel should
consider including a clause that allows the arbitrator to allocate or shift costs to either party as
may be equitable under the circumstances.

Post-Award Judicial Review
Another concern about a runaway arbitration is a runaway result. A poor result in an arbitration
that seems completely at odds with the law usually cannot be effectively challenged after the
arbitration has concluded, even if it would have made a promising appeal after a trial. To protect
the corporation, in-house counsel should consider whether to include a judicial review provision
in the agreement to arbitrate. Whether such a clause is enforceable varies by jurisdiction;
“manifest disregard of the law” is considered a valid ground for vacating an award in some
jurisdictions but not in others. Counsel should therefore operate on the assumption that, in
agreeing to arbitration, the resulting award will be binding and final, without an effective recourse to challenge it.

**Conclusion**

Drafting the arbitration clause provides the road map for how the future dispute will be handled. Other crucial tools to prevent a runaway arbitration include careful selection of an arbitrator with strong case management skills and the desired subject matter expertise, and in-house counsel’s participation in the pre-hearing conference calls. Indeed, in-house counsel’s close monitoring and involvement throughout the process, especially with regard to discovery and hearing preparation is extremely important. While it is only the beginning, strategic drafting of the arbitration clause is the vital first step toward maintaining control and preventing a runaway arbitration.


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**The Evidentiary Hurdles of Arbitration**

By Matthew K. Edling

Both California and the Federal Rules of Civil Procedure seek “to take the ‘game’ element out of trial preparation” by enabling parties to obtain the evidence necessary to evaluate a case prior to trial. See Weil & Brown, California Practice Guide: Civil Procedure Before Trial (The Rutter Group 2007) § 8:1; Emerson Elec. Co. v. Sup. Ct. (Grayson) 16 Cal. 4th 1101, 1107 (1997). The purpose of discovery is to preserve and narrow evidence for trial, promote settlement, and avoid surprise at trial. Arbitration differs. The primary arbitration venues—Judicial Arbitration and Mediation Services (JAMS), American Arbitration Association (AAA), and the Financial Industry Regulatory Authority (FINRA)—restrict a party’s right to discovery. While the means of obtaining evidence prior to an evidentiary hearing are inhibited, arbitrators have greater discretion as to what is relevant and material and what is not.

**Case Management**

In any arbitration, there is some form of preliminary hearing or case-management conference where the parties and the arbitrators should discuss necessary discovery, including document production; depositions; discovery from third parties; the dates by which pretrial briefs, exhibit lists, and witness lists are to be exchanged; and the expected length of the trial (including time
Commercial arbitration was designed as an economical alternative to court trials. Discovery was limited, hearings proceeded unencumbered by the rules of evidence and an award was to be issued no more than 30 days after close of hearings. Finality was assured because there was no lengthy appeal. However, as arbitration has grown in popularity as a way to resolve business disputes, many have expressed concern that arbitration has become increasingly time-consuming and expensive — just like the trials it was meant to replace.

Even experienced counsel don’t always take advantage of the ability to tailor the arbitration process to fit a particular case. Flexibility is one of arbitration’s main benefits. Arbitration is contractual, so parties are free to stipulate to procedures appropriate for efficient handling.

1. PREPARE A CLEAR STATEMENT OF CLAIMS

At the time of filing and certainly before a preliminary conference, it is important to file a statement of the case, including a short summary of the background facts and a list of all claims. While the damages claim may not be complete and may have to be calculated after working with experts, the numbers can be brought up to date later. The arbitrators can set a date for amending the claims and counterclaims to specify and quantify damages.

Lengthy, litigation-style, formulaic pleadings are neither required nor helpful. Claims, answering statements and counterclaims should be written in a straightforward and concise manner to avoid confusion and wasted time. It is important that counsel and the arbitration panel be clear on the claims and defenses asserted.

2. DESIGN THE PROCESS AT THE PRELIMINARY CONFERENCE

The preliminary conference is a good time to collaborate with the arbitrators to design an effective process. This is the time to agree on the hearing dates and location, set a time to submit a discovery plan, and schedule dates to exchange witness lists, arbitration exhibits and pre-hearing briefs. These arrangements are particularly important in laying the foundation for efficient hearings.

First, set hearing dates and stick to the schedule. Arbitration hearings are best held on consecutive days. It may make sense to schedule an extra day or two in case the hearings take more time than expected because continuances can be extremely expensive. There is a huge cost involved in preparing for hearings and then having to remobilize months later. Also, it is often difficult to reschedule because several calendars must be considered. Furthermore, most experienced arbitrators will charge a fee for time reserved and unused, especially if the hearings are continued or canceled at the last minute. Save money and time for your client by moving forward on schedule.

Second, limit motion practice. Motions in limine and dispositive motions can be wasteful at arbitration, especially if there has been little discovery. One of the grounds for vacating an arbitration award is the arbitrators’ refusal to hear relevant evidence. Arbitrators will want to prepare an award that ultimately will be confirmed and their rulings will be in-
fluenced by an interest in protecting the final award.

Third, consider whether the hearings should be bifurcated — into liability and damages phases, for example — or otherwise set to move forward in phases. The attorneys may want confer with the arbitrators to reach agreements on the order of proof, so the hearings move forward smoothly. For example, in a complex case involving claims of breach of fiduciary duty and fraud arising out of the handling of partnerships or other entities, claimants and respondents can agree to divide the hearings into phases. They can handle each discreet issue completely before moving to the next phase, rather than adhering to the usual order where claimants present their entire case and respondents’ case follows.

Finally, if there are witnesses who may be unavailable, discuss how to preserve their testimony or make plans to have them testify via video. Most arbitrators will allow these arrangements in order to assist counsel in presenting the case efficiently. They can handle each discreet issue completely before moving to the next phase, rather than adhering to the usual order where claimants present their entire case and respondents’ case follows.

In all of these matters, arbitrators can make the necessary rulings if counsel cannot reach agreement.

3. LIMIT DISCOVERY

Discovery is the most expensive part of any arbitration, especially now that so much of it involves electronically stored information. In the early days, arbitration discovery was limited to a broad exchange of relevant and nonprivileged documents as well as witness information. As arbitration has evolved, so has discovery.

Here again, it is in the parties’ best interests to rein in costs. Establish a discovery plan, being mindful that discovery should be proportional to the complexity of the dispute. Agree to limit electronic discovery in order to avoid enormous costs.

Both sides will be required to identify witnesses and establish a procedure for exchanging biographies and reports of expert witnesses. While counsel sometimes request an opportunity to issue interrogatories and requests for admission, written discovery is not favored in arbitration because it can be expensive and often fails to elicit significant information.

Taking some depositions may save hearing time. Experienced arbitrators know that listening to an attorney examine a witness extensively is a poor use of hearing time. Agree on some depositions, limited in number and duration. If agreement is not possible, an experienced arbitrator can make a ruling and allow each side five depositions, not to exceed seven hours, for example.

The discovery process should be designed to exchange information efficiently. Arbitrators are empowered to manage discovery and avoid scorched earth maneuvers.

4. LIMIT TIME FOR HEARINGS

Agree on a limited number of hearing days. The “chess clock” approach, where the parties divide time equally, is one of the best ways to avoid unnecessary costs.

This approach worked well in a recent licensing dispute involving patents for medical devices. The attorneys adhered to the schedule and presented the case with time left over. Time limits discipline everyone to focus on the most important documents and testimony.

There are many other approaches to encouraging efficiency. Sometimes, counsel will present percipient or expert direct testimony in writing, with an opportunity for live cross-examination. Also, documents can be admitted without formalities if there are no objections to items on the exhibit list. Demonstrative exhibits can help arbitrators get up to speed quickly on the chronology of events or on damages theories.

5. AVOID UNNECESSARY OBJECTIONS

The rules of evidence generally do not apply in arbitration, so raising numerous objections is not useful. It may be important to object to hearsay in order to alert the panel to it, but that objection will only go to the weight of the evidence and will not preclude it. Save objections for important matters and avoid repeated interruptions.

6. SELECT DECISIVE ARBITRATORS

None of these techniques for making arbitration economical will work unless the arbitrators are experienced, decisive and willing to make necessary rulings. Good arbitrators actively manage a case.

Arbitrators should be available to make discovery decisions promptly through e-mails or conference calls — not ex parte, of course — and often on shortened notice. Usually, one arbitrator will be designated to make decisions on routine discovery issues, while the others weigh in on important matters. In a recent contract dispute, involving two high-tech companies doing business on different sides of the country, it was necessary to confer by phone with the attorneys weekly.

Arbitrators should be skilled at moving the hearings along and making rulings as needed in accordance with the rules. Active arbitrators assist in dealing effectively with cumulative evidence and avoiding gamesmanship.

Review the biographies of the proposed arbitrators, including examples of cases they have handled. Ask for references. In large cases, it is customary to interview potential arbitrators about their experience, style and managerial skills.

CONCLUSION

Using these suggestions and designing with others to streamline the process will lead to a cost-effective resolution and greater client satisfaction with the process, win or lose.

In Practice articles inform readers on developments in substantive law, practice issues or law firm management. Contact Vitaly Gashpar with submissions or questions at vgashpar@alm.com.
Managing Discovery in Arbitration
By Gilda R. Turitz

Pretrial discovery is widely understood to be the most expensive phase of litigation, often more so than trial. That cost factor often drives many contracting parties—whether in the commercial, employment, or consumer context—to opt for arbitration clauses to resolve future disputes. In addition to wanting other perceived benefits of arbitrating such as speed and finality, parties expect discovery in arbitration to be more limited and, therefore, to get them more quickly to the end result and at less cost than in litigation.

In reality, such expectations about discovery in arbitration are not always met. Nor are such expectations always consistent with the desires of counsel and their clients once a dispute arises. At that point in time, it is not uncommon for the parties to want the same broad range of discovery that is provided as a matter of course in litigation. But such broad discovery is not available as a matter of right in arbitration. Especially in cases with complex issues or high dollars at stake, the restrictions on discovery in arbitration can make the parties and attorneys feel hamstrung in their ability to prove their claim or defense.

Therefore, from the outset of representation counsel must manage expectations about discovery. Counsel should address with their client the discovery challenges the case will present, as well as the client’s priorities, including the resources and expense to be devoted to pursuing discovery. Four factors generally govern discovery in an arbitration—the arbitration clause at issue; the rules of the administering tribunal; any applicable laws incorporated into the parties’ contract; and the discretion of the arbitrators—and these can result in a wide spectrum of what is permitted.

Arbitration Clauses and Provider Rules
The arbitration clause often will be silent on discovery, but it may specifically address one or more aspects, such as a prohibition on interrogatories, or a limit on the number of depositions allowed. An arbitration clause is most likely to refer to or incorporate rules of a particular tribunal, which vary widely in permitting discovery and will govern the arbitrators in establishing its boundaries. The parties’ arbitration clause may also make specific reference to the Federal Arbitration Act (FAA), the arbitration statutes of a particular state, or the Federal Rules of Civil Procedure or state analogs. If so, specific allowances or restrictions on discovery in such statutes or civil rules may be used to argue in favor of, or against, certain discovery. For example, under California’s arbitration act, except in a wrongful death or personal injury case, depositions may not be taken for discovery purposes, but they may be allowed for evidentiary purposes (such as testimony of an out-of-state witness who cannot be compelled to appear at a hearing in California). Such rules may also provide guidance to the arbitrators, even if the governing arbitration clause does not specifically refer to them.

Discovery of Documents and Electronically Stored Information
Discovery is not usually self-executing in arbitration, in that parties generally do not have the
right to commence discovery and propound whatever they choose until at least the prehearing conference with the arbitrators. Generally, arbitration rules provide for an exchange of documents as a matter of right, but arbitrators may impose limitations on the number of document requests. As provider rules are being updated and, recently, enhanced on a more regular basis, accessing the current rules, which are generally available on the providers’ websites, is critical.

Counsel should be particularly attentive to e-discovery issues in arbitration. With the proliferation of electronically stored information (ESI), especially email as the principal means of communication in business, surprisingly few arbitration providers’ rules specifically address discovery of ESI in a comprehensive way, although more are developing protocols. If not kept in check, e-discovery in arbitration can be as burdensome and costly as it is in court cases. Before discussing the matter with opposing counsel or at the prehearing conference, attorneys should become educated by their client, including their client’s IT managers, about the types of ESI that they have, their retention and back-up systems, destruction policies, and other technical matters. Counsel should be able to advise the client respecting the limitations on production of ESI considering such factors as the number of designated custodians whose records would be searched, time period limitations, and identification of sources for production such as primary and back-up servers, back-up tapes, mobile devices, voicemails, text messages, and the like.

**Depositions**

Arbitration rules may not expressly address depositions. If they do, they may limit the number (such as JAMS’ rules, which allow each side one deposition of the opposing party), or they may leave the issue to the arbitrators’ discretion. Because depositions are expensive, arbitrators are often reluctant to allow them over the objection of the opposing party. In the absence of parties’ stipulations for depositions, counsel seeking permission for a deposition must be prepared to make a showing of materiality and need for deposition testimony of a particular witness. In the case of an important third-party witness over whom a party has no control, arbitrators may be more amenable to allowing a deposition to proceed. Arbitrators who allow depositions may impose time limitations; as a guideline, the federal court’s seven-hour limit for a deposition, recently also adopted for California state courts, may be used if the parties do not agree on a deposition protocol. Counsel may be able to justify the cost of deposition in arbitration for important witnesses to cut down on hearing time in the same way that discovery depositions in litigation often substantially shorten the amount of time the witness spends on the stand at trial. Such depositions may ultimately save the parties time and money by not having to pay arbitrators to listen to lengthy testimony of marginal relevance.

**Written Discovery Requests and Alternatives**

Counsel should assume in most arbitrations that written discovery, other than document requests, will not be allowed, unless an arbitration clause or rules permit it. Therefore, counsel should expect that they cannot propound contention discovery through interrogatories and requests for admission, absent stipulation of counsel. However, it is still possible for attorneys to gather written factual information about claims and defenses in arbitration—and perhaps even more
efficiently than they would through such traditional civil discovery methods. Attorneys should request that the opposing party be required to provide, by a specific date: items such as a more factually detailed statement of claim, counterclaim or defense; specific damages information, including the nature and elements of the claimed damages, and calculations; or early identification of potential witnesses.

**Other Inspections or Examinations**

Site inspections, inspections of damaged or unique personal property, certain forensic examinations, or independent medical examinations (IMEs) should be requested in cases where they are relevant. These matters are usually not covered in general rules but may be provided for in specialized rules (e.g., site inspections in construction arbitration rules). Such discovery may be necessary for expert opinion testimony on which a party will rely in the arbitration.

**Expert Witnesses**

Expert witness testimony at arbitration requires a protocol for prehearing discovery including disclosure of experts, exchange of reports, if any, and disclosure of rebuttal experts. Counsel should manage the expert discovery process by negotiating an agreement with opposing counsel to the extent possible, before raising the issues with the arbitrators. Most arbitration clauses and rules either do not address experts or lack the details that guide litigators in civil cases concerning disclosures, so such matters are left to the arbitrators’ discretion. Unless the arbitrators have a particular protocol they like to follow for all cases, they are likely to approve a negotiated stipulation between counsel. Counsel should tread carefully in adopting established court rules as a default without studying their effect; for example, in an arbitration the Federal Rules of Civil Procedure’s requirements for preparation of written reports and timing of the exchange may be both a very costly exercise and one that puts counsel in difficult time constraints. Another issue is whether expert depositions will be allowed, or limited only to those experts who do not prepare written reports, as such depositions are not necessarily permitted as a matter of right in arbitration.

While litigators must adapt to preparing a case for arbitration with limitations on discovery, they can position themselves strategically, level the playing field, and have the opportunity for a cost-effective result by focusing on early identification of the key issues, obtaining the most relevant documents and ESI, working with their clients and opposing counsel to agree on the scope of other discovery, and making the best possible case to the arbitrators to allow broader discovery within the arbitrators’ discretion and the tribunal’s rules.

**Keywords:** woman advocate, litigation, discovery, arbitration

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E-DISCOVERY IN ARBITRATION PROCEEDINGS

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INTRODUCTION

Electronically stored information (“ESI”) is the most popular medium for data communication and storage in the past decade.\(^1\) ESI is most commonly represented by electronic mail messages, but may also be found in detachable media, voicemail, and even iPhones, to name a few.\(^2\) A massive amount of electronic data is now being retained by companies.\(^3\) Most ESI is on back-up data, which is not easily searched since it tends to be stored on a daily or weekly basis and not by subject matter.\(^4\) The sheer volume of the amount of ESI retained and the difficulty in searching through such data increases the costs to find documents to be produced for arbitration and/or litigation.\(^5\) In addition to finding responsive documents, the documents then must be reviewed to determine the applicability of attorney-client and/or work product protections.\(^6\) Indeed, the most formidable challenge to maintain efficiency and decrease costs in arbitration is the increasing demands of electronic discovery (“E-discovery”).\(^7\)

ADDRESSING E-DISCOVERY IN CONTRACT CLAUSES

An effective means to placing some realistic limits on the otherwise bottomless pit of E-discovery is to address such matters with clauses in the contract.\(^8\) Some effective clauses that should curtail E-discovery include limiting production of ESI from sources used in the ordinary course of business and specifying that restoration of back-up tapes, erased, damaged or fragmented data, archived data, or data deleted in the ordinary course of business will generally not be appropriate.\(^9\)
Additionally, another effective clause can limit the furnishing of ESI by limiting such disclosure to generally available technology usable by the party receiving it that is in a searchable format which is both convenient and economical for the producing party. A clause in the contract should also provide the arbitrator discretion to deny requests or require the advancement of reasonable costs by the requesting party if the burden and cost of E-discovery outweigh the likely importance of the materials requested.

USE OF CLAW-BACK AGREEMENTS TO MINIMIZE BURDEN OF E-DISCOVERY

As mentioned earlier, one of the largest costs associated with E-discovery involves the review of voluminous ESI to determine whether the material is protected by attorney-client or work-product privileges. Also, because of the massive amount of ESI that could be subject to disclosure, this increases the likelihood of inadvertently producing a privileged document. Attorneys have developed so called “claw-back” agreements that allow for a party who inadvertently produce a privileged document to take it back once discovered.

The use of “claw-back” agreements has expanded due to the time and cost involved to review ESI. An expansive version of these agreements permits a party to produce all of its relevant documents for review and selection by the requesting party without waiving the privilege. The party reviews those documents for privilege once the requesting party selects the documents it wants.

While court approval of such agreements varies, arbitration provides an advantage since arbitrators are not required to analyze and conform to the latest court decisions and are particularly attuned to the concerns of the parties before them. Accordingly, parties to arbitration should present to the arbitrators at an early preliminary hearing the
proposed claw-back agreement for approval.\textsuperscript{17} Arbitrating parties should obtain an order that: (1) relieves them of having the obligation to review all E-documents for privilege prior to production, and (2) specifically ordering that production of such documents does not waive the attorney-client and work-product privileges.\textsuperscript{18}

**TREATMENT OF E-DISCOVERY BY COMMERCIAL ARBITRATION PROVIDERS**

The International Institute for Conflict Prevention & Resolution (“CPR”) provides some guidelines for disclosure of ESI. The guidelines state that the disclosure of electronic documents should have a narrow focus that balances the cost, burden and accessibility with the need for disclosure.\textsuperscript{19} The guidelines suggest the parties should choose in their agreement, or separately thereafter, from four modes of disclosure for ESI provided by the guidelines.\textsuperscript{20}

The four modes of disclosure are: (1) Mode A, which is the narrowest scope, does not provide for prehearing disclosure except for copies of ESI to be presented in support of each party’s case; (2) Mode B provides for the production of ESI maintained by an agreed number of limited designated custodians, of ESI created from the signing date of the arbitration agreement to the filing date for the request for arbitration, and that production be limited to ESI from primary storage facilities, meaning no documents from backup tapes, voicemails, backup servers, personal digital assistants or cell phones;\textsuperscript{21} (3) Mode C allows for a larger number of custodians and a wider time period than Mode B, and disclosure of deleted, fragmented or other information difficult to obtain other than through forensic means upon a showing of special need and relevance;\textsuperscript{22} and (4) Mode D provides a broad level of disclosure similar to the Federal Rules of Civil Procedure.
allowing for disclosure of ESI, not privileged, that is relevant to a party’s claim or defense, subject to limitations of duplicativeness, undue burden, and reasonableness.\textsuperscript{23}

JAMS, another commercial arbitration provider, has recommended protocols for E-discovery. JAMS recommends that early in the arbitration proceeding parties seek an order providing for E-documents to be produced only from sources used in the ordinary course of business.\textsuperscript{24} JAMS further recommends the order provide that, absent a showing of compelling need, no ESI be produced from back-up servers, tapes, or other media, and that ESI shall be produced in a searchable format useable by the receiving party and convenient and economical for the producing party.\textsuperscript{25} The order should also provide the arbitrator discretion to deny requests after weighing the costs and burdens of E-discovery with the nature and gravity of the dispute, the amount in controversy, or the relevance of the materials requested or, at the very least, condition disclosure on the advancement of reasonable costs.\textsuperscript{26} JAMS also provides expedited arbitration procedures that adopt the protocols.\textsuperscript{27} In addition to the protocols, the expedited procedures also require the description of custodians to include only individuals reasonably expected to have evidence material to the dispute.\textsuperscript{28}

The International Centre for Dispute Resolution ("ICDR") is the international arm of the American Arbitration Association ("AAA") and is another commercial arbitration provider. The ICDR published Guidelines for Arbitrators Concerning Exchanges of Information, which may be adopted by agreement or in arbitration clauses in arbitrations administered by the AAA. With respect to electronic documents, the ICDR guidelines provide parties can provide access to such documents in the form most convenient and economical absent a compelling need for access in some other format.\textsuperscript{29} Request for ESI
should be narrowly focused and structured to allow searching for them to be as economical as possible.\textsuperscript{30}

**CONCLUSION**

E-discovery will be challenging for arbitration to maintain its goals of efficiency and decreased costs. However, parties to arbitration can minimize the impact of E-discovery by addressing its scope in arbitration provisions and addressing concerns with both the arbitrator and opposing counsel early in the arbitration process.

\textsuperscript{1}Michael Swarz, *Litigation News Applying Electronic Discovery in an Arbitrational Setting*, ABA 1 (2012).
\textsuperscript{2}Id.
\textsuperscript{4}Id.
\textsuperscript{5}Id at p. 1-2.
\textsuperscript{6}Id at p.2.
\textsuperscript{7}John Wilkinson, *Arbitration Contract Clauses A Potential Key to a Cost-Effective Process*, 16 Dispute Resolution Magazine 9, 10 (Fall 2009).
\textsuperscript{8}Id.
\textsuperscript{9}Id (summarizing from The NY State Bar Association’s “Report on Arbitration Discovery” and from the Chartered Institute of Arbitrators’ “Protocol for E-Disclosure in Arbitration Discovery”).
\textsuperscript{10}Id (summarizing from “Report on Arbitration Discovery” and “Protocol for E-Disclosure in Arbitration Discovery”).
\textsuperscript{11}Id (summarizing from “Report on Arbitration Discovery” and “Protocol for E-Disclosure in Arbitration Discovery”).
\textsuperscript{12}Warshauer, 61, Dispute Resolution Journal at 3.
\textsuperscript{13}Id.
\textsuperscript{14}Id.
\textsuperscript{15}Id.
\textsuperscript{16}Id at p. 4.
\textsuperscript{17}Id at p. 3.
\textsuperscript{18}Id at p. 4.
\textsuperscript{19}Elizabeth B. Chamberlin, *E-Discovery Bytes Is E-Discovery Eliminating the Benefits of Arbitration?*, Quarles & Brady LLP (December 2008).
\textsuperscript{20}CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration § 1(d)(2).
\textsuperscript{21}Chamberlin, Quarles & Brady LLP; CPA Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration § 1 Schedule 2.
\textsuperscript{22}CPA Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration § 1 Schedule 2.
23 Id.
25 Id at p. 4-5.
26 Id at 5.
27 JAMS Comprehensive Arbitration Rules & Procedures § 16.2.
28 JAMS Comprehensive Arbitration Rules & Procedures § 16.2(c)(iii).
29 ICDR Guidelines for Arbitrators Concerning Exchanges of Information § 4.
30 Id.
Alternative Dispute Resolution

Broad judicial deference is given to arbitration awards even where blatant factual or legal errors appear on their face. While California courts have no authority to review the reasoning by which arbitrators reach their conclusions, or even correct facial errors of fact or law, the courts can vacate or modify an award where arbitrators step beyond those powers granted to them by the parties in their agreement or in their submission of issues to be arbitrated. Code of Civil Procedure §1286.2(a)(4) provides in pertinent part that the court shall vacate an arbitration award if it determines that “[t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.”

Attacks by disappointed parties claiming that arbitrators exceeded their powers rarely succeed because the courts construe the “excessive powers” ground narrowly. They are, however, amenable to challenges on this basis where arbitration awards, including remedies ordered, conflict with an established public policy, including perceived impingement on constitutional or statutory rights, or the award is attacked as a product of procedural unfairness prejudicing a party’s rights. The courts may also find that a party has waived an otherwise successful excessive powers attack through its own conduct during the arbitration and the scope of its submissions, thus warranting caution that objections must be raised to the scope of the arbitrators’ authority during the proceedings to preserve the excessive powers ground to vacate an adverse award.

Analysis of a potential excessive powers attack starts with the scope of the submission of a dispute to arbitration, which is a matter of contract, as an alternative to court adjudication. Typical express limitations in an arbitration clause considered in excessive powers challenges include statements that the arbitrators will not have the power to expand, narrow or modify any contractual conditions or terms, or to grant an award which would have such effect. Common limitations on remedies include prohibitions against injunctive relief, awards for lost profits, consequential or punitive damages, or any multiple of compensatory damages (such as a statutory treble damage award). Parties also may submit to the arbitrators issues outside the contractual arbitration clause. In that instance, any challenge to arbitration awards for excessive powers will necessarily consider the scope of the parties’ extra-contractual submissions.

California courts have determined that arbitrators exceed their powers if the award violates a statutory right or a well-defined public policy that is expressed by statute or judicial decision. In California Statewide Law Enforcement Ass’n v. California Dept. of Personnel Administration, 11 C.D.O.S. 1201, the court vacated an arbitrator’s award which violated California law and an express public policy of legislative oversight of public employee contracts. The award mandated retroactive application of a memorandum of understanding between a public employees’ union and a state agency and explicitly altered provisions the state Legislature had previously ratified and approved. The award thus violated the legislative oversight public policy embodied by statute.

As also explained in Dept. of Personnel Administration v. California Correctional Peace Officers Assoc., 152 Cal.App.4th 1193 (2007), it is clear public policy in California that “the Legislature intended to retain ultimate authority over state employees’ wages, hours and working conditions” and an arbitration award that mandates the agreement be enforced without unequivocal legislative approval will exceed the

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arbitrator’s powers and be set aside.

In contrast, in Shahinian v. Cedars-Sinai Medical Center, 11 C.D.O.S. 4982, an employment termination dispute between a surgeon and a hospital in which the arbitrator awarded the surgeon economic, emotional distress and punitive damages, the excessive powers challenge failed where the asserted public policy argument was not well-grounded in express legislative or judicial pronouncements. The hospital unsuccessfully argued that public policy required the arbitrator to order the hospital to conduct a peer review hearing rather than award damages against it. The court found that the parties had neither waived nor agreed to circumvent the peer review process by arbitrating a dispute over competence. Neither the Legislature nor the courts had declared that business disputes between a doctor and a hospital unrelated to competence must be submitted to peer review hearing. The court therefore rejected the excessive powers challenge.

An award may also be vacated for excessive powers where the arbitrators fail, in conducting the hearings, to abide by statutory requirements or the rules of the arbitration provider, as in Hoso Foods v. Columbus Club, 10 C.D.O.S. 15168. The court made plain that arbitration procedures that interfere with a party’s right to a fair hearing are reviewable and can be cause to vacate the award. The arbitration in Hoso was administered under the American Arbitration Association’s Commercial Arbitration Rules. The arbitrator barred a corporate party’s secretary who was most knowledgeable about the lease in question from attending the hearing as its representative, reasoning that its president, who was in attendance and therefore the corporation was represented. The court held that the rules, which allowed any person having a direct interest in the arbitration as entitled to attend hearings, stood for the proposition that an arbitrator lacks the power to preclude a party or its representative from attending the arbitration, and that because of the secretary’s exclusion the corporation “suffered obvious prejudice from the absence of an independent representative.” The arbitrator therefore had “precluded [the corporation] from receiving a fair hearing,” and thus exceeded his authority.

Impingement on a party’s free speech rights constituted excessive powers and caused modification of an arbitration award in a defamation case in Kelly Sutherlin McLeod Architecture v. Schneickert, 11 C.D.O.S. 4555. The award required an architect’s client to publish a retraction of his statements that were found to be defamatory, mandating specific language for the client to characterize his statements about the architect as “false” and that he “apologize[d] for any misconceptions ... [and] damage such statements may have done to [the architect’s] reputation.” The court found that the retraction order violated public policy, specifically infringing on the client’s constitutional free speech rights. The client could be compelled to inform others of the arbitrator’s findings of defamation, but could not be compelled to apologize and express regrets and that he agreed with the finding of falsity. Thus, an arbitration award that purports to curtail a constitutional right can be successfully challenged exercise of excessive powers.

Even a valid excessive powers claim can be waived by a party’s conduct in arbitration, by its failure to object to certain issues or evidence, and by failing to assert limitations on the arbitrator’s power. The facts in J.C. Gury v. Nippon Carbide Industries (USA), 152 Cal.App.4th 1300 (2007), involving an arbitration over allegedly defective goods, where an excessive powers challenge failed, highlight the pitfalls of responding to an issue raised by an opponent without asserting that the issue is beyond the scope of the arbitrator’s power.

In J.C. Gury, the seller contended that the arbitrator exceeded his powers because the award found unconscionable and thus nullified a contractual warranty disclaimer and consequential damage exclusion. The arbitration clause provided that the arbitrators lacked the power to grant any award with the effect of changing, modifying or altering any expressed contractual condition, term or provision. During the arbitration, both in briefing and in evidence, the seller responded to the buyer’s assertions that the warranty disclaimer and damages exclusion were unenforceable and unconscionable. Most compelling to the court in rejecting the excessive powers challenge to the arbitrator’s finding those clauses unenforceable were the seller’s failures during the arbitration both to object that the unconscionability issue exceeded the arbitrator’s authority, and to assert specifically the contractual limitation on the arbitrator’s power. Therefore, both parties had unequivocally submitted the issue of unconscionability to arbitration and had waived the ability to claim that the arbitrator had exceeded his authority in determining that the clauses were unenforceable.

Arbitrating parties should be vigilant at all phases of their arbitration, from initial submission through the post-hearing briefing, to raise any claim of excessive powers and the scope of the arbitrators’ authority to decide the issues. Excessive powers can be an effective challenge where the right circumstances involving public policy come into play, but can be lost by a failure effectively to preserve the issue for subsequent court proceedings to vacate an award.

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The College of Commercial Arbitrators

Protocols

for

Expeditious, Cost-Effective Commercial Arbitration

Key Action Steps for

Business Users, Counsel, Arbitrators

& Arbitration Provider Institutions

Thomas J. Stipanowich, Editor-in-Chief
Curtis E. von Kann and Deborah Rothman, Associate Editors

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This monograph was printed with the financial assistance of the ABA Section of Dispute Resolution.
The College of Commercial Arbitrators
Protocols for Expeditious, Cost-Effective
Commercial Arbitration

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

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Foreword

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

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

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

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

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1 As used in the draft report and in this publication, the term "commercial arbitration" refers to arbitration between two or more commercial entities, i.e., business-to-business arbitration. Neither the Summit nor this report has attempted to address the rather separate and distinct issues that arise in arbitration between businesses and employees or consumers. While those scenarios are certainly worthy of thoughtful study and attention, they are beyond the scope of the present initiative. Furthermore, although the recommendations offered herein may be of great benefit in the context of international arbitration, the focus of this report is on commercial arbitration in the United States.
for Conflict Prevention and Resolution ("CPR"), and the Chartered Institute of Arbitrators, joined the College as co-sponsors of the Summit, along with the Straus Institute for Dispute Resolution of Pepperdine University School of Law and seventy-two Fellows of the College.

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

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

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

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

Bruce W. Belding
President of the College 2008-2009

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

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

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About the Editors

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

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

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

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

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

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

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

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


7 Stipanowich, New Litigation, supra note 3, at 9.
from important standard industry contract forms.8 As one West Coast in-house counsel recently reported,

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

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

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

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

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

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

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

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

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

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

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

In order to address this disquieting status quo, the Summit focused on identifying the perceived roots of the problem and exploring potential solutions.
II
The Root of the Problem:
Arbitration Has Become Too Much Like Litigation

A. Reduced Use of Trial: Growth of Commercial Arbitration

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

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

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

\(^\text{10}\) Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. EMPIRICAL LEGAL STUD. 459, 460 (2004).


\(^\text{13}\) As one experienced commercial dispute resolution lawyer explains, "Nature abhors a vacuum, and a vacuum has been created with the decreased frequency of bench and jury trials. This portends good things for alternative dispute resolution processes."

\(^\text{14}\) William H. Knoll, III & Noah D. Rubins, Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?, 11 AM. REV. INT’L ARB. 531, 532 (2000); Richard E. Speidel, Securities Arbitration: A Decade after McMahon,
resolution times, a more satisfactory process, expert decision makers, privacy and confidentiality, and relative finality.\textsuperscript{15} The untiring efforts of arbitration providers in promoting commercial arbitration rules and standard model clauses have encouraged broader use of arbitration in recent decades, while the growth of a large cadre of relatively sophisticated, accomplished, and well-trained professional arbitrators has undoubtedly enhanced confidence that arbitration will produce a reasonable and fair result. A wide variety of simple as well as sophisticated contractual provisions for the resolution of disputes by arbitrators are now featured in many different kinds of commercial contracts.\textsuperscript{16} These phenomena, coupled with plenary judicial enforcement of broadly tailored arbitration provisions, have made arbitration a wide-ranging surrogate for trial in a public courtroom.\textsuperscript{17}

\textbf{B. Importation of Trial Practices into Arbitration}

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

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


\textsuperscript{17} See Thomas J. Stipanowich, Contract and Conflict Management, 2001 Wis. L. Rev. 831, 839-44.
1. Discovery

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

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

![Graph showing survey results]

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

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

\(^{20}\) In some cases arbitrators are confronted by a prior agreement of counsel for arbitrating parties to utilize the discovery provisions of the Federal Rules of Civil Procedure in arbitration. This poses a dilemma for the arbitrator, who may or may not be able to persuade counsel to forego requests for admission and interrogatories and to strictly limit the number of depositions, and also to closely supervise the discovery process to avoid unnecessary delays.
is a tendency to use the tools with which one is most familiar, and lawyers schooled in trial may predictably rely on their knowledge and experience in the private analog of the process. Trial practice, with its heavy emphasis on intensive discovery and related motion practice, is reinforced by ethical rules enshrining the model of zealous advocacy.\(^\text{21}\) For lawyers accustomed to full-fledged discovery, anything less may seem tantamount to malpractice.\(^\text{22}\)

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

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

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


\(^\text{22}\) John Hinchey, Remarks at the Annual Meeting, American College of Construction Lawyers, Adjudication: Coming to America (Feb. 22, 2008) (notes on file with author).


\(^\text{25}\) Carr & Jencks, supra note 23, at 240.

\(^\text{26}\) See Sorenson, Jr., supra note 23, at 699-700. Discovery has been used as a tactical weapon to impose excessive costs on the opposing party.

\(^\text{27}\) There is little case law in this area to provide guidance and reassurance to arbitrators who might otherwise be inclined to more rigorously impose limits over counsel’s objection. In Hicks v. UBS Financial Services, Inc., 649 Utah Adv. Rep. 7 No 20080950-CA , filed Feb. 4, 2010 UT, App 26, the Utah Court of Appeals held that "erroneous
For all of these reasons, discovery under standard arbitration procedures has tended to become much like its civil court counterpart. As one corporate general counsel explains:

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

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

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

2. Motion practice

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

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

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


30 FINAL REPORT ON LITIGATION REFORM, supra note 12, at 14.
The use of dispositive motions in arbitration—now contemplated even by some expedited rules—31—is, practically speaking, a double-edged sword.32 This import from the court system, prudently employed, is a potentially useful tool for narrowing arbitral issues prior to hearings and full-blown discovery, thus avoiding unnecessary preparation and hearing time. While arbitrators are properly chary of summarily disposing of matters implicating factual issues, there are certain matters that may be forthrightly addressed early on with little or no discovery, such as contractual limitations on damages, statutory remedies, or statutes of limitations and other legal limitations on causes of action.33 The problem is that, as in court, motion practice often contributes significantly to arbitration cost and cycle time without clear benefits. The filing of motions leads to the establishment of schedules for briefing and argument entailing considerable effort by advocates, only to have the arbitrators postpone a decision until the close of hearings because of the existence of unresolved factual disputes raised by the motion papers.34

3. Other concerns

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

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

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31 See, e.g., JAMS ENGINEERING/CONSTRUCTION EXPEDITED RULES, Rule 18 (2009).
33 COMMERCIAL ARBITRATION AT ITS BEST, supra note 14, at 48, 53-55. The new Final Report on Litigation Reform states that "parties and the courts should give greater priority to the resolution of motions that will advance the case more quickly to trial or resolution." FINAL REPORT ON LITIGATION REFORM, supra note 12, at 22. It also calls for "a new summary procedure . . . by which parties can submit applications for the determination of enumerated matters (such as rights that are dependent on the interpretation of a contract) on pleadings and affidavits or other evidentiary materials." Id. at 6.
As with discovery and motion practice, the cause of drawn-out hearings is often a complex interaction of several factors. It typically starts with attorneys, intent on pursuing their brand of "zealous advocacy" for strategic or tactical reasons, interposing constant objections, introducing redundant testimony, and framing the same question over and over again. It is facilitated by arbitrators who are unable or unwilling to come down too heavily on the parties—perhaps because of lack of skill or native discomfort with proactive management, or because they may be uncomfortably aware of scheduling issues of their own that may need to be accommodated during the course of trying a complex case. The ballooning of hearing time is especially likely within the ambit of open-ended arbitration procedures with considerable "wiggle room"; however, even previously established timetables and prescribed deadlines sometimes fall by the wayside due to mindsets like those described above.

C. Looking Beyond Litigation-Style Arbitration

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

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

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

The overriding objectives [of businesses in choosing an appropriate forum for resolving disputes] . . . are fairness, efficiency (including speed and cost) and certainty in the enforcement of contractual rights and protections. These are complementary objectives, and to focus on one at the expense of the others leads to a result inconsistent with the expectations of the business world and denies basic commercial needs. Too often the practice of . . . arbitration has
done just that, by focusing on perceived concepts of due process to the
detriment of efficiency, resolution and certainty.\textsuperscript{35}

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

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

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

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

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

\textsuperscript{35} Michael McIlwraith & Roland Schroeder, \textit{The View from an International Arbitration Customer: In Dire Need of

\textsuperscript{36} \textit{Id.} at 4-5.

\textsuperscript{37} \textit{See \textit{FINAL REPORT ON LITIGATION REFORM}, supra note 12.}

\textsuperscript{38} Frank E. A. Sander \& S. Goldberg, \textit{Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR
This arrangement, which came to be known as "the rocket docket," soon became the distinguishing feature of the court’s reputation and legal culture. Attorneys who had cases there quickly focused their discovery efforts on the most important evidence, eschewed any attempt to track down every marginal lead or possibility, and generally cooperated in discovery and pre-hearing activities (knowing that failure to cooperate would be quickly sanctioned).

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

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

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

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

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

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

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

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

A. The Need for a Mutual Effort

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

42 See George J. SiDEL, Using the Law for Competitive Advantage 3 (2002).
Second, in most businesses, corporate energy and attention is focused on consummating transactions; in contrast dispute resolution provisions tend to be accorded low priority in contract negotiations, at least partly because raising the specter of conflict seems inappropriate when the emphasis is on coming together. Those insiders who say “but let's also make careful arrangements for what happens if things go wrong” risk being viewed as obstructionists who might derail the deal. Perhaps, too, some transactional lawyers are reluctant to make a negotiating point of arbitration, fearful that that may require trading off more "substantive" elements.

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

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

Arbitration is often unsatisfactory because litigators have been given the keys . . . and they run it exactly like a piece of litigation. It's the corporate counsel's fault [for] simply turning over the keys to a matter.¹⁴⁷

3. Business Clients and Counsel Must Change These Realities

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

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¹⁴⁴ See id.
¹⁴⁷ Stipanowich, Vanishing Trial, supra note 29, at 895 (quoting Jeffrey W. Carr, Vice President and General Counsel, FMC Technologies, Inc.). See also David B. Lipsky & Ronald L. Seeber, In Search of Control: The Corporate Embrace of ADR, 1 U. Pa. J. Lab. & Emp. L. 133, 142 (1998); Craig A. McEwen, Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation, 14 Ohio St. J. Disp. Resol. 1 (1998); Lande, supra note 11.
fulfilling legal counselors’ ethical obligations to actively promote consideration of appropriate dispute resolution alternatives.

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

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

C. The Role of Provider Organizations

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

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

![Survey Results]

Business users rely heavily on the organizations that publish and promote (a) arbitration and dispute resolution procedures, (b) lists of pre-screened, experienced arbitrators and other "neutrals" and (c) related administrative services. In many different respects, these "provider institutions" channel the expectations and behavior of business parties and the arbitrators that serve them and set the stage for the success or failure of arbitration. Their offerings should be closely examined and compared, but never taken for granted.
The published commercial arbitration procedures of major provider institutions offer a number of perceived advantages. For busy lawyers they offer a seemingly "tried and true" alternative to the minefield of customized drafting combined with an administrative support system and access to lists of pre-screened, trained neutrals. Many in-house counsel report that, unless a client is entering into an exceptionally significant commercial relationship or preparing a contract template that will be used multiple times, it is unrealistic to expect counsel to spend considerable time planning and drafting arbitration agreements. Even in circumstances where more attention is appropriate, drafting dispute resolution agreements from whole cloth without reliance on published templates can be a dicey proposition. It therefore makes sense to examine and compare what different administrative institutions have to offer.

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

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

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

49 Leading providers provide some basic guidance for drafters about ways of incorporating their own rules in the contract. See, e.g., AAA, DRAFTING DISPUTE RESOLUTION CLAUSES: A PRACTICAL GUIDE (Amended and Effective September 1, 2007); JAMS GUIDE TO DISPUTE RESOLUTION CLAUSES FOR COMMERCIAL CONTRACTS (Rev. June 2000). One relatively comprehensive set of guideposts for business users is the product of the CPR Commission on the Future of Arbitration. See generally COMMERCIAL ARBITRATION AT ITS BEST, supra note 14. Even this extensive guide, however, does not approach process questions from the standpoint of various specific user goals. A more recent CPR publication does, however, address many key drafting issues. CPR INSTITUTE FOR DISPUTE RESOLUTION, CPR DRAFTER'S DESKBOOK (Kathleen Scanlon ed., 2002).
50 The AAA has offered a multi-tiered approach in its basic rules for a number of years. See, e.g., AAA's COMMERCIAL ARBITRATION RULES (Amended and Effective September 1, 2007) and AAA'S CONSTRUCTION INDUSTRY ARBITRATION RULES (Amended and Effective October 1, 2009). See generally Thomas J. Stipanowich, At the Cutting Edge: Conflict Avoidance and Resolution in the Construction Industry in ADR & THE LAW 65-86 (1997) (describing rationale for American Arbitration Association's tiered construction procedures).
users of arbitration. For example, there has been a trend among leading U.S. arbitration institutions to create discrete templates for expedited or streamlined arbitration. In light of growing concerns about the scope and cost of arbitration-related discovery, moreover, various institutions have devoted attention to that subject, and choices may now be discerned among existing procedures. These are important steps toward the goal of moving beyond a "one-size-fits-all" approach to arbitration, but much more can be done both from the standpoint of developing alternatives and providing business users with user-friendly roadmaps.

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

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

**D. The Role of Outside Counsel**

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

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

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

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

E. The Role of Arbitrators

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

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

![Survey Results]

The critical role of arbitrators in achieving efficiency and cost-saving—and in striking an appropriate balance between efficiency and fairness—is well understood by many experienced arbitrators.54 That role also helped inspire recent published guidebooks55 and prompted

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

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

F. The Central Lesson

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

56 See, e.g., McIlwrath & Schroeder, supra note 35, at 6 (discussing priorities of corporate counsel).
IV
Protocols for Expeditious, Cost-Effective Commercial Arbitration

General Principles

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

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

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

Control motion practice. Substantive motions can be the enemy or the friend of the effort to achieve lower costs and greater efficiencies. Some see current motion practice as adding another layer of court-like procedures, resulting in heavy costs and delay. Others see current motion practice as missing an opportunity for reducing costs and delay, where clear legal issues that might be disposed of at the outset are instead deferred by arbitrators, to allow parties to conduct discovery and then offer their proofs. Recognizing whether in a particular
case a substantive motion would advance the goal of lower cost and greater efficiency is among the most challenging tasks these Protocols present to the constituencies; they aim to promote cooperation and close consideration of the role a motion might play.

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

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

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

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

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

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

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

Comments:

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

57 One famous nightmare scenario of one-off drafting which generated nine years of litigation involved a contractual provision for expanded judicial review of arbitration awards. See Kyocera Corp. v. Prudential-Bache Trade Services, Inc., 341 F.3d 987, 1000 (9th Cir. 2003) overruling LaPine Technology Corp. v. Kyocera Corp., 130 F.3d 884, 888 (9th Cir. 1997).
ahead of time.\textsuperscript{58} By today's standards, simply ticking off basic options ("mediation," "arbitration") and throwing in convenient boilerplate clauses without reflection might be characterized as malpractice; lawyer-counselors must have or gain access to the knowledge and sophisticated tools necessary to address key process choices and issues.

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

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

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


\textsuperscript{59} Id.

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

\textsuperscript{61} See generally COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS Ch. 1, 2 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001) [hereinafter COMMERCIAL ARBITRATION AT ITS BEST] (discussing general strategies for conflict management and drafting considerations).
• "fast-track" procedures for appropriate cases;
• relying on one rather than multiple arbitrators when appropriate.

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

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

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

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

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

Comments

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

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

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

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

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

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

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

Comments:

C. Northcote Parkinson's famous "law" that work expands to fill the time available for its completion63 encapsulates the fundamental truth that human beings find it nearly impossible to terminate working on an important matter when there is still time left to do more. This is especially true in commercial arbitration where the stakes are often high, those doing the work are typically conscientious "Type A" lawyers, and all actors – both counsel and arbitrators – are being paid by the hour. However, if work on the matter is firmly limited to a fixed period of time, lawyers are very good at determining how to use that time most effectively by concentrating on the most important tasks and dispensing with activities that offer less promise.

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

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

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

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

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

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

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

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

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

\(^{66}\) See id., Rules 3, 5, 9.3.

\(^{67}\) See JAMS STREAMLINED ARBITRATION RULES & PROCEDURES (2009) [hereinafter JAMS STREAMLINED RULES].

\(^{68}\) Michelle Leatham, Esq., Bechtel Corporation, Rossdale Group ADR Teleconference (May 5, 2010).

\(^{69}\) Larry Harris, Esq., Partner, Greenberg Traurig, Washington, D.C., Rossdale Group ADR Teleconference (May 5, 2010).
4. Use "fast-track arbitration" in appropriate cases.

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

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

Comments:
See comments under Action 3 above.

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

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

Comments:
In-house counsel must play an important part in forward planning and continuous management of the arbitration schedule; minimization of interruptions through firm stances supported by flexible solutions such as consensus; and preparing their companies to deal
appropriately with changing circumstances. Communication must be healthy not only with traditional stakeholders but with “the key business person(s) who will often have the best handle on the value to the business of the disputed matter, including its risks. They will discuss frankly the expense, delay, and lost opportunity cost of proceeding in the most litigation-like manner in arbitration, especially discovery and motion costs, scheduling the evidentiary hearing (how soon and how lengthy), and hearing procedures. In arbitration the parties can and should decide how much process they want, and want to pay for.”

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

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

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

Comments:

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

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


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

73 These comments are drawn in large measure from Stipanowich, Arbitration and Choice, supra note 58.
practice employing different approaches, including early case assessment, negotiation, mediation, arbitration and litigation to address particular client needs.

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

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

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

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

74 Commercial Arbitration at Its Best, supra note 61, at 5-6, 10-33, 39-41.

75 Depending on the circumstances, this might include an exploration of experience with expedited rules, rules for large or complex arbitration, or appellate arbitration rules.
process. This means being present at key decision points before and during arbitration, including pre-hearing conferences at which the timetable and format for the arbitration are discussed and established.\textsuperscript{76}

7. \textit{Select arbitrators with strong case management skills.}

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

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

\textbf{Comments:}\textsuperscript{77}

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

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

\begin{itemize}
\item \textsuperscript{76} See \textit{Commercial Arbitration at Its Best, supra} note 61, at 183-190.
\item \textsuperscript{77} These comments are drawn in large measure from Stipanowich, \textit{Arbitration and Choice, supra} note 58, 432-434.
\item \textsuperscript{78} JAY FOLBERG ET AL., \textit{RESOLVING DISPUTES—THEORY, PRACTICE & LAW} 470-73 (2008) ("the choice of arbitrators \textit{is} critical for two reasons: They will likely provide the only review of the case's merits, and arbitrators will have primary control over the process itself.").
\item \textsuperscript{79} Notability in the sense of perceived standing within a commercial community or industry, while insufficient in itself, may be especially desirable if an authoritative pronouncement or application of pertinent norms and practices is needed. \textit{Int'l Produce, Inc. v. A/S Rosshavet}, 638 F.2d 548, 551-52 (2nd Cir. 1981) ("The most sought-after arbitrators are those who are prominent and experienced members of the specific business community in
\end{itemize}
Again, the relevant questions depend on goals and priorities. If those priorities include low cost, efficiencies, and the avoidance of undue delay, the following queries may be helpful:

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

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

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

which the dispute to be arbitrated arose.


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


83 Commercial Arbitration at Its Best, supra note 61, at 6-8.


85 Id., Ch. 6 § V(L).

86 Id., §§ V(B)-(D), (I); Ch. 7 §§ III(B)-(C), (E)-(L).
• Addressing jurisdictional issues and reasonable requests for interim relief as soon as practicable;87
• Facilitating and actively monitoring information exchange/discovery;88
• Employing electronic means of communication and document management as appropriate;89
• Scheduling hearings with as few interruptions as possible;90
• Planning and actively managing the hearings (ending each hearing day with housekeeping sessions);91
• Anticipating potential problems (such as the unavailability of witnesses, unanticipated circumstances) and seeking creative solutions to minimize delay.92

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

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

Comments:93

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

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

87 Id., Ch. 2 § III; Ch. 6 §§ III(C), V(D); Ch. 7 § III(B), (D).
88 Id., Ch. 8.
89 Id., Ch. 6 §§ II(D), IV, V(L).
90 Id., Ch. 9(VI).
91 Id., Ch. 9 passim.
92 Id., §§V, VI(A)-(D), VII(C)-(D), IX(A), (F).
93 These comments are drawn in large measure from Stipanowich, Arbitration and Choice, supra note 73, 410-411.
documents that Claimant intends to reply upon in the arbitration and names of all witnesses and experts Claimant intends to present at the Hearing.  

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

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

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

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

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

95 See CPR EXPEDITED ARBITRATION, supra note 94.

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

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

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

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

Comments.\textsuperscript{99}

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

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

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

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

\textsuperscript{99} These comments are drawn in large measure from Stipanowich, Arbitration and Choice, supra note 58, 412-413.


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

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

\textsuperscript{103} COMMERCIAL ARBITRATION AT ITS BEST, supra note 61, at 48, 53-55. The new Final Report on Litigation Reform states that "parties and the courts should give greater priority to the resolution of motions that will advance the case more quickly to trial or resolution." FINAL REPORT ON LITIGATION REFORM, supra note 60, at 22. It also calls for "a new summary procedure . . . by which parties can submit applications for the determination of enumerated
If dispositive action is foreseen as a useful element in arbitration, there should be an appropriate provision in the arbitration procedure.\textsuperscript{104}

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

10. *Use a single arbitrator in appropriate circumstances.*

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

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

Comments:

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

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

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

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

\textsuperscript{105} See Chang, supra note 82, at 16.

\textsuperscript{106} See, e.g., AAA EXPEDITED PROCEDURES, supra note 64, E-4; JAMS STREAMLINED RULES, supra note 67, Rule 12(a). But see CPR EXPEDITED ARBITRATION, supra note 65, Rule 5.1 (providing for three neutral arbitrators).}
delay. If drafters are truly serious about maintaining timelines, they should require each appointee to the tribunal to expressly represent to the parties that he or she has the time available to ensure that the expedited timetable will be achieved.\textsuperscript{107}

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

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

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

Comments:

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

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

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

\textsuperscript{107} See, e.g., CPR EXPEDITED ARBITRATION, supra note 65, Rule 7.2. It makes sense to obtain such a commitment from a sole arbitrator as well.

\textsuperscript{108} Paul L. Sayre, Development of Commercial Arbitration Law, 37 YALE L.J. 595, 614 n. 44 (1928).

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

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

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

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

112 Id.


114 La Pine Tech Corp. v. Kyocera Corp., 130 F.3d 884 (9th Cir. 1997) (attorneys were able to provide for expanded judicial review in the arbitration clause that they drafted), overruled by Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 1000 (2003).
itself, declaring that enforcing expanded review provisions such as those before it would "rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process."\(^\text{115}\)

Compounding the drafter's dilemma is the fact that such provisions have not been uniformly embraced by federal and state courts. The federal circuits split on the question of whether expansion of the FAA grounds for judicial review was permissible; state court decisions also reflect a divergence of authority.

Seeking to resolve the split among federal circuits, the U.S. Supreme Court held in *Hall Street Associates, L.L.C. v. Mattel, Inc.* that the Federal Arbitration Act (FAA) does not permit parties to expand the scope of judicial review of arbitration awards by agreement.\(^\text{116}\) Justice Souter's opinion, joined by five other justices, declared that the grounds for judicial review of arbitration awards set forth in §§ 10–11 of the FAA are the exclusive sources of judicial review under that statute.\(^\text{117}\) Moreover, the FAA's provisions for confirmation, vacatur and modification should be viewed as "substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."\(^\text{118}\) Having strained mightily to nail down the coffin lid on contractually expanded review under the FAA, however, the Court affirmatively invited consideration of other avenues to the same ends,\(^\text{119}\) as where parties "contemplate enforcement under state statutory or common law . . . where judicial review of different scope is arguable."\(^\text{120}\) Although it may be some time before the full import of this invitation is clarified, it is likely that state statutes or controlling judicial decisions promoting contractually expanded review will become "safe harbors" for such activity. New Jersey is perhaps the sole example of a statutory template for parties that wish to "opt in" to the legislative framework for elevated scrutiny of awards;\(^\text{121}\) in *Cable Connection, Inc. v. DIRECTV, Inc.*,\(^\text{122}\) California's highest court recognized a more general "safe harbor" for contractually expanded judicial review under that state's law.

\(^{115}\) *Kyocera*, 341 F.3d at 998.


\(^{117}\) *Id.* at 1403.

\(^{118}\) "Any other reading [would open] the door to full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.' *Id.* (quoting *Kyocera*, 341 F.3d at 998).

\(^{119}\) In a highly unusual move, the Court had requested additional briefing on these issues after the initial arguments; its March decision concluded that the supplemental arguments raised new points which required a remand for the development of the issues. The Ninth Circuit subsequently issued a remand order to the district court, concluding that the High Court decision "preserved the issue of sources of authority, other than the Federal Arbitration Act, through which a court may enforce an arbitration award. . . ." *Hall Street Associates LLC v. Mattel Inc.*, No. 05-35721, 2008 U.S. App. LEXIS 14490 (July 8, 2008).

\(^{120}\) 128 S. Ct. at 1406.

\(^{121}\) New Jersey law permits parties to arbitration agreements to "opt in" to a heightened standard of review established by the statute. *New Jersey Alternative Dispute Resolution Act, N.J. STAT. ANN. 2A, §§ 23A-12* (1999).

\(^{122}\) *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586 (Ca. 2008).
The foregoing survey of the complex legal landscape surrounding contractually expanded judicial review illustrates the risks and uncertainties confronting those who would seek to include such provisions in their arbitration agreements. In some cases contract planners may come to the conclusion that the difficulties of securing judicial oversight of arbitration awards require them to forego arbitration entirely, at least for certain classes of cases.

2. Alternatives to expanded judicial review; appellate arbitration processes

There are other, less radical choices for those concerned about protection from "off the wall" arbitration awards. These include identifying arbitrators who are likely to deliver an authoritative and rational decision, requiring the arbitrators to produce a detailed rationale for their awards, placing limits on awards of monetary damages (including upper and lower limits for the award), a baseball arbitration format requiring arbitrators to make a choice between two alternative monetary awards, and a prohibition on certain kinds of relief, such as punitive damages. For those who seek a close analogue to judicial review, however, an appellate arbitration procedure may afford the most suitable alternative.

Appellate arbitration procedures afford parties the opportunity of a "second look" at an arbitration award in a controlled setting while avoiding the delays and legal uncertainties associated with expanded judicial review, since properly constituted agreements for "second-tier" arbitration are just as enforceable as any other arbitration agreements, as are resulting awards. Appellate arbitration procedures have been utilized in a variety of commercial contexts, and at least two major institutions, the International Institute for Conflict Prevention & Resolution (CPR) and JAMS, have published appellate arbitration rules that may be utilized in commercial cases.

Crafting an appropriate arbitral appeal process involves consideration of numerous procedural issues, including the qualifications of the appellate arbitrator(s) and method of selection; scope limits on appealable disputes; filing requirements; administrative fees; time limits on filing and appellate procedures; applicable standards of review; the type of record that will be maintained of the original arbitration hearing, and transmitted to the appellate arbitrator(s); the format of the original arbitration award; the form of argument on appeal (written, oral, or both); the remedial authority of the appellate arbitrator(s); the possibility of remand of the award to the original panel or to a different panel; and the handling of costs, including the potential shifting of costs if an appeal is unsuccessful. Given the transaction

123 See id. at 277-281.
124 See, e.g., Cummings v. Future Nissan, 2005 WL 805173 (Cal. Ct. App. 3\textsuperscript{rd} Dist Apr. 8, 2005) (affirming lower court order confirming award by appellate arbitrator).
125 See COMMERCIAL ARBITRATION AT ITS BEST, supra note 61, at 299-300.
costs associated with their formulation, fully customized appellate rules are probably feasible only in exceptional cases (such as long-term relationships or large-scale business transactions). In most cases, parties will probably want to rely on existing institutional models.

12. Conduct a post-process “lessons learned” review and make appropriate adjustments.

At the conclusion of the arbitration, in-house counsel should conduct a thorough analysis of lessons learned and should make appropriate adjustments in arbitration policies, agreements, rules and management to address concerns regarding efficiency and economy.

Comments:

Self-evaluation is a fundamental strategy for every successful enterprise. Arbitration should be regarded no differently from other strategic processes. Executives and in-house counsel should review the entire proceeding and consider the financial and strategic impact of each tactical decision. These Protocols offer a road map for some key decision points to consider, while sections like Action 5 above may assist in-house counsel specifically in a frank self-evaluation. Questions that might be asked include these: Did the particular dispute resolution clause in this contract work well for us in this situation? Why or why not? Did the arbitration rules incorporated in that clause work well? Did our initial case assessment turn out to be accurate? If not, how can we improve our assessments in the future? Are we satisfied with the budget and effort level that we set for this case? Did outside counsel stick to the budget and represent us both effectively and efficiently? Was our fee arrangement with outside counsel appropriate? Did the arbitrator(s) conduct the proceeding efficiently? If not, how could it have been better conducted? Overall, was arbitration preferable to litigation in this instance?

Business users should also seek out arbitration providers who support evaluation and feedback processes through their arbitrators and rules (see Protocol for Arbitrations Providers, Actions 10 and 13).
A Protocol for Arbitration Providers

Business users rely heavily on arbitration providers for arbitration procedures, arbitrator selection and administrative services. In order to effectively promote economy and efficiency, providers need to offer users clear-cut process choices and develop and share information on their relative value and effectiveness. They also need to take measures to ensure that parties can find arbitrators with the proper case management skills and philosophy. The following specific Actions should be undertaken by providers for the purpose of achieving these goals.

1. Offer business users clear options to fit their priorities.

Instead of promoting a single "one-size-fits-all" set of procedures, institutions that provide dispute resolution services for business disputes should publish and actively promote a variety of templates, including arbitration clauses and procedures to give users real choices that fit their priorities, including time and cost savings. A provider's website should be organized in a manner that facilitates clear and easy access to different process choices, and should offer straightforward guidance (including, if possible, specific user feedback) about the benefits and costs to users of each process choice.

Comments:

Conceptually, between an arbitration model that seeks maximum expedition and economy and a model that incorporates litigation-like procedures while still preserving many of the advantages of arbitration (selection and accessibility of the decision-makers, privacy, finality, etc.) lies a broad spectrum of graduated arbitration models, each allowing a little greater process with a little less economy. To enable commercial arbitration users to choose the balance that is right for them, or even different balances for different kinds of cases, arbitration providers should offer a basic complement of dispute resolution clauses and rule sets that reflect several different points along the spectrum. Each rule set should prescribe procedures and staged timelines that permit completion of the arbitration by specified deadlines.

For example, the most economical ("fast track") model could involve a highly truncated arbitration with no discovery or motions and award issuance within 90 days of commencement (see Protocol for Arbitration Providers, Actions 5 and 8 below). Next could be a streamlined arbitration model that would offer a modicum of discovery (perhaps five document requests and four hours of depositions) but still provide for completion of the arbitration within six months. A standard arbitration model might allow somewhat more discovery and motions practice, though still far less than in litigation, and provide for completion of the arbitration in nine months (see Protocol for Business Users and In-House Counsel, Actions 2, 8, 9, and 11, and Protocol for Arbitration Providers, Actions 3, 4, 6, and 11). Finally, providers should offer a customized model, in which arbitrators would be empowered to develop, after consulting with counsel, customized procedures, perhaps litigation-like in some respects, which would nevertheless permit completion of the arbitration within one year in all but the most exceptional circumstances. Offering the arbitral counterpart of four, progressively fuller fixed-
price menus would truly provide business users with meaningful, easily implemented choices among arbitration models.

User feedback can be valuable in convincing business users and outside counsel of the viability of alternatives to traditional standard procedures. Dependable information about the application of process choices will make business users and outside counsel significantly more likely to "jump in" and take advantage of fresh options. Providers should aggressively solicit and organize feedback about specific options and their effectiveness in meeting users' priorities and standards.

See comments under Protocol for Business Users, Action 1, above. See also Actions 4, 5, 10 and 13 below for discussion of other related issues.

2. **Promote arbitration in the context of a range of process choices, including "stepped" dispute resolution processes.**

Resolving conflict through negotiation or mediation usually affords parties a superior opportunity to avoid significant cost or delay, and offers several other potential benefits, including greater control over outcome, enhanced privacy and confidentiality, preservation or improvement of business relationships, and better communications. Even if it fails to produce settlement, moreover, mediation may also "set the table" for arbitration. Therefore, provider-developed arbitration clauses and procedures should be employed within comprehensive, stepped dispute resolution provisions that begin with executive negotiation and mediation.

**Comments:**

See Protocol for Business Users, Action 1, above.

Stepped dispute resolution clauses can project a note of flexibility when a commercial agreement is created, while still assuring a binding, arbitrated resolution of any disputes that defy settlement.

One example of arbitration as part of a basic layered dispute resolution process is the following provision for arbitration as a "third layer" process following negotiation ("layer one") and mediation ("layer two"):  

C. **LAYER THREE: THE ARBITRATION STAGE (c) Arbitration.** If the mediation provided for in "b" above does not conclude with an agreement between the Parties resolving the Dispute, the Parties agree to submit the Dispute to binding arbitration under the [insert incorporated commercial arbitration procedures]. If the Parties cannot agree on an arbitrator, the person who served as mediator shall select the person to serve as arbitrator from a list compiled by the Parties or, where the Parties do not compile a list, from a list maintained by a bona fide dispute resolution service provider or private arbitrator. The arbitrator's award shall be final, binding and may be converted to a judgment by a court of competent jurisdiction upon application by either party. The arbitrator's award shall be a written, reasoned opinion (unless the reasoned opinion is waived by
the Parties). The Parties shall have ten (10) days from the termination of the mediation to appoint the arbitrator and shall complete the arbitration hearing within six (6) months from the termination of the mediation. The arbitrator shall have the authority to control and limit discovery sought by either party. The arbitrator shall have the same authority as a court of competent jurisdiction to grant equitable relief, and to issue interim measures of protection, including granting an injunction, upon the written request with notice to the other party and after opposition and opportunity to be heard. The arbitrator shall take into consideration the Parties' intent to limit the cost of and the time it takes to complete dispute resolution processes by agreeing to arbitrate any Dispute.  

An option to consider is that of an "arbitration reset button." Contained in tiered dispute resolution clause, this clause provides that if the parties' dispute is not first resolved through the prerequisite executive negotiation and/or mediation, "then, within ___ days [or immediately] following the executive discussions and/or mediation, the parties shall confer and determine whether they wish to mutually renegotiate the default arbitration provision contained herein."  

A less formal approach to the “reset button” concept may occur in the context of mediation. Where the parties are unable to reach full agreement on substantive issues, it may be possible for an experienced mediator to facilitate a new or modified agreement respecting arbitration procedures. A mediator can play an invaluable role in escorting parties into a structured and economical arbitration process. For example, a mediator can:

- Facilitate agreement on exchange of document and other information;
- Help clarify which issues have been resolved in mediation and frame issues to be resolved in arbitration;
- Encourage parties to jointly submit the one or two most significant questions of law or fact to the arbitrator for speedy resolution, and then return to mediation.
- Assist in selection of an arbitrator;
- Help the parties define or refine any provided arbitration procedures;
- Remain available during the arbitration process itself as a resource to resolve issues informally.  

3. **Develop and publish rules that provide effective ways of limiting discovery to essential information.**

Because discovery is usually the chief determinant of arbitration cost and duration, and because arbitration procedures that leave parties and arbitrators significant "wiggle room"

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129 Posting by James M. Gaitis to mediate-and-arbitrate@peach.ease.lsoft.com (May 13, 2010) (on file with author).

130 See COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 18.
often result in litigation-like discovery, provider institutions should develop and publish procedures that give business users the ability to effectively limit the scope of discovery in arbitration through their pre-dispute agreement. As a general matter, discovery should be restricted to information that is material and not merely relevant. Among the possible approaches to limiting discovery:

- limiting document production to documents or categories of documents for which there is a specific, demonstrable need; requiring parties to describe requested documents with specificity, explain their materiality, assure the tribunal they do not have the documents, and make clear why they believe the other party has possession or control of the documents;
- prohibiting requests for admission, and instead encouraging party representatives to confer regarding stipulation of facts;
- prohibiting form interrogatories and limiting the number of interrogatories;
- setting limits on the number and length of depositions, and limiting arbitrator discretion to authorize additional depositions to situations where there is a demonstrated need for the requested information, there are no other reasonable means of obtaining the information, and the request is not unduly burdensome to other parties;
- directing parties to cooperate on voluntary information exchange/discovery;
- directing arbitrators to manage discovery disputes as expeditiously as possible (e.g., by offering to resolve issues through prompt conference calls before resorting to extensive briefing and written argument);
- authorizing arbitrators to consider, when awarding fees and costs, the failure of parties to cooperate in discovery and/or to comply with arbitrator orders, thereby causing delays to the proceeding or additional costs to other parties.

Special attention should be given to detailed procedures for managing electronic records and handling electronic discovery much more efficiently than is currently done in federal and state courts. At a minimum, the description of custodians from whom electronic discovery can be collected should be narrowly tailored to include only those individuals whose electronic data may reasonably be expected to contain evidence that is material to the dispute and cannot be obtained from other sources. In addition to filtering data based on the custodian, the data should be filtered based on file type, date ranges, sender, receiver, search term or other similar parameters. Normally, disclosure should be limited to reasonably accessible active data from primary storage facilities; information from back-up tapes or back-up servers, cell phones, PDAs, voicemails and the like should only be subject to disclosure if a particularized showing of exceptional need is made.

Comments:131

In litigation, parties have broad rights to discover any evidence that may be reasonably calculated to lead to the discovery of admissible evidence without regard to whether such

131 These comments are drawn in large part from Stipanowich, Arbitration and Choice, supra note 58, 414-425.
evidence is truly material to the outcome of the case.\textsuperscript{132} This approach, coupled with lack of focus at the outset of discovery, means that "discovery costs far too much and becomes an end in itself."\textsuperscript{133} Thus, the recent \textit{Final Report on Litigation Reform} calls for dramatic overhauling of the court discovery process based on a "principle of proportionality."\textsuperscript{134}

Parties who choose to arbitrate presumably do so with the expectation of reduced discovery. As observed in the Commentary to the CPR Rules,

"[a]rbitration is not for the litigator who will 'leave no stone unturned.'" Unlimited discovery is incompatible with the goals of efficiency and economy. The Federal Rules of Civil Procedure are not applicable. Discovery should be limited to those items for which a party has a substantial, demonstrable need.\textsuperscript{135}

Yet, as discussed in Part II, discovery is now very much a part of arbitration processes.\textsuperscript{136} The rising scope and cost of discovery in arbitration have been a long time in the making, due in large part to the lack of formal guidelines. As technology, litigation intensity, and the popularity of arbitration have exacerbated the problem, the need for more comprehensive guidelines has become overwhelming. In cases of any size or complexity cogent arguments may be framed in support of document discovery and for a number of depositions. While there are those who will draw firm lines, the response will vary with the arbitrator. Arbitrators will be especially reluctant to draw lines in the face of a broad litigation-style discovery plan embraced by counsel for the parties.\textsuperscript{137} Because arbitration is first and last a consensual process, even arbitrators who suspect that business parties would have preferred a more attenuated process will tend to bow to a mutual agreement of the parties' counsel in the absence of (1) clear contractual guidance regarding the parties' intent to circumscribe discovery or (2) clear arbitral authority to modify the agreement of counsel regarding discovery. They are left with the alternative of encouraging or cajoling parties to consider more carefully tailored discovery; for

\textsuperscript{132} \textsc{The Federal Rules of Civil Procedure}, for example, state:

\begin{quote}
Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party....relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.
\end{quote}

\textsc{Fed. R. Civ. P. 26(b)(1)}.

\textsuperscript{133} \textsc{Final Report on Litigation Reform}, supra note 60, at 2.

\textsuperscript{134} \textit{Id.} at 7-16.

\textsuperscript{135} CPR Rules, \textit{supra} note 62, Commentary to CPR Rule 11.

\textsuperscript{136} It is worth noting that we have evolved from no mention of prehearing discovery in the Federal Arbitration Act, 9 U.S.C. §§1-14 (1925), and the \textsc{Uniform Arbitration Act} (1955) to highly deferential language in the \textsc{Revised Uniform Arbitration Act} (2000).

\textsuperscript{137} The CPR Commentary encourages parties' counsel "to agree, preferably before the initial pre-hearing conference, on a discovery plan and schedule and to submit the same to the Tribunal for its approval." \textit{Id.}
this purpose, some arbitrators insist that business principals be present at the pre-hearing conference to participate in the discussion on discovery.\(^{138}\)

Parties desiring explicit, non-litigation-like guidelines for information exchange and discovery in arbitration, including those who are concerned about the impact of discovery on the cost and duration of arbitration, now have a variety of templates to consider.

1. Emerging discovery templates

Organizations that publish leading arbitration procedures and other institutions have begun to develop specific provisions setting clear limits on discovery or establishing standards to guide arbitral discretion in addressing discovery disputes.

The International Bar Association (IBA) Rules on the Taking of Evidence in International Commercial Arbitration\(^ {139} \) were an early and excellent standard aimed at limiting information exchange. Though designed for international proceedings that involve parties and practitioners from civil law countries as well as sovereign states applying common law, the IBA Rules are sometimes applied by agreement in purely domestic (U.S.) arbitration. The ICDR Guidelines for Arbitrators Concerning Exchanges of Information are a more recent standard designed for international disputes.\(^ {140} \)

On the domestic scene, discovery limitations are most often built into streamlined or expedited arbitration rules like the JAMS Streamlined Arbitration Rules & Procedures.\(^ {141} \) The CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration is another effort to offer counselors and drafters clear choices regarding information exchange and discovery.\(^ {142} \) It offers parties the opportunity to select among several alternative standards regarding pre-hearing exchange of documents and witness information—some of which are useful templates.

Emerging standards may enhance the ability of arbitrators to effectively address information exchange issues by encouraging deliberate weighing of burdens and benefits. They

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\(^{138}\) Alternatively, some arbitrators require principals of the clients to sign-off on any discovery plan submitted by outside counsel.

\(^{139}\) INTERNATIONAL BAR ASSOCIATION, IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION (May, 29 2010) [hereinafter IBA Rules], available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx


\(^{141}\) JAMS STREAMLINED RULES, supra note 94, R. 13.

\(^{142}\) INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, CPR PROTOCOL ON DISCLOSURE OF DOCUMENTS AND PRESENTATION OF WITNESSES IN COMMERCIAL ARBITRATION (2008) [hereinafter CPR PROTOCOL ON DISCLOSURE] (designed in part “to afford to parties an arbitration agreement the opportunity to adopt certain modes of dealing with pre-hearing disclosures of documents and with the presentation of witnesses, pursuant to Schedules.”) available at http://www.cpradr.org/ClausesRules/CPRProtocolonDisclosure/tabid/393/Default.aspx.
may also offer arbitrators other tools, including explicit authority to condition production on the payment by the requesting party of associated reasonable costs.\textsuperscript{143}

2. Document exchange and discovery

Standard procedures often provide for some exchange of documents, at least to the extent they are non-privileged and relevant to the dispute.\textsuperscript{144} In some cases, such production is to occur within a fairly short time frame.\textsuperscript{145} Some parties, however, may want to narrow (or expand) this framework or establish more specific standards for document exchange.

A straightforward template for more limited information exchange/discovery may be found in the leading international standard on the subject, the \textit{IBA Rules on the Taking of Evidence in International Commercial Arbitration}.	extsuperscript{146} This standard, a compromise in which U.S.-style discovery is tempered by the influence of prevailing practices in civil law countries, initially requires each party only to submit "all documents available to it on which it relies."\textsuperscript{147} It also establishes a procedure for arbitral resolution of disputes over further document production that requires parties to describe requested documents with specificity, explain their relevance and materiality, assure the tribunal that they do not have the documents and make clear why they believe the other party has possession or control of the documents.\textsuperscript{148}

\textsuperscript{143} \textit{See, e.g., Id.} at § 1(e)(2). \textit{See also ICDR GUIDELINES, supra} note 140, 8.a., which provides:

In resolving any dispute about pre-hearing exchanges of information, the tribunal shall require a requesting party to justify the time and expense that its request may involve, and may condition granting such a request on the payment of part or all of the cost by the party seeking the information. The tribunal may also allocate the costs of providing information among the parties, either in an interim order or in an award.

\textsuperscript{144} \textit{See, e.g., JAMS COMPREHENSIVE RULES, supra} note 104, (providing for the parties to "cooperate in . . . the voluntary and informal exchange of all relevant, non-privileged documents, including, but without limitation, copies of all documents in their possession or control on which they rely in support of their positions.").

\textsuperscript{145} The JAMS COMPREHENSIVE RULES call for document exchange "within twenty-one (21) calendar days after all pleadings or notice of claims have been received." JAMS COMPREHENSIVE RULES, supra note 104, Rule 17(a). Under the JAMS STREAMLINED ARBITRATION RULES & PROCEDURES, this period is reduced to 14 days. \textit{See JAMS STREAMLINED RULES, supra} note 67, R. 13(a).

\textsuperscript{146} \textit{IBA Rules, supra} note 139.

\textsuperscript{147} \textit{Id., Article} 3, \textit{Section} 1.

\textsuperscript{148} The IBA Rules call for Requests to Produce to contain

(a)(i) a description of a requested document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist;

(b) a description of how the documents requested are relevant and material to the outcome of the case; and

(c) a statement that the documents requested are not in the possession, custody or control of the requesting Party, and of the reason why that Party assumes the documents requested to be in the possession, custody or control of the other Party.

\textit{Id.} at 5.
In a similar vein, the *JAMS Streamlined Arbitration Rules & Procedures* call for "voluntary and informal" exchange of all relevant, non-privileged documents and other information, but admonish parties to limit their requests to "material issues in dispute" and to make them "as narrow as reasonably possible." Depositions are not permissible "except upon a showing of exceptional need" and with arbitrator approval. Electronic data may be furnished in the form most convenient for the producing party, and broad requests for email discovery are not permitted.\(^{149}\) (The more expedited AAA *Construction Industry Fast-Track Rules*, aimed at smaller dollar claims, contemplate no discovery beyond exhibits to be used at the arbitration hearing "except . . . as ordered by the arbitrator in exceptional cases."\(^{150}\)

The *CPR Protocol on Disclosure*\(^{151}\) offers parties a choice of four discrete "modes" for document disclosure. These include: Mode A (No disclosure save for documents to be presented at the hearing); Mode B (Disclosure as provided for in Mode A together with "[p]re-hearing production only of documents essential to a matter of import in the proceeding for which a party has demonstrated a substantial need"); Mode C (Disclosure provided for in Mode B together with disclosure, prior to the hearing, "of documents relating to issues in the case that are in the possession of persons who are noticed as witnesses by the party requested to provide disclosure"); and Mode D (Pre-hearing disclosure of documents regarding non-privileged matters that are relevant to any party's claim or defense, subject to limitations of reasonableness, duplication and undue burden).\(^{152}\) Some arbitrators limit each party to a certain number of document requests, including subparts.\(^{153}\)

### 3. Limits on depositions

In the interest of economy or certainty, some parties may want to provide that no depositions, or a specific, limited number of depositions, will be conducted in their

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The IBA *Rules* appear to have influenced the recent ICDR *Guidelines for Arbitrators Concerning Exchanges of Information*, which empower the arbitrators,

> upon application, [to] require one party to make available to another party documents in the party's possession, not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case. Request for documents shall contain a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case.

ICDR *Guidelines*, *supra* note 140, Guideline 3(a).

\(^{149}\) *Compare JAMS Streamlined Rules*, *supra* note 94, with CPR *Expedited Arbitration*, *supra* note 65.

\(^{150}\) *See AAA Construction Industry Fast Track Rule*, *supra* note 64, F-9.


\(^{152}\) *Id.*, Schedule 1.

A variant of this approach, used by some arbitrators, is to provide each party with a maximum number of hours for deposing persons within the other party’s employ or control. Such limitations may be tempered by giving arbitrators discretion to allow additional depositions in exceptional circumstances where justice requires. A useful example of a clear limit coupled with narrowly cabined arbitrator discretion is contained in Rule 17 of the JAMS Comprehensive Arbitration Rules, which permits each party to take a single deposition; [t]he necessity of additional depositions is to be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing parties and the witness.

Another proposed response to the burgeoning discovery problem is the adoption of the international arbitration practice of substituting detailed sworn witness statements for direct examination. Such statements, provided to all participants in advance of the hearing, might provide a rough surrogate for depositions and save hearing time. Adjustments to the international practice, such as abbreviated direct examination, might be necessary to provide comfort to American lawyers and arbitrators. The new draft CPR Protocol on Disclosure offers parties the choice of embracing such an approach in their arbitration agreement, possibly in lieu of depositions.

4. Guiding and empowering arbitrators.

Another approach to controlling discovery hinges on and provides a useful framework for the “good judgment of the arbitrator.” A set of guidelines for arbitrator-supervised discovery developed by the New York State Bar Association (and subsequently adopted in summary form by JAMS) offers tools for arbitrators to manage discovery and other procedural aspects of arbitration. Such guidelines operate on the presumption that parties have not yet established strict guidelines for discovery, and therefore depend upon the arbitrator(s) to control discovery by giving early and active attention to the process, using persuasion and other methods to achieve results appropriate to the specific circumstances and the parties’ indicated preferences (see Protocol for Arbitrators, Action 6).

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154 The ICDR GUIDELINES note that “[d]epositions, . . . as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration.” ICDR GUIDELINES, supra note 140, 6.b.

155 See supra note 94 (discussing discretionary authority of arbitrator under JAMS STREAMLINED RULES).

156 JAMS COMPREHENSIVE RULES, supra note 104, Rule 17(b).

157 The witness statement concept is embodied in the IBA Rules. IBA RULES, supra note 139. Article 4, Sections 4-9.

158 CPR PROTOCOL ON DISCLOSURE, supra note 142, at 2-3, 5, 8-9.

Should arbitrators or counsel have the last word on the scope of discovery? In this respect, expert opinion and current standards vary, although under most standards arbitrators must respect and adhere to party agreements regarding discovery. The AAA Rules for Large, Complex Cases authorize the arbitrator(s) to override party agreements and "place such limitations on the conduct of such [agreed] discovery as the arbitrator(s) shall deem appropriate." However, the JAMS Arbitration Discovery Protocol recognizes that, while party agreements regarding the scope of discovery should be respected by arbitrators, "[w]here one side wants broad arbitration discovery and the other wants narrow discovery, the arbitrator will set meaningful limitations."

Since parties can always amend their arbitration agreements (even, in most jurisdictions, by amending the provision of the agreement that says it may only be amended by a writing signed by the CEOs of both companies), any provision giving the arbitrator the last word on discovery (or anything else) could theoretically be rescinded by a subsequent agreement of the parties. If that happens, the arbitrators should convene a meeting with

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160 **AAA Commercial Arbitration Rules and Mediation Procedures** (2009) [hereinafter AAA Commercial Rules], L-4(c). An even stronger statement of the "final authority" of arbitrators regarding discovery is set forth in the **ICDR Guidelines**:

1. a. The tribunal shall manage the exchange of information among the parties in advance of the hearings with a view to maintaining efficiency and economy. The tribunal and the parties should endeavor to avoid unnecessary delay and expense while at the same time balancing the goals of avoiding surprise, promoting equality of treatment, and safeguarding each party's opportunity to present its claims and defenses fairly.

   b. The parties may provide the tribunal with their views on the appropriate level of information exchange for each case, but the tribunal retains final authority to apply the above standard. To the extent the Parties wish to depart from this standard, they may do so only on the basis of an express agreement in writing and in consultation with the tribunal. (Emphasis added.)

ICDR Guidelines, *supra* note 140, 1.a-b.

161 The JAMS Comprehensive Rules grant each party one deposition as of right, and call for "the necessity of additional depositions . . . [to] be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness." JAMS Comprehensive Rules, *supra* note 104, Rule 17(b). The JAMS Comprehensive Rules do not give any indication about what happens when the parties have agreed to multiple depositions.

While empowering the Tribunal to "require and facilitate such discovery as it shall determine is appropriate" taking into account parties' needs, expeditiousness and cost-effectiveness, the CPR Rules also do not address the impact of mutual agreement on discovery issues by the parties. CPR Rules, *supra* note 62, Rule 11. However, the CPR Protocol on Disclosure appears to anticipate that "[w]here the parties have agreed on discovery depositions, the Tribunal should exercise its authority to scrutinize and regulate the process . . . [and possibly impose] strict limits on the length and number of depositions consistent with the demonstrated needs of the parties." CPR Protocol on Disclosure, *supra* note 142, at 5.

principals present and make sure that they (not just their counsel) want to override the "last word" provision so that outside counsel may engage in much more extensive (and costly) discovery than the arbitrator considers warranted.

5. E-discovery

Particularly troublesome has been the area of electronic discovery. As one leading participant in the development of guidelines for the management and discovery of electronic information explains,

If the law of e-discovery were allowed to develop on an ad hoc basis, one decision at a time, companies with their complex information technology systems would be eaten alive by process costs. It is essential to develop best practices that work in a real world.163

The challenge for arbitrators and arbitration providers is to address these same concerns effectively, but in the context of a highly discretionary system without uniform rules or precedents that is conventionally aimed at efficiency and expedition in conflict resolution.164 Issues include the essential scope of and limits on e-discovery, and the weighing of burdens and benefits;165 the handling of the costs of retrieval and review for privilege;166 the duty to preserve electronic information, spoliation issues and related sanctions.167

Will it be possible for arbitrators to effectively meet the challenges of e-discovery in an efficient and relatively economical manner? The answer will depend in part on the effectiveness of choices made by counselors and drafters. But they cannot make good choices when good choices are not drafted and promoted by arbitration providers.

Arbitral institutions are in a unique position to assume more responsibility for providing this critical guidance. Concerns regarding the relative burdens associated with e-discovery may lead parties to consider adopting language similar to that contained in the ICDR Guidelines


165 See generally The Sedona Guidelines, supra note 163.

166 For a discussion of these and other issues, see John B. Tieder, Electronic Discovery and its Implications for International Arbitration; (unpublished article, on file with Watt, Tieder, Hoffar & Fitzgerald, LLP); Jessica L. Repa, Adjudicating Beyond the Scope of Ordinary Business: Why the Inaccessibility Test in Zubulake Unduly Stifles Cost-Shifting During Electronic Discovery, Comment, 54 AM. U. L. REV. 257 (Oct. 2004); Warshauer, supra note 164, at 11 (discussing the development of "claw-back" agreements, which permit a party to produce all of its relevant documents for review without waiving privilege).

167 Warshauer, supra note 164, at 12-15.
which permit a party to make documents maintained in electronic form "available in the form . . . most convenient and economical for it, unless the Tribunal determines, on application . . . that there is a compelling need for access to the documents in a different form." 168 Moreover, requests for such documents "should be narrowly focused and structured to make searching for them as economical as possible." The Guidelines conclude by permitting arbitrators to engage in "direct testing or other means of focusing and limiting any search."169 The use of "test batch production"—such as pilot tests using key search words on a limited scale—is emerging as a critical way of identifying areas that require special attention in advance of major production.

Parties may be able to avoid many of the costs—if not all the risks—of the revelation of privileged material in electronic data by agreeing to have the arbitrators issue a pre-arbitral order relieving the parties of the obligation to conduct a pre-production privilege review of all electronic documents and ordering that the attorney-client and work product privileges are not waived by production of documents that have not been reviewed.170 Parties may also wish to consider identifying likely informational needs and agreeing on what information needs to be preserved, in what format, and for how long.171

A prototypical, multi-faceted template addressing various aspects of pre-hearing disclosure of electronic information is contained in the CPR Protocol on Disclosure.172 That Protocol presents parties with four discrete alternatives regarding pre-hearing disclosure of electronic documents. The alternatives range from no-pre-hearing disclosure, except with respect to copies of printouts of electronic documents to be presented in the hearing, to full disclosures "as required/permited under the Federal Rules of Civil Procedure." The intermediate options permit parties to limit production to documents maintained by a specific number of designated custodians, to limit the time period for which documents will be produced, to identify the sources (primary storage, back-up servers, back-up tapes, cell phones, voicemails, etc.) from which production will be made, and to determine whether or not information may be obtained by forensic means.173

168 ICDR GUIDELINES, supra note 140, Section 4.
169 Id.
170 Warshauer, supra note 164, at 11.
172 See Newman & Zaslowsky, supra note 81.
173 See CPR PROTOCOL ON DISCLOSURE, supra note 142, Schedule B, Modes B, C. The Protocol also offers a set of General Principles which may be adopted by themselves or in tandem with a particular "mode" for pre-hearing disclosure of electronic documents. It provides:

In making rulings on pre-hearing disclosure, the tribunal should bear in mind the high cost and burden associated with requests for the production of electronic information. It should be recognized that e-mail and other electronically created documents found in the active or archived files of key witnesses or in shared drives used in connection with the matter at issue are more readily accessible and less burdensome to produce when sought pursuant to reasonably specific requests. Production of electronic materials from a wide range of users or custodians tends to be costly and burdensome and should not be permitted without a showing of
6. Other considerations

Depending on the circumstances, parties may consider it appropriate to include other provisions, such as a term giving arbitrators explicit authority to weigh the burdens and benefits of a discovery request, or the ability to condition disclosure on the requesting party paying reasonable costs of production.\footnote{See supra note 89.} It may serve efficiency to provide that the chair of the tribunal serve as discovery master; in cases in which confidentiality of sensitive information is of prime concern, there might be a provision for the use of a special master to supervise certain aspects of discovery.\footnote{See JAMS COMPREHENSIVE RULES, supra note 104, Rule 17(b).}

4. Offer rules that set presumptive deadlines for each phase of the arbitration; train arbitrators in the importance of enforcing stipulated deadlines.

In the interest of economy and efficiency, providers should ensure that parties have the opportunity to adopt arbitration procedures that include a presumptive deadline for completion of arbitration. The procedures should facilitate compliance with the final deadline through the inclusion of presumptive time limits for each phase of the arbitration, and by giving arbitrators explicit authority to employ procedures and set deadlines appropriate to the goal of meeting the overall deadline. Providers should also ensure that their training programs offer arbitrators instruction in the importance of adhering to stipulated timetables or deadlines for arbitration except in circumstances clearly beyond the contemplation of the parties when the time limits were established (see Protocol for Arbitrators, Action 3).

Comments:

See comments under Protocol for Business Users, Action 3.

5. Publish and promote "fast-track" arbitration rules.

Providers should offer a variety of procedural choices with varying degrees of emphasis on expedition and economy, including at least one set of procedures that place heavy emphasis on those goals (see Protocol for Business Users and In-House Counsel, Action 4). A "fast-track" approach may feature some or all of the following:

- relatively short presumptive deadlines;
- limits on the number of arbitrators;

extraordinary need. Requests for back-up tapes, deleted files and metadata should only be granted if the requesting party can demonstrate a reasonable likelihood that files were deliberately destroyed or altered by a party in anticipation of litigation or arbitration and outside of that party's usual and customary document-retention policies.

\textit{Id.}, Section 4(a).
• expedited arbitrator appointment procedure;
• early disclosure of information;
• heavily curtailed discovery and motion practice;
• limits on the length and form of the award.

If fast-track procedures are published separately from a provider's standard procedures, the provider should take measures to ensure that users are equally aware of the fast-track option and are provided with user-friendly guidance on how and when to employ the fast track procedures.

Comments:
See comments under Protocol for Business Users, Action 3.

6. **Develop procedures that promote restrained, effective motion practice.**

Properly employed, motions to narrow or dispose of claims or defenses can promote efficiency and economy in arbitration. Presently, however, there are two major concerns about motion practice in arbitration: (a) the reflexive use of motion practice in arbitration by some litigation attorneys, and (b) the reflexive denial of motions by arbitrators pending a full-blown hearing on the merits of the entire case. Providers should attempt to address these concerns by publishing guidelines for effective and efficient resolution of motions, particularly dispositive motions. This might involve a simple method for screening motions at the outset, including factors to be considered by arbitrators in deciding whether to entertain a motion. In the interest of time- and cost-saving, would-be movants might be required to set up a conference call with the arbitrator(s) and opposing counsel to discuss the issue before filing any motion (see Protocol for Business Users, Action 9; Protocol for Arbitrators, Action 7).

Comments:

7. **Require arbitrators to have training in process management skills and commitment to cost- and time-saving.**

Provider institutions should conduct training in managing hearings fairly but expeditiously, with particular emphasis on ways of reducing cost and promoting efficiency, and should require arbitrators to complete such training before being included on the provider's roster, and to update their knowledge and skills annually. Providers should also consider requiring arbitrators to make a pledge to actively seek ways to promote cost- and time-saving in a manner consistent with the agreement of the parties and fundamental fairness (see Protocol for Arbitrators, Action 1).
Comments:

Arbitrators need to anticipate that their predominant challenges are more likely to be encountered during the period prior to hearings. Of increasing importance is the critical role of the pre-hearing conference in establishing discovery and motion practice guidelines for the rest of the arbitration process. Arbitrators must be equipped with process management skills not only for the hearing itself, but for the pre-hearing period.

Among the many steps that skilled arbitrators may take during pre-hearing case management are the following: promoting dialogue between parties; addressing jurisdictional issues; developing a timetable and management plan; addressing requests for interim relief; facilitating information exchange and discovery; addressing dispositive motions; planning the hearings; planning the form of the final award; administrative details like rules, locations, fees, confidentiality, and communication methods.176

An arbitrator with a proper skill set will approach the pre-hearing proceedings as aggressively and deliberately as the hearings themselves, increasing the likelihood not only of achieving resolution of the matter before the hearing begins, but of ensuring a hearing that has set and met parties' expectations for efficiency.

8. Offer users a rule option that requires fact pleadings and early disclosure of documents and witnesses.

Providers' should afford users the option of adopting rules that require fact pleading rather than notice pleading in both demands and answers, and require that claimants and respondents serve with their initial pleadings a detailed statement of all facts to be proven, all legal authorities relied upon, copies of all documents supporting each claim or defense, as well as a list of witnesses they expect to call. Such rules should require that parties supplement their documents and witness lists periodically prior to the hearing.

Comments:

See Protocol for Business Users, Action 8, and the related entry in Appendix A.


Arbitration procedures should require that all pleadings, motions, orders and other documents filed in the arbitration be served electronically on each arbitrator and each parties' counsel except where that method of service is impractical (as with documents of too great a length to be conveyed electronically) or where other special considerations require another method.

Comments:

A number of providers and services have begun providing for electronic service of arbitration-related documents. See Appendix A for examples.

176 COMMERCIAL ARBITRATION AT ITS BEST, supra note 61, Ch. 4.
10. Obtain and make available information on arbitrator effectiveness.

Providers should conduct a post-arbitration telephone interview with arbitrating parties and counsel to obtain information on arbitrator effectiveness in managing arbitration fairly and expeditiously. Such information should periodically be furnished to arbitrators in a way that precludes their identifying the sources of the comments. Such information should also be made available in summary form (and without attribution) to parties and counsel selecting arbitrators. Providers should remove from their rosters those arbitrators who prove incapable of efficiently managing business arbitrations (see Protocol for Business Users, Action 7).

Comments:

Perhaps more commonly associated with other dispute resolutions processes, evaluation of neutrals should be a core service offered by arbitration providers. As standards evolve, arbitrators must continue to be held accountable for their knowledge and skill levels. Care should be taken to focus evaluations on objective measures of arbitrators’ management skills and knowledge levels and to make effective use of timing and language to prevent evaluations from being colored by arbitration outcomes.177

11. Provide for expedited appointment of arbitrators.

Provider rules should expedite the selection of the tribunal by providing that, if all arbitrators have not been appointed within a specific time (say, thirty days from the filing of the arbitration demand), the provider will appoint the arbitrators. The rules should also impose stringent time limits for all communications by parties and by prospective arbitrators that are required as a part of the appointment process.

Comments:

Arbitrations can be greatly delayed when the appointment of arbitrators drags on for many weeks or even months. While arbitrator selection is certainly an important step in the arbitration process, it is one that can be accomplished expeditiously by diligent counsel, particularly when the rules furnish the strong incentive of divesting foot-dragging parties of the right to select their arbitrators.

See below for examples of expedited procedures for appointment of arbitrators.

- American Arbitration Association, AAA Commercial Arbitration Rules and Mediation Procedures, Section E: Expedited Procedures R. 4 (June 1, 2009), available at http://www.adr.org/sp.asp?id=22440. (“If the parties are unable to agree... each party may strike two names from the list [of arbitrators] and return it to the AAA within seven days

177 Cf. Donald P. Crane & John B. Miner, Labor Arbitrators’ Performance: Views from Union and Management Perspectives, 9 J. Lab. Res. 1 (Mar. 1988) (discussing a study of performance evaluations of labor arbitrators by union representatives and management representatives that found the arbitrators’ awards to so color the evaluation results that the results were either unrelated or negatively related).
from the date of the AAA's mailing... If the appointment... cannot be made from the list, the AAA may make the appointment...

- AMERICAN ARBITRATION ASSOCIATION, SECURITIES ARBITRATION SUPPLEMENTARY PROCEDURES R. 3(a) (June 1, 2009), available at http://www.adr.org/sp.asp?id=22009 ("The list [of proposed arbitrators] must be returned to the AAA within 10 days from the date of the AAA's transmittal to the parties. If for any reason the appointment of an arbitrator cannot be made from the list, the AAA may make the appointment . . . ").

- ADR CHAMBERS, EXPEDITED ARBITRATION RULES R. 5 (2010), available at http://adrchambers.com/ca/expedited-arbitration/expedited-arbitration-rules/ ("If ADR Chambers is not notified of the selection of an arbitrator... within 5 business days after the Response has been delivered . . . ADR Chambers will select the arbitrator . . . ").

- AMERICAN DISPUTE RESOLUTION CENTER, INC., RULES OF EXPEDITED CONSTRUCTION ARBITRATION R. E-4 (Sept. 11, 2009), available at http://www.adrcenter.net/pdf/Construction/ExpRules.pdf ("The parties must return their selections to ADR Center within ten calendar days. If ADR Center is unable to appoint the arbitrator from the parties' selections, the Case Manager will appoint the arbitrator.").

12. Require arbitrators to confirm availability.

Providers should require arbitrators being considered for appointment in expedited proceedings to expressly confirm their availability to both manage and hear the case within a specific number of days prior to being confirmed.

Comments:

Per the 2009 International Arbitration Report, the ICC Court now requires arbitrators agreeing to serve in ICC arbitrations to disclose details regarding their availability.178

Similarly, the CPR Expedited Arbitration Rules provide:

Any arbitrator appointed by the parties or by the CPR Institute shall accept appointment by expressly representing to the CPR Institute within 2 days of appointment that he or she has the time available to devote to the expeditious process and time periods for Pre-hearing Conference, discovery, hearing and award contemplated by these Rules and to facilitate the expedition contemplated in these Rules.179

Obviously, most arbitrators understand the concept of scheduling, but requiring explicit affirmation of availability is intended to serve as reminder to all arbitrators of the importance of avoiding unnecessary delay throughout the entire process. In fact, with the advent of


179 CPR EXPEDITED ARBITRATION RULES, supra note 65, Rule 7.2.
electronic calendars, the day is not far off when parties will be able to view prospective arbitrators’ calendars to determine for themselves if candidates have sufficient time available in the relevant time frame.

13. **Afford business users an effective mechanism for raising and addressing concerns about arbitrator case management.**

Providers that offer administrative services, including arbitrator appointment services, should offer users a meaningful mechanism (such as a designated ombud) for addressing party concerns and complaints regarding the arbitrators or the arbitration process. Among other things, the individual/office would be authorized to explore opportunities for addressing concerns about process speed and cost.

Comments:

Identifying and resolving issues with arbitrator case management while still mid-process has a number of advantages, including preserving efficiency; identifying long-term issues with procedures or arbitrators while the matter is still fresh; and increasing party satisfaction with outcomes.

Conflict resolution studies have shown that outcome satisfaction is generally improved by the opportunity to provide feedback during the proceedings. "Increasing shared information is a basic strategy in ameliorating all conflicts. Consultation and feedback mechanisms between parties provide a consistent and reliable method of sharing information." 180

14. **Offer process orientation for inexperienced users.**

Providers should make available to business parties and to counsel online or in-person orientation programs that summarize and illustrate (a) the principal differences between arbitration and litigation and (b) how to use arbitration to accomplish the parties' goals of fair, economical and efficient resolution of disputes.

Comments:

Properly educated parties are far more likely to accept efficient process options, establish a constructive tone, set aside courtroom-style tactics in favor of flexibility, and reach an outcome without being frustrated by preconceptions regarding arbitration.

Note that—as discussed under Action 1—user feedback can be an effective way to "sell" a process to parties unfamiliar with the distinctions between arbitration and litigation. 181

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A Protocol for Outside Counsel

Business users depend on outside counsel to promote their business interests, which often include economy and efficiency, in arbitration. Outside counsel should be careful to clarify their client's goals and expectations for resolving disputes, and should approach arbitration in a manner that reflects these expectations and exploits the differences between arbitration and litigation. The following Actions are offered as specific guidance to Outside Counsel for this purpose.

1. Be sure you can pursue the client's goals expeditiously.

Outside counsel should only accept an advocacy role in arbitration when they have determined what the client's goals are in the particular case and are sure they have the knowledge, experience, and availability to pursue those goals effectively, efficiently and expeditiously. They should be familiar with the arbitration rules and provider involved in the particular case and should have in-depth knowledge of ways to save time and money in arbitration without compromising either the fairness of the process or the soundness of the result. They should also be certain that they or a partner have the negotiation and mediation skills that may be required at various stages of the arbitration.

Comments:

Rules of professional responsibility in nearly all jurisdictions make it unethical for attorneys to accept an engagement which they are not competent to perform. While that provision has generally been thought to require knowledge and experience in the type of substantive work the attorney is being asked to carry out, the recent client focus on reducing excessive cost and delay in commercial arbitration suggests that the ethical obligation may well extend to knowledge of how to conduct an arbitration efficiently and expeditiously. Arbitration is quite different from litigation in many respects, and techniques that work well in one process may be ineffective, even harmful in the other. Counsel who agree to represent parties in commercial arbitrations need to have a solid understanding of the arbitration rules that will apply, the practices of the provider that is administering the arbitration, and the growing body of state and federal arbitration law. They should know how to navigate the arbitration process in an economical yet effective way. Since arbitrations frequently require or precipitate negotiations and/or mediation between the parties, whoever will serve as lead counsel at the arbitration hearing should be certain that he or she or a partner has the skill needed to effectively conduct such adjunct activities.

2. **Memorialize early assessment and client understandings.**

Outside counsel should provide the client at the outset with a careful early assessment of the case, including a realistic estimate of the time and cost involved in arbitrating the matter at various levels of depth and detail. Counsel should reach an understanding with the client concerning the approach to be followed, the extent and nature of any discovery to be initiated, the possibility and desirability of a negotiated settlement, the desired overall timetable for arbitration, and the resources the client is prepared to devote to the matter. Counsel should memorialize those understandings in writing and should adhere to the client's expectations and budget. Counsel should periodically review these understandings with the client and should memorialize any significant changes in the client’s instructions (see *Protocol for Business Users and In-House Counsel*, Actions 5, 6).

**Comments:**

Studies show that many disputes arise between clients and counsel because of a failure to reach, at the outset of the engagement, a clear understanding of what counsel is expected to do (and not do) and what that work will likely cost the client.\(^{183}\) The potential for such problems are clearly present in engagements, like arbitration and litigation, where the lawyer's work may be quite intensive and extend over a period of many weeks. It is essential that outside counsel should make an early and realistic assessment of the case, including the cost and time which various alternative approaches to the arbitration may involve. Ultimately it is up to the client to determine, as a matter of business priorities, what amount of time and money it is willing to devote to the case. Once that decision is made, outside counsel should memorialize it in writing, along with other important client instructions, and should revisit the matter periodically and note any changes that may have occurred in the client's expectations.

3. **Select arbitrators with proven management ability. Be forthright with the arbitrators regarding your expectations of a speedy and efficient proceeding.**

Outside counsel should help their client select arbitrators with the experience, knowledge and capabilities that are likely to further the client’s business goals, including expectations as to cost and time. Counsel should do a thorough "due diligence" of all potential arbitrators under consideration and should, consistent with the Code of Ethics for Arbitrators in Commercial Disputes, interview them concerning their experience, case management practices, availability and amenability to compensation arrangements that would incentivize them to conduct the arbitration efficiently and expeditiously.

Parties desiring speed and economy in the arbitration process should be forthright in conveying their expectations to the arbitrators regarding the duration of the proceedings, beginning at the time candidates for appointment as arbitrator are identified. These expectations can be set down in writing at the beginning of the arbitration process and, even

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if unilateral and non-binding, may have an impact on scheduling and management decisions made by the arbitrators during the proceedings (see Protocol for Arbitrators, Action 3).

Comments:

One of the most important functions of outside arbitration counsel is selecting, in consultation with in-house counsel, the arbitrator(s) for the case. In addition to the traditional considerations such as intelligence, integrity, familiarity with the subject matter, and availability, outside counsel these days also need to determine whether the arbitrator candidates have the knowledge, skill and temperament to manage the arbitration efficiently. Much can be learned on this score by talking with lawyers who have participated in other cases the candidates have arbitrated and by interviewing the candidates concerning the procedures and practices they follow in conducting arbitrations. Counsel should advise the candidates of their client’s expectations concerning the cost and length of the arbitration proceedings and should determine whether the candidates are able and willing to meet those expectations. It is not inappropriate to ask prospective arbitrators, through the case manager, about their availability to conduct the hearing during a specific time frame. Counsel may also wish to explore with the candidates alternative billing arrangements that may encourage them to manage the arbitration efficiently.

4. Cooperate with opposing counsel on procedural matters.

If saving time and money is an important client goal in the arbitration, counsel should make clear to the client that the fullest benefits of time- and cost-saving (i.e., those concerning procedures for preparing for and conducting the hearing) can ordinarily only be achieved when opposing counsel cooperate fully and freely with each other and with the arbitrator to achieve those benefits. Counsel should obtain the client’s consent to such cooperation and should pursue that approach regarding all procedural and process issues in the arbitration. Counsel should meet and confer early with opposing counsel in order to foster a cordial and professional working relationship and to reach as many agreements as possible concerning matters that will be taken up at the Preliminary Conference and should continue to meet and confer regularly thereafter (see Protocol for Arbitrators, Actions 2, 3, 4).

Comments:

Psychologists tell us that, when people have a dispute, there is a natural tendency ("reactive devaluation") to view with suspicion anything proposed by the other side. This phenomenon, coupled with the hostility often accompanying commercial conflict and the ego satisfaction of trouncing one’s opponent, frequently impels counsel in arbitration and litigation

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184 Canon III of the ABA/AAA CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (2004) provides that a prospective arbitrator may respond to party inquiries designed to determine his or her suitability and availability for the appointment but may not engage in ex parte communications concerning the merits of the case.

185 This procedure is already offered, for example, by CPR Institute’s Director of Dispute Resolution Services.

to fight with their opposite number on every substantive and procedural aspect of the case. The most sophisticated outside counsel realize, however, that zealous advocacy on the merits does not preclude cooperation on procedure, which is typically in the best interest of both parties, especially if they wish to reduce cost and delay. Arbitration being entirely a creature of party agreement, arbitrators normally solicit agreement on procedural matters more aggressively than judges and will not take kindly to counsel who refuse to agree to sensible process arrangements. In most cases, if counsel pursue a professional and cooperative relationship with each other concerning the scope of discovery and motions, the length and location of the hearing, stipulations on facts not genuinely in dispute, and similar matters, it is possible to achieve substantial savings of time and money without compromising the client’s substantive position. If in-house counsel is inexperienced in arbitration, it may be necessary for outside counsel to explain why such cooperation is beneficial for the client and secure the client's consent to such an approach.

5. Seek to limit discovery in a manner consistent with client goals.

Make clients aware that ordinarily discovery in arbitration will be much more limited than in litigation, even in the absence of clear rules and guidelines, and cooperate with opposing counsel and the arbitrator in looking for appropriate ways to limit or streamline discovery in a manner consistent with the stated goals of the client (see Protocol for Arbitrators, Action 6).

Comments:

Discovery is far and away the greatest driver of cost and delay in litigation and in arbitration. In the Protocol for Arbitration Providers, Action 3 and the accompanying commentary discuss thoroughly the opportunities and resources available to in-house and outside counsel to greatly reduce discovery in arbitration, thus capitalizing on one of its principal advantages over litigation. Outside counsel have an obligation to make sure the client understands the limitations inherent in arbitration discovery, to assess how much (if any) discovery is truly needed in the case, and to ascertain how much time and money the client is willing to expend in turning over stones. Once that assessment is made, outside counsel should cooperate with opposing counsel and the arbitrator in establishing discovery limitations that match the client’s goals.

6. Periodically discuss settlement opportunities with your client.

During the arbitration, counsel should periodically discuss with their client the possible advantages of settlement and opportunities that may arise for pursuing settlement. Unless the case has been thoroughly mediated already, counsel should ask the client to consider the possibility of mediating with an experienced mediator (who is not one of the arbitrators) at an appropriate stage in the arbitration, before substantial sums are spent on preparing for and conducting the hearing.
Comments:

In arbitration as in litigation, a reasonable settlement that avoids risk and heavy transaction costs is often in a client’s best interest. Some clients seem to think that settlement may be pursued before arbitration but not once the arbitration has begun. In fact, propitious opportunities for settlement often appear at multiple points during arbitration, including during discussions with opposing counsel in preparation for the preliminary conference, after briefing or rulings on significant threshold matters, on completion of all or particular discovery, after submission of dispositive motions, during the hearing, and after submissions of post-hearing briefs. At all of these stages, outside counsel should re-evaluate their initial case assessment and discuss with the client the pros and cons of pursuing settlement. If a professionally conducted mediation did not precede the arbitration (and sometimes even if it did), counsel should raise with the client the possibility of a thorough mediation with a neutral not involved in the arbitration. In major cases, some experienced outside counsel like to establish two parallel tracks toward resolution, namely, the arbitration conducted by arbitration counsel and a separate, ongoing mediation dialogue conducted by separate counsel who are particularly skilled in the quite different mediation process.

7. **Offer clients alternative billing models.**

Counsel should offer clients professional service models other than an hourly fee basis, including models that provide incentives for reducing cycle time or the net costs of dispute resolution (see *Protocol for Business Users*, Action 6).

Comments:

In-house counsel are increasingly demanding that outside counsel offer alternatives to hourly billing. Arrangements such as a fixed fee for the entire arbitration or a reduced hourly rate coupled with a "success bonus" of some sort may reduce the client's transaction costs and incentivize economy and efficiency by outside counsel.187

8. **Recognize and exploit the differences between arbitration and litigation.**

Counsel should recognize the many differences between litigation and arbitration, including the absence of a jury on whom rhetorical displays and showboating may have some effect. Arbitrators are generally experienced and sophisticated professionals with whom posturing and grandstanding are almost always inappropriate, counter-productive, and wasteful of the client's time, money and credibility with the arbitrators. Counsel should keep in mind that dispositive motions are rarely granted in arbitration, and should employ such motions only where there will be a clear net benefit in terms of time and cost savings. Counsel should be aware that arbitrators tend to employ more relaxed evidentiary standards, and should therefore avoid littering the record with repeated objections to form and hearsay. An

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187 Ian Meredith & Sarah Aspinall, *Do Alternative Fee Arrangements Have a Place in International Arbitration?*, 72 ARBITRATION 22, 22-26 (2006).
advocate who objects at every turn is likely to try the patience of a tribunal and undermine his or her own credibility (see Protocol for Arbitrators, Actions 6, 7, 9).

Comments:

Veteran actors know that the gestures and speech patterns that work well on the stage are often ineffective, even annoying in the much different milieu of cinema or television. Arbitration is a much different milieu from litigation and requires similar adjustments in technique. Outside counsel who are serious about reducing cost and delay in arbitration must be thoroughly familiar with those differences, some obvious, some subtle, and adapt their strategy and style in ways that capitalize on arbitration's flexible, streamlined, more intimate character.

9. **Keep the arbitrators informed and enlist their help promptly; rely on the chair as much as possible.**

Counsel should work with opposing counsel to keep the arbitrators informed of developments in the interval between the preliminary conference and the hearing so that the arbitrators may assist in resolving potential problems and avoid inefficiencies and unnecessary expenditures of time at the hearing. If it becomes apparent during the pre-hearing phase that one or more significant pre-hearing issues cannot be resolved by agreement of the parties, counsel should not delay in putting the arbitrators to work. Failure to do so could result in the need to postpone the hearing, thus generating avoidable delay and unnecessary costs. Agreeing to have the chair of a three-arbitrator tribunal resolve discovery, scheduling, and other procedural orders will generally produce significant savings of time and money without impairing any party's substantive rights (see Protocol for Business Users, Action 10; Protocol for Arbitrators, Action 8).

Comments:

Counsel who are primarily litigators and accustomed to dealing with overloaded, somewhat inaccessible judges often fail to take advantage of one of the key benefits of arbitration, namely, readily available decision-makers. Arbitrators who are good case managers know that festering, unresolved issues can seriously derail the best of schedules and thus welcome the opportunity to promptly break any logjams that counsel cannot quickly clear. Outside counsel should not be shy in seeking arbitrator assistance whenever good faith cooperation fails to resolve any process impediments. Many such obstacles can be removed in a short conference call with a sole arbitrator or tribunal chair, without necessity of any written submissions that drive up costs. The flexibility, informality and economy potential of arbitration can only be fully realized if counsel share responsibility with the arbitrators for moving the case along at a brisk pace.

10. **Help your client make appropriate changes based on lessons learned.**

Once arbitration is completed, counsel should conduct an evaluation of the entire process with the client and attorneys involved in the representation. Counsel should memorialize
lessons learned and make appropriate changes to dispute resolution provisions, firm arbitration training, and firm procedures and policies (see Protocol for Business Users, Action 12).

Comments:

Action 12 of the Protocol for Business Users and In-House Counsel describes the sort of post-arbitration evaluation that should be conducted by in-house counsel in every case. Outside counsel should be part of that evaluation. In addition, however, outside counsel should conduct their own internal assessment of how they performed in the subject engagement. Did they make an accurate initial assessment of the case? Did they establish with the client a clear understanding of the client's goals and the way in which counsel would pursue them, including the cost and length of the arbitration? Did they take advantage of all opportunities presented for reducing transaction time and costs? What could they have done better? Only by answering questions of this kind will outside counsel be equipped to make necessary changes in their retainer agreements and billing models, training programs, and arbitration procedures and strategy.

11. Work with providers to improve arbitration processes.

Outside counsel should work with arbitration providers to create more effective choices for business arbitration through the development of new alternative process techniques, rules and clauses.

Comments:

Insights gained by outside counsel during arbitration and through post-arbitration evaluations can be very helpful to providers in improving their clauses, rules and administrative procedures. Outside counsel should freely share such insights with providers to the extent that is consistent with the client's business goals and any confidentiality provisions in the subject arbitration.

12. Encourage better arbitration education and training.

Outside counsel should help improve laws governing dispute resolution, including arbitration, and should encourage more effective legal, business and judicial education regarding arbitration and other forms of dispute resolution.

Comments:

Through their affiliations with law schools, bar associations, other professional organizations, and various local and national civic groups, outside counsel are often in a position to affect education and legislation concerning arbitration. Improving arbitration awareness and understanding among business executives, lawyers, judges and the general public increases the opportunities for effective use of this valuable dispute resolution process and may have the collateral benefit of increasing the demand for counsel's arbitration services.
A Protocol for Arbitrators

Whether or not business users have tailored arbitration procedures to most effectively promote economy and efficiency, they commonly rely on arbitrators to conduct arbitration proceedings economically and efficiently. Arbitrator training, experience and philosophy may all play a part in their ability to accomplish these goals through thoughtful case management; adherence to contractual limits on discovery, timetables, etc.; and effectively distinguishing, and appropriately acting upon, dispositive motions that might conclude or streamline a dispute. The following Actions are offered as detailed guidance for arbitrators in addressing these concerns.

1. Get training in managing commercial arbitrations.

It is axiomatic that all arbitrators should have the knowledge, temperament, experience and availability required by the appointment, as well as a working knowledge of arbitration law, practice and procedures of administrative organizations, and the various opportunities for realizing economies and efficiencies throughout the arbitration process. Those who wish to arbitrate large and complex commercial cases should secure special training in how to manage such arbitrations with expedition and efficiency without sacrificing essential fairness, should identify that training in their biographical materials, and should pledge to conduct the arbitration so as to adhere to any time limits in the arbitration agreement or governing rules (see Protocol for Arbitration Providers, Action 7).

Comments:

Just as "one size fits all" is not a cost-saving approach to arbitration rules, it is also true that being an effective arbitrator in one field does not assure effectiveness in another. Commercial arbitration, for example, is quite different from labor arbitration or consumer arbitration. One serving as an arbitrator in any of these fields should be well grounded in the arbitration law, practice, and management techniques particular to that field. Fortunately, many institutions, including the American Bar Association, the American Arbitration Association, JAMS and CPR, offer specialized instruction in managing the sort of large, complex cases that typify commercial arbitration. In addition, there are a number of excellent published practice guides, including The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration (James M. Gaitis, Curtis E. von Kann & Robert W. Wachsmuth, eds. 2nd ed. Juris Net 2010) and Commercial Arbitration at Its Best: Successful Strategies for Business Users (Thomas J. Stipanowich & Peter H. Kaskell, eds. 2001). In short, the resources are there for those who seek to learn how to arbitrate commercial cases fairly but efficiently.

2. Insist on cooperation and professionalism.

Arbitrators should communicate clearly and unequivocally from the outset their expectation that counsel can and will cooperate fully and willingly with each other and with the arbitrator in all procedural aspects of the arbitration. Arbitrators should establish a professionally cordial atmosphere, one that reinforces expectations of cooperation and reasonableness and
affords counsel the fullest opportunity to contribute to shaping the arbitration process. Arbitrators should lead by example by being prepared and punctual for all arbitration proceedings and by fixing and meeting deadlines for their own actions, such as ruling on motions, issuing orders and the like (see Protocol for Outside Counsel, Actions 4, 5, 8).

Comments:

Arbitrators set the tone of any arbitration, and establishing a tone of professionalism and mutual respect among participants greatly increases the prospects for developing cooperative approaches to expedite the proceedings. Arbitrators must make clear that they expect reasonable and constructive conduct by counsel and must model such conduct in their own interactions with counsel and parties. Arbitrators can hardly insist on counsel's compliance with deadlines if they themselves are late in issuing rulings, appearing at hearings, and the like. Arbitrators who make their expectations of cooperation clear and lead by example will have built a solid foundation on which to rest reasonable and efficient management actions.

3. Actively manage and shape the arbitration process; enforce contractual deadlines and timetables.

Arbitrators should recognize that commercial parties are generally looking for "muscular" arbitrators who will take control of the arbitration and actively manage it from start to finish, encourage and guide efforts to streamline the process, make a serious effort to avoid unnecessary discovery or motions, and generally conduct the arbitration fairly and thoughtfully but also expeditiously. Commercial arbitrators should utilize their considerable discretion and the natural reluctance of counsel and parties to displease the ultimate decision-maker so as to fashion, with the input and cooperation of the parties and their counsel, an arbitration process that is appropriate for the case at hand and as expeditious as possible while still affording all parties a full and fair hearing.

Arbitrators should routinely enforce contractual deadlines or timetables for arbitration except in circumstances that were clearly beyond the contemplation of the parties when the time limits were established (see Protocol for Business Users, Action 3). They should also encourage parties to "tee up" particular issues for early resolution when the resolution of such issues is likely to promote fruitful settlement discussions or expedite the arbitration (see Protocol for Arbitration Providers, Action 6; Protocol for Outside Counsel, Action 8).

Comments:

A recurrent plea from National Summit participants was that arbitrators take active control of commercial arbitrations. Even when counsel are cooperating with one another, there are inevitably many points during an arbitration when someone needs to make a decision or take other action to keep the proceeding "on time and under budget." All arbitration rules give arbitrators considerable discretion in managing the arbitration process. Business users, in-house counsel, and outside counsel want arbitrators who will accept that responsibility and act. Especially if they have set a collegial tone at the outset and thoughtfully consider the views of
counsel on process issues that arise, arbitrators will find that parties welcome pro-active management by the neutral person(s) to whom they have entrusted the resolution of their dispute. With input from counsel, arbitrators must announce clear procedures and deadlines and must enforce them absent exceptional circumstances. In the commercial arbitration world of today, it is no longer up to arbitrators to decide whether to be pro-active or laissez faire. Thoughtful, well-informed and active management of the arbitration is now a critical part of the service parties are paying arbitrators to deliver. Just as Harry Truman reminded us that those who can't stand the heat should get out of the kitchen, those who are unwilling to devote serious attention to managing their cases should not serve as commercial arbitrators.

4. Conduct a thorough preliminary conference and issue comprehensive case management orders.

As early in the case as possible, arbitrators should conduct a thorough Preliminary Conference in the manner prescribed in Chapter 6 of The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration. Arbitrators should emphasize the importance of participation by senior client representatives of each party, in person or by phone, in this critical opportunity to develop a sensible and economical plan for the arbitration. Whenever feasible, the first conference should be conducted in-person, since that setting is more conducive than conference calls to fostering cordial and cooperative relations among parties and counsel. After the conference, arbitrators should issue a comprehensive "case management order" setting forth the procedures and schedule that will govern the arbitration. Arbitrators should only permit departures from those procedures and schedule for good cause shown (see Protocol for Outside Counsel, Actions 3, 4, 5).

Comments:

The single greatest tool for achieving a fair and efficient commercial arbitration is a well-conducted preliminary conference. It is the best opportunity for all participants to focus their attention and creativity on how to make the arbitration run smoothly and economically. It is also the ideal time for client representatives to appreciate how costly and protracted a "scorched earth" campaign will be and how much time and money can be saved by scaling back on discovery, motions and hearing time. That is why arbitrators should insist that senior client representatives (business executives or in-house counsel) attend the conference.

Because the preliminary conference is such a critical phase of the arbitration, it must not be given short shrift. Arbitrators should assure that lead counsel appear at the conference and that all parties have reserved ample time for careful consideration of all issues. If possible, the conference should be conducted in-person, which is more conducive to cooperation and mutual brainstorming than a conference call. Unless the amount at stake is quite modest, the increased productivity of an in-person conference is almost always worth the added expense.

A productive preliminary conference requires thorough preparation by all participants. Arbitrators should provide counsel with an agenda of matters to be taken up at the conference and should invite counsel to add to the list. Arbitrators should require counsel to discuss the agenda items in an effort to reach agreement on as many items as possible and provide to the
arbitrators, prior to the conference, a joint email setting forth the agreements they have reached and their respective positions on points of disagreement. How best to conduct a preliminary conference could be a course in itself. The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration devotes thirty single-spaced pages to the topic. While that discussion should be consulted in full, here is a summary checklist of the matters that ought to be determined at the preliminary conference:

- Identity of ALL parties to the arbitration (no et al descriptions).
- The specific claims, defenses and counterclaims (if any) to be decided. Are all stated with sufficient specificity?
- Under what arbitration agreement is the arbitration being conducted?
- What law governs the arbitration procedure?
- What law governs the merits of the claims and defenses?
- What rules will apply in the arbitration?
- Is there any dispute concerning the arbitrability of any claim or defense?
- Do the arbitrators need any additional information (e.g., names of testifying witnesses and key actors who may not testify) in order to make additional disclosures?
- Does any party seek to join additional parties? On what authority and basis?
- Does any party seek consolidation with another arbitration? On what authority and basis? Who is authorized to make the decision if a party is opposed to consolidation?
- What discovery (if any) will be permitted? What procedures will apply? (See Protocol for Arbitration Providers, Action 3.)
- What motions (if any) will be permitted? What procedures and time frames will apply? (See Protocol for Business Users and In-House Counsel, Action 9.)
- Does the arbitration involve specialized scientific or technical matters for which the arbitrators should have a "tutorial"? If so, can the parties agree on a treatise or other publication for the arbitrators to read, or neutral expert to teach the Panel?
- Would appointment of one or more neutral experts be appropriate?
- How will the parties submit documents and information to the arbitrators and to each other- email, fax, electronic filing, hand delivery?
- At what location(s) will the hearing be held?
- On what dates will the hearing be held?
- Do the parties need subpoenas for non-party witnesses? What authority to issue?
- Procedures and standards for seeking a continuance of the hearing.
- Procedures for the conduct of the hearing (see Action 9 below).
- Nature of the award (see Action 10 below).
- Due date of the award.

Following the preliminary conference, arbitrators should promptly issue a case management order that memorializes the determinations made on all the foregoing matters and any others addressed at the conference. If subsequent developments require some adjustments in that order, an amended case management order should be promptly be prepared and issued.
5. **Schedule consecutive hearing days.**

In order to avoid the delay and excess costs caused by having multiple hearing sessions, arbitrators should schedule the hearing on consecutive days whenever possible. Arbitrators should encourage the parties to make a realistic estimate of the number of hearing days they will need and should reserve a sufficient number of days for completing the hearing in the time allotted, even if unexpected developments, or unduly optimistic estimates, lead to a somewhat longer hearing than originally projected.

**Comments:**

Arbitration hearings that do not run on consecutive days involve much greater expense than those that do. Apart from the possibility of repetitive travel expenses, there is duplicative deployment, preparation and refreshing tasks for all participants and added work that people think to do in the time between sessions. Spreading the hearing out over a period of weeks or months obviously protracts the arbitration. Arbitrators should attempt to schedule consecutive hearing days whenever possible. Arbitrators should also be sure that a realistic number of days are reserved for the hearing. Counsel frequently underestimate, sometimes drastically, the amount of time they will take for examinations and arguments at the hearing. It is better to schedule an ample number of days and cancel those not needed than to schedule too few days and then have to find, on the calendars of busy lawyers and arbitrators, additional, mutually available time for completing the hearing.

6. **Streamline discovery; supervise pre-hearing activities.**

Arbitrators should make clear at the preliminary conference that discovery is ordinarily much more limited in arbitration than in litigation and should work with counsel in finding ways to limit or streamline discovery in a manner appropriate to the circumstances. Arbitrators should actively supervise the pre-hearing process. They should keep a close eye on the progress of discovery and other preparations for the hearing and should promptly resolve any problems that might disrupt the case schedule (usually through a conference call preceded by a jointly-prepared email outlining the nature of the parties' disagreements and each side's position with regard to the dispute, rather than formal written submissions) (see *Protocol for Outside Counsel, Action 5*).

**Comments:**

The necessity of containing discovery and multiple ways of doing so are thoroughly discussed in the *Protocol for Arbitration Providers*, Action 3. Such procedures are typically set at the preliminary conference and memorialized in the case management order. However, it is

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188 The AAA COMMERCIAL RULES provide that, “Generally hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.” AAA COMMERCIAL RULES, supra note 160, at R. L-4(h).

189 When a hearing may require multiple weeks, it may be appropriate to have one week day off per week so that counsel and arbitrators can keep up with their other cases.
equally essential for arbitrators to monitor the parties' progress with discovery and other pre-hearing activities and to quickly step in if unexpected developments threaten to disrupt the schedule. Some arbitrators like to schedule periodic conference calls to check the status of pre-hearing activities. Others fear this may encourage counsel to pile up problems for the periodic calls rather than work them out themselves and thus instruct counsel to request a conference call promptly after serious, good faith efforts at resolution have failed. Whichever approach is taken, arbitrators need to "stay on top of the case" from preliminary conference to hearing to make sure that the parties' expectations about the length of the arbitration are met.\footnote{An excellent template for arbitrator control of discovery is provided by the \textit{New York State Bar Association Report on Arbitration Discovery} and JAMS \textit{Recommended Arbitration Discovery Protocols} based on the Report.}


7. \textit{Discourage the filing of unproductive motions; limit motions for summary disposition to those that hold reasonable promise for streamlining or focusing the arbitration process, but act aggressively on those.}

Arbitrators should establish procedures to avoid the filing of unproductive and inappropriate motions. They should generally require that, before filing any motion, the moving party demonstrates, either in a short letter or a telephone conference, that the motion is likely to be granted and is likely to produce a net savings in arbitration time and/or costs.

Arbitrators should explain to parties that dispositive motions involving issues of fact are granted less frequently in arbitration than in litigation because there is no appellate court to reinstate the case if they erred in dismissing it. However, there are matters for which a dispositive motion, especially a motion for partial summary disposition, might provide an opportunity for shortening, streamlining or focusing the arbitration process—as, for example, where arbitrators are able to rule on a statute of limitations defense, determine whether a contract permits claims for certain kinds of damages, or construe a key contract provision. Thus, arbitrators should encourage parties to be judicious in filing motions but should be willing to entertain and rule on them in situations where the motion presents a realistic possibility of shortening, streamlining or focusing the arbitration process.

Comments:

After discovery, motions are probably the leading cause of excessive cost and delay in commercial arbitrations. Veteran litigators, acting largely out of habit, frequently file motions

\footnote{The ICDR has established a voluntary set of guidelines designed to promote fair and expeditious arbitration proceedings by encouraging voluntary exchanges of the most material documents. \textit{See ICDR GUIDELINES, supra note 140.}}
for summary disposition and other relief, which impose substantial burdens of briefing and argument on all counsel and intensive factual and legal review by arbitrators. While arbitrators certainly have the authority to grant such motions, the absence of appellate review typically and properly makes them quite cautious about doing so, especially when the other side has had little or no discovery. On the other hand, there are purely legal issues, such as statute of limitations, interpretation of a contract, or identifying the required elements of a cause of action, which arbitrators can and should undertake to decide early in a case, particularly when a decision in favor of the movant could substantially reduce transaction time and cost for both sides. Arbitrators need to educate counsel on which sorts of motions are likely to be productive in arbitration and which are not and then establish procedures for processing the former quickly and efficiently.\textsuperscript{192}

8. Be readily available to counsel.

Arbitrators should recognize that their acceptance of an arbitral appointment carries with it an obligation to be reasonably available to the parties to resolve procedural, process or scheduling disputes that could delay the timely resolution of the case. Thus, they should be willing on fairly short notice (generally not more than two or three business days) to hold a conference call with the parties in order to resolve such matters.

In litigation, parties sometimes wait months to present an issue to a judge or to receive the judge’s decision; often the case is at a near standstill until the issue is resolved. Arbitration parties can escape these long delays, but only if arbitrators are prepared to hear their arguments promptly and issue prompt decisions. Arbitrators who are committed to speed and economy in commercial arbitration must encourage counsel to consult them quickly when obstacles to schedule compliance arise, must be willing to convene a conference call within a few days of such a contact, and must be able to rule either at the end of the call or very shortly thereafter.

9. Conduct fair but expeditious hearings.

Arbitrators should conduct hearings in a manner that is both fair and expeditious as described in detail in Chapter 9 of \textit{The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration}.\textsuperscript{192}

\textsuperscript{192} For example, arbitrators may provide in their case management order that (1) prior to filing any dispositive motion, the moving party must provide the arbitrator with a letter of not more than five pages explaining why the motion is ripe, likely to be granted, and likely to save time and money in the arbitration; (2) the opposing party may have five days to respond with a five page letter; and (3) the arbitrator will promptly decide whether to entertain the motion. If he or she does so, the arbitrator may set an expedited briefing schedule and page limits on the briefs. After receiving the briefs, the arbitrator may deny the motion without argument or schedule a prompt oral argument (perhaps by phone) and then rule. \textit{See generally CCA GUIDE TO BEST PRACTICES, supra} note 84.
Comments:

Every day of a hearing, in which one or more lawyers, paralegals, client representatives and witnesses are in attendance, having prepared hours for that day's events, typically costs a client many thousands of dollars. While it is certainly important that the proceedings be fair and contribute to a sound result, it is also important that the proceedings be efficient and respectful of the parties' time and money. Conducting a fair but efficient hearing is almost entirely in the hands of the arbitrators and is the best hallmark of a truly accomplished commercial arbitrator. Chapter 9 of The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration provides 45 pages of guidance on how to accomplish that goal and should be reviewed in detail. Major steps toward an efficient arbitration hearing include the following:

• Make clear to counsel that, unless formal rules of evidence apply (which is rare in arbitration), virtually all non-privileged evidence offered by any party will be received and traditional objections (hearsay, foundation, etc.) will not be entertained. Urge counsel to focus on the probativeness of evidence, not its admissibility.
• Determine what order of proof is most appropriate for the particular case, including sequencing the hearing in progressive phases, taking both sides' witnesses issue by issue, or ruling on threshold issues before receiving evidence on other issues.
• Encourage the parties to submit a joint collection of core exhibits in chronological order with key portions highlighted.
• Establish an expedited procedure for receipt of other exhibits. For example, require all parties to submit their tabbed, index exhibits in advance of the hearing and advise counsel that all such exhibits will be received en masse at the start of the hearing save for any that are privileged or genuinely challenged as to authenticity.
• Require that parties show demonstrative exhibits, including power point slides, to each other a reasonable time before they are used in the hearing so that time is not wasted in assessing and possibly challenging their accuracy.
• Discuss with counsel the possible use of written direct testimony for some or all witnesses.
• Establish procedures to narrow and highlight the matters on which opposing experts disagree. For example, require experts to confer before hearing and provide the arbitrators with a list of the points on which they agree, the points on which they disagree, and a summary statement of their respective opinions on the latter.
• Limit the presentation of duplicative or cumulative testimony.
• Make appropriate arrangements for receiving by conference call or otherwise testimony from witnesses in remote locations.
• Consider receiving affidavits or pre-recorded testimony regarding less critical matters.
• Sequester witnesses until they testify unless all parties request otherwise.
• Establish and maintain a realistic daily schedule for the hearing. Start hearings on time and don't allow excessive recesses and lunch breaks.
• Encourage the parties to employ a “chess clock” that limits the total number of ours available to counsel for examination and argumentation.
• At the close of each hearing day (NOT the beginning), discuss with counsel any administrative matters that need attention and monitor their progress against the projected hearing schedule. If needed to meet the scheduled completion date, consider starting hearings earlier, ending them later, or having one or more weekend sessions.
• Don't hesitate to tell counsel when a point has been understood and they may move on, or when a point was not understood and requires clarification.
• Make sure, well prior to the hearing, that counsel have worked out all logistical arrangements concerning transcripts, shared use of power point or other equipment, etc.
• Freely take witnesses out of turn when necessary to accommodate scheduling conflicts.
• Prohibit parties from running out of witnesses on any given day. "Call your next witness" is a powerful tool for keeping a hearing moving.193

Through these and similar techniques practiced by experienced arbitrators, commercial arbitration hearings can be conducted both fairly and efficiently.

10. Issue timely and careful awards.

Arbitrators should issue carefully crafted awards that meet the parties' needs in terms of format, level of detail, and timing, and that are unlikely to lead to additional cost and delay due to vacatur and further proceedings. See Chapter 11 of The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration.

Comments:

Arbitration award are of multiple types (e.g., interim awards, partial final awards, and final awards) and multiple forms (e.g., bare awards, reasoned awards, awards with findings of fact and conclusions of law). There are pros and cons to each form and type. See generally Chapter 11 of The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration.194 Arbitrators should explain these considerations to the parties and ascertain what sort of award they want. Arbitrators should then exercise maximum care and judgment in crafting such an award and issuing it within any applicable time limit. Vacatur proceedings can add substantially to the cost and length of an arbitration; arbitrators thus have a duty to the parties to render awards that are as "vacatur-proof" as possible.

_____

193 Id. at Ch. 9.
194 Id. at Ch. 11.
Appendices

Appendix A: Bibliography/Helpful Sources

Helpful General Sources


Excellent, current guidance for commercial arbitrators on all aspects of the process, including management of hearings, control of discovery, etc.

**COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS** (Thomas J. Stipanowich & Peter H. Kaskell, eds. 2001).

Book-length report by national commission of arbitrators and advocates offering guidance on all aspects of commercial arbitration (from drafting to award and appeal) for business users and counsel.


Excellent ICC report addressing approaches to controlling cost and delay in international arbitration.


Guidelines for corporate counsel seeking efficiency and economy in arbitration, with extensive references to current rules and emerging standards.


Short piece identifying several keys to improving economy and efficiency in commercial arbitration.


Article recommending steps for in-house counsel to take before and during arbitration.
Drafting Guidelines


Useful summary of topics to consider when drafting, adoption or recommending a dispute resolution clause.

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

Succinct, useful discussion of key drafting issues for commercial arbitration provisions.


Thoughtful treatment of stepped provisions for commercial contracts.

Discovery and Information Exchange Guidelines and Protocols


Short, succinct guidance for information exchange in international arbitrations under ICDR Rules.


JAMS’ adaptation of the NYSBA Report (see below).

NEW YORK STATE BAR ASSOCIATION DISPUTE RESOLUTION SECTION ARBITRATION COMMITTEE, REPORT ON ARBITRATION DISCOVERY IN DOMESTIC COMMERCIAL CASES (June 2009), available at http://www.nysba.org/Content/NavigationMenu42/April42009HouseofDelegatesMeetingAgendaItems/DiscoveryPreceptsReport.pdf

Extensive, thoughtful guidance for arbitrators in managing discovery in commercial arbitration.


Comparison of two similar construction disputes that reached comparable outcomes through litigation and arbitration respectively; the arbitration proceeding is significantly more efficient as a result of skilled arbitrator case management.


Discussions of an arbitrator's power to order sanctions against parties for discovery abuse.

**E-discovery**


Extensive, seminal discussion of e-discovery issues.


Short discussion of key challenges facing arbitrators and counsel.

**Accelerated, Streamlined or Fast Track Procedures**


Example of innovative methods of e-filing, service, searching and monitoring.


Analysis of one company’s aggressively streamlined arbitration process, including setting time limits, requiring single arbitrators, and eliminating discovery.


Corporate counsels’ view of the need for expedited arbitration procedures.

**Appellate Arbitration Procedures**


**Feedback Systems**


Treatment of the value of feedback systems to structuring dispute resolutions systems and refining ongoing disputes.
### Appendix B: Summit Sponsors

American Arbitration Association  
American Bar Association Section of Dispute Resolution  
The Chartered Institute of Arbitrators  
CPR Institute for Conflict Prevention and Resolution  
JAMS The Resolution Experts  
Straus Institute for Dispute Resolution, Pepperdine University School of Law

The following Fellows of the College of Commercial Arbitrators:

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Appendix D: Members of the Summit Task Forces

(All task force members participated as individuals and not as representatives of their firms.)

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The Editors also gratefully acknowledge the transcription services provided by Sarnoff Court Reporters & Legal Technologies.
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Commercial Arbitration Rules and Mediation Procedures

Important Notice

These rules and any amendment of them shall apply in the form in effect at the time the administrative filing requirements are met for a demand for arbitration or submission agreement received by the AAA. To ensure that you have the most current information, see our website at www.adr.org.

Introduction

Each year, many millions of business transactions take place. Occasionally, disagreements develop over these business transactions. Many of these disputes are resolved by arbitration, the voluntary submission of a dispute to an impartial person or persons for final and binding determination. Arbitration has proven to be an effective way to resolve these disputes privately, promptly, and economically.

The American Arbitration Association (AAA), a not-for-profit, public service organization, offers a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, families, communities, and all levels of government. Services are available through AAA headquarters in New York and through offices located in major cities throughout the United States. Hearings may be held at locations convenient for the parties and are not limited to cities with AAA offices. In addition, the AAA serves as a center for education and training, issues specialized publications, and conducts research on all forms of out-of-court dispute settlement.
Standard Arbitration Clause

The parties can provide for arbitration of future disputes by inserting the following clause into their contracts:

*Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.*

Arbitration of existing disputes may be accomplished by use of the following:

*We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules the following controversy: (describe briefly) We further agree that the above controversy be submitted to (one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrator(s), and that a judgment of any court having jurisdiction may be entered on the award.*

In transactions likely to require emergency interim relief, the parties may wish to add to their clause the following language:

*The parties also agree that the AAA Optional Rules for Emergency Measures of Protection shall apply to the proceedings.*

These Optional Rules may be found on page 49.

The services of the AAA are generally concluded with the transmittal of the award. Although there is voluntary compliance with the majority of awards, judgment on the award can be entered in a court having appropriate jurisdiction if necessary.
Administrative Fees

The AAA charges a filing fee based on the amount of the claim or counterclaim. This fee information, which is included with these rules, allows the parties to exercise control over their administrative fees.

The fees cover AAA administrative services; they do not cover arbitrator compensation or expenses, if any, reporting services, or any post-award charges incurred by the parties in enforcing the award.

Mediation

The parties might wish to submit their dispute to mediation prior to arbitration. In mediation, the neutral mediator assists the parties in reaching a settlement but does not have the authority to make a binding decision or award. Mediation is administered by the AAA in accordance with its Commercial Mediation Procedures. There is no additional administrative fee where parties to a pending arbitration attempt to mediate their dispute under the AAA’s auspices.

If the parties want to adopt mediation as a part of their contractual dispute settlement procedure, they can insert the following mediation clause into their contract in conjunction with a standard arbitration provision:

*If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.*

If the parties want to use a mediator to resolve an existing dispute, they can enter into the following submission:
The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Commercial Mediation Procedures. (The clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, and any other item of concern to the parties.)

Large, Complex Cases

Unless the parties agree otherwise, the Procedures for Large, Complex Commercial Disputes, which appear in this pamphlet, will be applied to all cases administered by the AAA under the Commercial Arbitration Rules in which the disclosed claim or counterclaim of any party is at least $500,000 exclusive of claimed interest, arbitration fees and costs.

The key features of these procedures include:

> a highly qualified, trained Roster of Neutrals;
> a mandatory preliminary hearing with the arbitrators, which may be conducted by teleconference;
> broad arbitrator authority to order and control discovery, including depositions;
> presumption that hearings will proceed on a consecutive or block basis.
Commercial Mediation Procedures

M-1. Agreement of Parties

Whenever, by stipulation or in their contract, the parties have provided for mediation or conciliation of existing or future disputes under the auspices of the American Arbitration Association (AAA) or under these procedures, the parties and their representatives, unless agreed otherwise in writing, shall be deemed to have made these procedural guidelines, as amended and in effect as of the date of filing of a request for mediation, a part of their agreement and designate the AAA as the administrator of their mediation.

The parties by mutual agreement may vary any part of these procedures including, but not limited to, agreeing to conduct the mediation via telephone or other electronic or technical means.

M-2. Initiation of Mediation

Any party or parties to a dispute may initiate mediation under the AAA’s auspices by making a request for mediation to any of the AAA’s regional offices or case management centers via telephone, email, regular mail or fax. Requests for mediation may also be filed online via AAA WebFile at www.adr.org.

The party initiating the mediation shall simultaneously notify the other party or parties of the request. The initiating party shall provide the following information to the AAA and the other party or parties as applicable:

(i) A copy of the mediation provision of the parties’ contract or the parties’ stipulation to mediate.

(ii) The names, regular mail addresses, email addresses and telephone numbers of all parties to the dispute and representatives, if any, in the mediation.
(iii) A brief statement of the nature of the dispute and the relief requested.

(iv) Any specific qualifications the mediator should possess.

Where there is no pre-existing stipulation or contract by which the parties have provided for mediation of existing or future disputes under the auspices of the AAA, a party may request the AAA to invite another party to participate in “mediation by voluntary submission.” Upon receipt of such a request, the AAA will contact the other party or parties involved in the dispute and attempt to obtain a submission to mediation.

M-3. Representation

Subject to any applicable law, any party may be represented by persons of the party’s choice. The names and addresses of such persons shall be communicated in writing to all parties and to the AAA.

M-4. Appointment of the Mediator

Parties may search the online profiles of the AAA’s Panel of Mediators at www.aaamediation.com in an effort to agree on a mediator. If the parties have not agreed to the appointment of a mediator and have not provided any other method of appointment, the mediator shall be appointed in the following manner:

(i) Upon receipt of a request for mediation, the AAA will send to each party a list of mediators from the AAA’s Panel of Mediators. The parties are encouraged to agree to a mediator from the submitted list and to advise the AAA of their agreement.
(ii) If the parties are unable to agree upon a mediator, each party shall strike unacceptable names from the list, number the remaining names in order of preference and return the list to the AAA. If a party does not return the list within the time specified, all mediators on the list shall be deemed acceptable. From among the mediators who have been mutually approved by the parties, and in accordance with the designated order of mutual preference, the AAA shall invite a mediator to serve.

(iii) If the parties fail to agree on any of the mediators listed, or if acceptable mediators are unable to serve, or if for any other reason the appointment cannot be made from the submitted list, the AAA shall have the authority to make the appointment from among other members of the Panel of Mediators without the submission of additional lists.

M-5. Mediator’s Impartiality and Duty to Disclose

AAA mediators are required to abide by the Model Standards of Conduct for Mediators in effect at the time a mediator is appointed to a case. Where there is a conflict between the Model Standards and any provision of these Mediation Procedures, these Mediation Procedures shall govern. The Standards require mediators to (i) decline a mediation if the mediator cannot conduct it in an impartial manner, and (ii) disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator’s impartiality.

Prior to accepting an appointment, AAA mediators are required to make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for the mediator. AAA mediators are required to disclose any circumstance likely to create a presumption of bias or prevent a resolution of the parties’ dispute within the time-
frame desired by the parties. Upon receipt of such disclosures, the AAA shall immediately communicate the disclosures to the parties for their comments.

The parties may, upon receiving disclosure of actual or potential conflicts of interest of the mediator, waive such conflicts and proceed with the mediation. In the event that a party disagrees as to whether the mediator shall serve, or in the event that the mediator’s conflict of interest might reasonably be viewed as undermining the integrity of the mediation, the mediator shall be replaced.

M-6. Vacancies

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

M-7. Duties and Responsibilities of the Mediator

(i) The mediator shall conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.

(ii) The mediator is authorized to conduct separate or *ex parte* meetings and other communications with the parties and/or their representatives, before, during and after any scheduled mediation conference. Such communications may be conducted via telephone, in writing, via email, online, in person or otherwise.

(iii) The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator may request the exchange of memoranda on issues, including the underlying interests and the history of the parties’ negotiations. Information that a party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.
(iv) The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.

(v) In the event a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation session(s), the mediator may continue to communicate with the parties, for a period of time, in an ongoing effort to facilitate a complete settlement.

(vi) The mediator is not a legal representative of any party and has no fiduciary duty to any party.

M-8. Responsibilities of the Parties

The parties shall ensure that appropriate representatives of each party, having authority to consummate a settlement, attend the mediation conference.

Prior to and during the scheduled mediation conference session(s) the parties and their representatives shall, as appropriate to each party’s circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive mediation.

M-9. Privacy

Mediation sessions and related mediation communications are private proceedings. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.
M-10. Confidentiality

Subject to applicable law or the parties’ agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports or other documents received by a mediator while serving in that capacity shall be confidential.

The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding the following, unless agreed to by the parties or required by applicable law:

(i) Views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute,

(ii) Admissions made by a party or other participant in the course of the mediation proceedings,

(iii) Proposals made or views expressed by the mediator or

(iv) The fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

M-11. No Stenographic Record

There shall be no stenographic record of the mediation process.
M-12. Termination of Mediation

The mediation shall be terminated:

(i) By the execution of a settlement agreement by the parties; or
(ii) By a written or verbal declaration of the mediator to the effect that further efforts at mediation would not contribute to a resolution of the parties’ dispute; or
(iii) By a written or verbal declaration of all parties to the effect that the mediation proceedings are terminated; or
(iv) When there has been no communication between the mediator and any party or party’s representative for 21 days following the conclusion of the mediation conference.

M-13. Exclusion of Liability

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

M-14. Interpretation and Application of Procedures

The mediator shall interpret and apply these procedures insofar as they relate to the mediator’s duties and responsibilities. All other procedures shall be interpreted and applied by the AAA.

M-15. Deposits

Unless otherwise directed by the mediator, the AAA will require the parties to deposit in advance of the mediation conference such sums of money as it, in consultation with the mediator, deems necessary to cover the costs and expenses of the mediation and shall render an accounting to the parties and return any unexpended balance at the conclusion of the mediation.
M-16. Expenses

All expenses of the mediation, including required traveling and other expenses or charges of the mediator, shall be borne equally by the parties unless they agree otherwise. The expenses of participants for either side shall be paid by the party requesting the attendance of such participants.

M-17. Cost of the Mediation

There is no filing fee to initiate a mediation or a fee to request the AAA to invite parties to mediate.

The cost of mediation is based on the hourly mediation rate published on the mediator’s AAA profile. This rate covers both mediator compensation and an allocated portion for the AAA's services. There is a four-hour minimum charge for a mediation conference. Expenses referenced in section M-16 may also apply.

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.

The parties will be billed equally for all costs unless they agree otherwise.

If you have questions about mediation costs or services visit our website at www.adr.org or contact your local AAA office.

Conference Room Rental

The costs described do not include the use of AAA conference rooms. Conference rooms are available on a rental basis. Please contact your local AAA office for availability and rates.
R-1. Agreement of Parties*+

(a) The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules. These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a demand for arbitration or submission agreement received by the AAA. The parties, by written agreement, may vary the procedures set forth in these rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator.

(b) Unless the parties or the AAA determines otherwise, the Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds $75,000, exclusive of interest and arbitration fees and costs.

Parties may also agree to use these procedures in larger cases. Unless the parties agree otherwise, these procedures will not apply in cases involving more than two parties. The Expedited Procedures shall be applied as described in Sections E-1 through E-10 of these rules, in addition to any other portion of these rules that is not in conflict with the Expedited Procedures.

(c) Unless the parties agree otherwise, the Procedures for Large, Complex Commercial Disputes shall apply to all cases in which the disclosed claim or counterclaim of any party is at least $500,000, exclusive of claimed interest, arbitration fees and costs. Parties may also agree to use the procedures in cases involving claims or counterclaims under $500,000, or in nonmonetary cases. The Procedures for Large, Complex Commercial Disputes
shall be applied as described in Sections L-1 through L-4 of these rules, in addition to any other portion of these rules that is not in conflict with the Procedures for Large, Complex Commercial Disputes.

(d) All other cases shall be administered in accordance with Sections R-1 through R-54 of these rules.

* The AAA applies the Supplementary Procedures for Consumer-Related Disputes to arbitration clauses in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are nonnegotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The AAA will have the discretion to apply or not to apply the supplementary procedures and the parties will be able to bring any disputes concerning the application or non-application to the attention of the arbitrator. Consumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of its jurisdiction, even in consumer arbitration cases filed by the business.

+ A dispute arising out of an employer promulgated plan will be administered under the AAA’s Employment Arbitration Rules and Mediation Procedures.

**R-2. AAA and Delegation of Duties**

When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these rules, and may be carried out through such of the AAA’s representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices.

**R-3. National Roster of Arbitrators**

The AAA shall establish and maintain a National Roster of Commercial Arbitrators (“National Roster”) and shall appoint arbitrators as provided in these rules. The term “arbitrator” in these rules refers to the arbitration panel, constituted for a particular case, whether composed of one or more arbitrators, or to an individual arbitrator, as the context requires.
R-4. Initiation under an Arbitration Provision in a Contract

(a) Arbitration under an arbitration provision in a contract shall be initiated in the following manner:

(i) The initiating party (the “claimant”) shall, within the time period, if any, specified in the contract(s), give to the other party (the “respondent”) written notice of its intention to arbitrate (the “demand”), which demand shall contain a statement setting forth the nature of the dispute, the names and addresses of all other parties, the amount involved, if any, the remedy sought, and the hearing locale requested.

(ii) The claimant shall file at any office of the AAA two copies of the demand and two copies of the arbitration provisions of the contract, together with the appropriate filing fee as provided in the schedule included with these rules.

(iii) The AAA shall confirm notice of such filing to the parties.

(b) A respondent may file an answering statement in duplicate with the AAA within 15 days after confirmation of notice of filing of the demand is sent by the AAA. The respondent shall, at the time of any such filing, send a copy of the answering statement to the claimant. If a counterclaim is asserted, it shall contain a statement setting forth the nature of the counterclaim, the amount involved, if any, and the remedy sought. If a counterclaim is made, the party making the counterclaim shall forward to the AAA with the answering statement the appropriate fee provided in the schedule included with these rules.

(c) If no answering statement is filed within the stated time, respondent will be deemed to deny the claim. Failure to file an answering statement shall not operate to delay the arbitration.

(d) When filing any statement pursuant to this section, the parties are encouraged to provide descriptions of their claims in sufficient detail to make the circumstances of the dispute clear to the arbitrator.
R-5. Initiation under a Submission

Parties to any existing dispute may commence an arbitration under these rules by filing at any office of the AAA two copies of a written submission to arbitrate under these rules, signed by the parties. It shall contain a statement of the nature of the dispute, the names and addresses of all parties, any claims and counterclaims, the amount involved, if any, the remedy sought, and the hearing locale requested, together with the appropriate filing fee as provided in the schedule included with these rules. Unless the parties state otherwise in the submission, all claims and counterclaims will be deemed to be denied by the other party.

R-6. Changes of Claim

After filing of a claim, if either party desires to make any new or different claim or counterclaim, it shall be made in writing and filed with the AAA. The party asserting such a claim or counterclaim shall provide a copy to the other party, who shall have 15 days from the date of such transmission within which to file an answering statement with the AAA. After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator’s consent.

R-7. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.
(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

R-8. Mediation

At any stage of the proceedings, the parties may agree to conduct a mediation conference under the Commercial Mediation Procedures in order to facilitate settlement. The mediator shall not be an arbitrator appointed to the case. Where the parties to a pending arbitration agree to mediate under the AAA’s rules, no additional administrative fee is required to initiate the mediation.

R-9. Administrative Conference

At the request of any party or upon the AAA’s own initiative, the AAA may conduct an administrative conference, in person or by telephone, with the parties and/or their representatives. The conference may address such issues as arbitrator selection, potential mediation of the dispute, potential exchange of information, a timetable for hearings and any other administrative matters.

R-10. Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. If any party requests that the hearing be held in a specific locale and the other party files no objection thereto within 15 days after notice of the request has been sent to it by the AAA, the locale shall be the one requested. If a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale, and its decision shall be final and binding.
R-11. Appointment from National Roster

(a) If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner: The AAA shall send simultaneously to each party to the dispute an identical list of 10 (unless the AAA decides that a different number is appropriate) names of persons chosen from the National Roster. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.

(b) If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 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 AAA. 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 both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the National Roster without the submission of additional lists.

(c) Unless the parties agree otherwise when there are two or more claimants or two or more respondents, the AAA may appoint all the arbitrators.
R-12. Direct Appointment by a Party

(a) If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. The notice of appointment, with the name and address of the arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any appointing party, the AAA shall submit a list of members of the National Roster from which the party may, if it so desires, make the appointment.

(b) Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Section R-17 with respect to impartiality and independence unless the parties have specifically agreed pursuant to Section R-17(a) that the party-appointed arbitrators are to be non-neutral and need not meet those standards.

(c) If the agreement specifies a period of time within which an arbitrator shall be appointed and any party fails to make the appointment within that period, the AAA shall make the appointment.

(d) If no period of time is specified in the agreement, the AAA shall notify the party to make the appointment. If within 15 days after such notice has been sent, an arbitrator has not been appointed by a party, the AAA shall make the appointment.

R-13. Appointment of Chairperson by Party-Appointed Arbitrators or Parties

(a) If, pursuant to Section R-12, either the parties have directly appointed arbitrators, or the arbitrators have been appointed by the AAA, and the parties have authorized them to appoint a chairperson within a specified time and no appointment is made within that time or any agreed extension, the AAA may appoint the chairperson.
(b) If no period of time is specified for appointment of the chairperson and the party-appointed arbitrators or the parties do not make the appointment within 15 days from the date of the appointment of the last party-appointed arbitrator, the AAA may appoint the chairperson.

(c) If the parties have agreed that their party-appointed arbitrators shall appoint the chairperson from the National Roster, the AAA shall furnish to the party-appointed arbitrators, in the manner provided in Section R-11, a list selected from the National Roster, and the appointment of the chairperson shall be made as provided in that Section.

R-14. Nationality of Arbitrator

Where the parties are nationals of different countries, the AAA, at the request of any party or on its own initiative, may appoint as arbitrator a national of a country other than that of any of the parties. The request must be made before the time set for the appointment of the arbitrator as agreed by the parties or set by these rules.

R-15. Number of Arbitrators

If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed. A party may request three arbitrators in the demand or answer, which request the AAA will consider in exercising its discretion regarding the number of arbitrators appointed to the dispute.

R-16. Disclosure

(a) Any person appointed or to be appointed as an arbitrator shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator’s impartiality or independence, including any bias or any financial or personal interest in the
result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration.

(b) Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.

(c) In order to encourage disclosure by arbitrators, disclosure of information pursuant to this Section R-16 is not to be construed as an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.

R-17. Disqualification of Arbitrator

(a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for:

(i) partiality or lack of independence,

(ii) inability or refusal to perform his or her duties with diligence and in good faith, and

(iii) any grounds for disqualification provided by applicable law. The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-12 shall be nonneutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.

(b) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.
R-18. Communication with Arbitrator

(a) No party and no one acting on behalf of any party shall communicate ex parte with an arbitrator or a candidate for arbitrator concerning the arbitration, except that a party, or someone acting on behalf of a party, may communicate ex parte with a candidate for direct appointment pursuant to Section R-12 in order to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate’s qualifications, availability, or independence in relation to the parties or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party-designated arbitrators are to participate in that selection.

(b) Section R-18(a) does not apply to arbitrators directly appointed by the parties who, pursuant to Section R-17(a), the parties have agreed in writing are non-neutral. Where the parties have so agreed under Section R-17(a), the AAA shall as an administrative practice suggest to the parties that they agree further that Section R-18(a) should nonetheless apply prospectively.

R-19. Vacancies

(a) If for any reason an arbitrator is unable to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these rules.

(b) In the event of a vacancy in a panel of neutral arbitrators after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.

(c) In the event of the appointment of a substitute arbitrator, the panel of arbitrators shall determine in its sole discretion whether it is necessary to repeat all or part of any prior hearings.
R-20. Preliminary Hearing

(a) At the request of any party or at the discretion of the arbitrator or the AAA, the arbitrator may schedule as soon as practicable a preliminary hearing with the parties and/or their representatives. The preliminary hearing may be conducted by telephone at the arbitrator’s discretion.

(b) During the preliminary hearing, the parties and the arbitrator should discuss the future conduct of the case, including clarification of the issues and claims, a schedule for the hearings and any other preliminary matters.

R-21. Exchange of Information

(a) At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct

(i) the production of documents and other information, and

(ii) the identification of any witnesses to be called.

(b) At least five business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing.

(c) The arbitrator is authorized to resolve any disputes concerning the exchange of information.

R-22. Date, Time, and Place of Hearing

The arbitrator shall set the date, time, and place for each hearing. The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule. The AAA shall send a notice of hearing to the parties at least 10 days in advance of the hearing date, unless otherwise agreed by the parties.
R-23. Attendance at Hearings

The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person other than a party and its representatives.

R-24. Representation

Any party may be represented by counsel or other authorized representative. A party intending to be so represented shall notify the other party and the AAA of the name and address of the representative at least three days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

R-25. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

R-26. Stenographic Record

Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three days in advance of the hearing.
The requesting party or parties shall pay the cost of the record. If the transcript is agreed by the parties, or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator.

R-27. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

R-28. Postponements

The arbitrator may postpone any hearing upon agreement of the parties, upon request of a party for good cause shown, or upon the arbitrator’s own initiative.

R-29. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

R-30. Conduct of Proceedings

(a) The claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.
(b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

(c) The parties may agree to waive oral hearings in any case.

R-31. Evidence

(a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default or has waived the right to be present.

(b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.

(c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

(d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

R-32. Evidence by Affidavit and Post-hearing Filing of Documents or Other Evidence

(a) The arbitrator may receive and consider the evidence of witnesses by declaration or affidavit, but shall give it only such weight as the arbitrator deems it entitled to after consideration of any objection made to its admission.
(b) If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine and respond to such documents or other evidence.

R-33. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the date and time and the AAA shall notify the parties. Any party who so desires may be present at such an inspection or investigation. In the event that one or all parties are not present at the inspection or investigation, the arbitrator shall make an oral or written report to the parties and afford them an opportunity to comment.

R-34. Interim Measures **

(a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.

(b) Such interim measures may take the form of an interim award, and the arbitrator may require security for the costs of such measures.

(c) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

** The Optional Rules may be found on page 49.
R-35. Closing of Hearing
The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed. If briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If documents are to be filed as provided in Section R-32 and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the closing date of the hearing. The time limit within which the arbitrator is required to make the award shall commence, in the absence of other agreements by the parties, upon the closing of the hearing.

R-36. Reopening of Hearing
The hearing may be reopened on the arbitrator’s initiative, or upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed on by the parties in the contract(s) out of which the controversy has arisen, the matter may not be reopened unless the parties agree on an extension of time. When no specific date is fixed in the contract, the arbitrator may reopen the hearing and shall have 30 days from the closing of the reopened hearing within which to make an award.

R-37. Waiver of Rules
Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.
R-38. Extensions of Time

The parties may modify any period of time by mutual agreement. The AAA or the arbitrator may for good cause extend any period of time established by these rules, except the time for making the award. The AAA shall notify the parties of any extension.

R-39. Serving of Notice

(a) Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules, for any court action in connection therewith, or for the entry of judgment on any award made under these rules may be served on a party by mail addressed to the party, or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard to the dispute is or has been granted to the party.

(b) The AAA, the arbitrator and the parties may also use overnight delivery or electronic facsimile transmission (fax), to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be transmitted by electronic mail (e-mail), or other methods of communication.

(c) Unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

R-40. Majority Decision

When the panel consists of more than one arbitrator, unless required by law or by the arbitration agreement, a majority of the arbitrators must make all decisions.
R-41. Time of Award
The award shall be made promptly by the arbitrator and, unless other-
wise agreed by the parties or specified by law, no later than 30 days
from the date of closing the hearing, or, if oral hearings have been
waived, from the date of the AAA’s transmittal of the final statements
and proofs to the arbitrator.

R-42. Form of Award
(a) Any award shall be in writing and signed by a majority of the
arbitrators. It shall be executed in the manner required by law.
(b) The arbitrator need not render a reasoned award unless the
parties request such an award in writing prior to appointment of
the arbitrator or unless the arbitrator determines that a reasoned
award is appropriate.

R-43. Scope of Award
(a) The arbitrator may grant any remedy or relief that the arbitrator
deems just and equitable and within the scope of the agreement
of the parties, including, but not limited to, specific performance
of a contract.
(b) In addition to a final award, the arbitrator may make other
decisions, including interim, interlocutory, or partial rulings,
orders, and awards. In any interim, interlocutory, or
partial award, the arbitrator may assess and apportion the
fees, expenses, and compensation related to such award as the
arbitrator determines is appropriate.
(c) In the final award, the arbitrator shall assess the fees, expenses,
and compensation provided in Sections R-49, R-50, and R-51.
The arbitrator may apportion such fees, expenses, and
compensation among the parties in such amounts as the
arbitrator determines is appropriate.
(d) The award of the arbitrator(s) may include:

(i) interest at such rate and from such date as the arbitrator(s) may deem appropriate; and

(ii) an award of attorneys’ fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

R-44. Award upon Settlement

If the parties settle their dispute during the course of the arbitration and if the parties so request, the arbitrator may set forth the terms of the settlement in a “consent award.” A consent award must include an allocation of arbitration costs, including administrative fees and expenses as well as arbitrator fees and expenses.

R-45. Delivery of Award to Parties

Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at the last known addresses, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

R-46. Modification of Award

Within 20 days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other parties shall be given 10 days to respond to the request. The arbitrator shall dispose of the request within 20 days after transmittal by the AAA to the arbitrator of the request and any response thereto.
R-47. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party, furnish to the party, at the party’s expense, certified copies of any papers in the AAA’s possession that may be required in judicial proceedings relating to the arbitration.

R-48. Applications to Court and Exclusion of Liability

(a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party’s right to arbitrate.

(b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary or proper party in judicial proceedings relating to the arbitration.

(c) Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

(d) Parties to an arbitration under these rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.

R-49. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe an initial filing fee and a case service fee to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable. The filing fee shall be advanced by the party or parties making a claim or counterclaim, subject to final apportionment by the arbitrator in the award. The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.
R-50. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

R-51. Neutral Arbitrator’s Compensation

(a) Arbitrators shall be compensated at a rate consistent with the arbitrator’s stated rate of compensation.

(b) If there is disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the AAA and confirmed to the parties.

(c) Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.

R-52. Deposits

The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator’s fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.
R-53. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator’s powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

R-54. Suspension for Nonpayment

If arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that one of them may advance the required payment. If such payments are not made, the arbitrator may order the suspension or termination of the proceedings. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.
Expedited Procedures

E-1. Limitation on Extensions

Except in extraordinary circumstances, the AAA or the arbitrator may grant a party no more than one seven-day extension of time to respond to the demand for arbitration or counterclaim as provided in Section R-4.

E-2. Changes of Claim or Counterclaim

A claim or counterclaim may be increased in amount, or a new or different claim or counterclaim added, upon the agreement of the other party, or the consent of the arbitrator. After the arbitrator is appointed, however, no new or different claim or counterclaim may be submitted except with the arbitrator’s consent. If an increased claim or counterclaim exceeds $75,000, the case will be administered under the regular procedures unless all parties and the arbitrator agree that the case may continue to be processed under the Expedited Procedures.

E-3. Serving of Notices

In addition to notice provided by Section R-39(b), the parties shall also accept notice by telephone. Telephonic notices by the AAA shall subsequently be confirmed in writing to the parties. Should there be a failure to confirm in writing any such oral notice, the proceeding shall nevertheless be valid if notice has, in fact, been given by telephone.

E-4. Appointment and Qualifications of Arbitrator

(a) The AAA shall simultaneously submit to each party an identical list of five proposed arbitrators drawn from its National Roster from which one arbitrator shall be appointed.
(b) The parties are encouraged to agree to an arbitrator from this list and to advise the AAA of their agreement. If the parties are unable to agree upon an arbitrator, each party may strike two names from the list and return it to the AAA within seven days from the date of the AAA’s mailing to the parties. If for any reason the appointment of an arbitrator cannot be made from the list, the AAA may make the appointment from other members of the panel without the submission of additional lists.

(c) The parties will be given notice by the AAA of the appointment of the arbitrator, who shall be subject to disqualification for the reasons specified in Section R-17. The parties shall notify the AAA within seven days of any objection to the arbitrator appointed. Any such objection shall be for cause and shall be confirmed in writing to the AAA with a copy to the other party or parties.

E-5. Exchange of Exhibits

At least two business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing. The arbitrator shall resolve disputes concerning the exchange of exhibits.

E-6. Proceedings on Documents

Where no party’s claim exceeds $10,000, exclusive of interest and arbitration costs, and other cases in which the parties agree, the dispute shall be resolved by submission of documents, unless any party requests an oral hearing, or the arbitrator determines that an oral hearing is necessary. The arbitrator shall establish a fair and equitable procedure for the submission of documents.
E-7. Date, Time, and Place of Hearing

In cases in which a hearing is to be held, the arbitrator shall set the date, time, and place of the hearing, to be scheduled to take place within 30 days of confirmation of the arbitrator’s appointment. The AAA will notify the parties in advance of the hearing date.

E-8. The Hearing

(a) Generally, the hearing shall not exceed one day. Each party shall have equal opportunity to submit its proofs and complete its case. The arbitrator shall determine the order of the hearing, and may require further submission of documents within two days after the hearing. For good cause shown, the arbitrator may schedule additional hearings within seven business days after the initial day of hearings.

(b) Generally, there will be no stenographic record. Any party desiring a stenographic record may arrange for one pursuant to the provisions of Section R-26.

E-9. Time of Award

Unless otherwise agreed by the parties, the award shall be rendered not later than 14 days from the date of the closing of the hearing or, if oral hearings have been waived, from the date of the AAA’s transmittal of the final statements and proofs to the arbitrator.

E-10. Arbitrator’s Compensation

Arbitrators will receive compensation at a rate to be suggested by the AAA regional office.
Procedures for Large, Complex Commercial Disputes

L-1. Administrative Conference

Prior to the dissemination of a list of potential arbitrators, the AAA shall, unless the parties agree otherwise, conduct an administrative conference with the parties and/or their attorneys or other representatives by conference call. The conference will take place within 14 days after the commencement of the arbitration. In the event the parties are unable to agree on a mutually acceptable time for the conference, the AAA may contact the parties individually to discuss the issues contemplated herein. Such administrative conference shall be conducted for the following purposes and for such additional purposes as the parties or the AAA may deem appropriate:

(a) to obtain additional information about the nature and magnitude of the dispute and the anticipated length of hearing and scheduling;

(b) to discuss the views of the parties about the technical and other qualifications of the arbitrators;

(c) to obtain conflicts statements from the parties; and

(d) to consider, with the parties, whether mediation or other non-adjudicative methods of dispute resolution might be appropriate.

L-2. Arbitrators

(a) Large, complex commercial cases shall be heard and determined by either one or three arbitrators, as may be agreed upon by the parties. If the parties are unable to agree upon the number of arbitrators and a claim or counterclaim involves at least $1,000,000, then three arbitrator(s) shall hear and determine the case. If the parties are unable to agree on the number of arbitrators and each claim and counterclaim is less than $1,000,000, then one arbitrator shall hear and determine the case.
(b) The AAA shall appoint arbitrator(s) as agreed by the parties. If they are unable to agree on a method of appointment, the AAA shall appoint arbitrators from the Large, Complex Commercial Case Panel, in the manner provided in the regular Commercial Arbitration Rules. Absent agreement of the parties, the arbitrator(s) shall not have served as the mediator in the mediation phase of the instant proceeding.

L-3. Preliminary Hearing

As promptly as practicable after the selection of the arbitrator(s), a preliminary hearing shall be held among the parties and/or their attorneys or other representatives and the arbitrator(s). Unless the parties agree otherwise, the preliminary hearing will be conducted by telephone conference call rather than in person. At the preliminary hearing the matters to be considered shall include, without limitation:

(a) service of a detailed statement of claims, damages and defenses, a statement of the issues asserted by each party and positions with respect thereto, and any legal authorities the parties may wish to bring to the attention of the arbitrator(s);

(b) stipulations to uncontested facts;

(c) the extent to which discovery shall be conducted;

(d) exchange and premarking of those documents which each party believes may be offered at the hearing;

(e) the identification and availability of witnesses, including experts, and such matters with respect to witnesses including their biographies and expected testimony as may be appropriate;

(f) whether, and the extent to which, any sworn statements and/or depositions may be introduced;

(g) the extent to which hearings will proceed on consecutive days;

(h) whether a stenographic or other official record of the proceedings shall be maintained;
(i) the possibility of utilizing mediation or other non-adjudicative methods of dispute resolution; and

(j) the procedure for the issuance of subpoenas.

By agreement of the parties and/or order of the arbitrator(s), the pre-hearing activities and the hearing procedures that will govern the arbitration will be memorialized in a Scheduling and Procedure Order.

L-4. Management of Proceedings

(a) Arbitrator(s) shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of large, complex commercial cases.

(b) Parties shall cooperate in the exchange of documents, exhibits and information within such party’s control if the arbitrator(s) consider such production to be consistent with the goal of achieving a just, speedy and cost-effective resolution of a large, complex commercial case.

(c) The parties may conduct such discovery as may be agreed to by all the parties provided, however, that the arbitrator(s) may place such limitations on the conduct of such discovery as the arbitrator(s) shall deem appropriate. If the parties cannot agree on production of documents and other information, the arbitrator(s), consistent with the expedited nature of arbitration, may establish the extent of the discovery.

(d) At the discretion of the arbitrator(s), upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator(s) may order depositions of, or the propounding of interrogatories to, such persons who may possess information determined by the arbitrator(s) to be necessary to determination of the matter.

(e) The parties shall exchange copies of all exhibits they intend to submit at the hearing 10 business days prior to the hearing unless the arbitrator(s) determine otherwise.
(f) The exchange of information pursuant to this rule, as agreed by the parties and/or directed by the arbitrator(s), shall be included within the Scheduling and Procedure Order.

(g) The arbitrator is authorized to resolve any disputes concerning the exchange of information.

(h) Generally hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.
Optional Rules for Emergency Measures of Protection

O-1. Applicability

Where parties by special agreement or in their arbitration clause have adopted these rules for emergency measures of protection, a party in need of emergency relief prior to the constitution of the panel shall notify the AAA and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by facsimile transmission, or other reliable means, but must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties.

O-2. Appointment of Emergency Arbitrator

Within one business day of receipt of notice as provided in Section O-1, the AAA shall appoint a single emergency arbitrator from a special AAA panel of emergency arbitrators designated to rule on emergency applications. The emergency arbitrator shall immediately disclose any circumstance likely, on the basis of the facts disclosed in the application, to affect such arbitrator’s impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the AAA to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.

O-3. Schedule

The emergency arbitrator shall as soon as possible, but in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceeding by telephone conference or on written submissions as alternatives to a formal hearing.
O-4. Interim Award

If after consideration, the emergency arbitrator is satisfied that the party seeking the emergency relief has shown that immediate and irreparable loss or damage will result in the absence of emergency relief, and that such party is entitled to such relief, the emergency arbitrator may enter an interim award granting the relief and stating the reasons therefore.

O-5. Constitution of the Panel

Any application to modify an interim award of emergency relief must be based on changed circumstances and may be made to the emergency arbitrator until the panel is constituted; thereafter such a request shall be addressed to the panel. The emergency arbitrator shall have no further power to act after the panel is constituted unless the parties agree that the emergency arbitrator is named as a member of the panel.

O-6. Security

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

O-7. Special Master

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. If the AAA is directed by a judicial authority to nominate a special master to consider and report on an application for emergency relief, the AAA shall proceed as provided in Section O-1 of this article and the references to the emergency arbitrator shall be read to mean the special master, except that the special master shall issue a report rather than an interim award.
O-8. Costs

The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator or special master, subject to the power of the panel to determine finally the apportionment of such costs.
Administrative Fee Schedules (Standard and Flexible Fee)

The AAA has two administrative fee options for parties filing claims or counterclaims, the Standard Fee Schedule and Flexible Fee Schedule. The Standard Fee Schedule has a two payment schedule, and the Flexible Fee Schedule has a three payment schedule which 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 AAA 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.

In an effort to make arbitration costs reasonable for consumers, the AAA has a separate fee schedule for consumer-related disputes. Please refer to Section C-8 of the Supplementary Procedures for Consumer-Related Disputes when filing a consumer-related claim. Note that the Flexible Fee Schedule is not available on cases administered under these supplementary procedures.

The AAA applies the Supplementary Procedures for Consumer-Related Disputes to arbitration clauses in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The AAA will have the discretion to apply or not to apply the Supplementary Procedures and the parties will be able to bring any disputes concerning the application or non-application to the attention of the arbitrator. Consumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of its jurisdiction, even in consumer arbitration cases filed by the business.
**Fees for incomplete or deficient filings:** Where the applicable arbitration agreement does not reference the AAA, the AAA will attempt to obtain the agreement of the other parties to the dispute to have the arbitration administered by the AAA. However, where the AAA is unable to obtain the agreement of the parties to have the AAA administer the arbitration, the AAA will administratively close the case and will not proceed with the administration of the arbitration. In these cases, the AAA 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 AAA’s request to correct the deficiency.

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

**Standard Fee Schedule**

An Initial Filing Fee is payable in full by a filing party when a claim, counterclaim, or additional claim 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 Association 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.
These fees will be billed in accordance with the following schedule:

<table>
<thead>
<tr>
<th>Amount of Claim</th>
<th>Initial Filing Fee</th>
<th>Final Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Above $0 to $10,000</td>
<td>$775</td>
<td>$200</td>
</tr>
<tr>
<td>Above $10,000 to $75,000</td>
<td>$975</td>
<td>$300</td>
</tr>
<tr>
<td>Above $75,000 to $150,000</td>
<td>$1,850</td>
<td>$750</td>
</tr>
<tr>
<td>Above $150,000 to $300,000</td>
<td>$2,800</td>
<td>$1,250</td>
</tr>
<tr>
<td>Above $300,000 to $500,000</td>
<td>$4,350</td>
<td>$1,750</td>
</tr>
<tr>
<td>Above $500,000 to $1,000,000</td>
<td>$6,200</td>
<td>$2,500</td>
</tr>
<tr>
<td>Above $1,000,000 to $5,000,000</td>
<td>$8,200</td>
<td>$3,250</td>
</tr>
<tr>
<td>Above $5,000,000 to $10,000,000</td>
<td>$10,200</td>
<td>$4,000</td>
</tr>
<tr>
<td>Above $10,000,000</td>
<td>Base fee of $12,800 plus .01% of the amount above $10,000,000 Fee Capped at $65,000</td>
<td>$6,000</td>
</tr>
<tr>
<td>Nonmonetary Claims(^1)</td>
<td>$3,350</td>
<td>$1,250</td>
</tr>
<tr>
<td>Deficient Claim Filing Fee(^2)</td>
<td>$350</td>
<td></td>
</tr>
<tr>
<td>Additional Services(^3)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\(^1\) 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 their dispute to arbitration pursuant to an employer promulgated plan.

\(^3\) The AAA 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 Initial Filing Fee, plus a $1,250 Final Fee. Expedited Procedures are applied in any case where no disclosed claim or counterclaim exceeds $75,000, exclusive of interest and arbitration costs.

Parties 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, otherwise the matter will be administratively closed.

For more information, please contact your local AAA office, case management center, or our Customer Service desk at 1-800-778-7879.

Refund Schedule for Standard Fee Schedule

The AAA 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 AAA 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 AAA 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 ninety (90) days of the filing of the Claimant’s Demand for Arbitration, the Association 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 Flexible Fee Schedule below 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 Association 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.
All fees will be billed in accordance with the following schedule:

<table>
<thead>
<tr>
<th>Amount of Claim</th>
<th>Initial Filing Fee</th>
<th>Proceed Fee</th>
<th>Final Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Above $0 to $10,000</td>
<td>$400</td>
<td>$475</td>
<td>$200</td>
</tr>
<tr>
<td>Above $10,000 to $75,000</td>
<td>$625</td>
<td>$500</td>
<td>$300</td>
</tr>
<tr>
<td>Above $75,000 to $150,000</td>
<td>$850</td>
<td>$1250</td>
<td>$750</td>
</tr>
<tr>
<td>Above $150,000 to $300,000</td>
<td>$1,000</td>
<td>$2,125</td>
<td>$1,250</td>
</tr>
<tr>
<td>Above $300,000 to $500,000</td>
<td>$1,500</td>
<td>$3,400</td>
<td>$1,750</td>
</tr>
<tr>
<td>Above $500,000 to $1,000,000</td>
<td>$2,500</td>
<td>$4,500</td>
<td>$2,500</td>
</tr>
<tr>
<td>Above $1,000,000 to $5,000,000</td>
<td>$2,500</td>
<td>$6,700</td>
<td>$3,250</td>
</tr>
<tr>
<td>Above $5,000,000 to $10,000,000</td>
<td>$3,500</td>
<td>$8,200</td>
<td>$4,000</td>
</tr>
<tr>
<td>Above $10,000,000</td>
<td>$4,500</td>
<td>$10,300 plus .01% of claim amount over $10,000,000 up to $65,000</td>
<td>$6,000</td>
</tr>
<tr>
<td>Nonmonetary¹</td>
<td>$2,000</td>
<td>$2,000</td>
<td>$1,250</td>
</tr>
<tr>
<td>Deficient Claim Filing Fee</td>
<td>$350</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Additional Services²</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

¹This 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.

²The AAA reserves the right to assess additional administrative fees for services performed by the AAA beyond those provided for in these Rules and which may be required by the parties’ agreement or stipulation.
For more information, please contact your local AAA office, case management center, or our Customer Service desk at 1-800-778-7879. 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 closed.

Note: The date of receipt by the AAA of the demand for arbitration will be used to calculate the ninety (90) day time limit for payment of the Proceed Fee.

There is no Refund Schedule in the Flexible Fee Schedule.

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 AAA for availability and rates.
JAMS provides arbitration and mediation services from Resolution Centers located throughout the United States. Its arbitrators and mediators hear and resolve some of the nation’s largest, most complex and contentious disputes, utilizing JAMS Rules & Procedures as well as the rules of other domestic and international arbitral institutions.

JAMS arbitrators and mediators are full-time neutrals who come from the ranks of retired state and federal judges and prominent attorneys. These highly trained and experienced ADR professionals are dedicated to the highest ethical standards of conduct.

Parties wishing to write a pre-dispute JAMS arbitration clause into their agreement should review the sample arbitration clauses on Page 4. These clauses may be modified to tailor the arbitration process to meet the parties’ individual needs.
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<tr>
<td>28</td>
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</tbody>
</table>
Standard Commercial Arbitration Clause*

Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in (insert the desired place of arbitration), before (one) (three) arbitrator(s). The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules & Procedures (Streamlined Arbitration Rules & Procedures). Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.

(Optional) Allocation of Fees and Costs: The arbitrator may, in the Award, allocate all or part of the costs of the arbitration, including the fees of the arbitrator and the reasonable attorneys’ fees of the prevailing party.

(Optional) Expedited Procedures: The parties agree that the Expedited Procedures set forth in JAMS Comprehensive Rules 16.1 and 16.2 shall be employed.

*(The drafter should select the desired option from those provided in the parentheses.

Case Management Fees

JAMS charges a nominal Case Management Fee. For arbitrations the Case Management Fee is:

**Hearing Length** | **Fee**
--- | ---
1 to 3 days | $400 per party, per day (1 day is defined as 10 hours of professional time)

Time in excess of initial 30 hours. . . . . . . . . . . . . . 10% of professional fees

JAMS neutrals set their own hourly, partial and full-day rates. For information on individual neutrals’ rates and the Case Management Fee, please contact JAMS at 800-352-JAMS. The Case Management Fee structure is subject to change.

Optional Expedited Procedures

For matters where the parties intend to use the Comprehensive Rules and Procedures, JAMS Optional Expedited Procedures, set forth in Rules 16.1 and 16.2, are designed to ensure a swift resolution. If followed, an arbitration could be completed within 150 days of the Preliminary Conference.

*The drafter should select the desired option from those provided in the parentheses.
STREAMLINED RULES

JAMS provides clients with the option to select a simplified arbitration process for those cases where the claims and counterclaims are below $250,000. JAMS Streamlined Arbitration Rules & Procedures are designed to minimize the arbitration costs associated with these cases while providing a full and fair hearing for all parties.

All of the JAMS Rules, including the Comprehensive Arbitration Rules set forth below, can be accessed at the JAMS website: www.jamsadr.com.

JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES

NOTICE: These Rules are the copyrighted property of JAMS. They cannot be copied, reprinted or used in any way without permission of JAMS, unless they are being used by the parties to an arbitration as the rules for that arbitration. If they are being used as the rules for an arbitration, proper attribution must be given to JAMS. If you wish to obtain permission to use our copyrighted materials, please contact JAMS at 949-224-1810.

Rule 1. Scope of Rules

(a) The JAMS Comprehensive Arbitration Rules and Procedures (“Rules”) govern binding Arbitrations of disputes or claims that are administered by JAMS and in which the Parties agree to use these Rules or, in the absence of such agreement, any disputed claim or counterclaim that exceeds $250,000, not including interest or attorneys’ fees, unless other Rules are prescribed.

(b) The Parties shall be deemed to have made these Rules a part of their Arbitration agreement (“Agreement”) whenever they have provided for Arbitration by JAMS under its Comprehensive Rules or for Arbitration by JAMS without specifying any particular JAMS Rules and the disputes or claims meet the criteria of the first paragraph of this Rule.

(c) The authority and duties of JAMS are prescribed in the Agreement of the Parties and in these Rules, and may be carried out through such representatives as it may direct.

(d) JAMS may, in its discretion, assign the administration of an Arbitration to any of its Resolution Centers.

(e) The term “Party” as used in these Rules includes Parties to the Arbitration and their counsel or representatives.

(f) “Electronic filing” (e-file) means the electronic transmission of documents to and from JAMS and other Parties for the purpose of filing via the Internet. “Electronic service” (e-service) means the electronic transmission of documents via JAMS Electronic Filing System to a Party, attorney or representative under these Rules.
Rule 2. Party-Agreed Procedures

The Parties may agree on any procedures not specified herein or in lieu of these Rules that are consistent with the applicable law and JAMS policies (including, without limitation, Rules 15(i), 30 and 31). The Parties shall promptly notify JAMS of any such Party-agreed procedures and shall confirm such procedures in writing. The Party-agreed procedures shall be enforceable as if contained in these Rules.

Rule 3. Amendment of Rules

JAMS may amend these Rules without notice. The Rules in effect on the date of the commencement of an Arbitration (as defined in Rule 5) shall apply to that Arbitration, unless the Parties have agreed upon another version of the Rules.

Rule 4. Conflict with Law

If any of these Rules, or modification of these Rules agreed on by the Parties, is determined to be in conflict with a provision of applicable law, the provision of law will govern over the Rule in conflict, and no other Rule will be affected.

Rule 5. Commencing an Arbitration

(a) The Arbitration is deemed commenced when JAMS confirms in a Commencement Letter its receipt of one of the following:

(i) A post-dispute Arbitration agreement fully executed by all Parties and that specifies JAMS administration or use of any JAMS Rules; or

(ii) A pre-dispute written contractual provision requiring the Parties to arbitrate the dispute or claim and that specifies JAMS administration or use of any JAMS Rules or that the Parties agree shall be administered by JAMS; or

(iii) A written confirmation of an oral agreement of all Parties to participate in an Arbitration administered by JAMS or conducted pursuant to any JAMS Rules; or

(iv) A copy of a court order compelling Arbitration at JAMS.

(b) The Commencement Letter shall confirm which one of the above requirements for commencement has been met, that JAMS has received all payments required under the applicable fee schedule, and that the claimant has provided JAMS with contact information for all Parties along with evidence that the Demand has been served on all Parties.

(c) If a Party that is obligated to arbitrate in accordance with subparagraph (a) of this Rule fails to agree to participate in the Arbitration process, JAMS shall confirm in writing that Party’s failure to respond or participate and, pursuant to Rule 22(j), the Arbitrator, once appointed, shall schedule, and provide appropriate notice of, a Hearing or other opportunity for the Party demanding the Arbitration to demonstrate its entitlement to relief.

(d) The date of commencement of the Arbitration is the date of the Commencement Letter, but is not intended to be applicable to any legal requirements such as the statute of limitations, any contractual limitations period, or claims notice requirements. The term “commencement” as used in this Rule is intended only to pertain to the operation of this and other rules (such as Rules 3, 9(a), 9(c), 13(a), 17(a) and 31(a)).

Rule 6. Preliminary and Administrative Matters

(a) JAMS may convene, or the Parties may request, administrative conferences to discuss any procedural matter relating to the administration of the Arbitration.

(b) If no Arbitrator has yet been appointed, at the request of a Party and in the absence of Party agreement, JAMS may determine the location of the Hearing, subject to Arbitrator review. In determining the location of the Hearing such factors as the subject matter of the dispute, the convenience of the Parties and witnesses and the relative resources of the Parties shall be considered.

(c) If, at any time, any Party has failed to pay fees or expenses in full, JAMS may order the suspension or termination of the proceedings. JAMS may so inform the Parties in order that one of them may advance the required payment. If one Party advances the payment owed by a non-paying Party, the Arbitration shall proceed and the Arbitrator may allocate the non-paying Party’s share of such costs, in accordance with Rules 24(f) and 31(c). An administrative suspension shall toll any other time limits contained in these Rules or the Parties’ Agreement.
(d) JAMS does not maintain an official record of documents filed in the Arbitration. If the Parties wish to have any documents returned to them, they must advise JAMS in writing within 30 calendar days of the conclusion of the Arbitration. If special arrangements are required regarding file maintenance or document retention, they must be agreed to in writing and JAMS reserves the right to impose an additional fee for such special arrangements. Documents that are submitted for e-filing are retained for 30 calendar days following the conclusion of the Arbitration.

(e) Unless the Parties’ agreement or applicable law provides otherwise, JAMS, if it determines that the Arbitrations so filed have common issues of fact or law, may consolidate Arbitrations in the following instances:

(i) If a Party files more than one Arbitration with JAMS, JAMS may consolidate the Arbitrations into a single arbitration.

(ii) Where a Demand or Demands for Arbitration is or are submitted naming Parties already involved in another Arbitration or Arbitrations pending under these Rules, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators or panels of Arbitrators already appointed.

(iii) Where a Demand or Demands for Arbitration is or are submitted naming Parties that are not identical to the Parties in the existing Arbitration or Arbitrations, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators or panels of Arbitrators already appointed.

When rendering its decision, JAMS will take into account all circumstances, including the links between the cases and the progress already made in the existing Arbitrations.

Unless applicable law provides otherwise, where JAMS decides to consolidate a proceeding into a pending Arbitration, the Parties to the consolidated case or cases will be deemed to have waived their right to designate an Arbitrator as well as any contractual provision with respect to the site of the Arbitration.

(f) Where a third party seeks to participate in an Arbitration already pending under these Rules or where a Party to an Arbitration under these Rules seeks to compel a third party to participate in a pending Arbitration, the Arbitrator shall determine such request, taking into account all circumstances the Arbitrator deems relevant and applicable.

Rule 7. Number of Arbitrators and Appointment of Chairperson

(a) The Arbitration shall be conducted by one neutral Arbitrator unless all Parties agree otherwise. In these Rules, the term “Arbitrator” shall mean, as the context requires, the Arbitrator or the panel of Arbitrators in a tripartite Arbitration.

(b) In cases involving more than one Arbitrator the Parties shall agree on, or in the absence of agreement JAMS shall designate, the Chairperson of the Arbitration Panel. If the Parties and the Arbitrators agree, a single member of the Arbitration Panel may, acting alone, decide discovery and procedural matters, including the conduct of hearings to receive documents and testimony from third parties who have been subpoenaed to produce documents.

(c) Where the Parties have agreed that each Party is to name one Arbitrator, the Arbitrators so named shall be neutral and independent of the appointing Party unless the Parties have agreed that they shall be non-neutral.

Rule 8. Service

(a) The Arbitrator may at any time require electronic filing and service of documents in an Arbitration. If an Arbitrator requires electronic filing, the Parties shall maintain and regularly monitor a valid, usable and live email address for the receipt of all documents filed through JAMS Electronic Filing System. Any document filed electronically shall be considered as filed with JAMS when the transmission to JAMS Electronic Filing System is complete. Any document e-filed by 11:59 p.m. (of the sender’s time zone) shall be deemed filed on that date. Upon completion of filing, JAMS Electronic Filing System shall issue a confirmation receipt that includes the date and time of receipt. The confirmation receipt shall serve as proof of filing.

(b) Every document filed with JAMS Electronic Filing System shall be deemed to have been signed by the Arbitrator, Case Manager, attorney or declarant who submits the document to JAMS Electronic Filing System, and shall bear the typed name, address, telephone number and Bar number of a signing attorney. Documents containing
signatures of third parties (i.e., unopposed motions, affidavits, stipulations, etc.) may also be filed electronically by indicating that the original signatures are maintained by the filing Party in paper format.

(c) Delivery of e-service documents through JAMS Electronic Filing System to other registered users shall be considered as valid and effective service and shall have the same legal effect as an original paper document. Recipients of e-service documents shall access their documents through JAMS Electronic Filing System. E-service shall be deemed complete when the Party initiating e-service completes the transmission of the electronic document(s) to JAMS Electronic Filing System for e-filing and/or e-service. Recipients of e-service documents shall access their documents through JAMS Electronic Filing System. E-service shall be deemed complete when the Party initiating e-service completes the transmission of the electronic document(s) to JAMS Electronic Filing System for e-filing and/or e-service. Upon actual or constructive receipt of the electronic document(s) by the Party to be served, a Certificate of Electronic Service shall be issued by JAMS Electronic Filing System to the Party initiating e-service and that Certificate shall serve as proof of service. Any Party who ignores or attempts to refuse e-service shall be deemed to have received the electronic document(s) 72 hours following the transmission of the electronic document(s) to JAMS Electronic Filing System.

(d) If an electronic filing or service does not occur because of (1) an error in the transmission of the document to JAMS Electronic Filing System or served Party that was unknown to the sending Party; (2) a failure to process the electronic document when received by JAMS Electronic Filing System; (3) the Party being erroneously excluded from the service list; or (4) other technical problems experienced by the filer, the Arbitrator or JAMS may for good cause shown permit the document to be filed nunc pro tunc to the date it was first attempted to be sent electronically. Or, in the case of service, the Party shall, absent extraordinary circumstances, be entitled to an order extending the date for any response or the period within which any right, duty or other act must be performed.

(e) For documents that are not filed electronically, service by a Party under these Rules is effected by providing one signed copy of the document to each Party and two copies in the case of a sole Arbitrator and four copies in the case of a tripartite panel to JAMS. Service may be made by hand-delivery, overnight delivery service or U.S. mail. Service by any of these means is considered effective upon the date of deposit of the document. Service by electronic mail or facsimile transmission is considered effective upon transmission, but only if followed within one week of delivery by service of an appropriate number of copies and originals by one of the other service methods.

(f) In computing any period of time prescribed or allowed by these Rules for a Party to do some act within a prescribed period after the service of a notice or other paper on the Party and the notice or paper is served on the Party only by U.S. mail, three (3) calendar days shall be added to the prescribed period.

Rule 9. Notice of Claims

(a) Each Party shall afford all other Parties reasonable and timely notice of its claims, affirmative defenses or counterclaims. Any such notice shall include a short statement of its factual basis. No claim, remedy, counterclaim or affirmative defense will be considered by the Arbitrator in the absence of such prior notice to the other Parties, unless the Arbitrator determines that no Party has been unfairly prejudiced by such lack of formal notice or all Parties agree that such consideration is appropriate notwithstanding the lack of prior notice.

(b) Within fourteen (14) calendar days after the commencement of an Arbitration, Claimant shall submit to JAMS and serve on the other Parties a notice of its claim and remedies sought. Such notice shall consist of either a Demand for Arbitration or a copy of a Complaint previously filed with a court. (In the latter case, Claimant may accompany the Complaint with a copy of any Answer to that Complaint filed by any Respondent.)

(c) Within fourteen (14) calendar days of service of the notice of claim, a Respondent may submit to JAMS and serve on other Parties a response and must so submit and serve a statement of any affirmative defenses (including jurisdictional challenges) or counterclaims it may have.

(d) Within fourteen (14) calendar days of service of a counterclaim, a claimant may submit to JAMS and serve on other Parties a response to such counterclaim and must so submit and serve a statement of any affirmative defenses (including jurisdictional challenges) it may have.

(e) Any claim or counterclaim to which no response has been served will be deemed denied.
Rule 10. Changes of Claims

After the filing of a claim and before the Arbitrator is appointed, any Party may make a new or different claim against a Party or any third party that is subject to Arbitration in the proceeding. Such claim shall be made in writing, filed with JAMS and served on the other Parties. Any response to the new claim shall be made within fourteen (14) calendar days after service of such claim. After the Arbitrator is appointed, no new or different claim may be submitted except with the Arbitrator’s approval. A Party may request a Hearing on this issue. Each Party has the right to respond to any new or amended claim in accordance with Rule 9(d).

Rule 11. Interpretation of Rules and Jurisdictional Challenges

(a) Once appointed, the Arbitrator shall resolve disputes about the interpretation and applicability of these Rules and conduct of the Arbitration Hearing. The resolution of the issue by the Arbitrator shall be final.

(b) Whenever in these Rules a matter is to be determined by JAMS (such as in Rules 6; 11(d); 15(d), (f) or (g); and 31(d)), such determination shall be made in accordance with JAMS administrative procedures.

(c) Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

(d) Disputes concerning the appointment of the Arbitrator shall be resolved by JAMS.

(e) The Arbitrator may upon a showing of good cause or sua sponte, when necessary to facilitate the Arbitration, extend any deadlines established in these Rules, provided that the time for rendering the Award may be altered only in accordance with Rules 22(i) or 24.

Rule 12. Representation

(a) The Parties may be represented by counsel or any other person of the Party’s choice. Each Party shall give prompt written notice to the Case Manager and the other Parties of the name, address, telephone and fax numbers and email address of its representative. The representative of a Party may act on the Party’s behalf in complying with these Rules.

(b) Changes in Representation. A Party shall give prompt written notice to the Case Manager and the other Parties of any change in its representation, including the name, address, telephone and fax numbers and email address of the new representative. Such notice shall state that the written consent of the former representative, if any, and of the new representative, has been obtained and shall state the effective date of the new representation.

Rule 13. Withdrawal from Arbitration

(a) No Party may terminate or withdraw from an Arbitration after the issuance of the Commencement Letter (see Rule 5), except by written agreement of all Parties to the Arbitration.

(b) A Party that asserts a claim or counterclaim may unilaterally withdraw that claim or counterclaim without prejudice by serving written notice on the other Parties and on the Arbitrator. However, the opposing Parties may, within fourteen (14) calendar days of service of notice of the withdrawal of the claim or counterclaim, request that the Arbitrator order that the withdrawal be with prejudice. If such a request is made, it shall be determined by the Arbitrator.

Rule 14. Ex Parte Communications

(a) No Party may have any ex parte communication with a neutral Arbitrator jointly selected by the Parties. The Arbitrator(s) may authorize any Party to communicate directly with the Arbitrator(s) by email or other written correspondence as long as copies are simultaneously forwarded to the JAMS Case Manager and the other Parties.

(b) A Party may have ex parte communication with its appointed neutral or non-neutral Arbitrator as necessary to secure the Arbitrator’s services and to assure the absence of conflicts, as well as in connection with the selection of the Chairperson of the arbitral panel.

(c) The Parties may agree to permit more extensive ex parte communication between a Party and a non-neutral
Rule 15. Arbitrator Selection and Replacement

(a) Unless the Arbitrator has been previously selected by agreement of the Parties, JAMS may attempt to facilitate agreement among the Parties regarding selection of the Arbitrator.

(b) If the Parties do not agree on an Arbitrator, JAMS shall send the Parties a list of at least five (5) Arbitrator candidates in the case of a sole Arbitrator and ten (10) Arbitrator candidates in the case of a tripartite panel. JAMS shall also provide each Party with a brief description of the background and experience of each Arbitrator candidate. JAMS may replace any or all names on the list of Arbitrator candidates for reasonable cause at any time before the Parties have submitted their choice pursuant to subparagraph (c) below.

(c) Within seven (7) calendar days of service upon the Parties of the list of names, each Party may strike two (2) names in the case of a sole Arbitrator and three (3) names in the case of a tripartite panel, and shall rank the remaining Arbitrator candidates in order of preference. The remaining Arbitrator candidate with the highest composite ranking shall be appointed the Arbitrator. JAMS may grant a reasonable extension of the time to strike and rank the Arbitrator candidates to any Party without the consent of the other Parties.

(d) If this process does not yield an Arbitrator or a complete panel, JAMS shall designate the sole Arbitrator or as many members of the tripartite panel as are necessary to complete the panel.

(e) If a Party fails to respond to a list of Arbitrator candidates within seven (7) calendar days after its service, JAMS shall deem that Party to have accepted all of the Arbitrator candidates.

(f) Entities whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of the Arbitrator selection process. JAMS shall determine whether the interests between entities are adverse for purposes of Arbitrator selection, considering such factors as whether the entities are represented by the same attorney and whether the entities are presenting joint or separate positions at the Arbitration.

(g) If, for any reason, the Arbitrator who is selected is unable to fulfill the Arbitrator’s duties, a successor Arbitrator shall be chosen in accordance with this Rule. If a member of a panel of Arbitrators becomes unable to fulfill his or her duties after the beginning of a Hearing but before the issuance of an Award, a new Arbitrator will be chosen in accordance with this Rule unless, in the case of a tripartite panel, the Parties agree to proceed with the remaining two Arbitrators. JAMS will make the final determination as to whether an Arbitrator is unable to fulfill his or her duties, and that decision shall be final.

(h) Any disclosures regarding the selected Arbitrator shall be made as required by law or within ten (10) calendar days from the date of appointment. The obligation of the Arbitrator to make all required disclosures continues throughout the Arbitration process. Such disclosures may be provided in electronic format, provided that JAMS will produce a hard copy to any Party that requests it.

(i) At any time during the Arbitration process, a Party may challenge the continued service of an Arbitrator for cause. The challenge must be based upon information that was not available to the Parties at the time the Arbitrator was selected. A challenge for cause must be in writing and exchanged with opposing Parties who may respond within seven (7) calendar days of service of the challenge. JAMS shall make the final determination as to such challenge. Such determination shall take into account the materiality of the facts and any prejudice to the Parties. That decision will be final.

(j) Where the Parties have agreed that a Party-appointed Arbitrator is to be non-neutral, that Party-appointed Arbitrator is not obliged to withdraw if requested to do so only by the Party who did not appoint that Arbitrator.

Rule 16. Preliminary Conference

At the request of any Party or at the direction of the Arbitrator, a Preliminary Conference shall be conducted with the Parties or their counsel or representatives. The Preliminary Conference may address any or all of the following subjects:
(a) The exchange of information in accordance with Rule 17 or otherwise;

(b) The schedule for discovery as permitted by the Rules, as agreed by the Parties or as required or authorized by applicable law;

(c) The pleadings of the Parties and any agreement to clarify or narrow the issues or structure the Arbitration Hearing;

(d) The scheduling of the Hearing and any pre-Hearing exchanges of information, exhibits, motions or briefs;

(e) The attendance of witnesses as contemplated by Rule 21;

(f) The scheduling of any dispositive motion pursuant to Rule 18;

(g) The premarking of exhibits, the preparation of joint exhibit lists and the resolution of the admissibility of exhibits;

(h) The form of the Award; and

(i) Such other matters as may be suggested by the Parties or the Arbitrator.

The Preliminary Conference may be conducted telephonically and may be resumed from time to time as warranted.

Rule 16.1 Application of Expedited Procedures

(a) If these Expedited Procedures are referenced in the Parties’ agreement to arbitrate or are later agreed to by all Parties, they shall be applied by the Arbitrator.

(b) If the Claimant opts in to the Expedited Procedures in the Demand for Arbitration, the Respondent shall indicate within seven (7) calendar days of notice thereof whether it agrees to the Expedited Procedures.

(c) If the Respondent declines to agree to the Expedited Procedures, each Party shall have a client or client representative present at the first Preliminary Conference (which should, if feasible, be an in-person conference) unless excused by the Arbitrator for good cause.

Rule 16.2 Where Expedited Procedures Are Applicable

(a) The Arbitrator shall require compliance with Rule 17(a) prior to conducting the first Preliminary Conference. Each Party shall confirm in writing to the Arbitrator that it has so complied or shall indicate any limitations on full compliance and the reasons therefor.

(b) Document requests shall (1) be limited to documents that are directly relevant to the matters in dispute or to its outcome; (2) be reasonably restricted in terms of time frame, subject matter and persons or entities to which the requests pertain; and (3) not include broad phraseology such as “all documents directly or indirectly related to.” The Requests shall not be encumbered with excessive “definitions” or “instructions.” The Arbitrator may edit or limit the number of requests.

(c) E-Discovery shall be limited as follows:

(i) There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from backup servers, tapes or other media.

(ii) 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 that is usable by the requesting Party 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.

(iii) The description of custodians from whom electronic documents may be collected should be narrowly tailored to include only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute.

(iv) Where the costs and burdens of e-discovery are disproportionate to the nature of the dispute or to the amount in controversy, or to the relevance of the materials requested, the Arbitrator may either deny such requests or order disclosure on the condition that the requesting Party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final award.

(v) The Arbitrator may vary these rules after discussion with the Parties at the Preliminary Conference.
(d) Depositions of percipient witnesses shall be limited as follows:
   (i) The limitation of one discovery deposition per side (Rule 17(b)) shall be applied by the Arbitrator unless it is determined, based on all relevant circumstances, that more depositions are warranted. The Arbitrator shall consider the amount in controversy, the complexity of the factual issues, the number of Parties and the diversity of their interests and whether any or all of the claims appear, on the basis of the pleadings, to have sufficient merit to justify the time and expense associated with the requested discovery.
   (ii) The Arbitrator shall also consider the additional factors listed in the JAMS Recommended Arbitration Discovery Protocols for Domestic Commercial Cases.

(e) Expert Depositions, if any, shall be limited as follows: Where written expert reports are produced to the other side in advance of the Hearing (Rule 17(a)), expert depositions may be conducted only by agreement of the Parties or by order of the Arbitrator for good cause shown.

(f) Discovery disputes shall be resolved on an expedited basis.
   (i) Where there is a panel of three arbitrators, the Parties are encouraged to agree, by rule or otherwise, that the Chair or another member of the panel is authorized to resolve discovery issues, acting alone.
   (ii) Lengthy briefs on discovery matters should be avoided. In most cases, the submission of brief letters will sufficiently inform the arbitrator with regard to the issues to be decided.
   (iii) The Parties should meet and confer in good faith prior to presenting any issues for the arbitrator’s decision.
   (iv) If disputes exist with respect to some issues, that should not delay the Parties’ discovery on remaining issues.

(g) The Arbitrator shall set a discovery cutoff not to exceed 75 calendar days after the Preliminary Conference for percipient discovery and not to exceed 105 calendar days for expert discovery (if any). These dates may be extended by the Arbitrator for good cause shown.

(h) Dispositive motions (Rule 18) shall not be permitted, except as set forth in the JAMS Recommended Arbitration Discovery Protocols for Domestic Commercial Cases or unless the Parties agree to that procedure.

(i) The hearing shall commence within 60 calendar days after the cutoff for percipient discovery. Consecutive hearing days shall be established unless otherwise agreed by the Parties or ordered by the Arbitrator. These dates may be extended by the Arbitrator for good cause shown.

(j) The Arbitrator may alter any of these Procedures for good cause.

**Rule 17. Exchange of Information**

(a) The Parties shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information (including electronically stored information (“ESI”)) relevant to the dispute or claim immediately after commencement of the Arbitration. They shall complete an initial exchange of all relevant, non-privileged documents, including, without limitation, copies of all documents in their possession or control on which they rely in support of their positions, and names of individuals whom they may call as witnesses at the Arbitration Hearing, within twenty-one (21) calendar days after all pleadings or notice of claims have been received. The Arbitrator may modify these obligations at the Preliminary Conference.

(b) Each Party may take one deposition of an opposing Party or of one individual under the control of the opposing Party. The Parties shall attempt to agree on the time, location and duration of the deposition. If the Parties do not agree, these issues shall be determined by the Arbitrator. The necessity of additional depositions shall be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness.

(c) As they become aware of new documents or information, including experts who may be called upon to testify, all Parties continue to be obligated to provide relevant, non-privileged documents to supplement their identification of witnesses and experts and to honor any informal agreements or understandings between the Parties regarding documents or information to be exchanged. Documents that were not previously exchanged, or witnesses and experts that were not previously identified, may not be considered by the Arbitrator at the Hearing, unless agreed by the Parties or upon a showing of good cause.
(d) The Parties shall promptly notify JAMS when a dispute exists regarding discovery issues. A conference shall be arranged with the Arbitrator, either by telephone or in person, and the Arbitrator shall decide the dispute. With the written consent of all Parties, and in accordance with an agreed written procedure, the Arbitrator may appoint a special master to assist in resolving a discovery dispute.

**Rule 18. Summary Disposition of a Claim or Issue**

The Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request.

**Rule 19. Scheduling and Location of Hearing**

(a) The Arbitrator, after consulting with the Parties that have appeared, shall determine the date, time and location of the Hearing. The Arbitrator and the Parties shall attempt to schedule consecutive Hearing days if more than one day is necessary.

(b) If a Party has failed to participate in the Arbitration process, the Arbitrator may set the Hearing without consulting with that Party. The non-participating Party shall be served with a Notice of Hearing at least thirty (30) calendar days prior to the scheduled date unless the law of the relevant jurisdiction allows for, or the Parties have agreed to, shorter notice.

(c) The Arbitrator, in order to hear a third-party witness, or for the convenience of the Parties or the witnesses, may conduct the Hearing at any location. Any JAMS Resolution Center may be designated a Hearing location for purposes of the issuance of a subpoena or subpoena *duces tecum* to a third-party witness.

**Rule 20. Pre-Hearing Submissions**

(a) Except as set forth in any scheduling order that may be adopted, at least fourteen (14) calendar days before the Arbitration Hearing, the Parties shall file with JAMS and serve and exchange (1) a list of the witnesses they intend to call, including any experts; (2) a short description of the anticipated testimony of each such witness and an estimate of the length of the witness’ direct testimony; (3) any written expert reports that may be introduced at the Arbitration Hearing; and (4) a list of all exhibits intended to be used at the Hearing. The Parties should exchange with each other a copy of any such exhibits to the extent that it has not been previously exchanged. The Parties should pre-mark exhibits and shall attempt to resolve any disputes regarding the admissibility of exhibits prior to the Hearing.

(b) The Arbitrator may require that each Party submit concise written statements of position, including summaries of the facts and evidence a Party intends to present, discussion of the applicable law and the basis for the requested Award or denial of relief sought. The statements, which may be in the form of a letter, shall be filed with JAMS and served upon the other Parties at least seven (7) calendar days before the Hearing date. Rebuttal statements or other pre-Hearing written submissions may be permitted or required at the discretion of the Arbitrator.

**Rule 21. Securing Witnesses and Documents for the Arbitration Hearing**

At the written request of a Party, all other Parties shall produce for the Arbitration Hearing all specified witnesses in their employ or under their control without need of subpoena. The Arbitrator may issue subpoenas for the attendance of witnesses or the production of documents either prior to or at the Hearing pursuant to this Rule or Rule 19(c). The subpoena or subpoena *duces tecum* shall be issued in accordance with the applicable law. Pre-issued subpoenas may be used in jurisdictions that permit them. In the event a Party or a subpoenaed person objects to the production of a witness or other evidence, the Party or subpoenaed person may file an objection with the Arbitrator, who shall promptly rule on the objection, weighing both the burden on the producing Party and witness and the need of the proponent for the witness or other evidence.

**Rule 22. The Arbitration Hearing**

(a) The Arbitrator will ordinarily conduct the Arbitration Hearing in the manner set forth in these Rules. The Arbitrator may vary these procedures if it is determined reasonable and appropriate to do so.

(b) The Arbitrator shall determine the order of proof, which will generally be similar to that of a court trial.
(c) The Arbitrator shall require witnesses to testify under oath if requested by any Party, or otherwise in the discretion of the Arbitrator.

(d) Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product. The Arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate. The Arbitrator may be guided in that determination by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence. The Arbitrator may limit testimony to exclude evidence that would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence.

(e) The Arbitrator shall receive and consider relevant deposition testimony recorded by transcript or videotape, provided that the other Parties have had the opportunity to attend and cross-examine. The Arbitrator may in his or her discretion consider witness 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 the Arbitrator deems appropriate.

(f) The Parties will not offer as evidence, and the Arbitrator shall neither admit into the record nor consider, prior settlement offers by the Parties or statements or recommendations made by a mediator or other person in connection with efforts to resolve the dispute being arbitrated, except to the extent that applicable law permits the admission of such evidence.

(g) The Hearing, or any portion thereof, may be conducted telephonically with the agreement of the Parties or in the discretion of the Arbitrator.

(h) When the Arbitrator determines that all relevant and material evidence and arguments have been presented, and any interim or partial awards have been issued, the Arbitrator shall declare the Hearing closed. The Arbitrator may defer the closing of the Hearing until a date agreed upon by the Arbitrator and the Parties in order to permit the Parties to submit post-Hearing briefs, which may be in the form of a letter, and/or to make closing arguments. If post-Hearing briefs are to be submitted or closing arguments are to be made, the Hearing shall be deemed closed upon receipt by the Arbitrator of such briefs or at the conclusion of such closing arguments.

(i) At any time before the Award is rendered, the Arbitrator may, *sua sponte* or on application of a Party for good cause shown, re-open the Hearing. If the Hearing is re-opened and the re-opening prevents the rendering of the Award within the time limits specified by these Rules, the time limits will be extended until the reopened Hearing is declared closed by the Arbitrator.

(j) The Arbitrator may proceed with the Hearing in the absence of a Party that, after receiving notice of the Hearing pursuant to Rule 19, fails to attend. The Arbitrator may not render an Award solely on the basis of the default or absence of the Party, but shall require any Party seeking relief to submit such evidence as the Arbitrator may require for the rendering of an Award. If the Arbitrator reasonably believes that a Party will not attend the Hearing, the Arbitrator may schedule the Hearing as a telephonic Hearing and may receive the evidence necessary to render an Award by affidavit. The notice of Hearing shall specify if it will be in person or telephonic.

(k) Any Party may arrange for a stenographic or other record to be made of the Hearing and shall inform the other Parties in advance of the Hearing.

(i) The requesting Party shall bear the cost of such stenographic record. If all other Parties agree to share the cost of the stenographic record, it shall be made available to the Arbitrator and may be used in the proceeding.

(ii) If there is no agreement to share the cost of the stenographic record, it may not be provided to the Arbitrator and may not be used in the proceeding unless the Party arranging for the stenographic record agrees to provide access to the stenographic record either at no charge or on terms that are acceptable to the Parties and the reporting service.

(iii) If the Parties agree to an Optional Arbitration Appeal Procedure (Rule 34), they shall ensure that a stenographic or other record is made of the Hearing and shall share the cost of that record.

(iv) The Parties may agree that the cost of the stenographic record shall or shall not be allocated by the Arbitrator in the Award.
Rule 23. Waiver of Hearing

The Parties may agree to waive the oral Hearing and submit the dispute to the Arbitrator for an Award based on written submissions and other evidence as the Parties may agree.

Rule 24. Awards

(a) The Arbitrator shall render a Final Award or a Partial Final Award within thirty (30) calendar days after the date of the close of the Hearing as defined in Rule 22(h) or, if a Hearing has been waived, within thirty (30) calendar days after the receipt by the Arbitrator of all materials specified by the Parties, except (1) by the agreement of the Parties; (2) upon good cause for an extension of time to render the Award; or (3) as provided in Rule 22(i). The Arbitrator shall provide the Final Award or the Partial Final Award to JAMS for issuance in accordance with this Rule.

(b) Where a panel of Arbitrators has heard the dispute, the decision and Award of a majority of the panel shall constitute the Arbitration Award.

(c) In determining the merits of the dispute, the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator shall be guided by the rules of law and equity that the Arbitrator deems to be most appropriate. The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties’ agreement, including, but not limited to, specific performance of a contract or any other equitable or legal remedy.

(d) In addition to a Final Award or Partial Final Award, the Arbitrator may make other decisions, including interim or partial rulings, orders and Awards.

(e) Interim Measures. The Arbitrator may grant whatever interim measures are deemed necessary, including injunctive relief and measures for the protection or conservation of property and disposition of disposable goods. Such interim measures may take the form of an interim Award, and the Arbitrator may require security for the costs of such measures. Any recourse by a Party to a court for interim or provisional relief shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

(f) The Award of the Arbitrator may allocate Arbitration fees and Arbitrator compensation and expenses unless such an allocation is expressly prohibited by the Parties’ agreement. (Such a prohibition may not limit the power of the Arbitrator to allocate Arbitration fees and Arbitrator compensation and expenses pursuant to Rule 31(c).)

(g) The Award of the Arbitrator may allocate attorneys’ fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties’ agreement or allowed by applicable law. When the Arbitrator is authorized to award attorneys’ fees and must determine the reasonable amount of such fees, he or she may consider whether the failure of a Party to cooperate reasonably in the discovery process and/or comply with the Arbitrator’s discovery orders caused delay to the proceeding or additional costs to the other Parties.

(h) The Award shall consist of a written statement signed by the Arbitrator regarding the disposition of each claim and the relief, if any, as to each claim. Unless all Parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award.

(i) After the Award has been rendered, and provided the Parties have complied with Rule 31, the Award shall be issued by serving copies on the Parties. Service may be made by U.S. mail. It need not be sent certified or registered.

(j) Within seven (7) calendar days after service of the Award by JAMS, any Party may serve upon the other Parties and on JAMS a request that the Arbitrator correct any computational, typographical or other similar error in an Award (including the reallocation of fees pursuant to Rule 31(c)), or the Arbitrator may sua sponte propose to correct such errors in an Award. A Party opposing such correction shall have seven (7) calendar days thereafter in which to file any objection. The Arbitrator may make any necessary and appropriate correction to the Award within twenty-one (21) calendar days thereafter in which to file any objection. The Arbitrator may extend the time within which to make corrections upon good cause. The corrected Award shall be served upon the Parties in the same manner as the Award.

(k) The Award is considered final, for purposes of either an Optional Arbitration Appeal Procedure pursuant to Rule 34 or a judicial proceeding to enforce, modify or vacate the Award pursuant to Rule 25, fourteen (14) calendar days after service as deemed effective if no request for a
correction is made, or as of the effective date of service of a corrected Award.

Rule 25. Enforcement of the Award
Proceedings to enforce, confirm, modify or vacate an Award will be controlled by and conducted in conformity with the Federal Arbitration Act, 9 U.S.C. Sec 1 et seq. or applicable state law. The Parties to an Arbitration under these Rules shall be deemed to have consented that judgment upon the Award may be entered in any court having jurisdiction thereof.

Rule 26. Confidentiality and Privacy
(a) JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.

(b) The Arbitrator may issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information.

(c) Subject to the discretion of the Arbitrator or agreement of the Parties, any person having a direct interest in the Arbitration may attend the Arbitration Hearing. The Arbitrator may exclude any non-Party from any part of a Hearing.

Rule 27. Waiver
(a) If a Party becomes aware of a violation of or failure to comply with these Rules and fails promptly to object in writing, the objection will be deemed waived, unless the Arbitrator determines that waiver will cause substantial injustice or hardship.

(b) If any Party becomes aware of information that could be the basis of a challenge for cause to the continued service of the Arbitrator, such challenge must be made promptly, in writing, to the Arbitrator or JAMS. Failure to do so shall constitute a waiver of any objection to continued service of the Arbitrator.

Rule 28. Settlement and Consent Award
(a) The Parties may agree, at any stage of the Arbitration process, to submit the case to JAMS for mediation. The JAMS mediator assigned to the case may not be the Arbitrator or a member of the Appeal Panel, unless the Parties so agree pursuant to Rule 28(b).

(b) The Parties may agree to seek the assistance of the Arbitrator in reaching settlement. By their written agreement to submit the matter to the Arbitrator for settlement assistance, the Parties will be deemed to have agreed that the assistance of the Arbitrator in such settlement efforts will not disqualify the Arbitrator from continuing to serve as Arbitrator if settlement is not reached; nor shall such assistance be argued to a reviewing court as the basis for vacating or modifying an Award.

(c) If, at any stage of the Arbitration process, all Parties agree upon a settlement of the issues in dispute and request the Arbitrator to embody the agreement in a Consent Award, the Arbitrator shall comply with such request unless the Arbitrator believes the terms of the agreement are illegal or undermine the integrity of the Arbitration process. If the Arbitrator is concerned about the possible consequences of the proposed Consent Award, he or she shall inform the Parties of that concern and may request additional specific information from the Parties regarding the proposed Consent Award. The Arbitrator may refuse to enter the proposed Consent Award and may withdraw from the case.

Rule 29. Sanctions
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, but are not limited to, assessment of Arbitration fees and Arbitrator compensation and expenses; assessment of any other costs occasioned by the actionable conduct, including reasonable attorneys’ fees; exclusion of certain evidence; drawing adverse inferences; or, in extreme cases, determining an issue or issues submitted to Arbitration adversely to the Party that has failed to comply.
Rule 30.  Disqualification of the Arbitrator as a Witness or Party and Exclusion of Liability

(a) The Parties may not call the Arbitrator, the Case Manager or any other JAMS employee or agent as a witness or as an expert in any pending or subsequent litigation or other proceeding involving the Parties and relating to the dispute that is the subject of the Arbitration. The Arbitrator, Case Manager and other JAMS employees and agents are also incompetent to testify as witnesses or experts in any such proceeding.

(b) The Parties shall defend and/or pay the cost (including any attorneys’ fees) of defending the Arbitrator, Case Manager and/or JAMS from any subpoenas from outside Parties arising from the Arbitration.

(c) The Parties agree that neither the Arbitrator, nor the Case Manager nor JAMS is a necessary Party in any litigation or other proceeding relating to the Arbitration or the subject matter of the Arbitration, and neither the Arbitrator, nor the Case Manager nor JAMS, including its employees or agents, shall be liable to any Party for any act or omission in connection with any Arbitration conducted under these Rules, including, but not limited to, any disqualification of or recusal by the Arbitrator.

Rule 31.  Fees

(a) Each Party shall pay its pro rata share of JAMS fees and expenses as set forth in the JAMS fee schedule in effect at the time of the commencement of the Arbitration, unless the Parties agree on a different allocation of fees and expenses. JAMS’ agreement to render services is jointly with the Party and the attorney or other representative of the Party in the Arbitration. The non-payment of fees may result in an administrative suspension of the case in accordance with Rule 6(c).

(b) JAMS requires that the Parties deposit the fees and expenses for the Arbitration prior to the Hearing. The Arbitrator may preclude a Party that has failed to deposit its pro rata or agreed-upon share of the fees and expenses from offering evidence of any affirmative claim at the Hearing.

(c) The Parties are jointly and severally liable for the payment of JAMS Arbitration fees and Arbitrator compensation and expenses. In the event that one Party has paid more than its share of such fees, compensation and expenses, the Arbitrator may award against any other Party any such fees, compensation and expenses that such Party owes with respect to the Arbitration.

(d) Entities whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of JAMS assessment of fees. JAMS shall determine whether the interests between entities are adverse for purpose of fees, considering such factors as whether the entities are represented by the same attorney and whether the entities are presenting joint or separate positions at the Arbitration.

Rule 32.  Bracketed (or High-Low) Arbitration Option

(a) At any time before the issuance of the Arbitration Award, the Parties may agree, in writing, on minimum and maximum amounts of damages that may be awarded on each claim or on all claims in the aggregate. The Parties shall promptly notify JAMS and provide to JAMS a copy of their written agreement setting forth the agreed-upon minimum and maximum amounts.

(b) JAMS shall not inform the Arbitrator of the agreement to proceed with this option or of the agreed-upon minimum and maximum levels without the consent of the Parties.

(c) The Arbitrator shall render the Award in accordance with Rule 24.

(d) In the event that the Award of the Arbitrator is between the agreed-upon minimum and maximum amounts, the Award shall become final as is. In the event that the Award is below the agreed-upon minimum amount, the final Award issued shall be corrected to reflect the agreed-upon minimum amount. In the event that the Award is above the agreed-upon maximum amount, the final Award issued shall be corrected to reflect the agreed-upon maximum amount.

Rule 33.  Final Offer (or Baseball) Arbitration Option

(a) Upon agreement of the Parties to use the option set forth in this Rule, at least seven (7) calendar days before the Arbitration Hearing, the Parties shall exchange and
provide to JAMS written proposals for the amount of money damages they would offer or demand, as applicable, and that they believe to be appropriate based on the standard set forth in Rule 24(c). JAMS shall promptly provide a copy of the Parties’ proposals to the Arbitrator, unless the Parties agree that they should not be provided to the Arbitrator. At any time prior to the close of the Arbitration Hearing, the Parties may exchange revised written proposals or demands, which shall supersede all prior proposals. The revised written proposals shall be provided to JAMS, which shall promptly provide them to the Arbitrator, unless the Parties agree otherwise.

(b) If the Arbitrator has been informed of the written proposals, in rendering the Award the Arbitrator shall choose between the Parties’ last proposals, selecting the proposal that the Arbitrator finds most reasonable and appropriate in light of the standard set forth in Rule 24(c). This provision modifies Rule 24(h) in that no written statement of reasons shall accompany the Award.

(c) If the Arbitrator has not been informed of the written proposals, the Arbitrator shall render the Award as if pursuant to Rule 24, except that the Award shall thereafter be corrected to conform to the closest of the last proposals, and the closest of the last proposals will become the Award.

(d) Other than as provided herein, the provisions of Rule 24 shall be applicable.

**Rule 34. Optional Arbitration Appeal Procedure**

At any time before the Award becomes final pursuant to Rule 24, the Parties may agree to the JAMS Optional Arbitration Appeal Procedure. All Parties must agree in writing for such procedure to be effective. Once a Party has agreed to the Optional Arbitration Appeal Procedure, it cannot unilaterally withdraw from it, unless it withdraws, pursuant to Rule 13, from the Arbitration.
JAMS provides arbitration and mediation services from Resolution Centers located throughout the United States. Its arbitrators and mediators hear and resolve some of the nation’s largest, most complex and contentious disputes, utilizing JAMS Rules & Procedures as well as the rules of other domestic and international arbitral institutions.

JAMS arbitrators and mediators are full-time neutrals who come from the ranks of retired state and federal judges and prominent attorneys. These highly trained and experienced ADR professionals are dedicated to the highest ethical standards of conduct.

Parties wishing to write a pre-dispute JAMS arbitration clause into their agreement should review the sample arbitration clauses on Page 4. These clauses may be modified to tailor the arbitration process to meet the parties’ individual needs.
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STANDARD ARBITRATION CLAUSES
REFERRING TO THE JAMS
STREAMLINED ARBITRATION RULES

Standard Commercial Arbitration Clause*

Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in (insert the desired place of arbitration), before (one) (three) arbitrator(s). The arbitration shall be administered by JAMS pursuant to its Streamlined Arbitration Rules & Procedures (Comprehensive Arbitration Rules & Procedures). Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.

(Optional) Allocation of Fees and Costs: The arbitrator may, in the Award, allocate all or part of the costs of the arbitration, including the fees of the arbitrator and the reasonable attorneys’ fees of the prevailing party.

*The drafter should select the desired option from those provided in the parentheses.

CASE MANAGEMENT FEES

JAMS charges a nominal Case Management Fee. For arbitrations the Case Management Fee is:

**HEARING LENGTH**       **FEE**
1 to 3 days . . . . . . . . . $400 per party, per day (1 day is defined as 10 hours of professional time)

Time in excess of initial 30 hours. . . . . . . . . . . 10% of professional fees

JAMS neutrals set their own hourly, partial and full-day rates. For information on individual neutrals’ rates and the Case Management Fee, please contact JAMS at 800-352-JAMS. The Case Management Fee structure is subject to change.

All of the JAMS Rules, including the Streamlined Arbitration Rules set forth below, can be accessed at the JAMS website: www.jamsadr.com.

Sometimes contracting parties may want their agreement to allow a choice of provider organizations (JAMS being one) that can be used if a dispute arises. The following clause permits a choice between JAMS or another provider organization at the option of the first party to file the arbitration.

Standard Commercial Arbitration Clause
Naming JAMS or Another Provider*

Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in (insert the desired place of arbitration), before (one) (three) arbitrator(s). At the option of the first to commence an arbitration, the arbitration shall be administered either by JAMS pursuant to its (Streamlined Arbitration Rules & Procedures) (Comprehensive Arbitration Rules & Procedures), or by (name an alternate provider) pursuant to its (identify the rules that will govern). Judgment on the Award may be entered in any court having jurisdic-
Rule 1. Scope of Rules

(a) The JAMS Streamlined Arbitration Rules & Procedures ("Rules") govern binding Arbitrations of disputes or claims that are administered by JAMS and in which the Parties agree to use these Rules or, in the absence of such agreement, no disputed claim or counterclaim exceeds $250,000, not including interest or attorneys’ fees, unless other Rules are prescribed.

(b) The Parties shall be deemed to have made these Rules a part of their Arbitration agreement ("Agreement") whenever they have provided for Arbitration by JAMS under its Streamlined Rules or for Arbitration by JAMS without specifying any particular JAMS Rules and the disputes or claims meet the criteria of the first paragraph of this Rule.

(c) The authority and duties of JAMS are prescribed in the Agreement of the Parties and in these Rules, and may be carried out through such representatives as it may direct.

(d) JAMS may, in its discretion, assign the administration of an Arbitration to any of its Resolution Centers.

(e) The term “Party” as used in these Rules includes Parties to the Arbitration and their counsel or representatives.

(f) “Electronic filing” (e-file) means the electronic transmission of documents to and from JAMS and other Parties for the purpose of filing via the Internet. “Electronic service” (e-service) means the electronic transmission of documents via JAMS Electronic Filing System to a Party, attorney or representative under these Rules.

Rule 2. Party-Agreed Procedures

The Parties may agree on any procedures not specified herein or in lieu of these Rules that are consistent with the applicable law and JAMS policies (including, without limitation, Rules 12(j), 25 and 26). The Parties shall promptly notify JAMS of any such Party-agreed procedures and shall confirm such procedures in writing. The Party-agreed procedures shall be enforceable as if contained in these Rules.

Rule 3. Amendment of Rules

JAMS may amend these Rules without notice. The Rules in effect on the date of the commencement of an Arbitration (as defined in Rule 5) shall apply to that Arbitration, unless the Parties have agreed upon another version of the Rules.

Rule 4. Conflict with Law

If any of these Rules, or modification of these Rules agreed on by the Parties, is determined to be in conflict with a provision of applicable law, the provision of law will govern over the Rule in conflict, and no other Rule will be affected.

Rule 5. Commencing an Arbitration

(a) The Arbitration is deemed commenced when JAMS confirms in a Commencement Letter its receipt of one of the following:

(i) A post-dispute Arbitration agreement fully executed by all Parties and that specifies JAMS administration or use of any JAMS Rules; or

(ii) A pre-dispute written contractual provision requiring the Parties to arbitrate the dispute or claim and which specifies JAMS administration or use of any JAMS Rules or which the Parties agree shall be administered by JAMS; or

(iii) A written confirmation of an oral agreement of all Parties to participate in an Arbitration administered by JAMS or conducted pursuant to any JAMS Rules, confirmed in writing by the Parties; or

(iv) A copy of a court order compelling Arbitration at JAMS.

(b) The Commencement Letter shall confirm which one of the above requirements for commencement has been met, that JAMS has received all payments required under the applicable fee schedule, and that the claimant has
provided JAMS with contact information for all Parties along with evidence that the Demand has been served on all Parties.

(c) If a Party that is obligated to arbitrate in accordance with subparagraph (a) of this Rule fails to agree to participate in the Arbitration process, JAMS shall confirm in writing that Party’s failure to respond or participate and, pursuant to Rule 14, the Arbitrator shall schedule, and provide appropriate notice of, a Hearing or other opportunity for the Party demanding the Arbitration to demonstrate its entitlement to relief.

(d) The date of commencement of the Arbitration is the date of the Commencement Letter, but is not intended to be applicable to any legal requirements such as the statute of limitations, any contractual limitations period, or claims notice requirement. The term “commencement” as used in this Rule is intended only to pertain to the operation of this and other rules (such as Rule 3, 7(a), 7(c), 10(a), 26(a)).

(e) Service by a Party under these Rules is effected by providing one signed copy of the document to each Party and two copies to JAMS. Service may be made by hand-delivery, overnight delivery service or U.S. Mail. Service by any of these means is considered effective upon the date of deposit of the document. Service by electronic mail or facsimile transmission is considered effective upon transmission, but only if followed within one week of delivery by service of an appropriate number of copies and originals by one of the other service methods. In computing any period of time prescribed or allowed by these Rules for a Party to do some act within a prescribed period after the service of a notice or other paper on the Party and the notice or paper is served on the Party only by U.S. Mail, three (3) calendar days shall be added to the prescribed period.

(f) Electronic Filing. The Arbitrator may at any time require electronic filing and service of documents in an Arbitration. If an Arbitrator requires electronic filing, the Parties shall maintain and regularly monitor a valid, usable and live email address for the receipt of all documents filed through JAMS Electronic Filing System. Any document filed electronically shall be considered as filed with JAMS when the transmission to JAMS Electronic Filing System is complete. Any document e-filed by 11:59 p.m. (of the sender’s time zone) shall be deemed filed on that date. Upon completion of filing, JAMS Electronic Filing System shall issue a confirmation receipt that includes the date and time of receipt. The confirmation receipt shall serve as proof of filing.

Every document electronically filed or served shall be deemed to have been signed by the Arbitrator, Case Manager, attorney or declarant who submits the document to JAMS Electronic Filing System, and shall bear the typed name, address, telephone number, and Bar number of a signing attorney. Typographical signatures shall be treated as personal signatures for all purposes under these Rules. Documents containing signatures of third-parties (i.e., unopposed motions, affidavits, stipulations, etc.) may also be filed electronically by indicating that the original signatures are maintained by the filing Party in paper-format.

Delivery of e-service documents through JAMS Electronic Filing System to other registered users shall be considered as valid and effective service and shall have the same legal effect as an original paper document. Recipients of e-service documents shall access their documents through JAMS Electronic Filing System. E-service shall be deemed complete when the party initiating e-service completes the transmission of the electronic document(s) to JAMS Electronic Filing System for e-filing and/or e-service. Upon actual or constructive receipt of the electronic document(s) by the party to be served, a Certificate of Electronic Service shall be issued by JAMS Electronic Filing System to the party initiating e-service and that Certificate shall serve as proof of service. Any party who ignores or attempts to refuse e-service shall be deemed to have received the electronic document(s) 72 hours following the transmission of the electronic document(s) to JAMS Electronic Filing System.

If an electronic filing or service does not occur because of (1) an error in the transmission of the document to JAMS Electronic Filing System or served Party which was unknown to the sending Party, (2) a failure to process the electronic document when received by JAMS Electronic Filing System, (3) the Party was erroneously excluded from the service list, or (4) other technical problems experienced by the filer, the Arbitrator or JAMS may for good cause shown permit the document to be filed nunc pro tunc to the date it was first attempted to be sent electronically. Or, in the case of service, the Party shall, absent extraordinary circumstances, be entitled to an order extending the date
for any response or the period within which any right, duty or other act must be performed.

**Rule 6. Preliminary and Administrative Matters**

(a) JAMS may convene, or the Parties may request, administrative conferences to discuss any procedural matter relating to the administration of the Arbitration.

(b) If no Arbitrator has yet been appointed, at the request of a Party and in the absence of Party agreement, JAMS may determine the location of the Hearing, subject to Arbitrator review. In determining the location of the Hearing such factors as the subject matter of the dispute, the convenience of the Parties and witnesses and the relative resources of the Parties shall be considered.

(c) If, at any time, any Party has failed to pay fees or expenses in full, JAMS may order the suspension or termination of the proceedings. JAMS may so inform the Parties in order that one of them may advance the required payment. If one Party advances the payment owed by a non-paying Party, the Arbitration shall proceed and the Arbitrator may allocate the non-paying Party’s share of such costs, in accordance with Rules 19 (e) and 26 (c). An administrative suspension shall toll any other time limits contained in these Rules, or the Parties’ agreement.

(d) JAMS does not maintain an official record of documents filed in the Arbitration. If the Parties wish to have any documents returned to them, they must advise JAMS in writing within 30 days of the conclusion of the Arbitration. If special arrangements are required regarding file maintenance or document retention, they must be agreed to in writing and JAMS reserves the right to impose an additional fee for such special arrangements. Documents that are submitted for e-filing are retained for 30 days following the conclusion of the Arbitration.

(e) Unless the Parties’ agreement or applicable law provides otherwise, JAMS may consolidate Arbitrations in the following instances:

(i) If a Party files more than one Arbitration with JAMS, JAMS may consolidate the Arbitrations into a single Arbitration.

(ii) Where a Demand or Demands for Arbitration is or are submitted naming Parties already involved in another Arbitration or Arbitrations pending under these Rules, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators already appointed.

(iii) Where a Demand or Demands for Arbitration is or are submitted naming parties that are not identical to the Parties in the existing Arbitration or Arbitrations, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators already appointed.

When rendering its decision, JAMS will take into account all circumstances, including the links between the cases and the progress already made in the existing Arbitrations.

Unless applicable law provides otherwise, where JAMS decides to consolidate a proceeding into a pending Arbitration, the Parties to the consolidated case or cases will be deemed to have waived their right to designate an Arbitrator as well as any contractual provision with respect to the site of the Arbitration.

(f) Where a third party seeks to participate in an Arbitration already pending under these Rules or where a Party to an Arbitration under these Rules seeks to compel a third party to participate in a pending Arbitration, the Arbitrator shall determine such request, taking into account all circumstances the Arbitrator deems relevant and applicable.

**Rule 7. Notice of Claims**

(a) Each Party shall afford all other Parties reasonable and timely notice of its claims, affirmative defenses or counterclaims. Any such notice shall include a short statement of its factual basis. No claim, remedy, counterclaim, or affirmative defense will be considered by the Arbitrator in the absence of such prior notice to the other Parties, unless the Arbitrator determines that no Party has been unfairly prejudiced by such lack of formal notice or all Parties agree that such consideration is appropriate notwithstanding the lack of prior notice.

(b) Within seven (7) calendar days after the commencement of an Arbitration, Claimant shall submit to JAMS and
serve on the other Parties a notice of its claim and remedies sought. Such notice shall consist of either a Demand for Arbitration or a copy of a Complaint previously filed with a court. (In the latter case, Claimant may accompany the Complaint with a copy of any Answer to that Complaint filed by any Respondent.)

(c) Within seven (7) calendar days of service of the notice of claim, a Respondent may submit to JAMS and serve on other Parties a response and must so submit and serve a statement of any affirmative defenses (including jurisdictional challenges) or counterclaims it may have.

(d) Within seven (7) calendar days of service of a counterclaim, a claimant may submit to JAMS and serve on other Parties a response to such counterclaim and must so submit and serve a statement of any affirmative defenses (including jurisdictional challenges) it may have.

(e) Any claim or counterclaim to which no response has been served will be deemed denied.

Rule 8. Interpretation of Rules and Jurisdiction Challenges

(a) Once appointed, the Arbitrator shall resolve disputes about the interpretation and applicability of these Rules and conduct of the Arbitration Hearing. The resolution of the issue by the Arbitrator shall be final.

(b) Whenever in these Rules a matter is to be determined by “JAMS” (such as in Rules 6; 12(d), (e), (h) or (j); or 26(d)), such determination shall be made in accordance with JAMS administrative procedures.

(c) Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

(d) Disputes concerning the appointment of the Arbitrator shall be resolved by JAMS.

(e) The Arbitrator may, upon a showing of good cause or sua sponte, when necessary to facilitate the Arbitration, extend any deadlines established in these Rules, provided that the time for rendering the Award may only be altered in accordance with Rule 19.

Rule 9. Representation

(a) The Parties may be represented by counsel or any other person of the Party’s choice. Each Party shall give prompt written notice to JAMS and the other Parties of the name, address, telephone and fax numbers and email address of its representative. The representative of a Party may act on the Party’s behalf in complying with these Rules.

(b) Changes in Representation. A Party shall give prompt written notice to the Case Manager and the other Parties of any change in its representation, including the name, address, telephone and fax numbers, and email address of the new representative. Such notice shall state that the written consent of the former representative, if any, and of the new representative, has been obtained and shall state the effective date of the new representation.

Rule 10. Withdrawal from Arbitration

(a) No Party may terminate or withdraw from an Arbitration after the issuance of the Commencement Letter (see Rule 5) except by written agreement of all Parties to the Arbitration.

(b) A Party that asserts a claim or counterclaim may unilaterally withdraw that claim or counterclaim without prejudice by serving written notice on the other Parties and on the Arbitrator. However, the opposing Parties may, within fourteen (14) calendar days of service of notice of the withdrawal of the claim or counterclaim, request that the Arbitrator order that the withdrawal be with prejudice. If such a request is made, it shall be determined by the Arbitrator.

Rule 11. Ex Parte Communications

No Party will have any ex parte communication with the Arbitrator regarding any issue related to the Arbitration. Any necessary ex parte communication with the Arbitrator, whether before or after the Arbitration Hearing, will be conducted through JAMS.
Rule 12. Arbitrator Selection and Replacement

(a) JAMS Streamlined Arbitrations will be conducted by one neutral Arbitrator.

(b) Unless the Arbitrator has been previously selected by agreement of the Parties, the Case Manager may attempt to facilitate agreement among the Parties regarding selection of the Arbitrator.

(c) If the Parties do not agree on an Arbitrator, JAMS shall send the Parties a list of at least three (3) Arbitrator candidates. JAMS shall also provide each Party with a brief description of the background and experience of each Arbitrator candidate. JAMS may replace any or all names on the list of Arbitrator candidates for reasonable cause at any time before the Parties have submitted their choice pursuant to subparagraph (d) below.

(d) Within seven (7) calendar days of service by the Parties of the list of names, each Party may strike one name and shall rank the remaining Arbitrator candidates in order of preference. The remaining Arbitrator candidate with the highest composite ranking shall be appointed the Arbitrator. JAMS may grant a reasonable extension of the time to strike and rank the Arbitrator candidates to any Party without the consent of the other Parties.

(e) If this process does not yield an Arbitrator, JAMS shall designate the Arbitrator.

(f) If a Party fails to respond to a list of Arbitrator candidates within seven (7) calendar days after its service, JAMS shall deem that Party to have accepted all of the Arbitrator candidates.

(g) Entities whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of the Arbitrator selection process. JAMS shall determine whether the interests between entities are adverse for purposes of Arbitrator selection, considering such factors as whether the entities are represented by the same attorney and whether the entities are presenting joint or separate positions at the Arbitration.

(h) If, for any reason, the Arbitrator who is selected is unable to fulfill his or her duties, and that decision shall be final.

(i) Any disclosures regarding the selected Arbitrator shall be made as required by law or within ten (10) calendar days from the date of appointment. The obligation of the Arbitrator to make all required disclosures continues throughout the Arbitration process. Such disclosures may be provided in electronic format, provided that JAMS will produce a hard copy to any Party that requests it.

(j) At any time during the Arbitration process, a Party may challenge the continued service of an Arbitrator for cause. The challenge must be based upon information that was not available to the Parties at the time the Arbitrator was selected. A challenge for cause must be in writing and exchanged with opposing Parties who may respond within seven (7) days of service of the challenge. JAMS shall make the final determination as to such challenge. Such determination shall take into account the materiality of the facts and any prejudice to the Parties. That decision will be final.

Rule 13. Exchange of Information

(a) The Parties shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and information (including electronically stored information (“ESI”)) relevant to the dispute or claim, including copies of all documents in their possession or control on which they rely in support of their positions or which they intend to introduce as exhibits at the Arbitration Hearing, the names of all individuals with knowledge about the dispute or claim and the names of all experts who may be called upon to testify or whose report may be introduced at the Arbitration Hearing. The Parties and the Arbitrator will make every effort to conclude the document and information exchange process within fourteen (14) calendar days after all pleadings or notices of claims have been received. The necessity of additional information exchange shall be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness.

(b) As they become aware of new documents or information, including experts who may be called upon to testify, all Parties continue to be obligated to provide relevant, non-
privileged documents, to supplement their identification of witnesses and experts and to honor any informal agreements or understandings between the Parties regarding documents or information to be exchanged. Documents that were not previously exchanged, or witnesses and experts that were not previously identified, may not be considered by the Arbitrator at the Hearing, unless agreed by the Parties or upon a showing of good cause.

(c) The Parties shall promptly notify JAMS when a dispute exists regarding discovery issues. A conference shall be arranged with the Arbitrator, either by telephone or in person, and the Arbitrator shall decide the dispute.

Rule 14. Scheduling and Location of Hearing

(a) The Arbitrator, after consulting with the Parties that have appeared, shall determine the date, time and location of the Hearing. The Arbitrator and the Parties shall attempt to schedule consecutive Hearing days if more than one day is necessary.

(b) If a Party has failed to participate in the Arbitration process, the Arbitrator may set the Hearing without consulting with that Party. The non-participating Party shall be served with a Notice of Hearing at least thirty (30) calendar days prior to the scheduled date unless the law of the relevant jurisdiction allows for or the Parties have agreed to shorter notice.

(c) The Arbitrator, in order to hear a third party witness, or for the convenience of the Parties or the witnesses, may conduct the Hearing at any location. Any JAMS Resolution Center may be designated a Hearing location for purposes of the issuance of a subpoena or subpoena duces tecum to a third party witness.

Rule 15. Pre-Hearing Submissions

(a) Except as set forth in any scheduling order that may be adopted, at least seven (7) calendar days before the Arbitration Hearing, the Parties shall file with JAMS and serve and exchange (1) a list of the witnesses they intend to call, including any experts, (2) a short description of the anticipated testimony of each such witness and an estimate of the length of the witness’s direct testimony, and (3) a list of all exhibits intended to be used at the Hearing. The Parties should exchange with each other a copy of any such exhibits to the extent that it has not been previously exchanged. The Parties should pre-mark exhibits and shall attempt to resolve any disputes regarding the admissibility of exhibits prior to the Hearing.

(b) The Arbitrator may require that each Party submit concise written statements of position, including summaries of the facts and evidence a Party intends to present, discussion of the applicable law and the basis for the requested Award or denial of relief sought. The statements, which may be in the form of a letter, shall be filed with JAMS and served upon the other Parties, at least seven (7) calendar days before the Hearing date. Rebuttal statements or other pre-Hearing written submissions may be permitted or required at the discretion of the Arbitrator.

Rule 16. Securing Witnesses and Documents for the Arbitration Hearing

At the written request of a Party, all other Parties shall produce for the Arbitration Hearing all specified witnesses in their employ or under their control without need of subpoena. The Arbitrator may issue subpoenas for the attendance of witnesses or the production of documents either prior to or at the Hearing pursuant to this Rule or Rule 14(c). The subpoena or subpoena duces tecum shall be issued in accordance with the applicable law. Pre-issued subpoenas may be used in jurisdictions that permit them. In the event a Party or a subpoenaed person objects to the production of a witness or other evidence, the Party or subpoenaed person may file an objection with the Arbitrator, who shall promptly rule on the objection, weighing both the burden on the producing Party and witness and the need of the proponent for the witness or other evidence.

Rule 17. The Arbitration Hearing

(a) The Arbitrator will ordinarily conduct the Arbitration Hearing in the manner set forth in these Rules. The Arbitrator may vary these procedures if it is determined reasonable and appropriate to do so.

(b) The Arbitrator shall determine the order of proof, which will generally be similar to that of a court trial.

(c) The Arbitrator shall require witnesses to testify under oath if requested by any Party, or otherwise in the discretion of the Arbitrator.
(d) Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product. The Arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate. The Arbitrator may be guided in that determination by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence. The Arbitrator may limit testimony to exclude evidence that would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence.

(e) The Arbitrator shall receive and consider relevant deposition testimony recorded by transcript or videotape, provided that the other Parties have had the opportunity to attend and cross-examine. The Arbitrator may in his or her discretion consider witness 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 the Arbitrator deems appropriate.

(f) The Parties will not offer as evidence, and the Arbitrator shall neither admit into the record nor consider, prior settlement offers by the Parties or statements or recommendations made by a mediator or other person in connection with efforts to resolve the dispute being arbitrated, except to the extent that applicable law permits the admission of such evidence.

(g) The Hearing or any portion thereof may be conducted telephonically with the agreement of the Parties or in the discretion of the Arbitrator.

(h) When the Arbitrator determines that all relevant and material evidence and arguments have been presented, and any interim or partial awards have been issued, the Arbitrator shall declare the Hearing closed. The Arbitrator may defer the closing of the Hearing until a date agreed upon by the Arbitrator and the Parties, to permit the Parties to submit post-Hearing briefs, which may be in the form of a letter. If post-Hearing briefs are to be submitted the Hearing shall be deemed closed upon receipt by the Arbitrator of such briefs.

(i) At any time before the Award is rendered, the Arbitrator may, sua sponte or upon the application of a Party for good cause shown, re-open the Hearing. If the Hearing is re-opened and the reopening prevents the rendering of the Award within the time limits specified by these Rules, the time limits will be extended until the reopened Hearing is declared closed by the Arbitrator.

(j) The Arbitrator may proceed with the Hearing in the absence of a Party that, after receiving notice of the Hearing pursuant to Rule 14, fails to attend. The Arbitrator may not render an Award solely on the basis of the default or absence of the Party, but shall require any Party seeking relief to submit such evidence as the Arbitrator may require for the rendering of an Award. If the Arbitrator reasonably believes that a Party will not attend the Hearing, the Arbitrator may schedule the Hearing as a telephonic Hearing and may receive the evidence necessary to render an Award by affidavit. The notice of Hearing shall specify if it will be in person or telephonic.

(k) (i) Any Party may arrange for a stenographic or other record to be made of the Hearing and shall inform the other Parties in advance of the Hearing. The requesting Party shall bear the cost of such stenographic record. If all other Parties agree to share the cost of the stenographic record, it shall be made available to the Arbitrator and may be used in the proceeding.

(ii) If there is no agreement to share the cost of the stenographic record, it may not be provided to the Arbitrator and may not be used in the proceeding unless the Party arranging for the stenographic record either agrees to provide access to the stenographic record at no charge or on terms that are acceptable to the Parties and the reporting service.

(iii) The Parties may agree that the cost of the stenographic record shall or shall not be allocated by the Arbitrator in the Award.

Rule 18. Waiver of Hearing
The Parties may agree to waive oral Hearing and submit the dispute to the Arbitrator for an Award based on written submissions and other evidence as the Parties may agree.

Rule 19. Awards
(a) The Arbitrator shall render a Final Award or Partial Final Award within thirty (30) calendar days after the date of the close of the Hearing as defined in Rule 17(h) or, if a Hearing has been waived, within thirty (30) calendar days
after the receipt by the Arbitrator of all materials specified by the Parties, except (i) by the Agreement of the Parties, (ii) upon good cause for an extension of time to render the Award, or (iii) as provided in Rule 17(i). The Arbitrator shall provide the Final Award or Partial Final Award to JAMS for issuance in accordance with this Rule.

(b) In determining the merits of the dispute the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator will be guided by the law or the rules of law that the Arbitrator deems to be most appropriate. The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties’ agreement, including but not limited to specific performance of a contract or any other equitable or legal remedy.

(c) In addition to a Final Award or Partial Final Award, the Arbitrator may make other decisions, including interim or partial rulings, orders and Awards.

(d) The Arbitrator may grant whatever interim measures are deemed necessary, including injunctive relief and measures for the protection or conservation of property and disposition of disposable goods. Such interim measures may take the form of an interim Award, and the Arbitrator may require security for the costs of such measures. Any recourse by a Party to a court for interim or provisional relief shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

(e) The Award of the Arbitrator may allocate Arbitration Fees and Arbitrator compensation and expenses unless such an allocation is expressly prohibited by the Parties’ agreement. (Such a prohibition may not limit the power of the Arbitrator to allocate Arbitration fees and Arbitrator compensation and expenses pursuant to Rule 26(c).)

(f) The Award of the Arbitrator may allocate attorneys’ fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties’ agreement or allowed by applicable law.

(g) The Award will consist of a written statement signed by the Arbitrator regarding the disposition of each claim and the relief, if any, as to each claim. Unless all Parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award.

(h) After the Award has been rendered, and provided the Parties have complied with Rule 26, the Award shall be issued by serving copies on the Parties. Service may be made by U.S. Mail. It need not be sent certified or registered.

(i) Within seven (7) calendar days after service of the Award by JAMS, any Party may serve upon the other Parties and on JAMS a request that the Arbitrator correct any computational, typographical or other similar error in an Award (including the reallocation of fees pursuant to Rule 26(c)), or the Arbitrator may sua sponte propose to correct such errors in an Award. A Party opposing such correction shall have seven (7) calendar days thereafter in which to file any objection. The Arbitrator may make any necessary and appropriate correction to the Award within fourteen (14) calendar days of receiving a request or seven (7) calendar days after the Arbitrator’s proposal to do so. The Arbitrator may extend the time within which to make corrections upon good cause. The corrected Award shall be served upon the Parties in the same manner as the Award.

(j) The Award is considered final, for purposes of judicial proceeding to enforce, modify or vacate the Award pursuant to Rule 20, fourteen (14) calendar days after service is deemed effective if no request for a correction is made, or as of the effective date of service of a corrected Award.

Rule 20. Enforcement of the Award

Proceedings to enforce, confirm, modify or vacate an Award will be controlled by and conducted in conformity with the Federal Arbitration Act, 9 U.S.C. Sec 1 et. seq. or applicable state law. The Parties to an Arbitration under these Rules shall be deemed to have consented that judgment upon the Award may be entered in any court having jurisdiction thereof.

Rule 21. Confidentiality and Privacy

(a) JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.

(b) The Arbitrator may issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information.
(c) Subject to the discretion of the Arbitrator or agreement of the Parties, any person having a direct interest in the Arbitration may attend the Arbitration Hearing. The Arbitrator may exclude any non-Party from any part of a Hearing.

Rule 22. Waiver

(a) If a Party becomes aware of a violation of or failure to comply with these Rules and fails promptly to object in writing, the objection will be deemed waived, unless the Arbitrator determines that waiver will cause substantial injustice or hardship.

(b) If any Party becomes aware of information that could be the basis of a challenge for cause to the continued service of the Arbitrator, such challenge must be made promptly, in writing, to the Arbitrator or JAMS. Failure to do so shall constitute a waiver of any objection to continued service by the Arbitrator.

Rule 23. Settlement and Consent Award

(a) The Parties may agree, at any stage of the Arbitration process, to submit the case to JAMS for mediation. The JAMS mediator assigned to the case may not be the Arbitrator, unless the Parties so agree pursuant to Rule 23 (b).

(b) The Parties may agree to seek the assistance of the Arbitrator in reaching settlement. By their written agreement to submit the matter to the Arbitrator for settlement assistance, the Parties will be deemed to have agreed that the assistance of the Arbitrator in such settlement efforts will not disqualify the Arbitrator from continuing to serve as Arbitrator if settlement is not reached; nor shall such assistance be argued to a reviewing court as the basis for vacating or modifying an Award.

(c) If, at any stage of the Arbitration process, all Parties agree upon a settlement of the issues in dispute and request the Arbitrator to embody the agreement in a Consent Award, the Arbitrator shall comply with such request unless the Arbitrator believes the terms of the agreement are illegal or undermine the integrity of the Arbitration process. If the Arbitrator is concerned about the possible consequences of the proposed Consent Award, he or she shall inform the Parties of that concern and may request additional specific information from the Parties regarding the proposed Consent Award. The Arbitrator may refuse to enter the proposed Consent Award and may withdraw from the case.

Rule 24. Sanctions

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, but are not limited to, assessment of Arbitration fees and Arbitrator compensation and expenses, any other costs occasioned by the actionable conduct including reasonable attorney’s fees, exclusion of certain evidence, drawing adverse inferences, or in extreme cases determining an issue or issues submitted to Arbitration adversely to the Party that has failed to comply.

Rule 25. Disqualification of the Arbitrator as a Witness or Party and Exclusion of Liability

(a) The Parties may not call the Arbitrator, the Case Manager or any other JAMS employee or agent as a witness or as an expert in any pending or subsequent litigation or other proceeding involving the Parties and relating to the dispute that is the subject of the Arbitration. The Arbitrator, Case Manager and other JAMS employees and agents are also incompetent to testify as witnesses or experts in any such proceeding.

(b) The Parties shall defend and/or pay the cost (including any attorneys’ fees) of defending the Arbitrator, Case Manager and/or JAMS from any subpoenas from outside Parties arising from the Arbitration.

(c) The Parties agree that neither the Arbitrator, Case Manager nor JAMS is a necessary Party in any litigation or other proceeding relating to the Arbitration or the subject matter of the Arbitration, and neither the Arbitrator, Case Manager nor JAMS, including its employees or agents, shall be liable to any Party for any act or omission in connection with any Arbitration conducted under these Rules, including but not limited to any disqualification of or recusal by the Arbitrator.

Rule 26. Fees

(a) Each Party shall pay its pro-rata share of JAMS fees and expenses as set forth in the JAMS fee schedule in effect at the time of the commencement of the Arbitration,
unless the Parties agree on a different allocation of fees and expenses. JAMS agreement to render services is jointly with the Party and the attorney or other representative of the Party in the Arbitration. The non-payment of fees may result in an administrative suspension of the case in accordance with Rule 6(c).

(b) JAMS requires that the Parties deposit the fees and expenses for the Arbitration prior to the Hearing and the Arbitrator may preclude a Party that has failed to deposit its pro-rata or agreed-upon share of the fees and expenses from offering evidence of any affirmative claim at the Hearing.

c) The Parties are jointly and severally liable for the payment of JAMS Arbitration fees and Arbitrator compensation and expenses. In the event that one Party has paid more than its share of such fees, compensation and expenses, the Arbitrator may Award against any Party any such fees, compensation and expenses that such Party owes with respect to the Arbitration.

d) Entities whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of JAMS assessment of fees. JAMS shall determine whether the interests between entities are adverse for purpose of fees, considering such factors as whether the entities are represented by the same attorney and whether the entities are presenting joint or separate positions at the Arbitration.

Rule 27. Bracketed (or High-Low) Arbitration Option

(a) At any time before the issuance of the Arbitration Award, the Parties may agree, in writing, on minimum and maximum amounts of damages that may be awarded on each claim or on all claims in the aggregate. The Parties shall promptly notify JAMS, and provide to JAMS a copy of their written agreement setting forth the agreed-upon maximum and minimum amounts.

(b) JAMS shall not inform the Arbitrator of the agreement to proceed with this option or of the agreed-upon minimum and maximum levels without the consent of the Parties.

c) The Arbitrator shall render the Award in accordance with Rule 19.

d) In the event that the Award of the Arbitrator is between the agreed-upon minimum and maximum amounts, the Award shall become final as is. In the event that the Award is below the agreed-upon minimum amount, the final Award issued shall be corrected to reflect the agreed-upon minimum amount. In the event that the Award is above the agreed-upon maximum amount, the final Award issued shall be corrected to reflect the agreed-upon maximum amount.

Rule 28. Final Offer (or Baseball) Arbitration Option

(a) Upon agreement of the Parties to use the option set forth in this Rule, at least seven (7) calendar days before the Arbitration Hearing, the Parties shall exchange and provide to JAMS written proposals for the amount of money damages they would offer or demand, as applicable, and that they believe to be appropriate based on the standard set forth in Rule 19(b). JAMS shall promptly provide a copy of the Parties’ proposals to the Arbitrator, unless the Parties agree that they should not be provided to the Arbitrator. At any time prior to the close of the Arbitration Hearing, the Parties may exchange revised written proposals or demands, which shall supersede all prior proposals. The revised written proposals shall be provided to JAMS, which shall promptly provide them to the Arbitrator, unless the Parties agree otherwise.

(b) If the Arbitrator has been informed of the written proposals, in rendering the Award the Arbitrator shall choose between the Parties’ last proposals, selecting the proposal that the Arbitrator finds most reasonable and appropriate in light of the standard set forth in Rule 19(b). This provision modifies Rule 19(f) in that no written statement of reasons shall accompany the Award.

c) If the Arbitrator has not been informed of the written proposals, the Arbitrator shall render the Award as if pursuant to Rule 19, except that the Award shall thereafter be corrected to conform to the closest of the last proposals, and the closest of the last proposals will become the Award.

(d) Other than as provided herein, the provisions of Rule 19 shall be applicable.
JAMS
STREAMLINED ARBITRATION RULES & PROCEDURES

EFFECTIVE JULY 15, 2009
JAMS RECOMMENDED ARBITRATION DISCOVERY PROTOCOLS FOR DOMESTIC, COMMERCIAL CASES

JAMS provides arbitration and mediation services from Resolution Centers located throughout the United States. Its arbitrators and mediators hear and resolve some of the nation’s largest, most complex and contentious disputes, utilizing JAMS Rules and Procedures as well as the rules of other domestic and international arbitral institutions.

JAMS arbitrators and mediators are full-time neutrals who come from the ranks of retired state and federal judges and prominent attorneys. These highly trained and experienced ADR professionals are dedicated to the highest ethical standards of conduct.
JAMS RECOMMENDED
ARBITRATION DISCOVERY
PROTOCOLS FOR DOMESTIC,
COMMERCIAL CASES

INTRODUCTION

JAMS is committed to providing the most efficient, cost-effective arbitration process that is possible in the particular circumstances of each case. Its experienced, trained and highly qualified arbitrators are committed to: (1) Being sufficiently assertive to ensure that an arbitration will be resolved much less expensively and in much less time than if it had been litigated in court; and (2) At the same time, being sufficiently patient and restrained to ensure that there is enough discovery and evidence to permit a fair result.

The JAMS Recommended Arbitration Discovery Protocols (“Protocols”), which are set forth below, provide JAMS arbitrators with an effective tool that will help them exercise their sound judgment in furtherance of achieving an efficient, cost-effective process which affords the parties a fair opportunity to be heard.

THE KEY ELEMENT – GOOD JUDGMENT OF THE ARBITRATOR

- JAMS arbitrators understand that while some commercial arbitrations may have similarities, for the most part each case involves unique facts and circumstances. As a result, JAMS arbitrators adapt arbitration discovery to meet the unique characteristics of the particular case, understanding that there is no set of objective rules which, if followed, would result in one “correct” approach for all commercial cases.

- JAMS appreciates that the experience, talent and preferences brought to arbitration will vary with the arbitrator. It follows that the framework of arbitration discovery will always be based on the judgment of the arbitrator, brought to bear in the context of variables such as the applicable rules, the custom and practice for arbitrations in the industry in question, and the expectations and preferences of the parties and their counsel.

- Attached as Exhibit A is a list of factors which JAMS arbitrators take into consideration when addressing the type and breadth of arbitration discovery.

EARLY ATTENTION TO DISCOVERY BY THE ARBITRATOR

- JAMS understands the importance of establishing the ground rules governing an arbitration in the period immediately following the initiation of the arbitration. Therefore, following appointment, JAMS arbitrators promptly study the facts and the issues and become prepared to preside effectively over the early stages of the case in a way that will ultimately lead to an expeditious, cost-effective and fair process.

- Depending upon the provisions of the parties agreement, JAMS arbitrations may be governed by the JAMS Comprehensive Arbitration Rules and Procedures or by the arbitration rules of another provider organization. Such rules, for good reason, lack the specificity that one finds, for example, in the Federal Rules of Civil Procedure. That being so, JAMS arbitrators seek to avoid uncertainty and surprise by ensuring that the parties understand at an early stage the basic ground rules for discovery. This early attention to the scope of discovery increases the chance that parties will adopt joint principles of fairness and efficiency before partisan positions arise in concrete discovery disputes.

- JAMS arbitrators place the type and breadth of arbitration discovery high on the agenda for the first pre-hearing conference at the start of the case. If at all possible, in-house counsel should attend the pre-hearing conference at which discovery will be discussed.

- JAMS arbitrators strive to enhance the chances for limited, efficient discovery by acting at the first pre-hearing conference to set hearing dates and interim deadlines which, the parties are told, will be strictly enforced, and which, in fact, are thereafter strictly enforced.

- Where appropriate, JAMS arbitrators explain at the first pre-hearing conference that document requests:
  - should be limited to documents which are directly relevant to significant issues in the case or to the case’s outcome.
• should be restricted in terms of time frame, subject matter and persons or entities to which the requests pertain, and
• should not include broad phraseology such as “all documents directly or indirectly related to.”

PARTY PREFERENCES
• Overly broad arbitration discovery can result when all of the parties seek discovery beyond what is needed. This unfortunate circumstance may be caused by parties and/or advocates who are inexperienced in arbitration and simply conduct themselves in a fashion which is commonly accepted in court litigation. In any event, where all participants truly desire unlimited discovery, JAMS arbitrators will respect that decision, since arbitration is governed by the agreement of the parties.
• Where one side wants broad arbitration discovery and the other wants narrow discovery, the arbitrator will set meaningful limitations.

E-DISCOVERY
• 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.
• To be able to appropriately address issues pertaining to e-discovery, JAMS arbitrators are trained to deal with the technological issues that arise in connection with electronic data.
• While there can be no objective standard for the appropriate scope of e-discovery in all cases, JAMS arbitrators recognize that an early order containing language along the following lines can be an important first step in limiting such discovery in a large number of cases:
  • There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from back-up servers, tapes or other media.
  • Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format which is usable by the party receiving the e-documents and convenient and economical for the producing party. Absent a showing of compelling need, the parties need not produce metadata with the exception of header fields for email correspondence.
• Where the costs and burdens of e-discovery are disproportionate to the nature and gravity of the dispute or to the amount in controversy, or to the relevance of the materials requested, the arbitrator will either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final award.

ARTFULLY DRAFTED ARBITRATION CLAUSES
• JAMS recognizes that there is significant potential for dealing with time and other limitations on discovery in the arbitration clauses of commercial contracts. An advantage of such drafting is that it is much easier for parties to agree on such limitations before a dispute has arisen. A drawback, however, is the difficulty of rationally providing for how best to arbitrate a dispute that has not yet surfaced. Thus, the use of such clauses may be most productive in circumstances in which parties have a good idea from the outset as to the nature and scope of disputes that might thereafter arise.
• JAMS understands that in order for rational time and other discovery limitations to be effectively included in an arbitration clause, it is necessary that an attorney with a good understanding of arbitration be involved in the drafting process.

DEPOSITIONS
• Rule 17(c) of the JAMS Rules provides that in a domestic arbitration, each party is entitled to one deposition of an opposing party or an individual under the control of an opposing party and that each side may apply for the taking of additional depositions, if necessary.
• JAMS recognizes that the size and complexity of commercial arbitrations have now grown to a point where more than a single deposition can serve a useful purpose in certain instances. Depositions in a complex arbitration, for example, can significantly shorten the
cross-examination of key witnesses and shorten the hearing on the merits.

• If not carefully regulated, however, deposition discovery in arbitration can become extremely expensive, wasteful and time-consuming. In determining what scope of depositions may be appropriate in a given case, a JAMS arbitrator balances these considerations, considers the factors set forth in Exhibit A and confers with counsel for the parties. If a JAMS arbitrator determines that it is appropriate to permit multiple depositions, he/she may attempt to solicit agreement at the first pre-hearing conference on language such as the following:

    Each side may take 3* discovery depositions. Each side’s depositions are to consume no more than a total of 15* hours. There are to be no speaking objections at the depositions, except to preserve privilege. The total period for the taking of depositions shall not exceed 6* weeks.¹

**DISCOVERY DISPUTES**

• Discovery disputes must be resolved promptly and efficiently. In addressing discovery disputes, JAMS arbitrators consider use of the following practices which can increase the speed and cost-effectiveness of the arbitration:
  
  • Where there is a panel of three arbitrators, the parties may agree, by rule or otherwise, that the Chair or another member of the panel is authorized to resolve discovery issues, acting alone.

  • 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.

  • The parties should negotiate discovery differences in good faith before presenting any remaining issues for the arbitrator’s decision.

  • The existence of discovery issues should not impede the progress of discovery where there are no discovery differences.

**DISCOVERY & OTHER PROCEDURAL ASPECTS OF ARBITRATION**

Other aspects of arbitration have interplay with, and impact on, discovery in arbitration, as discussed below.

**Requests for Adjournments**

• Where parties encounter discovery difficulties, this circumstance often leads to a request for adjournment and the possible delay of the hearing. While the arbitrator may not reject a joint application of all parties to adjourn the hearing, the fact is that such adjournments can cause inordinate disruption and delay by needlessly extending unnecessary discovery and can substantially detract from the cost-effectiveness of the arbitration. If the request for adjournment is by all parties and is based on a perceived need for further discovery (as opposed to personal considerations), a JAMS arbitrator ensures that the parties understand the implications in time and cost of the adjournment they seek.

• If one party seeks a continuance and another opposes it, then the arbitrator has discretion to grant or deny the request. Factors that affect the exercise of such discretion include the merits of the request and the legitimate needs of the parties, as well as the proximity of the request to the scheduled hearing and whether any earlier requests for adjournments have been made.

**Discovery and Dispositive Motions**

• In arbitration, “dispositive” motions can cause significant delay and unduly prolong the discovery period. Such motions are commonly based on lengthy briefs and recitals of facts and, after much time, labor and expense, are generally denied on the ground that they raise issues of fact and are inconsistent with the spirit of arbitration. On the other hand, dispositive motions can sometimes enhance the efficiency of the arbitration process if directed to discrete legal issues such as statute of limitations or defenses based on clear contractual provisions. In such circumstances, an appropriately framed dispositive motion can eliminate the need for expensive and time consuming discovery. On balance, a JAMS arbitrator will consider the following procedure with regard to dispositive motions:

  • Any party wishing to make a dispositive motion must first submit a brief letter (not exceeding five

¹ The asterisked numbers can of course be changed to comport with the particular circumstances of each case.
pages) explaining why the motion has merit and why it would speed the proceeding and make it more cost-effective. The other side would have a brief period within which to respond.

- Based on the letters, the arbitrator would decide whether to proceed with more comprehensive briefing and argument on the proposed motion.
- If the arbitrator decides to go forward with the motion, he/she would place page limits on the briefs and set an accelerated schedule for the disposition of the motion.
- Under ordinary circumstances, the pendency of such a motion should not serve to stay any aspect of the arbitration or adjourn any pending deadlines.

Note: These Protocols are adapted from the April 4, 2009 Report on Arbitration Discovery by the New York Bar Association.

EXHIBIT A

Relevant Factors Considered By JAMS Arbitrators In Determining The Appropriate Scope Of Domestic Arbitration Discovery

NATURE OF THE DISPUTE
- The factual context of the arbitration and of the issues in question with which the arbitrator should become conversant before making a decision about discovery.
- The amount in controversy.
- The complexity of the factual issues.
- The number of parties and diversity of their interests.
- Whether any or all of the claims appear, on the basis of the pleadings, to have sufficient merit to justify the time and expense associated with the requested discovery.
- Whether there are public policy or ethical issues that give rise to the need for an in depth probe through relatively comprehensive discovery.
- Whether it might be productive to initially address a potentially dispositive issue which does not require extensive discovery.

AGREEMENT OF THE PARTIES
- Agreement of the parties, if any, with respect to the scope of discovery.
- Agreement, if any, by the parties with respect to duration of the arbitration from the filing of the arbitration demand to the issuance of the final award.
- The parties’ choice of substantive and procedural law and the expectations under that legal regime with respect to arbitration discovery.

RELEVANCE AND REASONABLE NEED FOR REQUESTED DISCOVERY
- Relevance of the requested discovery to the material issues in dispute or the outcome of the case.
- Whether the requested discovery appears to be sought in an excess of caution, or is duplicative or redundant.
- Whether there are necessary witnesses and/or documents that are beyond the tribunal’s subpoena power.
- Whether denial of the requested discovery would, in the arbitrator’s judgment (after appropriate scrutinizing of the issues), deprive the requesting party of what is reasonably necessary to allow that party a fair opportunity to prepare and present its case.
- Whether the requested information could be obtained from another source more conveniently and with less expense or other burden on the party from whom the discovery is requested.
- To what extent the discovery sought is likely to lead, as a practical matter, to a case-changing “smoking gun” or to a fairer result.
- Whether broad discovery is being sought as part of a litigation tactic to put the other side to great expense and thus coerce some sort of result on grounds other than the merits.
- The time and expense that would be required for a comprehensive discovery program.
- Whether all or most of the information relevant to the determination of the merits is in the possession of one side.
CPR PROCEDURES & CLAUSES

Administered
Arbitration
Rules

Effective July 1, 2013

International Institute for
Conflict Prevention & Resolution

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Changing the Way the World Resolves Conflict

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

Dispute Resolution Services:
• With litigation costing billions of dollars each year, effective conflict management is essential to reduce costs, increase privacy, lower litigation risks and improve business relationships.
• Mediation, arbitration and other consensual dispute resolution methods offer a low-cost, high-return option for parties.
• CPR’s Panels of Distinguished Neutrals, comprised of former judges, prominent attorneys and academics, are uniquely qualified to resolve worldwide complex business disputes in more than 20 specialized practice areas.

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• Allow parties to constructively and efficiently resolve disputes.
• Reduce time and money.
• Provide a range of options for administrative involvement.
• Enable proceedings to be held anywhere in the world.
• Conduct complex arbitration and/or mediation more efficiently with role of administered body determined by parties.

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• A highly selective vetting and evaluation process.
• A diverse Global Panel of Distinguished Neutrals across more than 20 countries.
• Highly skilled lawyers provide the administration and selection process.

CPR Services Include:
• Resources for drafting pre-dispute ADR clauses and custom post-dispute ADR agreements.
• Developing selection criteria for neutral selection, as well as generating lists of neutral candidates to meet parties’ specific complex needs.
• Fund-holding capabilities.
• Procedures for challenging and/or replacing neutrals.
• Appointment of special arbitrator for emergency relief.
• Fully administered arbitration.
CPR PROCEDURES & CLAUSES

Administered Arbitration Rules

Effective July 1, 2013

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CPR’S FULL RANGE OF ARBITRATION OPTIONS

The International Institute for Conflict Prevention and Resolution ("CPR") has long championed its Rules for Non-Administered Arbitration (Rev. 2007) as a means of providing for a fair, expeditious, and economical arbitration process. Hallmark features of non-administered or ad hoc rules include management of the process by the Tribunal and counsel, without the need for the involvement of a separate administering entity. To aid participants in a non-administered process when necessary, CPR offers customized services, such as arbitrator selection and a challenge procedure. For a full menu of such services, please refer to CPR’s website, www.cpradr.org.

CPR maintains its commitment to non-administered processes. However, mindful of the benefits that an arbitral institution can provide in appropriate cases, CPR has promulgated a set of administered arbitration rules to increase parties’ range of options. The CPR Rules for Administered Arbitration (July 1, 2013) provide parties with the same well-designed procedures and high quality arbitrators as CPR’s non-administered option, while also allowing the parties to avail themselves of CPR’s quality staff and resources when an administered process is desired.

Mediation and Other ADR Procedures. The following Rules are intended to govern administered arbitration proceedings. However, parties also may wish to incorporate pre-arbitral negotiation or mediation phases in their contract provisions. Parties desiring to use such procedures should consult the CPR Mediation Procedure and CPR’s Dispute Resolution Clauses (available on CPR’s website at www.cpradr.org).

To obtain a copy of any of our rules and procedures, or to find out more about our Dispute Resolution Services and fees, visit our website at www.cpradr.org or call CPR’s office at +1.212.949.6490.

CPR MODEL CLAUSES FOR ADMINISTERED ARBITRATION

Standard Contractual Provisions

The CPR Rules for Administered Arbitration (the “Administered Rules” or “Rules”) are intended in particular for use in complex commercial arbitrations where parties desire an administered process. They are designed to assure the expeditious and economical conduct of proceedings. The Administered Rules may be adopted by parties wishing to do so by using one of the following standard provisions:
A. Pre-Dispute Clause for Administered Arbitration

“Any dispute arising out of or relating to this contract, including the breach, termination or validity thereof, shall be finally resolved by arbitration in accordance with the International Institute for Conflict Prevention and Resolution ("CPR") Rules for Administered Arbitration (the “Administered Rules” or “Rules”) by (a sole arbitrator) (three arbitrators, of whom each party shall designate one, with the third arbitrator to be appointed by CPR) (three arbitrators, of whom each party shall designate one, with the third arbitrator to be designated by the two party-appointed arbitrators) (three arbitrators, of whom each party shall designate one in accordance with the screened appointment procedure provided in Rule 5.4) (three arbitrators, none of whom shall be designated by either party). The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq., and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of the arbitration shall be (city, state).”

B. Existing Dispute Submission Agreement for Administered Arbitration

“We, the undersigned parties, hereby agree to submit to arbitration in accordance with the International Institute for Conflict Prevention and Resolution ("CPR") Rules for Administered Arbitration (the “Administered Rules” or “Rules”) the following dispute: [Describe briefly]

We further agree that the above dispute shall be submitted to (a sole arbitrator) (three arbitrators, of whom each party shall designate one, with the third arbitrator to be appointed by CPR) (three arbitrators, of whom each party shall designate one, with the third arbitrator to be designated by the two party-appointed arbitrators) (three arbitrators, of whom each party shall designate one in accordance with the screened appointment procedure provided in Rule 5.4) (three arbitrators, none of whom shall be designated by either party). [We further agree that we shall faithfully observe this agreement and the Administered Rules and that we shall abide by and perform any award rendered by the arbitrator(s).] The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq., and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of arbitration shall be (city, state).”
A. GENERAL AND INTRODUCTORY ADMINISTERED RULES

Rule 1: Scope of Application

1.1 Where the parties to a contract have provided for arbitration under the International Institute for Conflict Prevention and Resolution (“CPR”) Rules for Administered Arbitration (the “Administered Rules” or “Rules”), they shall be deemed to have made these Administered Rules a part of their arbitration agreement, except to the extent that they have agreed in writing, or on the record during the course of the arbitral proceeding, to modify these Administered Rules. Unless the parties otherwise agree, these Administered Rules, and any amendment thereof adopted by CPR, shall apply in the form in effect at the time the arbitration is commenced. If the parties have provided for CPR arbitration without specifying either the Non-Administered or Administered Rules, the CPR Administered Rules shall apply to any arbitration agreement dated July 1, 2013 or later.

1.2 These Administered Rules shall govern the arbitration except that where any of these Administered Rules is in conflict with a mandatory provision of applicable arbitration law, that provision of law shall prevail.

Rule 2: Notices

2.1 Notices or other communications required under these Administered Rules shall be in writing and delivered to the address specified in writing by the recipient or, if no address has been specified, to the last known business or residence address of the recipient. Notices and communications may be given by registered mail, courier, telex, facsimile transmission, email or any other means of telecommunication that provides a record thereof. Notices and communications shall be deemed to be effective as of the date of receipt. Proof of transmission shall be deemed prima facie proof of receipt of any notice or communication given under these Rules.

2.2 Time periods specified by these Administered Rules or established by the Arbitral Tribunal (the “Tribunal”) shall start to run on the day following the day when a notice or communication is received, unless these Rules or the Tribunal shall specifically provide otherwise. If the last day of such period is an official holiday or a non-business day at the place where the notice or communication is received, the
period is extended until the first business day which follows. Official holidays and non-business days occurring during the running of the period of time are included in calculating the period.

Rule 3: Commencement of Arbitration

3.1 The party commencing arbitration (the “Claimant”) shall deliver to the other party (the “Respondent”) a notice of arbitration with an electronic copy to CPR at the same time in accordance with Rule 3.3.

3.2 The notice of arbitration shall include in the text or in attachments thereto:

a. The full names, addresses, telephone numbers and email addresses for the parties and their counsel;

b. A demand that the dispute be referred to arbitration pursuant to these Rules;

c. The text of the arbitration clause or the separate arbitration agreement that is involved;

d. A statement of the general nature of the Claimant’s claim;

e. The relief or remedy sought; and

f. The name, address, telephone number and email address of the arbitrator designated for appointment by the Claimant, unless the parties have agreed that neither shall designate an arbitrator or that the party-designated arbitrators shall be appointed as provided in Rule 5.4.

3.3 Delivery of the notice of arbitration to CPR required under this Rule 3.1 shall be as specified on the CPR website. Simultaneous with delivery of the notice of arbitration to CPR, the Claimant shall make payment to CPR of the appropriate Filing Fee as provided in the Schedule of Administered Arbitration Costs on the CPR website. In the event the Claimant fails to comply with this requirement, CPR may fix a time limit within which the Claimant must make payment, failing which the file shall be closed without prejudice to the Claimant’s right to submit the same claim(s) at a later date in another notice of arbitration if permissible.

3.4 The date on which CPR is in receipt of both the notice of arbitration and Filing Fee shall, for all purposes, be deemed to be the date of the commencement of the arbitration (“Commencement Date”). CPR will determine the Commencement Date and so notify the parties.
3.5 CPR shall notify the Respondent of its time to deliver a notice of defense, which shall be 20 days after the Commencement Date.

3.6 The Respondent shall deliver to the Claimant a notice of defense by the date provided by CPR under Rule 3.5 with an electronic copy to CPR at the same time. Failure to deliver a notice of defense shall not delay the arbitration; in the event of such failure, all claims set forth in the notice of arbitration shall be deemed denied. Failure to deliver a notice of defense shall not excuse the Respondent from notifying the Claimant and CPR in writing, by the date provided by CPR under Rule 3.5, of the arbitrator designated for appointment by the Respondent, unless the parties have agreed that neither shall designate an arbitrator or that the party-designated arbitrators shall be appointed as provided in Rule 5.4.

3.7 The notice of defense shall include:

a. The full names, addresses, telephone numbers and email addresses for the parties and their counsel;

b. Any comment on the notice of arbitration that the Respondent may deem appropriate;

c. A statement of the general nature of the Respondent’s defense; and

d. The name, address, telephone number and email address of the arbitrator designated for appointment by the Respondent, unless the parties have agreed that neither shall designate an arbitrator or that the party-designated arbitrators shall be appointed as provided in Rule 5.4.

3.8 The Respondent may include in its notice of defense any counterclaim within the scope of the arbitration clause. If it does so, the counterclaim in the notice of defense shall include items (a), (b), (c), (d) and (e) of Rule 3.2.

3.9 If a counterclaim is asserted in accordance with Rule 3.8, CPR shall notify the Claimant of its time to deliver a response, which shall be 20 days after CPR’s receipt of the notice of defense and counterclaim. Such response shall have the same elements as provided in Rule 3.7(b) and (c) for the notice of defense. Failure to deliver a reply to a counterclaim shall not delay the arbitration; in the event of such failure, all counterclaims set forth in the notice of defense shall be deemed denied.
3.10 Claims or counterclaims within the scope of the arbitration clause may be freely added, amended or withdrawn prior to the appointment of the Tribunal and thereafter with the consent of the Tribunal. Notices of defense or replies to added or amended claims or counterclaims shall be delivered by the date CPR provides, which shall be within 20 days after CPR’s receipt of the addition or amendment or such other date as specified by CPR, or, if the Tribunal has been appointed, by the date specified by the Tribunal.

3.11 If a dispute is submitted to arbitration pursuant to a submission agreement, this Rule 3 shall apply to the extent that it is not inconsistent with the submission agreement.

Rule 4: Representation

4.1 The parties may be represented or assisted by persons of their choice.

4.2 Each party shall communicate the name, address, telephone number and email address, and function of such persons in writing to the other party, to the Tribunal and to CPR.

B. RULES WITH RESPECT TO THE TRIBUNAL

Rule 5: Selection of Arbitrator(s) by the Parties

5.1 a. Unless the parties have agreed otherwise in writing, the Tribunal shall consist of three arbitrators, one designated for appointment by each of the parties as provided in Rules 3.2 and 3.7 respectively, and a third who shall chair the Tribunal, selected as provided in Rule 5.2.

b. Unless otherwise agreed, any arbitrator not designated for appointment by a party shall be a member of the CPR Panels of Distinguished Neutrals (“CPR Panels”). Upon request, CPR will provide a list of candidates from the CPR Panels in accordance with the Rules.

c. Where a party has designated an arbitrator for appointment, CPR will query such candidate for their availability and request that the candidate disclose in writing any circumstances that might give rise to justifiable doubt regarding the candidate’s independence or impartiality as provided in Rule 7. Upon receipt, CPR shall circulate any disclosures made to the parties, and, within 10 days after receipt of that candidate’s disclosures, a party may object to the appointment of any candidate on grounds of
lack of independence or impartiality by written and reasoned notice to CPR, with a copy to the other party. CPR shall decide the objection after providing the non-objecting party with an opportunity to comment on the objection. If there is no objection to the candidate, or if the objection is overruled by CPR, CPR shall appoint the candidate as a party-appointed arbitrator, and any subsequent challenges of that arbitrator, based on circumstances subsequently learned, shall be made and decided in accordance with the procedures set forth in Rules 7.6 - 7.8. At its discretion, CPR may decide an objection made under this Rule 5.1(c) by referring it to a Challenge Review Committee pursuant to the CPR Challenge Protocol (excluding its fee requirement).

5.2 a. Unless the parties agree that the third arbitrator who shall chair the Tribunal be selected jointly by the party-appointed arbitrators, CPR shall select the third arbitrator as provided in Rule 6.

b. If the party-appointed arbitrators shall designate for appointment the third arbitrator who shall chair the Tribunal, such designation cannot occur until after appointment by CPR of both of the party-designated arbitrators. The party-appointed arbitrators shall inform CPR of the candidate designated by them to be the third arbitrator, whereupon CPR will query such candidate for availability and request such candidate to disclose in writing any circumstances that might give rise to justifiable doubt regarding the candidate's independence or impartiality as provided in Rule 7. Upon receipt, CPR shall circulate any disclosures made to the parties, and, within 10 days after receipt of that candidate's disclosures, a party may object to the appointment of such candidate on grounds of lack of independence or impartiality by written and reasoned notice to CPR, with a copy to the other party. CPR shall decide the objection after providing the non-objecting party with an opportunity to comment. If there is no objection to the candidate, or if the objection is overruled by CPR, CPR shall appoint the candidate as the third arbitrator, and any subsequent challenges of that arbitrator, based on circumstances subsequently learned, shall be made and decided in accordance with the procedures set forth in Rules 7.6 - 7.8. At its discretion, CPR may decide an objection under this Rule 5.2 (b) by referring
it to a Challenge Review Committee pursuant to the CPR Challenge Protocol (excluding its fee requirement).

In the event that the party-appointed arbitrators are unable to agree on a third arbitrator within 20 days of CPR’s appointment of the second arbitrator, the third arbitrator shall be selected by CPR as provided in Rule 6.2.

5.3 If the parties have agreed on a Tribunal consisting of a sole arbitrator or of three arbitrators none of whom shall be designated for appointment by either party, the parties shall attempt jointly to designate such arbitrator(s) within 20 days after the notice of defense provided for in Rule 3.6 is due. CPR will query such jointly designated candidate(s) in accordance with the procedure provided for in Rule 5.1(c). The parties may extend their selection process until one or both of them have concluded that a deadlock has been reached, but in no event for more than 30 days after the notice of defense provided for in Rule 3.6 is due. In the event the parties are unable to designate the arbitrator(s) within the extended selection period, the arbitrator(s) shall be selected as provided in Rule 6.2.

5.4 If the parties have agreed on a Tribunal consisting of three arbitrators, two of whom are to be designated by the parties without knowing which party designated each of them, as provided for in this Rule 5.4, CPR shall conduct a “screened” selection of party-designated arbitrators as follows:

a. CPR will provide each party with a copy of a list of candidates from the CPR Panels together with confirmation of their availability to serve as arbitrators and disclosure of any circumstances that might give rise to justifiable doubt regarding their independence or impartiality, as provided in Rule 7. Within 10 days after the receipt of the CPR list, each party shall designate from the list three candidates, in order of preference, for its party-designated arbitrator, and so notify CPR and the other party in writing.

b. Within the same 10-day period after receipt of the CPR list, a party may also object to the appointment of any candidate on the list on grounds of lack of independence or impartiality by written and reasoned notice to CPR, with a copy to the other party. CPR shall decide the objection after providing the non-objecting party with an opportunity to comment. If there is no
objection to the first candidate designated by a
party, or if the objection is overruled by
CPR, CPR shall appoint the candidate as the
arbiter, and any subsequent challenges of that
arbiter, based on circumstances subsequently
learned, shall be made and decided in
accordance with the procedures set forth in
Rules 7.6 - 7.8. At its discretion, CPR may decide
an objection under this Rule 5.4 (b) by referring
it to a Challenge Review Committee pursuant to
the CPR Challenge Protocol (excluding its
fee requirement).

c. If the independence or impartiality of the first
candidate designated by a party is successfully
challenged, CPR will appoint the subsequent
candidate designated by that party, in order of
the party's indicated preference, provided CPR
does not sustain any objection made to the
appointment of that candidate.

d. Neither CPR nor the parties shall advise or
otherwise provide any information or indication
to any arbitrator candidate or appointed
arbiter 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
arbiter candidate or appointed arbitrator
pursuant to this Rule 5.4.

e. The chair of the Tribunal will be appointed by
CPR in accordance with the procedure set forth
in Rule 6.2, which shall proceed concurrently
with the procedure for appointing the party-
designated arbitrators provided in subsections
(a)-(d) above.

5.5 Where the arbitration agreement entitles each party
to designate an arbitrator but there is more than one
Claimant or Respondent to the dispute, and either
the multiple Claimants or the multiple Respondents
do not jointly designate an arbitrator, CPR shall
appoint all of the arbitrators as provided in Rule 6.2.

Rule 6: Selection of Arbitrator(s) by CPR

6.1 Whenever (i) a party has failed to designate its
arbiter to be appointed by CPR; (ii) the parties,
acting jointly, have failed to designate the
arbiter(s) for appointment by CPR; (iii) the parties
have agreed that the party-designated arbitrators
who have been appointed by CPR shall designate
the third arbitrator and such arbitrators have failed
to designate the third arbitrator; (iv) the parties have
provided that one or more arbitrator(s) shall be
appointed by CPR; or (v) the multi-party nature of the dispute calls for CPR to appoint all members of a three-member Tribunal pursuant to Rule 5.5, the arbitrator(s) required to complete the Tribunal shall be selected as provided in this Rule 6.

6.2 Except where a party has failed to designate the arbitrator to be appointed by it, CPR shall proceed as follows:

a. CPR shall jointly convene the parties by telephone to discuss the selection of the arbitrator(s).

b. Thereafter, CPR shall provide to the parties a list of candidates, from the CPR Panels, of not less than five candidates if one arbitrator is to be selected, and of not less than seven candidates if two or three arbitrators are to be selected. Such list shall include a brief statement of each candidate’s qualifications, availability and disclosures in writing of any circumstances that might give rise to justifiable doubt regarding the candidate’s independence or impartiality as provided in Rule 7. Each party shall number the candidates in order of preference, shall note any objection it may have to any candidate, and shall deliver the list so marked to CPR, which, on agreement of the parties, shall circulate the delivered lists to the parties. Any party failing without good cause to return the candidate list so marked within 10 days after receipt shall be deemed to have assented to all candidates listed thereon. CPR shall appoint as arbitrator(s) the nominee(s) willing to serve for whom the parties collectively have indicated the highest preference and who appear to meet the standards set forth in Rule 7. If a tie should result between two candidates, CPR may designate either candidate. If this procedure for any reason should fail to result in designation of the required number of arbitrators or if a party fails to participate in this procedure, CPR shall appoint a person or persons whom it deems qualified to fill any remaining vacancy.

6.3 Where a party has failed to designate the arbitrator to be appointed by it, CPR shall appoint a person whom it deems qualified to serve as such arbitrator.

Rule 7: Qualifications, Challenges and Replacement of Arbitrator(s)

7.1 Each arbitrator shall be independent and impartial.
7.2 By accepting appointment, each arbitrator shall be deemed to be bound by these Administered Rules and any modification thereof agreed to by the parties, and to have represented that he or she has the time available to devote to the expeditious process contemplated by these Administered Rules.

7.3 Each arbitrator shall disclose in writing to CPR and the parties prior to appointment in accordance with the Rules, and also promptly upon there arising during the course of the arbitration, any circumstances that might give rise to justifiable doubt regarding the arbitrator's independence or impartiality. Such circumstances include bias, interest in the result of the arbitration, and past or present relations with a party or its counsel.

7.4 No party or anyone acting on its behalf shall have any ex parte communications concerning any matter relating to the proceeding with any arbitrator or arbitrator candidate, except that a party may advise an arbitrator candidate being considered for designation as its appointed arbitrator of the general nature of the case and discuss the candidate's qualifications, availability, and independence and impartiality with respect to the parties, and a party also may confer with its designated arbitrator after the arbitrator's appointment by CPR regarding the selection of the chair of the Tribunal. As provided in Rule 5.4(d), no party or anyone acting on its behalf shall have any ex parte communications relating to the case with any arbitrator candidate designated or appointed pursuant to Rule 5.4.

7.5 Any arbitrator may be challenged if circumstances exist or arise that give rise to justifiable doubt regarding that arbitrator's independence or impartiality, provided that a party may challenge an arbitrator whom it has designated only for reasons of which it becomes aware after the designation has been made.

7.6 A party may challenge an appointed arbitrator only by a notice in writing to CPR, with a copy to the Tribunal and the other party, in accordance with the CPR Challenge Protocol (excluding its fee requirement) given no later than 15 days after the challenging party (i) receives notification of the appointment of that arbitrator, or (ii) becomes aware of the circumstances specified in Rule 7.5, whichever shall last occur. The notice shall state the reasons for the challenge with specificity. The notice shall not be sent to the Tribunal when the challenged arbitrator is a party-designated arbitrator selected as provided in Rule 5.4; in that event, CPR may provide
each member of the Tribunal with an opportunity to comment on the substance of the challenge without disclosing the identity of the challenging party.

7.7 When an arbitrator has been challenged by a party, the other party may agree to the challenge or the arbitrator may voluntarily withdraw. Neither of these actions implies acceptance of the validity of the challenge.

7.8 If neither agreed disqualification nor voluntary withdrawal occurs, the challenge shall be decided by CPR in accordance with the CPR Challenge Protocol (excluding its fee requirement) after providing the non-challenging party and each member of the Tribunal with an opportunity to comment on the challenge in accordance with these Rules.

7.9 In the event of death, resignation or successful challenge of an arbitrator not designated by a party, a substitute arbitrator shall be appointed pursuant to the procedure by which the arbitrator being replaced was selected. In the event of the death, resignation or successful challenge of an arbitrator designated by a party, that party may designate a substitute arbitrator; provided, however, that should that party fail to notify CPR and the other party of the substitute designation within 20 days from the date on which it becomes aware that the opening arose, that party’s right of designation shall lapse, and CPR shall appoint a substitute arbitrator forthwith in accordance with these Rules.

7.10 In the event that an arbitrator fails to act or is de jure or de facto prevented from duly performing the functions of an arbitrator, the procedures provided in Rule 7.9 shall apply to the selection of a replacement. If the parties do not agree on whether the arbitrator has failed to act or is prevented from performing the functions of an arbitrator, either party may request CPR to make that determination forthwith.

7.11 If the sole arbitrator or the chair of the Tribunal is replaced, the successor shall decide the extent to which any hearings held previously shall be repeated. If any other arbitrator is replaced, the Tribunal in its discretion may require that some or all prior hearings be repeated.

7.12 If an arbitrator on a three-person Tribunal fails to participate in the arbitration, the two other arbitrators shall have the power in their sole discretion to continue the arbitration and to make any decision,
ruling or award, notwithstanding the failure of the third arbitrator to participate, unless the parties agree otherwise. In determining whether to continue the arbitration or to render any decision, ruling or award without the participation of an arbitrator, the two other arbitrators shall take into account the stage of the arbitration, the reason, if any, expressed by the third arbitrator for such nonparticipation, and such other matters as they consider appropriate in the circumstances of the case. In the event that the two other arbitrators determine not to continue the arbitration without the participation of a third arbitrator, the procedures provided in Rule 7.9 shall apply to the selection of a replacement.

Rule 8: Challenges to the Jurisdiction of the Tribunal

8.1 The Tribunal shall have the power to hear and determine challenges to its jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

8.2 The Tribunal shall have the power to determine the existence, scope or validity of the contract of which an arbitration clause forms a part. For the purpose of challenges to the jurisdiction of the Tribunal, the arbitration clause shall be considered as separable from any contract of which it forms a part.

8.3 Any challenges to the jurisdiction of the Tribunal, except challenges based on the award itself, shall be made no later than the notice of defense or, with respect to a counterclaim, the reply to the counterclaim; provided, however, that if a claim or counterclaim is later added or amended, a challenge to jurisdiction over such claim or counterclaim must be made not later than the response to such claim or counterclaim as provided under these Rules.

C. RULES WITH RESPECT TO THE CONDUCT OF THE ARBITRAL PROCEEDINGS

Rule 9: General Provisions

9.1 Subject to these Rules, the Tribunal may conduct the arbitration in such manner as it shall deem appropriate. The chair shall be responsible for the organization of arbitral conferences and hearings and arrangements with respect to the functioning of the Tribunal, and shall keep CPR informed of such arrangements throughout the proceedings.

9.2 The proceedings shall be conducted in an expeditious manner. The Tribunal is empowered to impose time limits it considers reasonable on each
phase of the proceeding, including without limitation, the time allotted to each party for presentation of its case and for rebuttal. In setting time limits, the Tribunal should bear in mind its obligation to manage the proceeding firmly in order to complete proceedings as economically and expeditiously as possible.

**9.3** The Tribunal shall hold an initial pre-hearing conference for the planning and scheduling of the proceeding. Such conference shall be held promptly after the constitution of the Tribunal, unless the Tribunal is of the view that further submissions from the parties are appropriate prior to such conference. The objective of this conference shall be to discuss all elements of the arbitration with a view to planning for its future conduct. Following the initial pre-hearing conference, a schedule for the conduct of the arbitration should be issued as soon thereafter as appropriate. Matters to be considered in the initial pre-hearing conference may include, *inter alia*, the following:

a. Procedural matters (such as setting specific time limits for, and manner of, any required discovery; the desirability of bifurcation or other separation of the issues in the arbitration; the desirability and practicability of consolidating the arbitration with any other proceeding; the scheduling of conferences and hearings; the scheduling of pre-hearing memoranda; the need for and type of record of conferences and hearings, including the need for transcripts; the amount of time allotted to each party for presentation of its case and for rebuttal; the mode, manner and order for presenting proof; the need for expert witnesses and how expert testimony should be presented; and the necessity for any on-site inspection by the Tribunal);

b. The early identification and narrowing of the issues in the arbitration;

c. The possibility of stipulations of fact and admissions by the parties solely for purposes of the arbitration, as well as simplification of document authentication;

d. The possibility of appointment of a neutral expert by the Tribunal; and

e. The possibility of the parties engaging in settlement negotiations, with or without the assistance of a mediator.
After the initial conference, further pre-hearing or other conferences may be held as the Tribunal deems appropriate.

9.4 In order to define the issues to be heard and determined, the Tribunal may, *inter alia*, make pre-hearing orders and instruct the parties to file more detailed statements of claim and of defense and pre-hearing memoranda.

9.5 Unless the parties have agreed upon the place of arbitration, the Tribunal shall fix the place of arbitration based upon the contentions of the parties and the circumstances of the arbitration. The award shall be deemed made at such place. The Tribunal may schedule meetings and hold hearings wherever it deems appropriate.

9.6 Except as otherwise provided in these Administered Rules, only electronic copies of filings, communications and other documents shall be sent to CPR; hard copies of filings or other documents sent to the Tribunal and/or the other party should not be sent to CPR in the ordinary course.

**Rule 10: Applicable Law(s) and Remedies**

10.1 The Tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to the dispute. Failing such a designation by the parties, the Tribunal shall apply such law(s) or rules of law as it determines to be appropriate.

10.2 Subject to Rule 10.1, in arbitrations involving the application of contracts, the Tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract.

10.3 The Tribunal may grant any remedy or relief, including but not limited to specific performance of a contract, which is within the scope of the agreement of the parties and permissible under the law(s) or rules of law applicable to the dispute.

10.4 The Tribunal may award such pre-award and post-award interest, simple or compound, as it considers appropriate, taking into consideration the contract and applicable law.

**Rule 11: Discovery**

The Tribunal may require and facilitate such discovery as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective. The
Tribunal may issue orders to protect the confidentiality of proprietary information, trade secrets and other sensitive information disclosed in discovery.

**Rule 12: Evidence and Hearings**

12.1 The Tribunal shall determine the manner in which the parties shall present their cases. Unless otherwise determined by the Tribunal or agreed by the parties, the presentation of a party's case shall include the submission of a pre-hearing memorandum including the following elements:

a. A statement of facts;

b. A statement of each claim being asserted;

c. A statement of the applicable law and authorities upon which the party relies;

d. A statement of the relief requested, including the basis for any damages claimed; and

e. A statement of the nature and manner of presentation of the evidence, including the name, capacity and subject of testimony of any witnesses to be called and an estimate of the amount of time required for each witness's direct testimony.

12.2 If either party so requests or the Tribunal so directs, a hearing shall be held for the presentation of evidence and oral argument. Testimony may be presented in written and/or oral form as the Tribunal may determine is appropriate. The Tribunal is not required to apply any rules of evidence used in judicial proceedings, provided, however, that the Tribunal shall apply any lawyer-client privilege and work product immunity it deems applicable. The Tribunal shall determine the applicability of any privilege or immunity and the admissibility, relevance, materiality and weight of the evidence offered.

12.3 The Tribunal, in its discretion, may require the parties to produce evidence in addition to that initially offered. It may also appoint neutral experts whose testimony shall be subject to cross-examination and rebuttal.

12.4 The Tribunal shall determine the manner in which witnesses are to be examined. The Tribunal shall have the right to exclude witnesses from hearings during the testimony of other witnesses.
Rule 13: Interim Measures of Protection

13.1 At the request of a party, the Tribunal may take such interim measures as it deems necessary, including measures for the preservation of assets, the conservation of goods or the sale of perishable goods. The Tribunal may require appropriate security as a condition of ordering such measures.

13.2 A request for interim measures by a party to a court shall not be deemed incompatible with the agreement to arbitrate or as a waiver of that agreement.

Rule 14: Interim Measures of Protection by a Special Arbitrator

14.1 Unless otherwise agreed by the parties, this Rule 14 shall be deemed part of any arbitration clause or agreement that provides for arbitration under these Administered Rules.

14.2 Prior to the constitution of the Tribunal, any party may request that interim measures be granted under this Administered Rule against any other party by a special arbitrator appointed for that purpose.

14.3 Interim measures under this Administered Rule are requested by written application to CPR, entitled “Request for Interim Measures of Protection by a Special Arbitrator,” describing in reasonable detail the relief sought, the party against whom the relief is sought, the grounds for the relief, and, if practicable, the evidence and law supporting the request. The request shall be delivered in accordance with Administered Rule 2.1, and shall certify that all other parties affected have been notified of the request or explain the steps taken to notify such parties.

14.4 The request for interim measures by a special arbitrator shall be accompanied by an initial deposit payable to CPR as provided in the Schedule of Administered Arbitration Costs on the CPR website. CPR shall promptly determine whether any further deposit is due to cover the fee of CPR and the remuneration of the special arbitrator, which amount shall be paid within the time period determined by CPR.

14.5 If the parties agree upon a special arbitrator within one business day of the request, that arbitrator shall be appointed by CPR subject to Rule 14.6. If there is no such timely agreement, CPR shall appoint a special arbitrator from a list of arbitrators maintained by CPR for that purpose. To the extent practicable, CPR shall appoint the special arbitrator within one business day of CPR’s receipt of the application for interim measures under this Administered Rule. The
special arbitrator’s fee shall be determined by CPR in consultation with the special arbitrator. The special arbitrator’s fee and reasonable out-of-pocket expenses shall be paid from the deposit made with CPR.

14.6 Prior to appointment, a special arbitrator candidate shall disclose to CPR any circumstances that might give rise to justifiable doubt regarding his or her independence or impartiality within the meaning of Administered Rule 7. Any challenge to the appointment of a special arbitrator must be made within one business day of the challenging party’s receipt of CPR’s notification of the appointment of the arbitrator and the circumstances disclosed. A special arbitrator may be challenged on any ground for challenging arbitrators generally under Administered Rule 7. To the extent practicable, CPR shall rule on the challenge within one business day after CPR’s receipt of the challenge. CPR’s ruling on the challenge shall be final.

14.7 In the event of death, resignation or successful challenge of a special arbitrator, CPR shall appoint a replacement forthwith in accordance with the procedures set forth in Administered Rules 14.5 and 14.6.

14.8 The special arbitrator shall determine the procedure to be followed, which shall include, whenever possible, reasonable notice to, and an opportunity for hearing (either in person, by teleconference or other appropriate means) for all affected parties. The special arbitrator shall conduct the proceedings as expeditiously as possible, and shall have the powers vested in the Tribunal under Administered Rule 8, including the power to rule on his or her own jurisdiction and the applicability of this Administered Rule 14.

14.9 The special arbitrator may grant such interim measures as he or she deems necessary, including but not limited to measures for the preservation of assets, the conservation of goods or the sale of perishable goods.

14.10 The ruling on the request for interim measures shall be made by award or order, and the special arbitrator may state in such award or order whether or not the special arbitrator views the award or order as final for purposes of any judicial proceedings in connection therewith. The award or order may be made conditional upon the provision of security or any act or cessation of any act specified in the award or order. The award or order may provide for the payment of a specified amount in case of noncompliance with its terms.
14.11 The award or order shall specify the relief awarded or denied, shall determine the cost of the proceedings, which includes CPR’s administrative fees and expenses, the special arbitrator’s fee and expenses as determined by CPR, and apportion such costs among the parties as the special arbitrator deems appropriate. The special arbitrator may also apportion the parties’ reasonable attorneys’ fees and expenses in the award or order or in a supplementary award or order. Unless the parties agree otherwise, the award or order shall state the reasoning on which the award or order rests as the special arbitrator deems appropriate.

14.12 Prior to the execution of any special arbitrator’s award, the special arbitrator shall send a copy of the award in draft form to CPR for a limited review for format, clerical, typographical or computational errors, or any errors of a similar nature in the award. CPR shall promptly review such award, suggest any corrections to the special arbitrator and the special arbitrator shall as soon as possible thereafter deliver executed copies of the award to CPR, which shall promptly deliver the award to the parties, provided no fees, expenses and other charges incurred in accordance with the Schedule of Administered Arbitration Costs are outstanding.

14.13 A request for interim measures by a party to a court shall not be deemed incompatible with the agreement to arbitrate, including the agreement to this Administered Rule 14, or as a waiver of that agreement.

14.14 The special arbitrator’s award or order shall remain in effect until modified or vacated by the special arbitrator or the Tribunal. The special arbitrator may modify or vacate the award or order for good cause. If the Tribunal is constituted before the special arbitrator has rendered an award or order, the special arbitrator shall retain jurisdiction to render such award or order unless and until the Tribunal directs otherwise. Once the Tribunal has been constituted, the Tribunal may modify or vacate the award or order rendered by the special arbitrator.

14.15 The special arbitrator shall not serve as a member of the Tribunal unless the parties agree otherwise.

Rule 15: The Award

15.1 The Tribunal may make final, interim, interlocutory and partial awards. With respect to any interim,
interlocutory or partial award, the Tribunal may state in its award whether or not it views the award as final for purposes of any judicial proceedings in connection therewith.

15.2 All awards shall be in writing and shall state the reasoning on which the award rests unless the parties agree otherwise. The award shall be deemed to be made at the seat of arbitration and shall contain the date on which the award was made. When there are three arbitrators, the award shall be made and signed by at least a majority of the arbitrators.

15.3 A member of the Tribunal who does not join in an award may issue a dissenting opinion. Such opinion shall not constitute part of the award.

15.4 Prior to execution of any award, the Tribunal shall send a copy of the award in draft form to CPR for a limited review for format, clerical, typographical or computational errors, or any errors of a similar nature in the award. CPR shall promptly review such award, and suggest any corrections to the Tribunal.

15.5 Thereafter as soon as possible, but in no event more than 3 days, the Tribunal shall deliver executed copies of the award and of any dissenting opinion to CPR, which shall promptly deliver the award and any dissenting opinion to the parties provided no fees, expenses and other charges incurred in accordance with the Schedule of Administered Arbitration Costs are outstanding.

15.6 Within 15 days after receipt of the award, either party, with notice to the other party and CPR, may request the Tribunal to clarify the award; to correct any clerical, typographical or computational errors, or any errors of a similar nature in the award; or to make an additional award as to claims or counterclaims presented in the arbitration but not determined in the award. The Tribunal shall make any clarification, correction or additional award requested by either party that it deems justified within 30 days after receipt of such request. Within 15 days after delivery of the award to the parties or, if a party requests a clarification, correction or additional award, within 30 days after receipt of such request, the Tribunal may make such corrections and additional awards on its own initiative as it deems appropriate. All clarifications, corrections, and additional awards shall be in writing, shall be submitted directly to CPR by the Tribunal for delivery by CPR to the parties, and the provisions of this Administered Rule 15 shall apply to them.
15.7 The award shall be final and binding on the parties, and the parties will undertake to carry out the award without delay. If an interpretation, correction or additional award is requested by a party, or a correction or additional award is made by the Tribunal on its own initiative as provided in Administered Rule 15.6, the award shall be final and binding on the parties when such clarification, correction or additional award is issued by CPR or upon the expiration of the time periods provided in Administered Rule 15.6 for such clarification, correction or additional award to be made, whichever is earlier.

15.8 a. The dispute should in most circumstances be submitted to the Tribunal for decision within six months after the initial pre-hearing conference required by Administered Rule 9.3. The final award should in most circumstances be submitted by the Tribunal to CPR within 30 days after the close of the hearing and thereafter CPR should render the award to the parties promptly. The Tribunal and CPR shall use their best efforts to comply with this schedule.

b. CPR must approve any scheduling orders or extensions that would result in a final award being rendered more than 12 months after the initial pre-hearing conference required by Administered Rule 9.3. When such approval is required, CPR in its discretion may convene a call with the parties and arbitrators to discuss factors relevant to such request.

Rule 16. Failure to Comply with Administered Rules

Whenever a party fails to comply with these Administered Rules, or any order of the Tribunal pursuant to these Administered Rules, in a manner deemed material by the Tribunal, the Tribunal, if appropriate, shall fix a reasonable period of time for compliance and, if the party does not comply within said period, the Tribunal may impose a remedy it deems just, including an award on default. Prior to entering an award on default, the Tribunal shall require the non-defaulting party to produce evidence and legal argument in support of its contentions as the Tribunal may deem appropriate. The Tribunal may receive such evidence and argument without the defaulting party’s presence or participation.
D. RULES WITH RESPECT TO COSTS AND FEES

Rule 17. Arbitrator Fees, Expenses and Deposits

17.1 Each arbitrator shall be compensated on a reasonable basis determined at the time of appointment for serving as an arbitrator and shall be reimbursed for any reasonable travel and other expenses. The compensation for each arbitrator should be fully disclosed to all Tribunal members and parties. If there is a disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by CPR and confirmed in writing to the parties. The parties shall be jointly and severally liable for such fees and expenses.

17.2 The Tribunal shall determine the necessary advances on the arbitrator(s) fees and expenses and advise CPR which, unless otherwise agreed by the parties, shall invoice the parties in equal shares. The amount of any advances to cover arbitrator fees and expenses may be subject to readjustment at any time during the arbitration. Such funds shall be held and disbursed in a manner CPR deems appropriate. An accounting will be rendered to the parties and any unexpended balance returned at the conclusion of the arbitration as may be appropriate.

17.3 If the requested advances are not paid in full within 10 days after receipt of the request, CPR shall so inform the parties and the proceeding may be suspended or terminated unless the other party pays the non-paying party’s share subject to any award on costs.

Rule 18. CPR Administrative Fees and Expenses

18.1 In addition to the CPR Filing Fee, CPR shall charge a Case Administrative Fee (“Administrative Fee”) as set forth in the Schedule of Administered Arbitration Costs on the CPR website. CPR reserves the right to adjust the Administrative Fee based on developments in the proceeding.

18.2 Unless otherwise agreed by the parties, CPR shall invoice the parties in equal shares for the Administrative Fees. Payment shall be due on receipt unless other arrangements are authorized by CPR. The parties shall be jointly and severally liable to CPR for the Administrative Fee. In the event a party fails to pay as provided in the invoice, the proceeding shall be suspended or terminated unless the other party pays the non-paying party’s share subject to any award on costs.
Rule 19. Fixing and Apportionment of Costs

19.1 The Tribunal shall fix the costs of arbitration in its award. The costs of arbitration include:

a. The fees and expenses of members of the Tribunal;

b. The costs of expert advice and other assistance engaged by the Tribunal;

c. The travel and other expenses of witnesses to such extent as the Tribunal may deem appropriate;

d. The costs for legal representation and assistance and experts incurred by a party to such extent as the Tribunal may deem appropriate;

e. The CPR Administrative Fee with respect to the arbitration;

f. The costs of a transcript; and

g. The costs of meeting and hearing facilities.

19.2 Subject to any agreement between the parties to the contrary, the Tribunal may apportion the costs of arbitration between or among the parties in such manner as it deems reasonable, taking into account the circumstances of the case, the conduct of the parties during the proceeding, and the result of the arbitration.

E. MISCELLANEOUS ADMINISTERED RULES

Rule 20: Confidentiality

Unless the parties agree otherwise, the parties, the arbitrators and CPR shall treat the proceedings, any related discovery and the decisions of the Tribunal, as confidential, except in connection with judicial proceedings ancillary to the arbitration, such as a judicial challenge to, or enforcement of, an award, and unless otherwise required by law or to protect a legal right of a party. To the extent possible, any specific issues of confidentiality should be raised with and resolved by the Tribunal.

Rule 21: Settlement and Mediation

21.1 Either party may propose settlement negotiations to the other party at any time. The Tribunal may suggest that the parties explore settlement at such times as the Tribunal may deem appropriate.

21.2 With the consent of the parties, the Tribunal at any stage of the proceeding may request CPR to arrange for mediation of the claims asserted in the
arbitration by a mediator acceptable to the parties. The mediator shall be a person other than a member of the Tribunal. Unless the parties agree otherwise, any such mediation shall be conducted under the CPR Mediation Procedure.

21.3 The Tribunal will not be informed of any settlement offers or other statements made during settlement negotiations or a mediation between the parties, unless both parties consent.

21.4 If the parties settle the dispute before an award is made, the Tribunal shall terminate the arbitration and so inform CPR. If requested by all parties and accepted by the Tribunal, the Tribunal may record the settlement in the form of an award made by consent of the parties. The Tribunal is not obliged to give reasons for such an award. CPR shall issue the award.

Rule 22: Actions Against CPR or Arbitrator(s)

Neither CPR nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these Administered Rules.

Rule 23: Waiver

A party knowing of a failure to comply with any provision of these Administered Rules, or any requirement of the arbitration agreement or any direction of the Tribunal, and neglecting to state its objections promptly, waives any objection thereto.

Rule 24: Interpretation and Application of Administered Rules

The Tribunal shall interpret and apply these Administered Rules insofar as they relate to the Tribunal’s powers and duties. When there is more than one member on the Tribunal and a difference arises among them concerning the meaning or application of these Administered Rules, that difference shall be decided by a majority vote. All other Rules shall be interpreted and applied by CPR.
CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration
ABOUT CPR
The International Institute for Conflict Prevention & Resolution is a membership-based nonprofit organization that promotes excellence and innovation in public and private dispute resolution, serving as a primary multinational resource for avoidance, management, and resolution of business-related disputes.

CPR Members – Our membership comprises General Counsel and senior lawyers of Fortune 1000 organizations, as well as partners in the top law firms around the world. It is a committed and active membership, diligently participating in CPR activities and serving on committees.

CPR’s Panels of Distinguished Neutrals – CPR’s Panels consist of the highest quality arbitrators and mediators, with specialization in over 20 practice areas and industries. As part of CPR’s nomination process, we check not only the suitability, but the availability of all neutrals nominated, as well as disclose any conflicts of interest up front.

CPR Pledge Signers – More than 4,000 operating companies have committed to the Corporate Policy Statement on Alternatives to Litigation©. Moreover, better than 1,500 law firms have signed the CPR Law Firm Policy Statement on Alternatives to Litigation©, including 400 of the nation’s 500 largest firms. This “Pledge” has been invaluable in bringing disputing parties to the negotiating table.

CPR’s Commitment – As we celebrate more than 30 years of achievement, we continue to dedicate the organization to providing effective, innovative ways of preventing and resolving disputes affecting business enterprises. We do so through leadership and advocacy, and by providing comprehensive resources, such as education, training, consultation, neutrals, as well as a networking and collaboration platform for business, the judiciary, government, and other institutions.
CPR PROTOCOL ON DISCLOSURE OF DOCUMENTS AND PRESENTATION OF WITNESSES IN COMMERCIAL ARBITRATION

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CPR PROTOCOL ON DISCLOSURE OF DOCUMENTS AND PRESENTATION OF WITNESSES IN COMMERCIAL ARBITRATION

Introduction

The CPR Protocol addresses concerns often expressed by users of arbitration, that there is, particularly in disputes involving parties of different nations, a lack of predictability in the ways in which the arbitration proceedings are conducted and that arbitration is becoming increasingly more complex, costly and time-consuming. The Protocol addresses these concerns by providing guidance in the form of recommendations as to practices that arbitrators may follow in administering proceedings before them, including proceedings conducted under the CPR Rules or under other ad hoc or institutional rules. The practices recommended deal with ways in which reasonable limitations may be placed on disclosure and efficiencies gained in the presentation of witness testimony in arbitration hearings.

Recognizing that there may be different interests and expectations on the part of arbitration users and their counsel, the Protocol offers various “modes” of disclosure and presentation of witnesses, ranging from minimal to extensive, so that the parties to an agreement to arbitrate may choose, at the time of entering into their agreement or thereafter, the general way in which their arbitration proceedings will be conducted in the important areas of document disclosure and witness presentation.

The Protocol is the product of two working groups of the Information Exchange Subcommittee chaired by Prof. Thomas J. Stipanowich of the CPR Arbitration Committee. The Working Group on the presentation of witnesses was chaired by Ben H. Sheppard, Jr. and the other Working Group, on documentary disclosure, was chaired by me. Members of those groups and members of the Arbitration Committee who have participated in the several meetings over the time since early in 2007 when this project was started are listed on the last page of this document.

Lawrence W. Newman
Chairman of the CPR International Committee on Arbitration
Preamble

1. This Protocol has two purposes. The first is to assist the arbitrators in CPR or other tribunals (hereinafter "the arbitrators" or "the tribunal") in carrying out their responsibilities under Rule 11 of the CPR Rules by setting out general principles for dealing with requests for the disclosure of documents and electronic information and for establishing procedures for the testimony of witnesses. The second purpose is to afford to the parties to an arbitration agreement the opportunity to adopt, before or after a dispute arises, certain modes of dealing with the disclosure of documents and the presentation of witnesses, as they may select from Schedules 1, 2 and 3.

2. The tribunal is encouraged to direct the attention of the parties to this Protocol at the outset of the arbitration and to draw upon it in organizing and managing the proceeding.

3. References to CPR Rules are to the CPR Non-Administered Arbitration Rules effective November 1, 2007. However, arbitrators are encouraged to draw upon this Protocol in organizing and managing arbitrations under any of the CPR arbitration rules or under the rules of any other institution.

Section 1. DISCLOSURE OF DOCUMENTS

General Considerations

(a) Philosophy Underlying Document Disclosure

Whether or not the parties adopt any of the modes of disclosure as provided herein, parties whose arbitrations are conducted under the CPR Rules should understand that CPR arbitrators are expected to conduct proceedings before them in accordance with the general principle that arbitration be expeditious and cost-effective as well as fundamentally fair. Consistent with this philosophy, it is expected that the parties will ensure that their counsel appreciate that arbitration is not the place for an approach of "leave no stone unturned," and that zealous advocacy in arbitration must be tempered by an appreciation for the need for speed and efficiency. Since

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1 As used herein, the term “documents” is intended to refer to all types of stored or recorded information, whether in the form of physical documents or not, including electronic information.
requests for information based on possible relevance are generally incompatible with these goals, disclosure should be granted only as to items that are relevant and material and for which a party has a substantial, demonstrable need in order to present its position. CPR arbitrators should supervise any disclosure process actively to ensure that these goals are met.

(b) Attorney-Client Privilege and Attorney-Work-Product Protection

No documents obtained through inadvertent disclosure of documents covered by the attorney-client privilege or attorney work-product protection may be introduced in evidence and any documents so obtained must upon request of the party holding the privilege or work product protection, be returned forthwith, unless such party expressly waives the privilege or work product protection. The arbitrators should apply the provisions of applicable law that afford the greatest protection of attorney client communications and work product documents.

(c) Party-Agreed Disclosure

The parties to an arbitration may provide, in their agreement to arbitrate, or separately thereafter, for certain modes of disclosure that they and the tribunal will follow. Suggested modes are set forth in Schedule 1 hereto and may be agreed to by the parties in such language as the following:

“The parties agree that disclosure of documents shall be implemented by the tribunal consistently with Mode [ ] in Schedule 1 to the CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration.”

If the parties have agreed on the applicability of any one of such modes, the tribunal shall issue orders for disclosure of documents pursuant to a time schedule and other reasonable conditions that are consistent with the parties’ agreement. Any mode of disclosure so chosen by the parties shall be binding upon the parties and the tribunal and shall govern the proceedings, unless all parties thereafter agree on a different form of disclosure. Disclosure of documents different from that which is provided for in the mode of disclosure selected by the parties may be ordered by the tribunal if it determines that there is a compelling need for such disclosure.

(d) Disclosure of Electronic Information

(1) General Principles

In making rulings on disclosure, the tribunal should bear in mind the high cost and burdens associated with compliance with requests for the disclosure of electronic information. It is frequently recognized that e-mail and other electronically created documents found in the active or archived files of key witnesses or in shared drives used in connection with the matter at issue are more readily accessible and less burdensome to produce when sought pursuant to reasonably specific requests. Production of electronic materials from a wide range of users or custodians tends to be costly and burdensome and should be granted only upon a showing of extraordinary need. Requests for back-up tapes, or fragmented or deleted files should only be granted if the requesting party can demonstrate a reasonable likelihood that files were deliberately destroyed or altered by a party in anticipation of litigation or arbitration and outside of that party’s document-retention policies operated in good faith.

(2) Modes of Disclosure

In order to give themselves greater assurance of predictability as to the extent of disclosure of electronic information, the parties may wish to provide, in their agreement to arbitrate or separately thereafter, for certain modes of disclosure of electronic information as set out in Schedule 2, pursuant to such language as the following:

“The parties agree that disclosure of electronic information shall be implemented by the tribunal consistently with Mode [ ] in Schedule 2 to the CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration.”

If the parties do not select a mode of disclosure for electronic documents under Schedule 2, the mode of disclosure selected by the parties from Schedule 1 shall apply to both electronic information and non-electronic documents.
(3) Preservation of Electronic Information

In view of the high cost and burden of preserving documents, particularly in the form of electronic information, issues regarding the scope of the parties’ obligation to preserve documents for potential disclosure in the arbitration should be dealt with at an early scheduling conference, or as soon as possible thereafter. The parties’ preservation obligations should comport with the Schedule 2 mode of disclosure of electronic information selected.

(e) Tribunal Orders for the Disclosure of Documents and Information

The arbitrators should ensure that they are sufficiently informed as to the issues to be determined, the burden and costs of preserving and producing requested documents and other information, and the relative value of the requested information to the issues to be determined, so as to enable the arbitrators to make a fair decision as to the requested disclosure.

Whether or not the parties have selected one of the modes for disclosure in Schedules 1 and/or 2, the tribunal, in making rulings on the disclosure of documents and information, should bear in mind the points set forth below:

(1) Timing of Disclosure

The tribunal should establish a reasonable and expeditious timetable for disclosure. Any issues or disagreements regarding disclosure should be identified and resolved as early as possible, preferably at a scheduling conference with the parties held early in the proceeding for the purpose of discussing the scope and timing of disclosure, identifying areas of disagreement and adopting expeditious procedures for resolving any such disagreements.

(2) Burdens versus Benefits

Arbitrators should carefully balance the likely value of documents requested against the cost and burdens, both financial and temporal, involved in producing the documents or information requested. Where the costs and burdens of disclosure requested are likely to be substantial in comparison to the amount in dispute or the need for the information to aid in resolving the dispute, the tribunal should ordinarily deny such requests. If extraordinary circumstances justify production of the information, the tribunal should condition disclosure on the requesting party’s paying to the requested party the reasonable costs of a disclosure.

(3) Documents for Use in Impeachment in Cross-examination

Except for the purpose of impeaching the testimony of witnesses, the tribunal should not permit a party to use in support of its case, at a hearing or otherwise, documents or electronic information unless the party has presented them as part of its case or previously disclosed them. But the tribunal should not permit a party to withhold documents or electronic information otherwise required to be disclosed on the basis that the documents will be used by it for the impeachment of another party’s witnesses.
SCHEDULE 1
Modes of Disclosure

Mode A. No disclosure of documents other than the disclosure, prior to the hearing, of documents that each side will present in support of its case.

Mode B. Disclosure provided for under Mode A together with pre-hearing disclosure of documents essential to a matter of import in the proceeding for which a party has demonstrated a substantial need.

Mode C. Disclosure provided for under Mode B together with disclosure, prior to the hearing, of documents relating to issues in the case that are in the possession of persons who are noticed as witnesses by the party requested to provide disclosure.

Mode D. Pre hearing disclosure of documents regarding non-privileged matters that are relevant to any party’s claim or defense, subject to limitations of reasonableness, duplication and undue burden.

SCHEDULE 2
Modes of Disclosure of Electronic Information

Mode A. Disclosure by each party limited to copies of electronic information to be presented in support of that party’s case, in print-out or another reasonably usable form.

Mode B. (1) Disclosure, in reasonably usable form, by each party of electronic information maintained by no more than [specify number] of designated custodians. (2) Provision only of information created between the date of the signing of the agreement that is the subject of the dispute and the date of the filing of the request for arbitration. (3) Disclosure of information from primary storage facilities only; no information required to be disclosed from back up servers or back up tapes; no disclosure of information from cell phones, PDAs, voicemails, etc. (4) No disclosure of information other than reasonably accessible active data.

Mode C. Same as Mode B, but covering a larger number of custodians [specify number] and a wider time period [to be specified]. The parties may also agree to permit upon a showing of special need and relevance disclosure of deleted, fragmented or other information difficult to obtain other than through forensic means.

Mode D. Disclosure of electronic information regarding non-privileged matters that are relevant to any party’s claim or defense, subject to limitations of reasonableness, duplicativeness and undue burden.

Parties selecting Modes B, C, or D agree to meet and confer, prior to an initial scheduling conference with the tribunal, concerning the specific modalities and timetable for electronic information disclosure.
Section 2. PRESENTATION OF WITNESSES

The CPR Non-Administered Arbitration Rules provide that the testimony of witnesses “may be presented in written and/or oral form as the Tribunal may determine is appropriate.” Rule 12.2.

(a) Testimony of Witnesses in Written Form (Witness Statements)

Witness statements are detailed presentations in writing of the testimony, including references to documents that are also presented, that a witness would give if questioned before the tribunal. These statements are exchanged prior to the presentation of oral evidence at a hearing. Witnesses then appear at the hearing to be questioned concerning their written statements.

Witness statements have been found to save considerable time that would otherwise be spent in hearings before the tribunal and offer other advantages as well: They serve to eliminate surprise, narrow the issues and permit more focused questioning of the witness at the hearings. They may also eliminate the need for oral testimony from uncontroversial or distant witnesses. Witness statements also allow the arbitrators and the parties to become acquainted with material facts in advance of the hearing, and they may therefore promote settlement.

The use of witness statements is referred to in the rules of the major international arbitral institutions, in the UNCITRAL Arbitration Rules and in the IBA Rules on the Taking of Evidence in International Commercial Arbitration.

The following are procedures that generally apply to the use of witness statements:

1. Each statement should be signed by the witness, contain an affirmation of its truth and be sufficiently detailed to constitute the entire evidence of that witness.

2. Each witness who has provided a statement must appear for examination at the evidentiary hearing by the opposing parties and the tribunal unless the parties and the tribunal agree otherwise. The tribunal may disregard the statement of any witness who fails to appear in support of it.

3. The parties may agree or the tribunal may direct that the witness statement shall serve as the direct testimony of the witness. In that event, the witness should, at a hearing before the tribunal, swear or affirm to tell the truth, confirm her/his witness statement following an opportunity to make any needed corrections to the statement and then be subject to cross-examination.

However, absent party agreement, the tribunal may consider whether to permit witnesses who have submitted a statement to respond to questions from the sponsoring party before being cross-examined so long as this oral testimony is brief and does not introduce matters not contained in the written statement. This allows the witness to “warm to the seat” and permits the tribunal to hear the witness testify in her/his own words.

4. The tribunal may wish to explore with the parties alternative forms of witness statements. Although such statements are commonly submitted in narrative form, they may also be submitted in question and answer format, as they are in some administrative proceedings in the United States. Testimony submitted in question and answer format is potentially more interesting and persuasive than a narrative text and more nearly replicates the presentation of oral testimony.

5. The tribunal should also explore with the parties whether witness statements are to be submitted simultaneously or sequentially, as well as the need for reply or rejoinder submissions.

6. A party may elect, a reasonable time prior to the hearing, not to question a witness presented by an opposing party. In such event, the tribunal should consider whether it wishes to have the witness appear before it for questioning by members of the tribunal.

(b) Testimony of Witnesses in Oral Form

In the absence of a witness statement, the testimony of a witness is presented at a hearing through questioning by counsel and the tribunal. Since the oral process permits the witness to present the evidence in her/his own words, the tribunal may benefit, especially where the credibility of a witness is important, from having the opportunity to observe the demeanor of witness in presenting his or her position in the case.
(c) Depositions

Depositions are recorded sessions at which witnesses are questioned by the parties outside the presence of the tribunal, enabling the parties to obtain information from witnesses in advance of their testifying at the hearings. Depositions should be permitted only where the testimony is expected to be material to the outcome of the case and where one or more of the following exigent circumstances apply: Witness statements are not being used, the parties agree to the taking of the deposition and/or the witness may not be available to testify, in person or by telecommunication, before the tribunal. The tribunal should impose strict limits on the number and length of any depositions allowed. Deposition transcripts may, as the tribunal determines, be used at hearings or otherwise be made part of the record before the tribunal.

(d) Determining the Appropriate Forms of Witness Evidence

The tribunal in its agenda for the initial pre-hearing conference should call to the attention of the parties the options for the presentation of witness testimony and should explore those options with the parties at the conference. The “Modes of Presenting Witnesses” set forth on Schedule 3, to the extent not previously agreed on by the parties, may be useful for this purpose. See Section 2(h) below. Any of the “modes” or variants of them can be effective methods for the presentation of witness testimony depending upon the circumstances of the particular case. Any procedure elected should be applied consistently with the expectations of the parties and their counsel and with the cost-effective resolution of the dispute.

(e) Presentations by Party-Appointed Experts

Although the tribunal is empowered to appoint neutral experts, this authority appears to have been seldom employed. Instead, the prevailing practice is for the parties to present the evidence of experts retained by them in support of their positions.

The following procedures may be applied to the use of party-appointed experts.

1. At the initial conference with the parties, the tribunal should ascertain whether the parties intend to present the evidence of expert witnesses and, if so, establish a schedule for the submission of expert reports.

2. Each expert witness should submit a signed report, setting forth the facts considered and conclusions reached in sufficient detail to serve as the entire evidence of the expert, together with a curriculum vitae or other biographical information describing the qualifications and experience of the witness.

3. The tribunal should discuss with the parties whether expert reports will be submitted simultaneously or sequentially, and whether there will be a need for reply or rejoinder submissions from the experts.

4. Each expert who has submitted a report must appear at a hearing before the tribunal unless the parties agree otherwise and the tribunal accepts this agreement. The tribunal may disregard the report of an expert who fails to appear at a hearing.

5. The tribunal may wish to consider directing that, within a specified period of time after the exchange of expert reports, opposing experts on the same issues meet and confer, without the parties or their counsel and prior to the submission of any reply expert reports, for the purpose of narrowing the scope of disputed issues among the experts.

6. The sequencing of expert testimony may be important. In order to avoid having experts on the same issue testify days or weeks apart, the tribunal may wish to arrange for such witnesses to testify sufficiently close to one another in time to enable the tribunal most effectively to consider the subjects of their testimony.

(f) Hearings

As a supplement to the applicable arbitration rules, the following procedures may also apply to the conduct of hearings:

1. The tribunal should require every witness to affirm, in a manner determined appropriate by the tribunal, that she or he is telling the truth. If the witness has submitted a witness statement or expert report, he or she should confirm the statement or report and note any corrections to it. In the tribunal’s discretion the witness whose testimony has been presented in writing may
thereafter be briefly questioned by the party presenting the witness, provided that no new testimony other than corrections is presented in this way.

2. The tribunal may consider whether to direct that expert or fact witnesses appear before them at the same time for questioning, in a process known as "witness conferencing." A typical application is for expert witnesses to provide their written or oral testimony separately and then appear jointly for further questioning by the tribunal and counsel.

(g) Cross examination of Witnesses

Any witness whose testimony is received by the tribunal must be made available for examination by other parties and the tribunal. The form and length of cross examination should be such as to afford a fair opportunity for the testimony of a witness to be fully clarified and/or challenged.

(h) Party-Agreed Procedures for the Presentation of Witnesses

The parties to an arbitration may provide, in their agreement to arbitrate, or separately thereafter (as in an initial conference with the tribunal – see paragraph (d) above), for certain modes of witness presentation that they and the tribunal will follow. Suggested modes are set forth in Schedule 3 hereto and may be agreed to by the parties in such language as the following:

"The parties agree that the presentation of witnesses shall be implemented by the tribunal consistently with Mode [ ] concerning witness presentation selected from Schedule 3 to the CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration."

If the parties have agreed on the applicability of any one of such modes, the tribunal shall issue orders and shall conduct the proceeding consistently with the parties’ agreement. Any agreed mode of witness presentation shall be binding on the parties and the tribunal and shall govern the proceedings, unless all parties thereafter agree on a different form of witness presentation. The tribunal may direct the use of procedures apart from the mode of presentation selected by the parties if it determines that there is a compelling need for such procedure.

SCHEDULE 3

Modes of Presenting Witnesses

Mode A. Submission in advance of the hearing of a written statement from each witness on whose testimony a party relies, sufficient to serve as that witness's entire evidence, supplemented, at the option of the party presenting the witness, by short oral testimony by the witness before being cross-examined on matters not outside the written statement. No depositions of witnesses who have submitted statements.

Mode B. No witness statements. Direct testimony presented orally at the hearing. No depositions of witnesses.

Mode C. As in Mode B, except depositions as allowed by the tribunal or as agreed by the parties, but in either event subject to such limitations as the tribunal may deem appropriate.
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