

*ABA Section of Litigation 2011 Corporate Counsel CLE Seminar, February 17-20, 2011:*

# **Protocols for Expeditious, Cost-Effective Commercial Arbitration**

The College of Commercial Arbitrators  
Thomas J. Stipanowich, Editor-in-Chief  
Curtis E. von Kann and Deborah Rothman, Associate Editors

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The College of Commercial Arbitrators

# Protocols

for

## Expeditious, Cost-Effective Commercial Arbitration

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

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*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*,"<sup>1</sup> 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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<sup>1</sup> 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.<sup>2</sup> 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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<sup>2</sup> The *Protocols* target ways to reduce cost and delay because those factors are the focus of most current complaints about commercial arbitration. Economy and efficiency are usually among the key concerns of arbitrating parties, but these goals may be in tension with, and may even be outweighed by, a desire for court-like due process. In any event, the *Protocols'* value will be in direct proportion to parties' desire to promote economy and efficiency in arbitration.

## **About the Editors**

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

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

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

# I

## Speed, Economy and Efficiency in Commercial Arbitration: Failed Expectations, Shared Responsibility<sup>3</sup>

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.<sup>4</sup> While many business users still prefer arbitration to court trial because of other procedural advantages,<sup>5</sup> 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.<sup>6</sup> Clients and counsel often wonder aloud what happened to the economical and efficient alternative to the courtroom.<sup>7</sup>

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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<sup>3</sup> 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*].

<sup>4</sup> Stipanowich, *New Litigation*, *supra* note 3, at 6-27.

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

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

<sup>7</sup> Stipanowich, *New Litigation*, *supra* note 3, at 9.

from important standard industry contract forms.<sup>8</sup> 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.<sup>9</sup>

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

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

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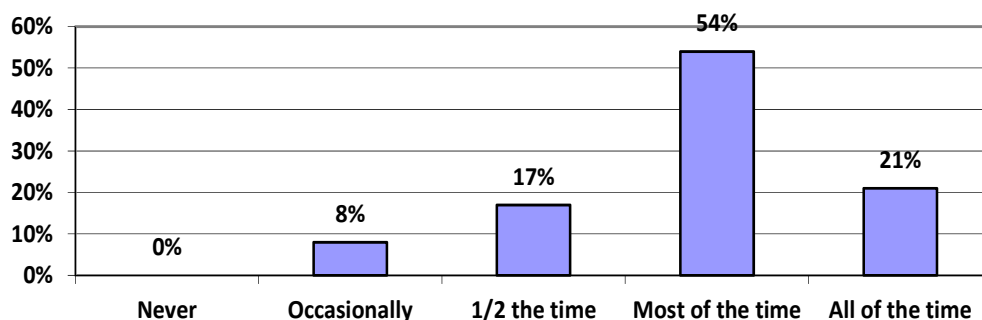
<sup>8</sup> The latest edition of the American Institute of Architects construction forms, the nation's most widely used template for building contracts, eliminates the default binding arbitration provision, long a *sine qua non* of construction contracts; parties must henceforth affirmatively agree 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).

<sup>9</sup> 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.

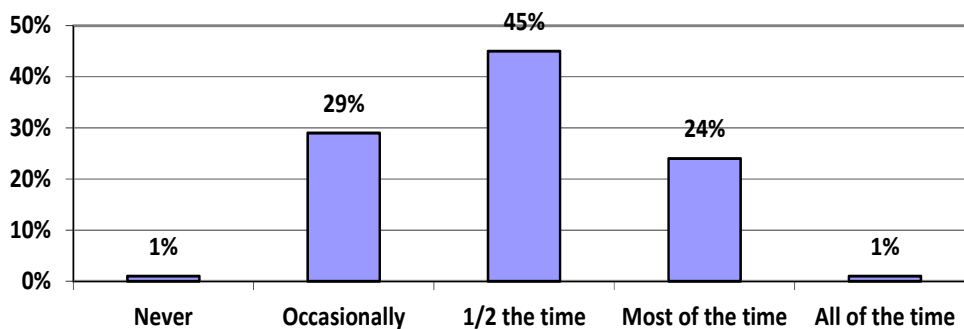
Summit participants overwhelmingly believed that relative speed, efficiency and economy tend to be important to business users of arbitration.

*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.<sup>10</sup> 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.<sup>11</sup> 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."<sup>12</sup>

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

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<sup>10</sup> 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).

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

<sup>12</sup> 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].

<sup>13</sup> 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."

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

resolution times, a more satisfactory process, expert decision makers, privacy and confidentiality, and relative finality.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup>

### **B. Importation of Trial Practices into Arbitration**

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

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

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

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

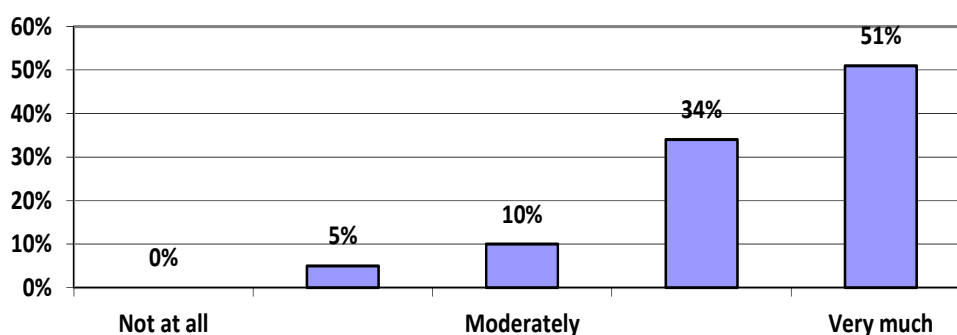
<sup>16</sup> Celeste M. Hammond, *A Real Estate Focus: The (Pre)(As)summed "Consent" of Commercial Binding Arbitration Contracts—An Empirical Study of Attitudes and Expectations of Transactional Lawyers*, 36 J. MARSHALL L. REV. 589, 591 (2003) (commenting on the widespread use of arbitration provisions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

<sup>17</sup> See Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 839-44.

## 1. Discovery

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

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



Arbitration hearings are now often preceded by extensive discovery, including requests for voluminous document production and depositions. Since discovery has traditionally accounted for the bulk of litigation-related costs,<sup>18</sup> 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,<sup>19</sup> 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.<sup>20</sup> This should not be surprising, since there

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

<sup>19</sup> 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).

<sup>20</sup> 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.<sup>21</sup> For lawyers accustomed to full-fledged discovery, anything less may seem tantamount to malpractice.<sup>22</sup>

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.<sup>23</sup> Alternatively, it might at least forestall an undesired resolution for months or years.<sup>24</sup>

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;<sup>25</sup> indeed, they may have strategic reasons for using discovery to increase their opponent's costs, and/or delay the final resolution of the dispute.<sup>26</sup>

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.<sup>27</sup> 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.<sup>28</sup>

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<sup>21</sup> See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1983).

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

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

<sup>24</sup> See BENJAMIN SELLS, *THE SOUL OF THE LAW* 88 (1994).

<sup>25</sup> Carr & Jencks, *supra* note 23, at 240.

<sup>26</sup> 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.

<sup>27</sup> 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.<sup>29</sup>

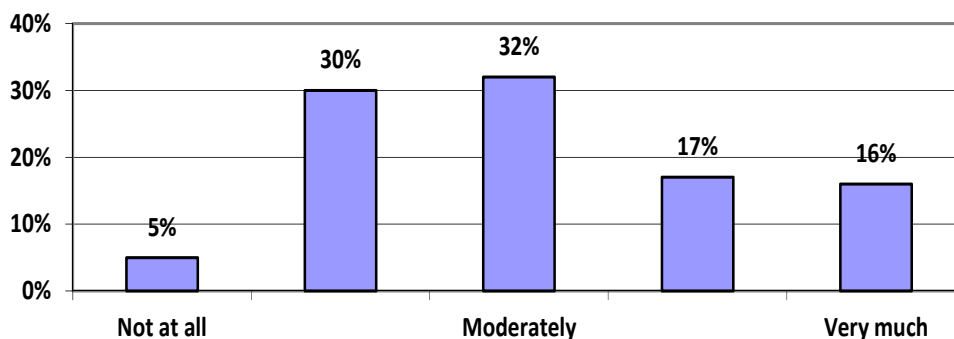
All too often, lamented another corporate lawyer at the National Summit, this expensive, "overblown" process results in little or no useful information, let alone the proverbial "smoking gun."

With the advent of electronic discovery—producing what was recently termed "a nightmare and a morass" for parties in litigation,<sup>30</sup> 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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discovery decisions" could provide a basis for vacating an arbitration award, but that the showing of "prejudice" resulting from the arbitrator's discovery decisions must be "substantial."

<sup>28</sup> 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).

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

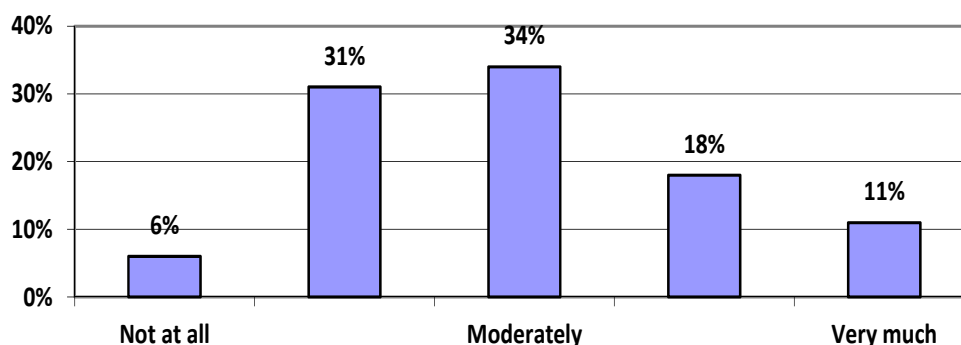
<sup>30</sup> FINAL REPORT ON LITIGATION REFORM, *supra* note 12, at 14.

The use of dispositive motions in arbitration—now contemplated even by some expedited rules<sup>31</sup>—is, practically speaking, a double-edged sword.<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup>

### 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?*



<sup>31</sup> See, e.g., JAMS ENGINEERING/CONSTRUCTION EXPEDITED RULES, Rule 18 (2009).

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

<sup>33</sup> 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.

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

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

### **C. Looking Beyond Litigation-Style Arbitration**

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

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

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

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

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

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 multinational 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."<sup>36</sup>

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."<sup>37</sup> If clear procedural choices are perceived as not just desirable but essential in litigation, the same should be *even more so in arbitration*—since arbitration is almost wholly a creature of contract and therefore highly amenable to choices that "fit the forum to the fuss."<sup>38</sup>

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

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

<sup>36</sup> *Id.* at 4-5.

<sup>37</sup> See FINAL REPORT ON LITIGATION REFORM, *supra* note 12.

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

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

This highly successful cost and time containment program is firmly grounded in the universal truth known as Parkinson's Law—to wit, "work expands so as to fill the time available for its completion."<sup>39</sup> (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.<sup>40</sup> 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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<sup>39</sup> 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).

<sup>40</sup> 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.

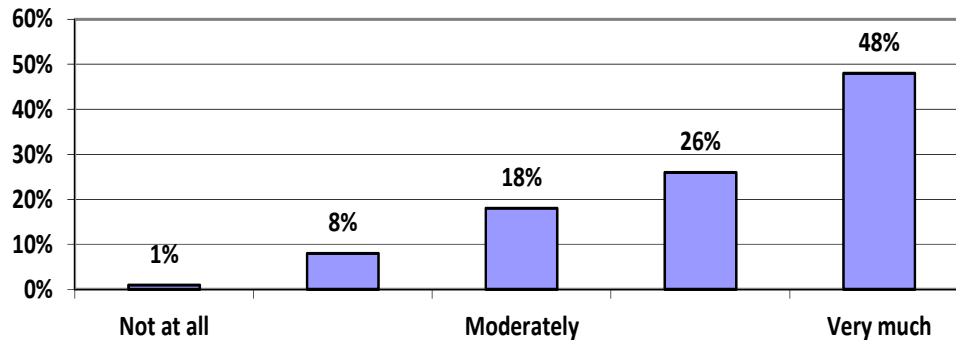
Finally, efficient and economical process depends upon the active efforts of arbitrators to employ effective process management skills, coupled with the discernment and willingness to make early rulings that will effectively truncate or streamline proceedings and the fortitude to enforce agreed timetables. 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.

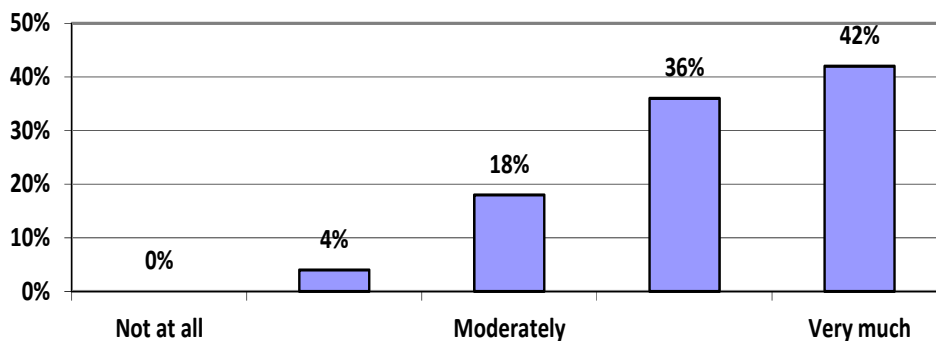
*When arbitration fails to meet the desires of business users regarding speed, efficiency and economy, how much more can corporate in-house counsel do to help fulfill those expectations before disputes arise?*



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.<sup>41</sup> 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.<sup>42</sup>

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.<sup>43</sup> In-house counsel may feel that the simplest solution to such uncertainty is the adoption of arbitration provisions that leave considerable room for the arbitrators and counsel to adapt the process to whatever circumstances present themselves—the "wiggle room" to which we have alluded.

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<sup>41</sup> Cf. BENJAMIN SILLS, *THE SOUL OF THE LAW* 88 (1994).

<sup>42</sup> See GEORGE J. SIEDEL, *USING THE LAW FOR COMPETITIVE ADVANTAGE* 3 (2002).

<sup>43</sup> See *COMMERCIAL ARBITRATION AT ITS BEST*, *supra* note 14, at 6-8.

Second, in most businesses, corporate energy and attention is focused on consummating transactions; in contrast dispute resolution provisions tend to be accorded low priority in contract negotiations, at least partly because raising the specter of conflict seems inappropriate when the emphasis is on coming together.<sup>44</sup> 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.<sup>45</sup> 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,”<sup>46</sup> 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.<sup>47</sup>

### **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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<sup>44</sup> See *id.*

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

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

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

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

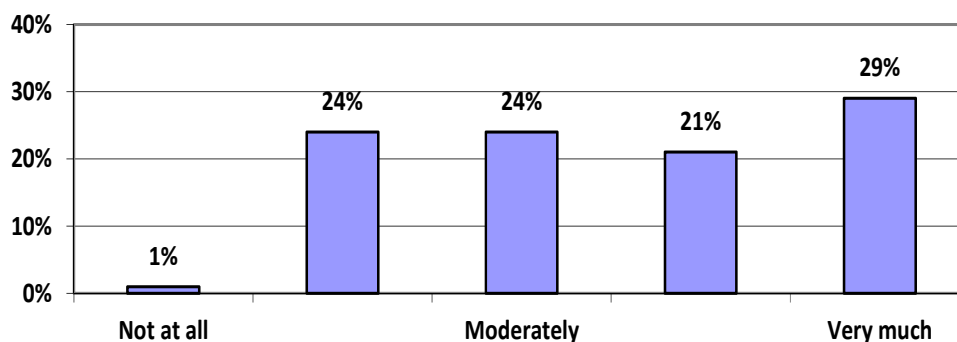
Selecting the right "template" is the first critical choice point for business users and in-house counsel. It is, however, essential to make other good choices after disputes arise. The selection of the right advocates and arbitrators can reinforce earlier process choices by ensuring adherence to the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

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

### **C. The Role of Provider Organizations**

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

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



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

The published commercial arbitration procedures of major provider institutions offer a number of perceived advantages. For busy lawyers they offer a seemingly "tried and true" alternative to the minefield of customized drafting combined with an administrative support system and access to lists of pre-screened, trained neutrals. Many in-house counsel report that, unless a client is entering into an exceptionally significant commercial relationship or preparing a contract template that will be used multiple times,<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup>

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

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

<sup>49</sup> 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).

<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup> 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.

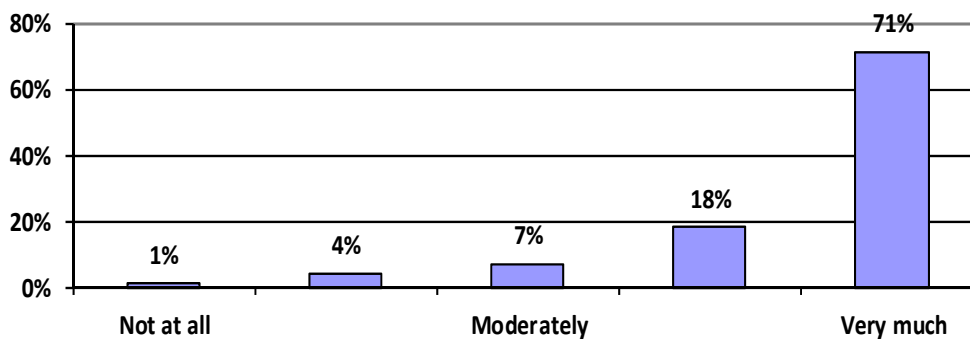
Moreover, providers are ideally positioned to collect and share information about the experience of users with streamlined procedures or other economy- and efficiency-focused devices. Such information is likely to be of critical importance to business clients and counsel as they consider the relative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



<sup>51</sup> See Stipanowich, *Arbitration and Choice*, *supra* note 3, Part III.B.

<sup>52</sup> See *id.*, Part III.C.

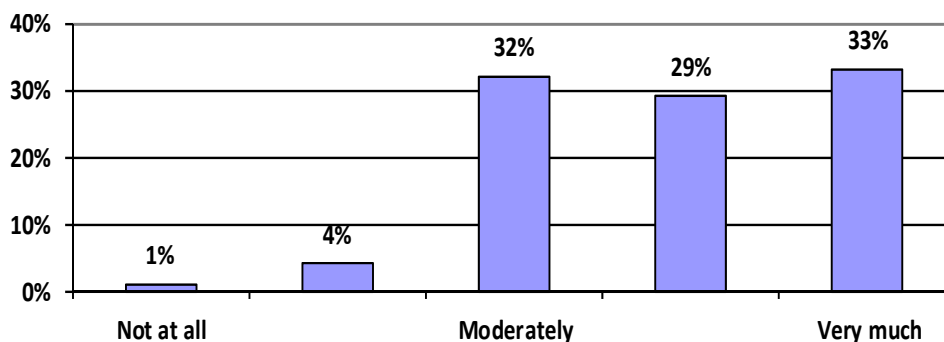
Thoughtful, experienced lawyers who understand arbitration and appreciate the significant differences between arbitration and litigation are in the best position to navigate through the arbitration process in a way that most effectively promotes client goals such as economy and efficiency. At each stage 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.<sup>53</sup>

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

### **E. The Role of Arbitrators**

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

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



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

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

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

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

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

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.

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<sup>56</sup> 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.<sup>57</sup> Choice regarding arbitration is too important to be left until the eleventh hour of negotiation; process options should be considered and developed

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<sup>57</sup> 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.<sup>58</sup> 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,<sup>59</sup> and promoted various appropriate dispute resolution tools (including executive negotiation, mediation and arbitration).<sup>60</sup> 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.<sup>61</sup>

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

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

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

<sup>59</sup> *Id.*

<sup>60</sup> 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].

<sup>61</sup> 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.<sup>62</sup>

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

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

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

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

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

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

#### Comments:

C. Northcote Parkinson's famous "law" that work expands to fill the time available for its completion<sup>63</sup> 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.

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<sup>63</sup> See PARKINSON'S LAW: THE PURSUIT OF PROGRESS (London, John Murray, 1958).

The best way to impose time limits on arbitration is to include those limits in the arbitration clause or incorporate provider rules that contain such limits. All expedited or streamlined rules are distinguished by fixed or presumptive time limits, although these vary considerably in detail. The *AAA Expedited Procedures*, aimed at small-dollar claims, contemplate the shortest cycle time, with an anticipated time horizon of around sixty days.<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup> JAMS' models also include shortened procedural stages.<sup>67</sup>

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]xpedit[ed] [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.<sup>68</sup>

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.<sup>69</sup>

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<sup>64</sup> 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].

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

<sup>66</sup> *See id.*, Rules 3, 5, 9.3.

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

<sup>68</sup> Michelle Leetham, Esq., Bechtel Corporation, Rossdale Group ADR Teleconference (May 5, 2010).

<sup>69</sup> 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.<sup>70</sup> 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."<sup>71</sup>

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.<sup>72</sup> 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:**<sup>73</sup>

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

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<sup>70</sup> COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 226.

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

<sup>72</sup> "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.metrocorpocounsel.com/current.php?artType=view&EntryNo=4160>.

<sup>73</sup> 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.<sup>74</sup> 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?<sup>75</sup> Are you familiar with the case managers or case administrators for this matter?
- Are you familiar with the provider institution's list of arbitrators?
- Are you familiar with applicable ethics rules?
- What experience have you had negotiating, arbitrating or litigating with opposing counsel? What is the nature of your relationship?
- How does your arbitration advocacy differ from your advocacy in litigation?
- What techniques have you found to be most effective in promoting efficiency and economy in commercial arbitration?
- What professional service models do you employ other than hourly fees? Are you willing to explore incentives for early resolution?

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

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<sup>74</sup> COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 5-6, 10-33, 39-41.

<sup>75</sup> 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.<sup>76</sup>

### **7. Select arbitrators with strong case management skills.**

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

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

#### **Comments:**<sup>77</sup>

It has been said that "the arbitrator is the process." This is not mere hyperbole: while the appropriate institutional and procedural frameworks are often critical to crafting better solutions for business parties in arbitration, the selection of an appropriate arbitrator or arbitration tribunal is nearly always the single most important choice confronting parties in arbitration;<sup>78</sup> 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;<sup>79</sup> hearing management experience and skills; attitudes about arbitration; current schedule and availability.

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<sup>76</sup> See COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 183-190.

<sup>77</sup> These comments are drawn in large measure from Stipanowich, *Arbitration and Choice*, *supra* note 58, 432-434.

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

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

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

- Should a single arbitrator be sufficient for selected classes or kinds of disputes?<sup>80</sup>
- 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.<sup>81</sup> 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;<sup>82</sup>
- Functioning as role models (cooperating with other arbitrators, including party-arbitrators; avoiding scheduling conflicts wherever possible);<sup>83</sup>
- Actively managing the process, beginning with a pre-hearing conference resulting in an initial procedural order and timetable for the entire arbitration;<sup>84</sup>
- Simplifying arrangements for communication, including the elimination of unnecessary communications through case administrators or third parties;<sup>85</sup>
- Simplifying, clarifying, and prioritizing issues;<sup>86</sup>

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

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

<sup>81</sup> 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).

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

<sup>83</sup> COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 6-8.

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

<sup>85</sup> *Id.*, Ch. 6 § V(L).

<sup>86</sup> *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;<sup>87</sup>
- Facilitating and actively monitoring information exchange/discovery;<sup>88</sup>
- Employing electronic means of communication and document management as appropriate;<sup>89</sup>
- Scheduling hearings with as few interruptions as possible;<sup>90</sup>
- Planning and actively managing the hearings (ending each hearing day with housekeeping sessions);<sup>91</sup>
- Anticipating potential problems (such as the unavailability of witnesses, unanticipated circumstances) and seeking creative solutions to minimize delay.<sup>92</sup>

**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:**<sup>93</sup>

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

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<sup>87</sup> *Id.*, Ch. 2 § III; Ch. 6 §§ III(C), V(D); Ch. 7 § III(B), (D).

<sup>88</sup> *Id.*, Ch. 8.

<sup>89</sup> *Id.*, Ch. 6 §§ II(D), IV, V(L).

<sup>90</sup> *Id.*, Ch. 9(VI).

<sup>91</sup> *Id.*, Ch. 9 *passim*.

<sup>92</sup> *Id.*, §§V, VI(A)-(D), VII(C)-(D), IX(A), (F).

<sup>93</sup> 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.<sup>94</sup>

Respondents are then required to prepare a Submission of Response of similar substance and form within twenty days of service of the Submission.<sup>95</sup> 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."<sup>96</sup>

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.<sup>97</sup> 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.<sup>98</sup> Arbitrators may also find it necessary or appropriate to conduct frequent telephonic status meetings to ensure that progress is being made toward meeting deadlines.

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<sup>94</sup> 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.").

<sup>95</sup> See CPR EXPEDITED ARBITRATION, *supra* note 94.

<sup>96</sup> 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.

<sup>97</sup> 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).

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

## **9. Control motion practice.**

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

### **Comments:**<sup>99</sup>

As stated in Part II, the use of dispositive motions in arbitration is a double-edged sword.<sup>100</sup> 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.<sup>101</sup> 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.<sup>102</sup>

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.<sup>103</sup>

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<sup>99</sup> These comments are drawn in large measure from Stipanowich, *Arbitration and Choice*, *supra* note 58, 412-413.

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

<sup>101</sup> 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).

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

<sup>103</sup> 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.<sup>104</sup>

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.<sup>105</sup>

#### **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.<sup>106</sup>

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

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

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

<sup>105</sup> See Chang, *supra* note 82, at 16.

<sup>106</sup> 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.<sup>107</sup>

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

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

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

Comments:

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

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

Consistent with the understanding that arbitration offered businesses the opportunity to avoid the "needless contention that [is] incidental to the atmosphere of trials in court,"<sup>108</sup> 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<sup>109</sup>). These strictures imbue arbitration awards with a meaningful—or, depending on one's point of view, an awful—finality. The fear of being

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<sup>107</sup> 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.

<sup>108</sup> Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 614 n. 44 (1928).

<sup>109</sup> See 9 U.S.C. § 10 (West Supp. 1994).

saddled with a truly bad award gives some business lawyers pause—especially when the potential business consequences are dire. This fear inspired in recent years the emergence of a species of arbitration agreements calling for more searching judicial scrutiny of awards, including review of awards for errors of law or fact.<sup>110</sup> 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!"<sup>111</sup> They viewed such provisions as undermining key conventional benefits of arbitration, including finality, efficiency and economy, and expert decision-making.<sup>112</sup> 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,<sup>113</sup> 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*,<sup>114</sup> 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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<sup>110</sup> See Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 HARV. NEGOT. L. REV. 171, 183-184 (2003); Dan C. Hulea, *Contracting to Expand the Scope of Review of Foreign Arbitral Awards: An American Perspective*, 29 BROOK. J. INT'L L. 313, 351 (2003); but see Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT'L ARB. 147, 150 (1997).

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

<sup>112</sup> *Id.*

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

<sup>114</sup> *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."<sup>115</sup>

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.<sup>116</sup> 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.<sup>117</sup> 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."<sup>118</sup> 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,<sup>119</sup> as where parties "contemplate enforcement under state statutory or common law . . . where judicial review of different scope is arguable."<sup>120</sup> 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;<sup>121</sup> in *Cable Connection, Inc. v. DIRECTV, Inc.*,<sup>122</sup> California's highest court recognized a more general "safe harbor" for contractually expanded judicial review under that state's law.

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<sup>115</sup> *Kyocera*, 341 F.3d at 998.

<sup>116</sup> *Hall Street Associates LLC v. Mattel Inc.*, 128 S.Ct. 1396, 1404-1405 (2008).

<sup>117</sup> *Id.* at 1403.

<sup>118</sup> "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).

<sup>119</sup> 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).

<sup>120</sup> 128 S. Ct. at 1406.

<sup>121</sup> 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).

<sup>122</sup> *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.<sup>123</sup> 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.<sup>124</sup> Appellate arbitration procedures have been utilized in a variety of commercial contexts, and at least two major institutions,<sup>125</sup> the International Institute for Conflict Prevention & Resolution (CPR) and JAMS, have published appellate arbitration rules that may be utilized in commercial cases.<sup>126</sup>

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.<sup>127</sup> Given the transaction

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<sup>123</sup> See *id.* at 277-281.

<sup>124</sup> See, e.g., *Cummings v. Future Nissan*, 2005 WL 805173 (Cal. Ct. App. 3<sup>rd</sup> Dist Apr. 8, 2005) (affirming lower court order confirming award by appellate arbitrator).

<sup>125</sup> See COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 299-300.

<sup>126</sup> See INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, CPR ARBITRATION APPEAL PROCEDURE (1999); JAMS ARBITRATION APPEAL PROCEDURE (revised June 2003), available at <http://www.jamsadr.com/rules/optional.asp>.

<sup>127</sup> See COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 298-304. See also Paul Bennett Marrow, *A Practical Approach to Affording Review of Commercial Arbitration Awards: Using an Appellate Arbitrator*, 60 DISP. RESOL. J. 10 (Aug.-Oct. 2005).

costs associated with their formulation, fully customized appellate rules are probably feasible only in exceptional cases (such as long-term relationships or large-scale business transactions). In most cases, parties will probably want to rely on existing institutional models.

**12. Conduct a post-process "lessons learned" review and make appropriate adjustments.**

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

**Comments:**

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

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

## **A Protocol for Arbitration Providers**

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

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

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

#### **Comments:**

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

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

price menus would truly provide business users with meaningful, easily implemented choices among arbitration models.

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

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

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

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

### **Comments:**

See *Protocol for Business Users*, Action 1, above.

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

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

C. LAYER THREE: THE ARBITRATION STAGE (c) Arbitration. If the mediation provided for in "b" above does not conclude with an agreement between the Parties resolving the Dispute, the Parties agree to submit the Dispute to binding arbitration under the [insert incorporated commercial arbitration procedures]. If the Parties cannot agree on an arbitrator, the person who served as mediator shall select the person to serve as arbitrator from a list compiled by the Parties or, where the Parties do not compile a list, from a list maintained by a bona fide dispute resolution service provider or private arbitrator. The arbitrator's award shall be final, binding and may be converted to a judgment by a court of competent jurisdiction upon application by either party. The arbitrator's award shall be a written, reasoned opinion (unless the reasoned opinion is waived by

the Parties). The Parties shall have ten (10) days from the termination of the mediation to appoint the arbitrator and shall complete the arbitration hearing within six (6) months from the termination of the mediation. The arbitrator shall have the authority to control and limit discovery sought by either party. The arbitrator shall have the same authority as a court of competent jurisdiction to grant equitable relief, and to issue interim measures of protection, including granting an injunction, upon the written request with notice to the other party and after opposition and opportunity to be heard. The arbitrator shall take into consideration the Parties' intent to limit the cost of and the time it takes to complete dispute resolution processes by agreeing to arbitrate any Dispute.<sup>128</sup>

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."<sup>129</sup>

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.<sup>130</sup>

### **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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<sup>128</sup> Adapted from Robert N. Dobbins, *Practice Guide: The Layered Dispute Resolution Clause: From Boilerplate To Business Opportunity*, 1 HASTINGS BUS. L.J. 161, 171 (2005).

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

<sup>130</sup> 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:<sup>131</sup>

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

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<sup>131</sup> 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.<sup>132</sup> 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."<sup>133</sup> Thus, the recent *Final Report on Litigation Reform* calls for dramatic overhauling of the court discovery process based on a "principle of proportionality."<sup>134</sup>

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."<sup>135</sup>

Yet, as discussed in Part II, discovery is now very much a part of arbitration processes.<sup>136</sup> 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.<sup>137</sup> Because arbitration is first and last a consensual process, even arbitrators who suspect that business parties would have preferred a more attenuated process will tend to bow to a mutual agreement of the parties' counsel in the absence of (1) clear contractual guidance regarding the parties' intent to circumscribe discovery or (2) clear arbitral authority to modify the agreement of counsel regarding discovery. They are left with the alternative of encouraging or cajoling parties to consider more carefully tailored discovery; for

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<sup>132</sup> THE FEDERAL RULES OF CIVIL PROCEDURE, for example, state:

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

FED. R. CIV. P. 26(b)(1).

<sup>133</sup> FINAL REPORT ON LITIGATION REFORM, *supra* note 60, at 2.

<sup>134</sup> *Id.* at 7-16.

<sup>135</sup> CPR RULES, *supra* note 62, Commentary to CPR Rule 11.

<sup>136</sup> It is worth noting that we have evolved from no mention of prehearing discovery in the Federal Arbitration Act, 9 U.S.C. §§1-14 (1925), and the UNIFORM ARBITRATION ACT (1955) to highly deferential language in the REVISED UNIFORM ARBITRATION ACT (2000).

<sup>137</sup> The CPR Commentary encourages parties' counsel "to agree, preferably before the initial pre-hearing conference, on a discovery plan and schedule and to submit the same to the Tribunal for its approval." *Id.*

this purpose, some arbitrators insist that business principals be present at the pre-hearing conference to participate in the discussion on discovery.<sup>138</sup>

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*<sup>139</sup> 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.<sup>140</sup>

On the domestic scene, discovery limitations are most often built into streamlined or expedited arbitration rules like the *JAMS Streamlined Arbitration Rules & Procedures*.<sup>141</sup> 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.<sup>142</sup> 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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<sup>138</sup> Alternatively, some arbitrators require principals of the clients to sign-off on any discovery plan submitted by outside counsel.

<sup>139</sup> 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](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx)

<sup>140</sup> INT'L CENTER FOR DISPUTE RESOLUTION, *ICDR GUIDELINES FOR ARBITRATORS CONCERNING EXCHANGES OF INFORMATION* (May 2008) [hereinafter *ICDR GUIDELINES*], available at <http://www.adr.org/si.asp?id=5288>.

<sup>141</sup> *JAMS STREAMLINED RULES*, *supra* note 94, R. 13.

<sup>142</sup> INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, *CPR PROTOCOL ON DISCLOSURE OF DOCUMENTS AND PRESENTATION OF WITNESSES IN COMMERCIAL ARBITRATION* (2008) [hereinafter *CPR PROTOCOL ON DISCLOSURE*] (designed in part "to afford to parties to an arbitration agreement the opportunity to adopt certain modes of dealing with pre-hearing disclosures of documents and with the presentation of witnesses, pursuant to Schedules.") available at <http://www.cpradr.org/ClausesRules/CPRProtocolonDisclosure/tabid/393/Default.aspx>.

may also offer arbitrators other tools, including explicit authority to condition production on the payment by the requesting party of associated reasonable costs.<sup>143</sup>

## 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.<sup>144</sup> In some cases, such production is to occur within a fairly short time frame.<sup>145</sup> Some parties, however, may want to narrow (or expand) this framework or establish more specific standards for document exchange.

A straightforward template for more limited information exchange/discovery may be found in the leading international standard on the subject, the *IBA Rules on the Taking of Evidence in International Commercial Arbitration*.<sup>146</sup> 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."<sup>147</sup> 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.<sup>148</sup>

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<sup>143</sup> See, e.g., *Id.* at § 1(e)(2). See also ICDR GUIDELINES, *supra* note 140, 8.a., which provides:

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

<sup>144</sup> 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.").

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

<sup>146</sup> IBA Rules, *supra* note 139.

<sup>147</sup> *Id.*, Article 3, Section 1.

<sup>148</sup> The IBA Rules call for Requests to Produce to contain

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

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

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

*Id.* at 5.

In a similar vein, the *JAMS Streamlined Arbitration Rules & Procedures* call for "voluntary and informal" exchange of all relevant, non-privileged documents and other information, but admonish parties to limit their requests to "material issues in dispute" and to make them "as narrow as reasonably possible." Depositions are not permissible "except upon a showing of exceptional need" and with arbitrator approval. Electronic data may be furnished in the form most convenient for the producing party, and broad requests for email discovery are not permitted.<sup>149</sup> (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."<sup>150</sup>)

The *CPR Protocol on Disclosure*<sup>151</sup> 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).<sup>152</sup> Some arbitrators limit each party to a certain number of document requests, including subparts.<sup>153</sup>

### 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).

<sup>149</sup> Compare JAMS STREAMLINED RULES, *supra* note 94, with CPR EXPEDITED ARBITRATION, *supra* note 65.

<sup>150</sup> See AAA CONSTRUCTION INDUSTRY FAST TRACK RULE, *supra* note 64, F-9.

<sup>151</sup> CPR PROTOCOL ON DISCLOSURE, *supra* note 142, § 1. Cf. Lawrence W. Newman & David Zaslowsky, *Predictability in International Arbitration*, 100 N.Y. L. J. 3. (May 25, 2004).

<sup>152</sup> *Id.*, Schedule 1.

<sup>153</sup> See, e.g., Wendy Ho, *Discovery in Commercial Arbitration Proceedings*, Comment, 34 Hous. L. REV. 199, 224-227 (Spring 1997).

arbitration.<sup>154</sup> 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.<sup>155</sup> 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.<sup>156</sup>

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.<sup>157</sup> 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.<sup>158</sup>

#### **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.<sup>159</sup> 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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<sup>154</sup> 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.

<sup>155</sup> See *supra* note 94 (discussing discretionary authority of arbitrator under JAMS STREAMLINED RULES).

<sup>156</sup> JAMS COMPREHENSIVE RULES, *supra* note 104, Rule 17(b).

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

<sup>158</sup> CPR PROTOCOL ON DISCLOSURE, *supra* note 142, at 2-3, 5, 8-9.

<sup>159</sup> See NEW YORK STATE BAR ASSOCIATION DISPUTE RESOLUTION SECTION ARBITRATION COMMITTEE, REPORT ON ARBITRATION DISCOVERY IN DOMESTIC COMMERCIAL CASES (June 2009), available at <http://www.nysba.org/Content/NavigationMenu42/April42009HouseofDelegatesMeetingAgendaItems/DiscoveryPreceptsReport.pdf> (describing factors to consider when artfully drafting arbitration clauses); see also, JAMS, RECOMMENDED ARBITRATION DISCOVERY PROTOCOLS FOR DOMESTIC, COMMERCIAL CASES (Jan. 6 2010), available at [http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS\\_Arbitration\\_Discovery\\_Protocols.pdf](http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Arbitration_Discovery_Protocols.pdf).

Should arbitrators or counsel have the last word on the scope of discovery? In this respect, expert opinion and current standards vary, although under most standards arbitrators must respect and adhere to party agreements regarding discovery. The *AAA Rules for Large, Complex Cases* authorize the arbitrator(s) to override party agreements and "place such limitations on the conduct of such [agreed] discovery as the arbitrator(s) shall deem appropriate."<sup>160</sup> Although both the JAMS and CPR Rules give arbitrators considerable authority regarding exchange of information, neither set of procedures is explicit regarding the authority of arbitrators to "trump" or modify agreements regarding discovery;<sup>161</sup> 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."<sup>162</sup>

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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<sup>160</sup> 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.

<sup>161</sup> 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.

<sup>162</sup> See JAMS, RECOMMENDED ARBITRATION DISCOVERY PROTOCOLS FOR DOMESTIC, COMMERCIAL CASES (Jan. 6 2010), available at [http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS\\_Arbitration\\_Discovery\\_Protocols.pdf](http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Arbitration_Discovery_Protocols.pdf).

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

## 5. E-discovery

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

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

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.<sup>164</sup> Issues include the essential scope of and limits on e-discovery, and the weighing of burdens and benefits;<sup>165</sup> the handling of the costs of retrieval and review for privilege;<sup>166</sup> the duty to preserve electronic information, spoliation issues and related sanctions.<sup>167</sup>

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

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

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<sup>163</sup> THE SEDONA GUIDELINES: BEST PRACTICE GUIDELINES & COMMENTARY FOR MANAGING INFORMATION & RECORDS IN THE ELECTRONIC AGE 11-20, 31-43 (Charles Ragan et al., The Sedona Conference Sept. 2005).

<sup>164</sup> Irene C. Warshauer, *Electronic Discovery in Arbitration: Privilege Issues and Spoliation of Evidence*, 61 DISP. RESOL. J. 9, 10 (Nov. 2006-Jan. 2007); Jennifer E. Lacroix, *Practical Guidelines for Managing E-Discovery Without Breaking the Bank*, in PLI PATENTS, COPYRIGHTS, TRADEMARKS AND LITERARY PROPERTY COURSE HANDBOOK SERIES 645-665 (Jan. 2008); Theodore C. Hirt, *The Two-Tier Discovery Provision of Rule 26(B)(2)(B) – A Reasonable Measure for Controlling Electronic Discovery?* 12 RICH. J. L. & TECH. 12 (2007); Thomas Y. Allman, *The "Two-Tiered" Approach to E-Discovery: Has Rule 26(B)(2)(B) Fulfilled its Promise?* 14 RICH. J. L. & TECH. 7 (2008).

<sup>165</sup> See generally THE SEDONA GUIDELINES, *supra* note 163.

<sup>166</sup> 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).

<sup>167</sup> 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."<sup>168</sup> 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."<sup>169</sup> 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.<sup>170</sup> 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.<sup>171</sup>

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

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<sup>168</sup> ICDR GUIDELINES, *supra* note 140, Section 4.

<sup>169</sup> *Id.*

<sup>170</sup> Warshauer, *supra* note 164, at 11.

<sup>171</sup> THE SEDONA GUIDELINES, *supra* note 163; William B. Dodero & Thomas J. Smith, *Creating a Strong Foundation for Your Company's Records Management Practices*, 25 ACC DOCKET 52 (Nov. 2007).

<sup>172</sup> See Newman & Zaslowsky, *supra* note 81.

<sup>173</sup> 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.<sup>174</sup> 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.<sup>175</sup>

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

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

#### Comments:

See comments under *Protocol for Business Users*, Action 3.

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

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

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

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

*Id.*, Section 4(a).

<sup>174</sup> See *supra* note 89.

<sup>175</sup> See JAMS COMPREHENSIVE RULES, *supra* note 104, Rule 17(b).

- expedited arbitrator appointment procedure;
- early disclosure of information;
- heavily curtailed discovery and motion practice;
- limits on the length and form of the award.

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

Comments:

See comments under *Protocol for Business Users*, Action 3.

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

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

Comments:

See comments under *Protocol for Business Users*, Action 9.

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

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

Comments:

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

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

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

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

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

Comments:

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

**9. Provide for electronic service of submissions and orders.**

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

Comments:

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

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<sup>176</sup> 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.<sup>177</sup>

#### **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

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<sup>177</sup> 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.<sup>178</sup>

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.<sup>179</sup>

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

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<sup>178</sup> ICC COMMISSION ON ARBITRATION, ICC PUBLICATION 843 -TECHNIQUES FOR CONTROLLING TIME AND COSTS IN ARBITRATION §12 (2007) *available at* [http://www.iccwbo.org/uploadedFiles/TimeCost\\_E.pdf](http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf).

<sup>179</sup> 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."<sup>180</sup>

**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.<sup>181</sup>

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<sup>180</sup> ERIC BRAHM & JULIAN OUELLET, DESIGNING NEW DISPUTE RESOLUTION SYSTEMS (Sept. 2003), *available at* [http://www.beyondintractability.org/essay/designing\\_dispute\\_systems/](http://www.beyondintractability.org/essay/designing_dispute_systems/).

<sup>181</sup> Jeffrey R Cruz, *Arbitration vs. Litigation: An Unintentional Experiment*, 60 DISP. RESOL. J. 10 (Jan. 2006) (addressing "combative" construction dispute advocates with candid, anecdotal observations about the advantages of a well-managed arbitration).

## **A Protocol for Outside Counsel**

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

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

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

#### **Comments:**

Rules of professional responsibility in nearly all jurisdictions make it unethical for attorneys to accept an engagement which they are not competent to perform.<sup>182</sup> 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.

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<sup>182</sup> ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.1 Competence (2010), *available at* [http://www.abanet.org/cpr/mrpc/rule\\_1\\_1.html](http://www.abanet.org/cpr/mrpc/rule_1_1.html); CA RULES OF PROFESSIONAL CONDUCT Rule 3-110 (Sept. 2009) *available at* <http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules.aspx>; NY STATE UNIFIED COURT SYSTEM, PART 1200 – RULES OF PROFESSIONAL CONDUCT Rule 1.1: Competence (2009) , *available at* <http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/NYRulesofProfessionalConduct4109.pdf>; ARTICLE VII: ILLINOIS RULES OF PROFESSIONAL CONDUCT, Rule 1.1. Competence (2010), *available at* [http://www.state.il.us/court/supremecourt/rules/art\\_viii/artviii.htm](http://www.state.il.us/court/supremecourt/rules/art_viii/artviii.htm).

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

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

### **Comments:**

Studies show that many disputes arise between clients and counsel because of a failure to reach, at the outset of the engagement, a clear understanding of what counsel is expected to do (and not do) and what that work will likely cost the client.<sup>183</sup> 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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<sup>183</sup> 2007 LAWYER-CLIENT FEE ARBITRATION REPORT CARD: HALT REPORT CARD FINDS LAWYER-CLIENT FEE DISPUTE PROGRAMS NOT MAKING THE GRADE (Sep. 17, 2007), *available at* [http://www.halt.org/reform\\_projects/lawyer\\_accountability/lawyer-client\\_fee\\_arbitration/report\\_card.php](http://www.halt.org/reform_projects/lawyer_accountability/lawyer-client_fee_arbitration/report_card.php).

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

Comments:

One of the most important functions of outside arbitration counsel is selecting, in consultation with in-house counsel, the arbitrator(s) for the case. In addition to the traditional considerations such as intelligence, integrity, familiarity with the subject matter, and availability, outside counsel these days also need to determine whether the arbitrator candidates have the knowledge, skill and temperament to manage the arbitration efficiently. Much can be learned on this score by talking with lawyers who have participated in other cases the candidates have arbitrated and by interviewing the candidates concerning the procedures and practices they follow in conducting arbitrations.<sup>184</sup> 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.<sup>185</sup> 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.<sup>186</sup> 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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<sup>184</sup> 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.

<sup>185</sup> This procedure is already offered, for example, by CPR Institute's Director of Dispute Resolution Services.

<sup>186</sup> Ross, L. and C. Stillinger, *Barriers to Conflict Resolution*, 8 NEG. J. 389-404 (1991).

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

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

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

**Comments:**

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

**6. Periodically discuss settlement opportunities with your client.**

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

#### Comments:

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

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

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

#### Comments:

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

#### **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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<sup>187</sup> 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.<sup>188</sup> 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.<sup>189</sup> 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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<sup>188</sup> 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).

<sup>189</sup> 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.<sup>190</sup>

An excellent template for arbitrator control of discovery is provided by the *New York State Bar Association Report on Arbitration Discovery* and *JAMS Recommended Arbitration Discovery Protocols* based on the Report.<sup>191</sup>

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

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

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

**Comments:**

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

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<sup>190</sup> The ICDR has established a voluntary set of guidelines designed to promote fair and expeditious arbitration proceedings by encouraging voluntary exchanges of the most material documents. See ICDR GUIDELINES, *supra* note 140.

<sup>191</sup> NEW YORK STATE BAR ASSOCIATION, REPORT ON ARBITRATION DISCOVERY IN DOMESTIC COMMERCIAL CASES (2009) *available at* <http://www.nysba.org/Content/NavigationMenu42/April42009HouseofDelegatesMeetingAgendaItems/DiscoveryPreceptsReport.pdf>; JAMS RECOMMENDED ARBITRATION DISCOVERY PROTOCOLS FOR DOMESTIC, COMMERCIAL CASES (2010) *available at* <http://www.jamsadr.com/arbitration-discovery-protocols/>.

for summary disposition and other relief, which impose substantial burdens of briefing and argument on all counsel and intensive factual and legal review by arbitrators. While arbitrators certainly have the authority to grant such motions, the absence of appellate review typically and properly makes them quite cautious about doing so, especially when the other side has had little or no discovery. On the other hand, there are purely legal issues, such as statute of limitations, interpretation of a contract, or identifying the required elements of a cause of action, which arbitrators can and should undertake to decide early in a case, particularly when a decision in favor of the movants could substantially reduce transaction time and cost for both sides. Arbitrators need to educate counsel on which sorts of motions are likely to be productive in arbitration and which are not and then establish procedures for processing the former quickly and efficiently.<sup>192</sup>

#### **8. Be readily available to counsel.**

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

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

#### **9. Conduct fair but expeditious hearings.**

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

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

### Comments:

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

- Make clear to counsel that, unless formal rules of evidence apply (which is rare in arbitration), virtually all non-privileged evidence offered by any party will be received and traditional objections (hearsay, foundation, etc.) will not be entertained. Urge counsel to focus on the probativeness of evidence, not its admissibility.
- Determine what order of proof is most appropriate for the particular case, including sequencing the hearing in progressive phases, taking both sides' witnesses issue by issue, or ruling on threshold issues before receiving evidence on other issues.
- Encourage the parties to submit a joint collection of core exhibits in chronological order with key portions highlighted.
- Establish an expedited procedure for receipt of other exhibits. For example, require all parties to submit their tabbed, index exhibits in advance of the hearing and advise counsel that all such exhibits will be received en masse at the start of the hearing save for any that are privileged or genuinely challenged as to authenticity.
- Require that parties show demonstrative exhibits, including power point slides, to each other a reasonable time before they are used in the hearing so that time is not wasted in assessing and possibly challenging their accuracy.
- Discuss with counsel the possible use of written direct testimony for some or all witnesses.
- Establish procedures to narrow and highlight the matters on which opposing experts disagree. For example, require experts to confer before hearing and provide the arbitrators with a list of the points on which they agree, the points on which they disagree, and a summary statement of their respective opinions on the latter.
- Limit the presentation of duplicative or cumulative testimony.
- Make appropriate arrangements for receiving by conference call or otherwise testimony from witnesses in remote locations.
- Consider receiving affidavits or pre-recorded testimony regarding less critical matters.
- Sequester witnesses until they testify unless all parties request otherwise.
- Establish and maintain a realistic daily schedule for the hearing. Start hearings on time and don't allow excessive recesses and lunch breaks.

- Encourage the parties to employ a “chess clock” that limits the total number of hours 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.<sup>193</sup>

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 awards 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*.<sup>194</sup> 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.

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<sup>193</sup> *Id.* at Ch. 9.

<sup>194</sup> *Id.* at Ch. 11.

## Appendices

### **Appendix A: Bibliography/Helpful Sources**

#### **Helpful General Sources**

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

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## **Appendix B: Summit Sponsors**

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